

Education in the 21st Century: Human Rights and Individual Actions

by
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Author's Declaration

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

This dissertation has three goals. The first goal is to outline how twentieth century advocates qualify education as a human right. The second goal is to offer an *integrative* account which argues that, to defend a right to education both the provision of educational resources and the freedom to do something with those resources must be taken into account. This requires more than the rhetoric of a UN document like the *Convention on the Rights of the Child*. It also requires more than the good intentions of duty-bound adults acting in the best interests of the child. To do this, it is necessary to consider how the institutional structure dedicated to education – in particular the structure dedicated to basic primary education to which the UN claims all children are entitled – integrates with the freedom each child has to do something with that basic primary education once he or she has obtained it. Finally, by identifying education as a human right within this integrative structure, this dissertation will demonstrate that, if policy documents related to education shift from a focus on the traditional relationship between an experienced adult and a dependent child to one based on the relationship between an individual and a capability set, the claim that education is a human right becomes a meaningful claim which can provide a justification for the social commitments required to recognize this claim.

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List of Abbreviations

In this work, I use a number of abbreviations to avoid repeating cumbersome phrases.

CAME = Conference of Allied Ministers of Education

CADE = Convention Against Discrimination in Education

CRC = Convention on the Rights of the Child

DRC = Declaration of the Rights of the Child

ECCD = Early Childhood Care and Development

EFA = Education For All

ESC = European Social Charter

ESCR = European Social Charter Revised

GDCR = Geneva Declaration of the Rights of the Child

GRD = Global Resources Dividend

IBE = International Bureau of Education

IBR = International Bill of Rights

ICCPR = International Covenant on Civil and Political Rights

ICE = International Conferences on Education

ICESCR = International Covenant on Economic, Social and Cultural Rights

ILO = International Labour Organization

MDG = Millennium Development Goal

MLA = Monitoring Learning Achievement

NEA = National Education Association

OHCHR = Office of the High Commissioner for Human Rights

SOWC = State of the World's Children, UNICEF reports

UDHR = Universal Declaration of Human Rights

UN = United Nations

UNDP = United Nations Development Programme

UNESCO = United Nations Educational, Scientific and Cultural Organization

UNICEF = United Nations International Children's Emergency Fund

WFEA = World Federation of Education Associations

Introduction

People think only of preserving their child's life; this is not enough. He must be taught to preserve himself as a man, to bear the blows of fate, to brave wealth and poverty, to live if necessary among the snows of Iceland or on the scorching rocks of Malta. In vain you guard against death: he will nevertheless have to die, and even if you do not kill him with your precautions, they are ill-conceived. It is less a question of keeping him from dying than of making him live. To live is not to breathe but to act. It is to make use of our organs, our senses, our faculties, of all the parts of ourselves which give us the sentiment of our existence.

— Jean-Jacques Rousseau, *Emile*

According to the United Nations (UN), education is a right to which all human beings are entitled. Since 2000, the UN has been promoting the millennium development goal (MDG) (established by the World Forum on Education in Dakar) to achieve free universal primary education for all, regardless of gender, by 2015. One catalyst motivating the establishment of this ambitious goal was the conviction that, if we consider the social dynamic found in many countries around the world, it would suggest that usually the more education people have, the better off they can be. A more formal catalyst driving this goal was the desire either to improve upon or to endorse more forcefully existing international law and UN documents like the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) or the *Convention on the Rights of the Child* (CRC) which already support¹ the

¹ In conjunction with other documents like Article 26 of the *Universal Declaration of Human Rights* (1948), Principle 7 of the *Universal Declaration of the Rights of the Child* (1959), Articles 7 & 10 of the *European Social Charter* (1961) (and 17 in the revised ESCR), Articles 10 & 11 of the *UN Declaration Regarding Social Progress and Development* (1969), or articles 17 & 25 of the *African Charter on Human and People's Rights* (1981). See Appendix for specific wording.

desire to make basic primary education free to all. Consider, for example, Article 13 (1) of the ICESCR, which stipulates:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.²

This stipulation highlights the need to recognize, beyond a loose symbolic suggestion, not only the fundamental nature of having a right to education but also the instrumental and the intrinsic value of this right. Consider also Article 28 (1) of the CRC, which builds upon the ICESCR by stipulating:

States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall in particular:

Make primary education compulsory and available free to all;

Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

Make higher education accessible to all on the basis of capacity by every appropriate means;

Make educational and vocational information and guidance available and accessible to all children;

Take measures to encourage regular attendance at schools and the reduction of drop-out rates.³

² Available online at www.ohchr.org/english/law/cescr.htm, especially Articles 13 & 14.

³ Available online at www.unhcr.ch/html/menu3/b/k2crc.htm.

To date, many governments have drawn upon these existing documents successfully in the development of their own national education programs. A closer inspection of Article 29 of the CRC, however, suggests that the desire to make basic primary education free for all also rests upon five demanding stipulations which attempt to address the educational interests of the three main stakeholders – the state, the parent/educator, and the child – as well as the general interests of society and of the environment:

States Parties agree that the education of the child shall be directed to:

The development of the child's personality, talents and mental and physical abilities;

The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

The preparation of the child for responsible life in a free society, in the spirit of understanding peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

The development of respect for the natural environment.⁴

Moreover, implied in the *Universal Declaration of Human Rights*, (UDHR), the ICESCR and the CRC is the suggestion that the role of the parent/educator is both one of mediation between the state and the child *and* one of authority over the child. Thus, these documents represent demanding – even contradictory – guidelines because they fail to address whose

⁴ Available online at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

authority should have priority when the values or beliefs of the parent clash with those of the state.

While many countries (157 signatories)⁵ have agreed to the principles embodied in the ICESCR, and most UN-recognized countries (193 signatories)⁶ have agreed to the principles embodied in the CRC, the demanding nature of these stipulations have left doubt in the minds of many about the feasibility – the actual attainability – of a universal human right to free and compulsory basic primary education. One notable case in point is the United States, which has signed the CRC but has yet to ratify this treaty.⁷ For many Americans, a document like the CRC represents a direct violation of not only American sovereignty but of parental sovereignty as well.⁸ Furthermore, many Americans believe that American domestic policy documents governing the well-being of children actually represent the needs of children more appropriately than any document which gives authority to a small committee in the middle of Europe. That is, a document which gives the Committee on the Rights of the Child, the international body responsible for monitoring the implementation of the CRC, the power to develop and direct the education of American (or any country's) children.

⁵ As of October 11, 2007. Available online <http://www2.ohchr.org/english/bodies/ratification/3.htm>.

⁶ As of July 13, 2007. Available online www2.ohchr.org/english/bodies/ratification/11.htm.

⁷ Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, (2004). Available online at www.unhcr.ch/pdf/report.pdf.

⁸ For example, at www.lifesite.net, the Evangelical ministry Focus on the Family has suggested that the CRC is “a danger to children, parents and national sovereignty.” See also the Home School Legal Defense Association declaration against ratification of the CRC at www.hslda.org/docs/nche/000000/00000021.asp. See also David Weissbrodt (2006) “Prospects for Ratification of the Convention on the Rights of the Child,” in *Emory International Law Review* 20.

Another notable case, which would actually strengthen this American claim, is a country like Iran which, despite ratifying the CRC in 1994, continues to violate the human rights of children. In fact, the UN recently found⁹ that the Iranian government is in violation of the CRC, citing the Iranian definition of a child as being inappropriate for the promotion and protection of Iranian children. According to the International Bureau for Children's Rights, Iran's Civil Code defines a child by age of puberty – which for girls is around 9 years and for boys 15.¹⁰ Age stipulations such as these not only place Iranian children in a much different category than their Western counterparts, who are considered to be children until the age of 18 (regardless of sex),¹¹ but they are certain to leave some children, particularly girls, vulnerable to abuse and exploitation.

To enhance the visibility of the right to education and to work towards the elimination of obstacles and challenges such as these, the Office of the High Commissioner on Human Rights (OHCHR) established Katarina Tomaševski as the first UN Special Rapporteur for education (1998-2004). Until her sudden death in 2006, Tomaševski was highly motivated by this role and produced a vast array of key resources dedicated to understanding the current state of education worldwide, and, to understanding what should be done to improve it. At

⁹ UN Committee on the Rights of the Child, *Concluding Observations: The Islamic Republic of Iran*, (Thirty-eighth Session, Official Records, 2005). Available online at www.bayefsky.com/pdf/iran_t4_crc.pdf and www.bayefsky.com/pdf/iran_t4_crc_38.pdf.

¹⁰ International Bureau for Children's Rights, *Making Children's Rights Work: Country Profile on Iran* (draft). Available online at www.ibcr.org/PAGE_EN/E_CP_3.htm.

¹¹ Article 1 of the CRC defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority age is attained earlier. For the purpose of this dissertation, this will be the assumed standard, acknowledging the further stipulation in Article 5 of the CRC which recommends that while any individual under the age of 18 is considered a child, all decision-making done on behalf of a child should be done in a manner consistent with the evolving capacities of the child.

the end of her term, however, she concluded that the OHCHR should not employ another Special Rapporteur to continue the work which she began. According to Tomaševski, she made this decision because it became apparent to her that while individual governments and the UN were committed to the right to education in principle, they failed to act on this commitment.¹² According to Tomaševski, while it is true that 193 countries have ratified the CRC and have thus made a commitment to the provision of free and compulsory primary education for all of their citizens, almost ½ (91) of the world's countries continue to charge a fee for elementary education.¹³ Given Tomasevski's reservations and given the actual state of primary education around the world today, it is important to question what it means to have a right to education.

To come within reach of the UN's desire to meet the MDG of education for all by 2015, and in so doing to improve the lives of children by adopting practical approaches to meeting this goal, two things need to occur. First, the CRC needs to be ratified by all countries, including the United States (US). Currently only the US and Somalia¹⁴ have yet to ratify, and according to Shulamit Almog and Ariel Bendor for example:

Ratification of the CRC by the United States may aid to transform the convention into a supreme law of the world. Such a transformation will constitute, for the first time, a truly universal declaration for the aspirations, hopes and goals of children.

¹² Katarina Tomasevski, (2005c) "Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004)," in *Human Rights Quarterly* 27: 709-720.

¹³ Katarina Tomaševski, (2006c) "The State of the Right to Education Worldwide: Free or Fee, 2006 Global Report," in *Studies in Human Rights Education* (Netherlands: Wolf Legal Publishers).

¹⁴ Given that Somali has not had a permanent, national government since 1991, it is unfortunate that the CRC has not been ratified but it should not be surprising that no legislative process is in place to deal with the adoption of an international document such as the CRC.

Ratification of the Convention by the US, a move that will hardly have implications on American positive law, is not a too high price to pay for such objectives.¹⁵

Clearly, Almog and Bendor recognize the fact that American law already does much for American children. Moreover, they acknowledge that, from an American point of view, it does seem as if ratification of the CRC will have a negligible effect upon the American institution of education. With that being said, however, Almog and Bendor argue that, by ratifying the CRC, despite this perceived lack of internal effect, the American government will have an influential and unifying impact on global policy related to children's rights and, furthermore, will provide a long-term influence by being able to participate as an active member on the Committee on the Rights of the Child.

Second, with this desire to establish an unconditional endorsement of the CRC, comes the need to move beyond the all-inclusive rhetoric (as noted by Tomaševski) contained in this legal document to establish a more concrete understanding of what it means to have a human right to education for all, so that trophy laws, such as those endorsed in Iran, are no longer perpetuated. The CRC is already the most universally accepted human rights instrument to date. With this near-universal consensus that the CRC should be ratified, it is now essential to look beyond ratification toward action. As this dissertation will argue, if the UN is correct in suggesting that, "education is both a human right in itself and an indispensable means of realizing other human rights,"¹⁶ then there is a duty on the part of all governments, especially

¹⁵ Shulamit Almog and Ariel Bendor, (2004) "The UN Convention on the Rights of the Child meets the American Constitution: Towards a Supreme Law of the World" in *International Journal of Children's Rights* 11: 277.

¹⁶ UNESCO, *Right to Education: Scope and Implementation* (General Comment 13, 1999). Available online at

one as powerful and influential as the US, to influence and support the institutional reforms necessary to achieve basic primary education for all. Moreover, there is a responsibility on the part of all individuals to ensure that the institutional structure dedicated to the provision of basic primary education is set up not only to provide children with access to a vague notion of education, but to a notion of basic education which can provide children with the freedom to do something with that education, once they have obtained it.

According to Brian Orend, the standard definition of a right is “a justified claim on someone, or on some institution, for something which one is owed.”¹⁷ For someone to claim a right to education, on this definition, suggests that there is a reason for that individual to claim that he is entitled to an education and, similarly, there is a reason for someone else to honour this claim. So, what reason exists for the claim that an individual is entitled to an education, and that others are responsible for honouring this claim? In the case of pure contractual arrangements, it is easy to provide reasons for such entitlements. I, as a customer, have paid for the services of a tutor, and the tutor, as a provider of teaching services, is obliged to tutor me. If either party fails to fulfill their obligations, there are established legal and social conventions for protection. Similarly, if I am a citizen of a country (a democratic one at least), whose constitutional arrangements include the provision of basic schooling, the government, whose duty it is to carry out the constitutional provisions, is obliged to provide

http://portal.unesco.org/education/en/file_download.php/c144c1a8d6a75ae8dc55ac385f58102erighteduc.pdf
¹⁷ Brian Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002), 17.

me with that service. The suggestion that a right to education is a *human* right, however, stakes a stronger claim on moral grounds not purely conventional ones.

If we accept Orend's suggestion that "a human right is a high-priority claim, or authoritative entitlement, justified by sufficient reasons, to a set of objects that are owed to each human person as a matter of minimally decent treatment,"¹⁸ and if we accept that the right to education is such a *human* right, then we also need to establish what qualifies education as an object in the set of vitally needed material goods, personal freedoms, and secure protections which human rights advocates claim each individual is owed. Now, it is correct to assume that without things like food or water an individual cannot survive physically. It is also correct to assume, although perhaps more controversially, that an individual without freedom or protection cannot continue to exist psychologically or spiritually. But is education equally significant? Does education provide something for an individual in the same way as food or freedom? Chapter 1 will address these questions by establishing what qualifies education as both a human right and an indispensable means of realizing other rights. To do this, it is important first to understand the development of the various UN documents that currently stand as models for the protection and promotion of both children's rights in general and the right to education in particular. These documents include the *Universal Declaration of Human Rights*, the *Declaration of the Rights of the Child*, and the *International Covenant on Economic, Social and Cultural Rights*.

¹⁸ Orend (2002), 34.

In the beginning, children's rights activists focused on the provision of emergency relief for children in desperate situations. This evolved into the general desire to secure formal and precise statements regarding the welfare and rights of children. For some, however, it was necessary to go beyond the discourse of rights designed by adults for adults, to establish a new discourse on rights specific to children. The creation of the *Convention on the Rights of the Child*, and the current UN challenge to establish education for all, represent a significant shift in how we think about children and their education. The original humanitarian proposal for childhood protection shifted to become a welfarist model to deal with childhood neediness. But then, this shifted again to become an all-inclusive framework for the entitlements which each child is owed as both an individual rights-holder and as a member of the human family.

Of course, claiming education as a human right is not without its critics, so Chapter 2 will follow with an examination of three alternative arguments regarding the education of children. The first argument fully endorses the equal rights of children, including a fundamental right to education, but rejects the UN justification for this claim. This will be followed by two arguments, which suggest that, while it is in the best interests of children to have an education, they reject the idea that it is feasible for children (or even in their best interests) to have a *human* right to free and compulsory education which is publicly funded and publicly directed.

The first argument for consideration comes from two of the most vocal defenders of rights for children, Richard Farson¹⁹ and John Holt,²⁰ who question the validity of the concept of childhood and the traditional belief that children are to be protected at the expense of giving them rights. More importantly, they also question the unconscious faith people have in the traditional approach to providing education through formal public schooling. Their platform is the idea that the same rights, privileges, duties, and responsibilities available to adults “be made available to any young person, of whatever age, who wants to make use of them.”²¹ Their concern is to improve the educational environment, and adult/child interactions within this environment, so that those children who want to make use of such rights, have the skills and understanding to do so. To this end, their goal is twofold: first, to recognize that children have an innate and unquenchable drive to understand the world in which they live; and second, to recognize the child’s claim to the same set of rights to which any human is entitled.

Farson, for example, defends this radical claim because he believes that the traditional dividing line between those with the capacity to be right-holders and those without this capacity is both arbitrary and unnecessary. For Farson, being a child should have no bearing on one’s ability to hold rights, especially a right to education, because “children should have the right to decide on the matters that affect them most directly.”²² While he acknowledges

¹⁹ Richard Farson, *Birthrights: A Bill of Rights for Children* (New York: Macmillan, 1974).

²⁰ John Holt, *How Children Fail* (New York: Dell Publishing Co., 1964), John Holt, *How Children Learn* (New York: Pitman Publishing Co., 1967), John Holt, *Escape From Childhood: The Needs and Rights of Children* (New York: Dutton, 1974).

²¹ Holt (1974), 18.

²² Farson, (1974), 27.

that no guarantees come with children's liberation, he urges that neither the promise of great benefits to all nor the prediction of great difficulties ahead can serve as the reason for granting or denying rights to children. The importance of rights, for Farson lies in the fact that, without them, all individuals (including children) can be incapacitated, oppressed, and abused.

In *Escape from Childhood*, Holt also contends that, until such time that equal rights are granted, children will continue to be controlled and manipulated. As a pioneer of the home-schooling movement, he believed that "learning is not the product of teaching,"²³ learning is the product of the activity of learners. He also believed that, next to the right to life, the right to control one's own mind is of utmost importance.²⁴ For Holt, the traditional school setting takes away this right in its attempts to micro-manage what students should learn and how students should learn it. Moreover, for Holt, having a right to education does not equate to having access to a standardized curriculum with standardized textbooks and overworked teachers; having a right to education means having the right to be the planner and director of one's own education.

The second argument for consideration comes from the libertarian Jan Narveson,²⁵ who opposes the claim that children have a fundamental right to education, despite sharing the belief in liberty with 'liberationists' like Holt and Farson. Narveson suggests that rights

²³ John Holt, *Learning All the Time* (Reading, Mass.: Addison-Wesley, 1989), 160.

²⁴ John Holt, "Doing, not 'Education,'" in John Holt, *Instead of Education: Ways to Help People Do Things Better* (New York: E. P. Dutton & Co., Inc., 1976).

²⁵ Jan Narveson, *The Libertarian Idea* (Peterborough: Broadview Press, 2001).

are for the protection or enhancement of individual liberty and must be limited to active claims or entitlements to the *non-interference* of others in the day-to-day activities of each individual. The libertarian – like the liberationist – argues that it is possible to have a concept of rights but – contra the liberationist – suggests that right-holders must be capable of promoting their own interests and taking responsibility for their own actions. A right to education fails to meet these requirements because education, by its very nature, requires the active and often involved assistance or ‘interference’ of others. Moreover, the libertarian argues that, when it comes to children, it is unusual to regard them as fully autonomous agents, and so, deliberate paternalism seems inevitable even prior to any discussion of rights. This is an idea strongly defended in the work of Narveson, who recommends that:

Children should be under the special direction of their parents. (And where there are none?) In the case where the child has been abandoned, or his parents are dead, then next-of-kin have first refusals, and after that, the first persons who want the child enough to bring it up, or perhaps the ones who bid the most for the right to direct it.²⁶

He defends this position because he believes that it is “illusory and fraudulent”²⁷ to imply that a child belongs somehow to society. According to Narveson, any kind of social decision-making will inevitably place the child in a position which is inferior to the naturally protective environment of the family. He suggests this occurs for the simple reason that the motivation to act beyond utilitarian considerations is diminished the more distant the adult/child relationship. He also suggests that parents, like any other ‘producer’, would only

²⁶ Jan Narveson, “Children and Rights,” in Jan Narveson *Respecting Persons in Theory and Practice: Essays on Moral and Political Philosophy* (Maryland: Rowman & Littlefield Publishers, Inc., 2002), 265-278.

²⁷ *Ibid.*, 267.

be interested in the time-consuming and arduous task of child-rearing if they can voluntarily direct and develop the nature of that child's environment and growth. With this in mind, Narveson includes the additional suggestion that there are no grounds for state-sponsored services or resources like public education outside of charitable provisions. Not only will parents likely be the most motivated to do the right thing, parents or individuals who are best suited to be guardians are also most likely to be in the best position to know what is in the interests of the children they care for. The claim that education is a right to which all children are entitled goes beyond what the libertarian accepts as a reasonable demand on the actions of others.

The third argument for consideration comes from protectionists like Laura Purdy²⁸ and Onora O'Neill.²⁹ These protectionists do not outright deny the feasibility of a right to education, but recommend that such a right remain in the domain of social welfare benefits, and not human rights proper. On this account, a concept of rights broader than the libertarian's is accepted to include both negative and positive rights, but the protectionist's reason to reject education as a fundamental right worth promoting parallels the libertarian claim that children are simply not in a position to act on their own to claim such rights. Onora O'Neill, for example, argues it is possible to have a concept of human rights but "children's fundamental rights are best grounded by embedding them in a wider account of fundamental obligations, which can also be used to justify positive rights and obligations."³⁰

²⁸ Laura Purdy, *In Their Best Interest?* (Ithaca: Cornell University Press, 1992).

²⁹ Onora O'Neill, (1988) "Children's Rights and Children's Lives," in *Ethics* 98: 445-463.

³⁰ O'Neill, (1988), 446.

Laura Purdy also suggests that the establishment of a human right to education would provide children with the misguided freedom to make their own decisions with regard to education, despite the observable fact that at least some children are incapable of acting as successful decision-makers. Rather than rights, O'Neill and Purdy focus on the obligations adults have to minimize the difficulties inherent in growing up. To promote conditions for fruitful and happy development, however, the protectionist endorses at least the possibility that children have some rights beyond those to which their parents are entitled to act on their behalf.

Thus, like the liberationist, the protectionist endorses the idea that children are rights-holders and not simply the property of their parents. Moreover, the protectionist agrees with the both the liberationist and the libertarian that it is undeniable that most public school systems are far from ideal.³¹ The protectionist argues, however, that this fact does not endorse the elimination of a public school system. For the protectionist, the possibility that many children will simply be left to their own devices because there are no parents or individuals who are capable, willing, or even interested in acknowledging their inherent duties to this vulnerable group, indicates that there is a greater need to attempt to improve the public school system rather than reject it. For this reason, the protectionist proposes that it is necessary to establish a concept of a right to education which falls within the broad category of positive social benefits. While it is traditional to view the family as important initial

³¹ Laura Purdy (1994) "Why Children Shouldn't Have Equal Rights," in *The International Journal of Children's Rights* 2: 223-241.

guardians in the realization of the child's need to be protected, nurtured, supported, and hopefully allowed to develop the knowledge and skills necessary to become complete, socially competent adults, the 20th century inclusion of the right to education under the umbrella of economic, social, and cultural rights also grants much protection to children and their ability to access education in the form of a social welfare benefit. The protectionist argues that it is easy to establish how the failure to protect the value of education will leave many children in a vulnerable and unstable condition, making it reasonable – the protectionist suggests – to justify the need for the provision of education as a social benefit that each country has an obligation to provide (to the best of its ability) for its members. The protectionist argues, however, that the beneficial effects of insisting upon a right to education as a *fundamental human* right are less certain. If rights are given priority, as the liberationist contends, the protectionist argues it will inevitably impair our ability to give our children what they need. According to the protectionist, there is nothing to be gained by giving self-governing rights to children prematurely, especially rights which pertain to something as important as education.³² For the protectionist, the claim that education is a *fundamental* right to which all children are entitled undermines the important adult/child relationship necessary for the protection and promotion of the best interests of the child. That is, it models the child as 'a little adult' in a way inappropriate to his or her developmental status.

Intuitively, the protectionist seems correct. As described, the protectionist argues that because children are dependents, we should simply stick with duties because every right

³² O'Neill (1988), especially 461-463.

implies a duty anyway. Nevertheless, it is important to ask what role the child should play in her own development and education. In this dissertation, I argue that while the protectionist comes closest to accepting education as a right by offering an approach which limits the scope of rights without eliminating the *possibility* of rights altogether, it does not go far enough to consider the rights of the child independently of external attachments (parents, adults, teachers). While children may be less capable of engaging their rights, it does not follow that they do not have rights. Nor does it follow that they must relinquish their rights to their parents, or to the state, or even to their own futures. Children, as members of the human family, have fundamental rights, and, the right to education is one of them.

If children are ultimately to become autonomous agents, I consider in this dissertation whether the desire of the liberationist to free children can make a significant contribution to our understanding of what it means for a child to have a right to education. Of course, the liberationist offers an incomplete (and many would say radical) picture of what it means to be a child by demanding full-fledged liberty rights for all children. With that being said, however, the liberationist's desire to free children is an important concept necessary to make the claim that children have a right to education both meaningful and manageable. To answer the question – *what role should the child play?* — I offer an *integrative* account which replaces full-fledged liberty rights with capability rights appropriately matched to the unfolding of that child's own unique mental and physical abilities and social circumstances. As this dissertation demonstrates, it is important to recognize that good intentions alone are not enough. The current move to establish the MDG of education for all by 2015

recommends that the desire to provide every child with a basic minimum education requires two things. First, there is the obvious requirement of protecting the child's right to access a basic minimum education. Full ratification of the CRC, including the US for example, would be a significant advancement towards this goal. More importantly, however, there must also be a social context in which education is seen as a right for all children (boys and girls) to actively participate in and develop through.³³ Having access to a school or to adequate educational resources is only meaningful if one actually participates (or can participate) in learning something or in deciding what to learn. The need to increase access to education, and the need to recognize why it is important to do so, are mutually reinforcing concepts, necessary not only to address childhood vulnerability, or to reach those students who are currently 'hard-to-reach', but to *retain* those who are in the system as well – not through coercion but through choice.

I argue that to move beyond mere questions of access, any desire to promote the right to education, must secure access directly through formal channels like human rights legislation *and* must incorporate the principles defended in such legislation. Where the libertarian and the protectionist focus on the structure of the educational experiences from which the child is to benefit, and where the liberationist focuses on the effects of external agents on the ability of the child to achieve educational success, I argue that consideration needs to be given to *both*. That is, to defend education as a fundamental human right to

³³ UNESCO, *The Dakar Framework for Action* (France, 2000), 75. Especially Article 3, which states "The most urgent priority is to ensure access to, and improve the quality of, education for girls and women, and to remove every obstacle that hampers their active participation."

which all children are entitled requires both the provision of educational resources *and* the freedom to do something with those resources. This requires more than the rhetoric of a UN document like the CRC. It also requires more than the good intentions of duty-bound adults acting in the best interests of the child. To do this, it is necessary to consider how the institutional structure dedicated to education – in particular the structure dedicated to basic primary education to which the UN claims all children are entitled – integrates with the freedom each child has to do something with that basic primary education once he or she has achieved access to it.

To support this claim to an *integrative* approach, the work of four separate, though as I argue complementary, philosophers are considered. First, chapter 3 reflects on John Rawls' theory of justice. Rawls famously and influentially posited that, if people were given the blanket protection of a rational, mutually-disinterested persona (a veil of ignorance), they would be able to design a social structure in which all could live at least a minimally decent life once the veil is lifted.³⁴ From this state of ignorance, Rawls contends, rational individuals will choose two foundational principles necessary to shape a just society. First would be the liberty principle, which states: *each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all*. Second is the difference principle, which states: *social and economic inequalities are to satisfy two conditions: first they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the*

³⁴ John Rawls, *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971).

*greatest benefit of the least-advantaged members of society.*³⁵ He recommends that these two principles of justice will be selected because he believes that, when biasing information is not available, rational agents will opt for a risk-averse distribution of fair and equitable treatment. Although education is not the primary focus of Rawls' work, education is one of the primary social institutions which he includes as an essential component in a just society. With this in mind, this dissertation provides a Rawlsian framework necessary to consider openly and critically both the role education should play within the larger social structure of a stable society *and* the scope of educational experience necessary to enhance an individual's life prospects.

Chapter 4 will continue with the work of another Rawlsian, Thomas Pogge, who reiterates Rawls' belief that it is the design of social institutions which determine whether people get the objects of their vital needs.³⁶ Like Rawls, Pogge is interested in analyzing social institutions and in establishing how such an analysis can be used to justify the need for reform when these institutions are demonstrably unjust. Pogge recommends, however, that it would be more beneficial to adapt Rawls' theory of justice to the complexities of the real world, which is interconnected and global in scope.³⁷ Thus, Pogge importantly expands upon the Rawlsian framework to recommend that we can no longer limit ourselves to well-ordered, ideal societies and the provision of primary goods. Pogge favours instead a concept of human

³⁵ John Rawls, *Justice as Fairness: A Restatement* Erin Kelly (ed.) (Cambridge: Harvard University Press, 2001), 42-43. A revised statement of the principles of justice found in Rawls (1971), 52-78.

³⁶ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), especially chapter 2.

³⁷ Thomas Pogge, (1988) "Rawls and Global Justice," in *Canadian Journal of Philosophy* 18 (2): 227-256.

rights. Moreover, he favours a concept of human rights that is not bound by national borders – for Pogge, human rights belong to humanity. Pogge chooses to adapt the Rawlsian theory of justice in this way because, while he is in favour of Rawls’ account of our natural duty to remove injustice through institutional reform, he also wants to question how far our moral concern for social institutions should extend.³⁸ That is, Pogge is interested in how we should assess a global institutional framework from a moral human rights point of view. Of course, Pogge’s work has mainly been dedicated to the issue of global poverty; nonetheless, his conception of human rights as moral human rights, and his conception of the nature of social institutions, are highly relevant distinctions necessary to understand, not only *why* education is a human right, but, also why we have a duty to respond positively to *securing* this right for all.

By examining the role institutions play in securing rights via Rawls and Pogge, chapters 3 and 4 address the first issue related to supporting the MDG of education for all by 2015 – namely the child’s right to *access* a basic minimum education. To address the further issue of developing a *social context necessary* for all children to actively participate in, and develop through, their own education, however, requires an alternative approach which favours human development and capabilities over an exclusive emphasis on rights. I argue that this approach is a necessary counterpart to understand fully what it means to have a human right to education. In particular, chapter 5 considers the work of Amartya Sen and chapter 6 considers the work of Martha Nussbaum.

³⁸ Thomas Pogge, (1994) “An Egalitarian Law of Peoples,” in *Philosophy and Public Affairs* 23 (3): 195-224.

Sen, like Pogge, is keenly interested in how to eradicate poverty, but he approaches this goal from the perspective of what individuals can do with the rights and resources which are available to them. For Sen, poverty is a complex notion of capability deprivation, not simply a lack of resources. With this in mind, he contends that, while it is correct to have concern for how certain institutional structures can deprive individuals of their material means to well-being, it is equally important to look to achieving certain levels of basic capabilities, below which people count as “scandalously deprived.”³⁹ To this end, it is necessary not only to examine the role institutions play in securing the child’s right to education, consideration needs to be given to a concept of human development *through* education as well.

Of course, as an economist, Sen presents a rich and technical account of social choice theory and human development which goes beyond the scope of this dissertation. With that being said, however, the importance of considering Sen’s work rests in his more philosophical belief that having a right is only significant if that right enables you to do something which you value.⁴⁰ By focusing on Sen’s notion of freedom or capability as the proper content of rights in this regard, it is possible to do two things. First, it is possible to deepen our understanding, in general, of both the rights and liberties which we each have as human beings, as well as the obligation which we all have to respond to the same rights and liberties of others. Second, it is possible to deepen our understanding, in particular, of

³⁹ Amartya Sen, “Capability and Well-Being,” in Martha Nussbaum and Amartya Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993).

⁴⁰ Nussbaum and Sen (1993).

education as a human right because, not only does Sen develop an important understanding of human capabilities, both he and Martha Nussbaum translate this understanding into a capability-sensitive educational framework – a framework which, according to Sen, embraces an old Bengali suggestion that:

Knowledge is a very special commodity: the more you give away, the more you have left. Imparting education not only enlightens the receiver, but also broadens the giver – the teachers, the parents, the friends. Schooling not only benefits the person being schooled, but also others who are close to those who are being schooled. Basic education is a truly social good, which people can share and from which they can jointly benefit, without having to snatch it from others.⁴¹

With this in mind, chapter 6 examines how Sen links education to human development and security, and how Nussbaum translates this into a three-part concrete model for development of capabilities in education.

It is necessary to integrate an understanding of a right to access education with an understanding of the social context necessary to support this right. This is so because it is an inert claim to state that a child has a right to education if there are no means for that child to realize this claim. As Brian Orend has suggested, “we do not know the full scope of our human rights until we know that the duties correlative to them can be performed at a reasonable cost.”⁴² With this in mind, Orend recommends two key objections which need to be addressed when defending any socio-economic object, like education. First, it is important

⁴¹ Amartya Sen, “Reflections on Literacy” in Namtip Aksornkool (ed.) *Literacy as Freedom: A UNESCO Round-Table* (Paris: UNESCO, 2003), a text version of an address given to the public celebration on International Literacy Day 2002 in Paris.

⁴² Orend (2002), 139.

to justify why the socio-economic object is a human rights object at all, and second, it is equally important, if not more, to justify the cost of its implementation.⁴³ Providing children with educational opportunities can be expensive, and clearly, children (particularly young children) do not have the means to provide such resources for themselves. Defending every child's right to education is one way to ensure that every child will get at least a minimal level of protection and support as he or she develops. But critics complain. As Jan Narveson⁴⁴ has suggested for example, defending a right to education for which we all bear a responsibility is tantamount to defending a right to good old-fashioned socialism and, as such, should be rejected soundly.

By examining the role which institutions play in securing rights via Rawls and Pogge, and by favouring a concept of human development via Sen and Nussbaum, this dissertation responds to this libertarian challenge – first, by establishing why basic primary public education is a fundamental human right and, second, by establishing that at least this minimum level of education is “readily absorbable in terms of cost”⁴⁵ as well. To address this twofold understanding even further, the final chapter of this dissertation considers the field work of Katarina Tomaševski, and the current Education for All (EFA) revolution, to provide some concrete examples of this integrative approach which are currently being undertaken to translate the moral challenge which Rawls, Pogge, Sen and Nussbaum direct at institutions

⁴³ Brian Orend, “Justifying Socioeconomic Rights,” Chapter 1 in Rhoda E. Howard-Hassmann and Claude E. Welch Jr. (eds.), *Economic Rights in Canada and the United States* (Philadelphia: University of Pennsylvania Press, 2006): 25-40.

⁴⁴ Jan Narveson, “Education: Should We Sell the Schools?” Chapter 20 in Jan Narveson, *The Libertarian Idea* (Peterborough: Broadview Press, 2001).

⁴⁵ *Ibid*, 140.

and capabilities into the actual conditions and working forces of community life. By identifying education as a human right within this integrative structure, this dissertation demonstrates why policy documents related to education should shift from a focus on the traditional relationship between two parties (a vulnerable one and an experienced one), to one based on the relationship between an individual and a capability set – an inherently pedagogical idea. Moreover, it is an idea which can justify the need to recognize education as a human rights object of equal significance to the more familiar vital needs like food and freedom.

The claim that a right to education is a human right is an important claim. It is an important claim, however, because there is a responsibility to enable children to develop an acquired set of capabilities to lead their own lives in a meaningful and fulfilling way. The MDG to achieve free universal primary education for all by 2015 is not meant to be an unmanageable or unsupported goal. The desire to promote and protect a child's fundamental right to basic primary education complements the commitment – shared by Rawls, Pogge, Sen, Nussbaum and Tomaševski – to institutional reform that is both meaningful and manageable. This commitment by the UN and participating states parties to recognize and support education as a fundamental human right recommends that education is the key to three things: 1) sustainable development; 2) peace and stability within and among countries; and 3) a means for effective participation in the societies and economies of the 21st century.⁴⁶ This dissertation provides a comprehensive overview of cutting edge

⁴⁶ UNESCO, *The Dakar Framework for Action*, (France, 2000).

developments in this contemporary conception of education as a human right, it also provides a robust Rawlsian justification for the social commitments required to recognize this conception of education as a human right and, finally, it offers some concrete and manageable policy implications regarding the implementation of this conception of education as a human right.

Chapter 1

The UN Claim to Education as a Human Right

Human rights advocates claim that every child has a right to education. This claim is based primarily on two premises: a positive one and a negative one. First, human rights advocates value education because they believe that if a child receives basic primary education, she will likely be literate and numerate, and will have the basic social and life skills necessary to secure a job, to be an active member of a peaceful community, and to have a fulfilling life. Second, human rights advocates recognize that, despite this positive premise, many children fail to benefit from even basic primary education. This gap between the positive reason to value education, and the negative reality facing many children, has led human rights advocates to conclude that education must be considered a human rights issue on par with the right to food or the right to freedom. Nevertheless, over 70 million children of primary school age still do not (or cannot) attend school.⁴⁷ This leads one to question, as representatives of organizations such as the UN⁴⁸ and UNESCO⁴⁹ are doing – what does having a human right to education mean?

This chapter considers some reasons which justify education as a right and whether the added stipulation that it is a *human* right really makes a notable difference. Section 1.1

⁴⁷ Nicholas Burnett (Director), “Education for All by 2015: Will We Make It?” *EFA Global Monitoring Report 2008* (Paris: UNESCO, 2007). Available online at www.efareport.unesco.org.

⁴⁸ Katarina Tomasevski, (2005c) “Unasked Questions about Economic, Social and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004),” in *Human Rights Quarterly* 27: 709-720.

⁴⁹ UNESCO, *Education for All: Is the World on Track?* (EFA Global Monitoring Report, 2002).

provides a brief overview of existing UN human rights documentation, like the *Universal Declaration of Human Rights* (UDHR) and the *Declaration of the Rights of the Child* (DRC).⁵⁰ These documents have helped to establish viable legal mechanisms, from which nation-states can and have implemented, supported, and assessed effective social structures. In the specific case of a right to education, the standard assumption is that education should be viewed as a social welfare right that either the parents or the state are obliged to recognize and support. This assumption is reflected in the traditional division of rights into *first-generation* and *second-generation* rights. Section 1.2 considers this traditional division, to reflect on why it is common to view the right to education as a social benefit and whether this common classification is, in fact, a warranted claim.

Section 1.3 of this chapter considers the more recent debate, which stresses the need to look beyond simply valuing education as a social good. The establishment of documents like the *Convention on the Rights of the Child* (CRC), for example, represents a significant shift in language from *first-generation* and *second-generation* rights to a more inclusive language which incorporates the minimum set of vitally needed considerations which should be granted to any individual as a matter of decent treatment. Where rights were once thought to be about either protecting negative liberties, or about providing positive welfare benefits, the language of the CRC has shifted the focus toward categories which are more suitable to the rights of children. For example, as Thomas Hammarberg has suggested, it is more

⁵⁰ For a complete history of the CRC see: *Legislative History of the Convention on the Rights of the Child*, volumes 1 and 2 (New York: Office of the United Nations High Commissioner for Human Rights, 2007). Available on line at http://www.ohchr.org/english/about/publications/docs/history_crc1.pdf and http://www.ohchr.org/english/about/publications/docs/history_crc2.pdf.

appropriate to think of children’s rights by grouping the articles found in the CRC into the “three P’s” of children’s rights – provision, protection, and participation.⁵¹ For advocates of the CRC, like Hammarberg, this shift in language is instrumental in making the CRC the most universally accepted human rights instrument to date, and the most comprehensive statement by the UN for why education should be included as part of the fundamental set of *human* rights. The final section of this chapter considers why the US disagrees with Hammarberg’s claim and what implications the current failure of the US to ratify the CRC has on the realization of every child’s right to education.

1.1. The Universal Promotion and Protection of Children’s Rights

At the beginning of the twentieth century, Ellen Key proclaimed that we were entering the “Century of the Child.”⁵² Of course, many before her had written on children and education, but her proclamation heralded a new era of social movements specifically aimed at children as individuals, independent of parental or governmental attachments. One example demonstrating this development was the 1919 adoption of the *Minimum Age Convention* by the International Labour Organisation (ILO), which fixed the minimum age of employment at 14. Another example was the creation of the United States Children’s Bureau in 1912 – a bureau described as “the first governmental agency in the world created solely to consider the problems of the child.”⁵³ One social reform movement of note, however, which

⁵¹ Thomas Hammarberg, (1990) “The UN Convention on the Rights of the Child – And How to Make it Work,” in *Human Rights Quarterly* 12 (1): 97-105.

⁵² Ellen Key, *The Century of the Child* (New York: G. P. Putnam’s Sons, 1909).

⁵³ Kriste Lindenmeyer, “A Right to Childhood”: The U.S. Children’s Bureau and Child Welfare, 1912-1946 (Urbana: University of Illinois Press, 1997), 30. As the oldest Federal agency for children within the

focused specifically on the rights of children and their need to be treated as human beings and not simply dependents, occurred in 1919. This was when Eglantyne Jebb established the Save the Children Fund.

Jebb established this Fund in London to deal with children primarily in European countries ravaged by World War I (WW1). With the almost instant success of this movement, and with the realization that there was a great need to reach out to all children, this fund quickly developed into the International Save the Children Union. As the tragedy of WWI subsided, and the need for immediate aid lessened, Jebb moved to craft a *Children's Charter*, which would not only promote emergency relief services for children but would also continue to promote the rights of children in general. Her desire to formalize the need to recognize the rights of children was built upon her belief that:

We should claim certain Rights for the children and labour for their universal recognition, so that everybody – not merely the small number of people who are in a position to contribute to relief funds, but everybody who in any way comes into contact with children, that is to say the vast majority of mankind – may be in a position to help forward the movement.⁵⁴

In 1924, this simple statement of rights became the *Geneva Declaration of the Rights of the Child* (GDCR).⁵⁵ While there were prior international reports which dealt with children, this

Administration for Children and Families, the Children's Bureau maintains, to this day, primary responsibility for administering Federal child welfare programs. For more: <http://www.acf.hhs.gov/programs/cb/>.

⁵⁴ Eglantyne Jebb, (1923), Save the Children website

www.savethechildren.org.uk/scuk/jsp/aboutus/index.jsp?section=historytimeline&timeframe=1920.

⁵⁵ League of Nations, *Geneva Declaration of the Rights of the Child of 1924* (adopted on 26 September, 1924), preamble. Available online at University of Minnesota online Human Rights Library, <http://www1.umn.edu/humanrts/instreet/childrights.html>. See Appendix for specific wording.

declaration was one of the first internationally recognized legal assertions for the promotion and protection of children's rights.

As one of the first attempts to recognize legally the rights of children, the GDCR is very broad and vague, providing only the stipulation that children should have a right to develop without hunger, fear, distress, or exploitation. Its significance, however, lies in the fact that, after the League of Nations adopted this convention, other (less political) organizations, like Save the Children, were able to recognize formally the need to look beyond politics and national boundaries to focus on specific issues related to children. Unfortunately, shortly after participating in the creation of the GDCR, Jebb's health failed and she died in 1928. But the strength of her claim that it was the responsibility of humanity to ensure that the rights of children be recognized and fulfilled did not diminish.

The International Bureau of Education (IBE), for example, was founded in 1925 to promote advancements for children in the area of education. As a non-governmental organization, it was concerned with the goal of providing centralized educational documentation and research in Europe. It was no longer acceptable simply to pass information on from one generation to the next in a rigid, hierarchical manner. According to this new educational movement, both children and society in general were entitled to progressive ideas derived from a comparative exploration of a variety of educational approaches. Another similar organization formed in 1923 when the American National Education Association hosted a world conference on education in San Francisco. This

conference brought together 50 different national education groups⁵⁶ who collectively determined that the traditional nation-state-centred, or top-down, approaches to education must be tempered by a more well-rounded, international focus (what we would now term today 'civil society'), to foster progressive educational development and to ensure the maintenance of peace and goodwill among nations. This decision resulted in the creation of the World Federation of Education Associations (WFEA), with the following stated purpose:

To secure international co-operation in educational enterprises, to foster the dissemination of information concerning the progress of education in all its forms among nations and peoples, to cultivate international good will, and to promote the interests of peace throughout the world.⁵⁷

Of course, the concept of education itself was hardly new, nor was the concept of research in education, but what the founding of organizations like these revolutionized was the need to consider non-political, intercultural educational and developmental innovations, and also to consider what impact these innovations could have on the lives of children.

There was also the need to consider how to implement such a vision, as it was not a vision shared by all. On the one hand, there was great optimism that the creation of non-governmental educational forums would enhance the advancement of intercultural understanding and education. On the other hand, there was the reality that each country maintained its right to design and implement its own educational programs necessary to serve

⁵⁶ Sylvester, Robert, "Mapping International Education: A Historical Survey 1893-1944," in *Journal of Research in International Education*, 1:1 (2002): 90-125.

⁵⁷ Henry Smith, "The World Federation of Education Associations," in *Annals of the American Academy of Political and Social Science*, 234 (1944): 107-112.

its own societal needs. This discord in educational vision, and the additional need for financial backing to implement any resource development, forced the IBE to open its doors to government memberships under the stipulation that, as an organization, it would remain at arms-length from specific or partisan political interference. This allowed the IBE to continue to act on its two primary directives: to collect information concerning existing private and public educational systems, and to perform and publish experimental and statistical educational research. In addition to this, in 1934 the IBE began the first of an ongoing set of annual International Conferences on Education (ICE)⁵⁸ to coordinate the independent work of the various Ministers of Education.

Although the ICE did not take place during World War II, in 1942 (under the threat of totalitarianism), the participating members held the Conference of Allied Ministers of Education (CAME)⁵⁹ to regroup and reform the educational systems that existed prior to the devastation of the war. This time, however, the consensus of those participating in CAME was to make a concerted effort to found a truly international approach to ensure that progressive, intergovernmental educational ideas would persevere. To achieve this end, the IBE ultimately joined forces with the United Nations Educational, Scientific and Cultural Organization (UNESCO) to establish an ongoing forum for debate between political agencies, intergovernmental and non-governmental organizations, researchers, educators, and anyone interested in the promotion and advancement of an institution of education designed

⁵⁸ For information about the ICE visit their website at http://www.ibe.unesco.org/International/ICE47/english/index_ICE47.htm.

⁵⁹ Fernando Valderrama, *A History of UNESCO* (Paris: UNESCO Publishing, 1995). Available online at http://www.ibe.unesco.org/International/ICE47/english/index_ICE47.htm.

to recognize that “since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed.”⁶⁰ Clearly, education in and of itself can be both a positive and a negative influence on a society, as was demonstrated by the destructive influence that a highly educated society like Germany had on the world around that time. With this in mind, the founders of UNESCO were careful to point out that the peace they were interested in building was not a concept of peace at all costs but a concept of peace derived from the intellectual and moral unity of humankind, the kind of unity that the newly established *Universal Declaration of Human Rights* (UDHR) exemplified.

The UDHR is a set of thirty Articles that the General Assembly of the United Nations adopted in 1948 and proclaimed as both morally persuasive and, one day it hoped, legally binding. The purpose of this declaration was to recognize formally “the inherent dignity and equal and inalienable rights of all members of the human family.”⁶¹ The foundation of this declaration was the desire to promote freedom, justice and peace in the world. With this hope in mind, the founding signers of this declaration believed that it was possible to establish and maintain:

A common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the people of territories under their jurisdiction.⁶²

⁶⁰ UNESCO, Constitution of the United Nations Educational, Scientific, and Cultural Organization, (adopted on 16 November, 1945), preamble.

⁶¹ United Nations, *Universal Declaration of Human Rights* (adopted on 10 December, 1948), preamble.

⁶² Ibid.

As a human rights instrument designed to provide a standard to which the actions of individual countries can be held to account, the UDHR provides several broad areas for consideration. Each area stipulates the kind of action necessary to promote things like: a sense of security; the need for due process, liberty, and equality; the importance of political participation; and finally, for those who are unable to provide for themselves, the provision of social welfare.

The desire to formulate one comprehensive document, which addresses each of these areas collectively, represents an important refinement of two key ideas which have been debated throughout history. The first idea comes from the belief that, because we belong to the group known as human, we are distinctive. The second idea builds on this to suggest that, because we have this distinct nature, we are somehow deserving of entitlements and are duty-bound to respect the entitlements of others. Historically, this belief in our distinctive nature and our sense of entitlement was derived primarily from two identifiable sources: the spiritual or the natural. Throughout history, one approach has alternately dominated the other but both points of view rests on the idea that we somehow acquired or we naturally possess certain characteristics essential to our humanity, and that these characteristics require certain kinds of action, protection and provision. After WW II, many felt that accepting either divine or natural justifications were no longer sufficient reasons to promote adequately these human entitlements. What the UDHR represented was a progression from the belief that our authority for social action comes from either a divine or a natural underpinning, to the belief that it is up to each of us to come together *to construct*, and *consent to*, legitimate social

structures. It would be important to ask, however, why the founders of the UDHR felt the need to recognize *human* rights when there were already many laws for the protection and promotion of the rights of the citizens of individual countries.⁶³

During the creation of the UDHR, there was a desire to highlight certain human rights believed to exist prior to national law or positive law. This was highlighted because it was believed that only a notion of *human* rights could address and protect the person as a human being independently of all external attachments. The rights and laws which each individual country establishes represent the social agreements citizens of a particular country make with each other and the social conventions to which these citizens should abide. If an individual legitimately has any of these rights, it is usually because that individual has participated with others to come to an understanding about what he can claim and what others have to do in response to that claim. A complementary notion of a positive law helps to enforce these claims when either side fails to comply. What the founders of the UDHR were also interested in establishing, however, were stipulations for those cases where an individual's own government or societal arrangements fail to act on that individual's behalf. There was an enduring promise for all of humanity, not simply particular sub-groups. As Micheline Ishay has noted:

“Never again!” was the rallying cry of Jews and human rights activists after World War II. The Nuremberg trials (1945-1946) and the Tokyo trial (1946), in which former Nazi and Japanese leaders were indicted and tried as war criminals by an

⁶³ Orend (2002), chapter 8 “Twentieth Century and Beyond”; See also Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley: University of California Press, 2004), chapter 4 “The World Wars: The Institutionalization of International Rights and the Right to Self-Determination.”

international military tribunal, vindicated the persecuted. They also set a new precedent in international law, namely that no one, whether a ruler, a public official, or a private individual, was immune from punishment from war crimes.⁶⁴

While the UDHR represents one of the most comprehensive statements of human rights and one of the most persuasive devices for the protection of individuals from the aggressive or inappropriate actions of governments, some dissenters suggested that two important areas still needed further reflection: 1) the rights of children; and 2) the divisive debate between liberty rights and welfare rights.

For those interested in the rights of children, their concern was reflected in the fact that there were only two Articles dealing specifically with children in the UDHR. Article 25 (2) notes the need to recognize that both women (mothers in particular) and children are entitled to special care and assistance. Article 26 (1) states: *Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.*⁶⁵ While advocates of children's rights did not deny that these two Articles were a big improvement on the GDRC, for example, they felt the UDHR failed to deal sufficiently with the rights of children. As a tool for adults, it is effective because adults usually have an official and immediate relationship with their governments. In the case of children, however, the UDHR does not directly protect them in the same way because children generally have a

⁶⁴ Ishay (2004), 218.

⁶⁵ United Nations, *Universal Declaration of Human Rights* (adopted on 10 December, 1948). Available online at <http://www.udhr.org/UDHR/default.htm>.

relationship with their parents, which is prior to the one they share with their government. This is reflected in Article 26 (3) of the UDHR, which suggests: *Parents have a prior right to choose the kind of education that shall be given to their children.* Recall the work of Eglantyne Jebb, however, who suggested that, when governments fail to protect adequately the rights of their members, it is often the children who suffer the most.

To address this need to protect children to the same degree as adults, there was a move to adopt a new *Declaration of the Rights of the Child (DRC)*⁶⁶ in 1959, as a more comprehensive version of the previous Geneva Declaration written by Jebb. One of the advancements to children's rights found in this document is the need to recognize the child's right to an identity found in Principle 3. That is, the child's right to a name and a nationality from birth, which may be tied to the child's parents, but which represents the child directly. Further to this, Principle 7 of the DRC builds upon article 26 of the UDHR not only by recognizing the child's right to receive free and compulsory basic primary education (as the UDHR does) but also by stipulating clearly why having access to free and compulsory basic primary public education is essential to the development of the whole child. Where the UDHR emphasizes the need to recognize education as an essential tool in the development of the human personality and for the promotion of peace and toleration among nations and social groupings, the DRC develops further the idea that any education to which a child is exposed must be in the child's best interests as well:

⁶⁶ UN General Assembly, *Declaration of the Rights of the Child* (proclaimed by General Assembly resolution 1386 (XIV) on 20 November, 1959), preamble. Available online at www.unhcr.ch/html/menu3/b/25.htm.

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him on a basis of equal opportunity to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of a society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.

The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and public authorities shall endeavour to promote the enjoyment of this right.⁶⁷

The inclusion of the child's right to have an identity, and a more comprehensive statement of the child's right to access and benefit from an education which addresses the child as an individual, was refined even further in 1960 by the adoption of the *Convention Against Discrimination in Education* (CADE).⁶⁸ This document added to the DRC not only the need to address overt discrimination but also the need to promote equality of opportunity in education. While parents retained the pragmatic privilege of primary responsibility for their children, what the DRC (combined with the CADE) offered was the first significant statement of the child's right to be treated with the same respect and consideration as any member of the human family. The advancements made by the UN in general, and UNESCO in particular, successfully shifted Jebb's general concern for humankind's *responsibilities toward* children to the establishment of a formal and specific statement on the *welfare and*

⁶⁷ UN General Assembly, *Declaration of the Rights of the Child* (resolution 1386 (XIV) adopted on 20 November 1959), Principle 7, paragraph 1.

⁶⁸ UN, *Convention against Discrimination in Education* (adopted on 14 December 1960 by General Conference of UNESCO, entry into force 22 May 1962). Available on line at www.hri.ca/uninfo/treaties/14.shtml.

rights of children. Increasingly, children were being seen as independent rights-holders in their own regard.

With regard to the divisive debate between liberty rights and welfare rights, it was determined that the comprehensive nature of the UDHR required two separate documents and committees, which could individually develop and promote either rights which favour the choices people make, or the benefits which people are entitled to claim.⁶⁹ Some of the thirty articles of the UDHR encompass the traditional civil and political rights found in many of the previous documents dedicated to basic rights, like the *English Bill of Rights*, the *American Declaration of Independence*, or the *French Declaration of the Rights of Man and of the Citizen*. All of these documents were created based on the acknowledgement of a universal right to self-preservation and to equal freedom from the interference of others in achieving this claim. Where the UDHR distinguishes itself, and where some of the criticism aimed at it comes from, is the additional inclusion of the need to consider economic and social standards. For some, this addition was a necessary requirement of being a free human being, as noted in the stipulation found in resolution 421 of the UN General Assembly which suggests that “the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent.”⁷⁰ For others, however, such a stipulation is a direct violation of the freedom to which all human beings are entitled. This difficulty of the UN to achieve consensus on the scope of the UDHR, led to a more

⁶⁹ James Nickel, *Making Sense of Human Rights* 2nd edition (Malden, MA: Blackwell Publishing, 2006), 14-17.

⁷⁰ UN General, *Draft International Covenant on Human Rights and measures of Implementation: Future Work of the Commission on Human Rights* (resolution 421 (V) adopted on 4 December 1950).

comprehensive set of bundled rights called the *International Bill of Rights* (IBR). This set included not only the *Universal Declaration of Human Rights* (UDHR 1948), but the *International Covenant on Civil and Political Rights* (ICCPR 1966) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR 1966) as well.⁷¹

While all three pieces are critical components within the debate on human rights, it is a common view (especially in the English-speaking world) that the civil and political rights found in the ICCPR are more familiar, and perhaps more essential, to defenders of human rights. Historically referred to as *first-generation* rights, these liberty rights typically relate to self-determination and include rights to freedom of thought and expression, freedom to peacefully assemble or associate with others of your own choosing, freedom to participate in political activities, security of the person, due process rights, freedom of religion and freedom to be in possession of property. The second area incorporates the remaining economic and social rights as outlined in the ICESCR. Historically referred to as *second-generation* rights, these welfare rights typically include rights to recognition of equality, freedom from discrimination, adequate standards of living, health care, and education. These rights also typically involve the positive action (and often resources) of others, leaving some to conclude that they are merely social benefits rather than rights proper. In the specific case of a right to education, the standard assumption has been that education should be viewed as a social welfare right which either the parents or the state (or even the church) are obliged to

⁷¹ Orend (2002), 27.

recognize and support, when it is feasible for them to do so.⁷² This assumption is reflected in the traditional placement of education within the category of social benefits. The next section considers this traditional division to reflect on why it is common to view the right to education as a social benefit, and whether this enduring classification remains a warranted claim.

1.2. Education as a Second-Generation Right

Within the traditional debate between liberty and welfare rights, there are those⁷³ who suggest that we are compelled to ascribe and respect the liberty rights stipulated in the ICCPR as *human* rights because they accord with certain common *human* attributes, namely the idea that individuals are small-scale sovereigns entitled to the freedom to act without the interference of others. Individuals, who hold this position, focus on the protected choices that the recognition of these human rights can provide. That is, they focus on the entitlements which we each have to a protected sphere for making free choices. This protected sphere grants us the personal freedom and autonomy to make choices about what is in our personal best interest, implying the correlative duty that others will abide by that claim and not interfere with its realization. Individuals who argue for this reciprocal relationship suggest that recognition of a set of liberty rights, including the right to freedom, to equality of opportunity, and to political participation is sufficient to protect this personal space. Any

⁷² Douglas Hodgson, *The Human Right to Education* (Aldershot: Dartmouth Publishing Company Ltd., 1990).

⁷³ For example, M. Cranston, "Human Rights, Real and Supposed," in D. D. Raphael (ed.) *Political Theory and the Rights of Man* (London: Macmillan, 1967) and M. Cranston, *What are Human Rights?* (London: Bodley Head, 1973).

notion of human rights beyond these broad liberty rights – like the right to health care or social security for example – while nice to have, is dependent on coercive social structures necessary to collect and manage the resources required for these rights, and therefore should be considered secondary social benefits and not rights proper.

On the other hand, there are those⁷⁴ who suggest that we are compelled to ascribe to and respect the socio-economic rights stipulated in the ICESCR as *human* rights because there is an undeniable link between certain material objects/resources and a minimally decent life. Individuals, who hold this position, focus on the protected interests which the recognition of these human rights can provide. That is, they focus on the entitlements we each have to the direct provision of concrete benefits. These protected interests grant us the personal well-being to live a minimally decent life, with the understanding that others will be able to do the same. Individuals who argue for this relationship suggest that, to be a fully functioning member of the human family, it is necessary to recognize not only a minimum set of *liberty* rights, but also a minimum set of *social* rights: including the right to freedom from discrimination, an adequate standard of living, and health care. Any notion of human rights which does not incorporate these rights will inevitably neglect those who are most in need of having their rights respected.

When the rights of children are added to this polarized debate, as in the case of a right to education, it has been traditional to assume that, because children are not direct rights-

⁷⁴ For Example J. Nickel, *Making Sense of Human Rights 2nd ed.* (Oxford: Blackwell Publishing, 2006); B. Orend, *Human Rights: Concept and Context* (Peterborough: Broadview Press, 2002); H. Shue, *Basic Rights 2nd ed.* (Princeton: Princeton University Press, 1996).

holders, their rights necessarily fall into the category of rights as protected interests.⁷⁵ Children, after all, usually are not sufficiently prepared to make major life choices. The preamble of the DRC, for example, states that we should respect children's rights because *mankind owes to the child the best it has to give*. In light of this document, to suggest that a child is a rights-holder is to suggest that the child is entitled to the direct provision of certain concrete benefits which adults are obliged to provide. The further claim in Principle 7 of the DRC, which stipulates the child's right to education, is to suggest that the child has an interest in having an education, which is so important to him that others are obliged to provide him with it *regardless* of whether he believes or understands that it is a good thing to pursue. While such a claim is better than no claim at all, do children automatically have a right to basic public education simply by virtue of it being in their best interest? Chapter 2 will examine more closely the position held by opponents of officially sanctioned rights for children who believe that, even if we did have compassionate reasons to protect a child's right to free and compulsory education, the inevitable cost which such a social benefit entails make it challenging to move beyond benevolence into the realm of human rights. The rest of this section, however, considers this standard assumption that education should be viewed, at least minimally, as a social right.

To begin, it is common to assume that the intellectual immaturity and inexperience of children leave them unprepared to make the kinds of personal life choices adults can make.

⁷⁵ David Archard, *Children: Rights and Childhood* (London: Routledge, 1993); John Eekelaar, (1992) "The Importance of Thinking That Children Have Rights," in *International Journal of Law and the Family* 6: 221-235.

Until children are capable of independent action, it is assumed that others must stand in as temporary rights-holders to act on their behalf. In light of this notion, the ICESCR promotes the care and education of children as a social responsibility. This document suggests that is in the best interests of children to have an education to develop the intellectual maturity and experience necessary to become fully participating members of society. Similarly, it is in the best interest of a society to have a social system, including public education, which can develop citizens who are capable of fully participating. Given the level of resources required to deliver an adequate educational experience, defenders of the ICESCR suggest that the state is often in the best position to stand in on behalf of children to determine both the distribution and the content of education for that end. Ideally, children who are in a position to claim this right to education can ultimately become adults capable of understanding their role in society. To this end, Article 13(2) of the ICESCR articulates both the need to provide free and compulsory basic primary education, and as many equal opportunities as possible to access a more complete education which is directed to the full development of the child's potential.

Similarly, it is believed that those governments who recognize and promote the right of every child to a free and compulsory basic primary education will reap the benefits of having a skilled workforce and active citizenry. To this end, Article 14 of the ICESCR addresses the concern that some under-developed countries will automatically be unable to secure compulsory basic primary education. According to this Article, the element of compulsion is necessary, not to penalize directly those countries who are incapable of

fulfilling this treaty, but to highlight the non-optional, interdependent nature of basic primary education. This Article is meant to highlight the principle that a child is entitled, regardless of nationality, sex, race, religion, or economic status to a free basic primary education. Moreover, it is the responsibility of each participating member country to secure this right – either through their own local resources, or by securing international assistance and cooperation. Therefore, while immaturity and inexperience are obvious barriers for children, the inclusion of a social right like education in the ICESCR is an important step for children to become rights-respecting individuals.

A second reason the defenders of the ICESCR suggest for the promotion of the right to education as a fundamental social right concerns the unique relationship which exists between adults and children. It is a common, and presumably correct, view that parents usually play a significant role as primary caregivers and teachers in the adult/child relationship. The ICESCR acknowledges this unique relationship carefully by maintaining that, although children have rights, it is the parents who maintain the primary responsibility to recognize and realize these rights. Article 13 (2) of the ICESCR carefully acknowledges, however, that in the specific case of the child's right to education, the parents must be seen as partners and not as executive directors. This Article maintains that there is a unique relationship between parent and child, but stipulates that the kind of education which will develop the child's potential fully, must progressively embrace both the familial values and the values of the society to which the child belongs, and in which the child will ultimately have to become a fully participating member. Therefore, while parents are essential to the

development of children, the promotion and protection of a right to education highlights the interconnected nature of the relationship between the child, the parent/educator, and the state.

Finally, the move to incorporate education in the ICESCR as a fundamental social right to which all children are entitled reflects the need to deal more aggressively with the sizeable problem of childhood vulnerability. Each year millions of children suffer from neglect, abuse and poverty. In particularly difficult situations, they are also vulnerable to slavery and armed conflict. Even in countries where these extreme circumstances are not obvious, it is believed that children who do not go to school are vulnerable to life choices which are not conducive to their full development. Promoting education as a fundamental social right is a natural consequence of the common and correct assumption that we have certain duties towards children to compensate them for these inherent vulnerabilities. Onora O'Neill, for example, has suggested:

Children are more fundamentally but less permanently powerless; their main remedy is to grow up. Because this remedy cannot be achieved rapidly they are peculiarly vulnerable and must rely more than other powerless groups on social practices and institutions that secure the performance of others' obligations.⁷⁶

The ICESCR's claim that the right to education is a fundamental social right represents this need to secure the commitments of adults to counteract childhood vulnerability. Article 13 (1) commits adults to recognize that until children have acquired enough skills and resources to develop their own sense of self, they are entitled to an education. To complement this, Article 13 (1) also emphasizes that, by recognizing this fundamental right, not only will the

⁷⁶ Onora O'Neill, (1988) "Children's Rights and Children's Lives," in *Ethics*, 98 (3), 463.

child's own sense of self be developed, but the child's sense of human rights and fundamental freedoms will be developed as well.

For many, the ICESCR represents an important and comprehensive international legal commitment to the provision of economic and social considerations necessary to ensure the possibility of a good life for all members of the human family. It also represents an important human rights document which builds on the belief that all human rights are universal, indivisible and interdependent. In the case of the specific right to education, for some like Kenneth Henley for example, the ICESCR offers a progressive statement of the kind of educational considerations necessary to represent and protect the interests of the three main stakeholders in this debate: the child, the parents, and the state:

The state can best exercise this ultimate authority as *parens patriae* by supporting the immediate authority of parents over the early and informal education of children, and by requiring schooling under strong licensing provisions which protect the maturing child's right to grow into an independent adult. The privacy of the family fosters the continuing intimate relationships so essential to the child's well-being, while the school's openness establishes the older child within the larger society.⁷⁷

Thus, Henley recommends that, while it is essential to recognize that children are members of the human family entitled to the same kind of respect and concern as any member, giving them rights is not a matter of stipulating a blanket denial of the protective role that adults (and parents in particular) must play. For Henley, documents dedicated to human rights should satisfy the interests and protect the liberties of the child, the parents and the state, and

⁷⁷ Kenneth Henley, "The Authority to Educate" in O'Neill and Ruddick (eds) *Having Children: Philosophical and Legal Reflections on Parenthood* (New York: Oxford University Press, 1979), 263.

the ICESCR is a positive document which stipulates both why adults should have a restricted authority to educate children, and why children should have restricted influence over their own education.

Others contend, however, that focusing on the right to education in this way provides both the child and the state with certain liberties that might cause unnecessary harm or disadvantage. Defenders of the home-schooling movement, for example, have defended the parents' fundamental right to direct and manage their own children's education because it is only the parents who can legitimately understand what is in the best interests of their children.⁷⁸ Many reasons are offered for this position but, most significantly, parents want to have the right to choose an education which is not based on secular, pluralistic values, or narrow political ideologies, for example. They want an education for their children which protects and reflects their own values and beliefs.

Defenders of children's rights and the ICESCR, however, have suggested that, unless there is a specific statement of the boundaries which provide for the rights of children and limit the paternalistic powers of others, the rights of children in general, and their right to education in particular, will always take a secondary role in rights deliberations. That is, when a bilateral parent-child relationship is favoured over a broader trilateral one, there is a greater chance that the more powerful party will dominate the weaker. While parents (like those interested in home-schooling) believe that they are offering their children both what they need and what is in their best interests to prevent them from making unwise or unsafe

⁷⁸ Tamar Meisels, (2004) "Home-Schooling: The Right to Choose," in *Israel Affairs* 10 (3): 110-137.

choices, they neglect to acknowledge that everyone is likely to make unwise or unsafe choices occasionally. It is difficult to demarcate the boundary between the need to protect the innocence and inexperience of childhood, and the need to allow children to learn from their own mistakes. The ICESCR is a document which attempts to address this problem of demarcation by recognizing that it is essential for the child's own growth toward independence that certain limits be placed on either the parent's, or the state's, paternalistic denials of liberty.⁷⁹

Recall the response to the stipulation found in resolution 421 of the UN General Assembly, which suggested that the enjoyment of civic and political freedoms are interconnected and interdependent with economic, social and cultural rights. For supporters of social rights, such a stipulation is a necessary requirement of being a free human being. On this account, the ICESCR represents an appropriate legal commitment made by the participating members to defend and protect both the autonomy and the social security of each of their members. For libertarians, however, such a stipulation is a direct violation of what it means to be a free human being. On this account, while it may be possible for the defenders of social rights to suggest that having a right to education is in the best interests of its members, the level of external interference required to support this claim make it an untenable *human rights* claim. At most, it is for them a claim to social welfare or charity.

⁷⁹ Laurence Houlgate, "Children, Paternalism, and Rights to Liberty," in Onora O'Neill and William Ruddick (eds.) *Having Children: Philosophical and Legal Reflections on Parenthood* (New York: Oxford University Press, 1979): 265-278.

In the interest of the importance of their own position, and to avoid this persistent polarization, many defenders of children’s rights decided that this traditional division between social rights and liberty rights was outdated and unhelpful. They decided to create a new document, the *Convention on the Rights of the Child (CRC)*, to develop a more inclusive language, which incorporates contemporary groupings of rights including rights that provide for a child’s basic needs, rights that protect a child from harm, and rights that allow a child to participate in decisions which will ultimately affect her life. As Thomas Hammarberg has suggested: “The division between economic and political rights has plagued UN discussions on human rights; [a division that] is not reflected in the *Convention on the Rights of the Child*.”⁸⁰ The next section considers the significance of this shift in human rights language.

1.3. Beyond Simply Valuing Education

The previous section considered the traditional view that a right to education is a social benefit which societies should strive, to the best of their ability, to recognize and support through official channels. For many, it is possible to justify this traditional view because it seems obvious that having a right to education is in the best interests of both the child and the society of which the child is a member. Moreover, children need the protection and guidance adults can provide until such time that they become capable of rational decision-making. For others, however, such a view can only work when there are already official channels in place to recognize and support the human rights project – what about

⁸⁰ Thomas Hammarberg, (1990) “The UN Convention on the Rights of the Child – And How to Make It Work,” in *Human Rights Quarterly*, 12 (1): 97-105.

those many situations where children are not in the company of caring, capable adults? This section considers the more recent view which suggests that, while recognized legislative channels provide an important legal guide for the provision and distribution of social goods like education, such a guide requires additional support to recognize the same right to education for all, regardless of existing social structures.⁸¹ On this view, it is not enough to recognize the legal rights to which children are entitled; sustained consideration needs to be given to the moral rights children are entitled to as well.

Twenty years after the creation of the DRC, the UN General Assembly convened again to discuss why, despite their best efforts, children were continuing to suffer needless and undue harm. In 1979, to mark the 20th anniversary of the DRC, the UN proclaimed the *International Year of the Child* (IYC). A notable difference between this proclamation and previous attempts to focus the world's attention on children was the shift from both the humanitarian vision of Jebb and the welfarist vision of the DRC, to a focus simply on children.⁸² More specifically, there was an interest in understanding the child as slave, the child as prostitute, the child as disease carrier, the child as student and, unfortunately, the child as invisible. Although largely a symbolic act, the IYC was instrumental in much the same way that Jebb's *Children's Charter* was in bringing the rights of children to the forefront of international debate. As with Jebb's charter, this 'purely symbolic' gesture to recognize children internationally also resonated. This time, however, the focus was not only

⁸¹ Philip Veerman, *The Rights of the Child and the Changing Image of Childhood* (Dordrecht: Martinus Nijhoff Publishers, 1991).

⁸² Michael Jupp, (1989) "The International Year of the Child: Ten Years Later," in *Proceedings of the Academy of Political Science* 37 (2, Special issue on Caring for America's Children): 31-44.

on *the rights* to which children are entitled; there was a concerted effort to bring *the voices* of children to the forefront as well.

In 1924, the aim of the GDRC was to encourage men and women to declare and accept as their duty *that mankind owes to the Child the best that it has to give*.⁸³ In 1959, the aim of the DRC shifted to call upon parents, men and women, and public authorities to recognize children's rights so that the child *may have a happy childhood and [may] enjoy for his own good and for the good of society the rights and freedoms set forth*.⁸⁴ The intent of supporters of such documents shifted again when the existing DRC transformed into the *Convention on the Rights of the Child (CRC)* to develop the minimum set of vitally needed considerations that should be granted to any individual, including a child, as a matter of decent treatment.

The Government of Poland, inspired by the work of Dr. Janusz Korczak⁸⁵ and by the momentum of the IYC, initiated this transformation in the hope that the adoption of the CRC would be the highlight of the IYC. Dr. Korczak, a paediatrician, children's author and orphanage director⁸⁶ was a pioneer of the notion that children are autonomous beings with needs, interests and rights. Although his life ended tragically in a gas chamber in Treblinka in

⁸³ League of Nations, *Geneva Declaration of the Rights of the Child of 1924* (adopted on 26 September, 1924), preamble.

⁸⁴ UN General Assembly, *Declaration of the Rights of the Child* (proclaimed by General Assembly resolution 1386 (XIV) on 20 November, 1959), preamble.

⁸⁵ Janusz Korczak, *When I Am Little Again* and *The Child's Right to Respect* Trans. E. P. Kulawiec (Lanham: University Press, 1992), originally published 1925 and 1929 respectively; Janusz Korczak, *How to Love a Child* Trans. Hatif Al Jinabi (UNESCO, 2002).

⁸⁶ Adir Cohen, *The Gate of Light: Janusz Korczak, The Educator, and Writer Who Overcame the Holocaust* (Rutherford, NJ: Fairleigh Dickinson University Press, 1994).

1942, the Polish Government developed the first draft of the CRC, in honour of his vision that children are rights-holders, who not only require care and concern but who have rights and interests which must be respected.⁸⁷ The Polish Government also felt a great need to honour the more than two million Polish children who were displaced or who lost their lives needlessly to Nazi persecution and medical experimentation during WWII.⁸⁸

From this first draft by Poland, a broad-based committee including – government representatives, agents from the United Nations High Commissioner for Refugees (UNHCR), the International Labour Organization (ILO), the United Nations Children’s Fund (UNICEF) and the World Health Organization (WHO) – convened annually (over a ten year time-frame) to develop and refine the Polish document into the final document, which ultimately the UN General Assembly adopted as the CRC on November 20, 1989. This time, the aim was an appeal to the world to ensure that each child is *fully prepared to live an individual life in society, and [is] brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, in particular, in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity.*⁸⁹

It is important to note that, in addition to viewing the child as a rights-holder rather than dependent, the creation of the CRC was part of a larger movement to fine-tune the

⁸⁷ UN, *Legislative History of the Convention on the Rights of the Child*, volumes 1 and 2 (New York: Office of the United Nations High Commissioner for Human Rights, 2007). Available online at http://www.ohchr.org/english/about/publications/docs/history_crc1.pdf.

⁸⁸ Lawrence LeBlanc *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (Lincoln: University of Nebraska Press, 1995).

⁸⁹ United Nations, *Convention on the Rights of the Child* (adopted on 20 November, 1989), preamble. Available online at <http://www.unhcr.ch/html/menu3/b/k2crc.htm>.

language of rights in general. For example, it was believed that the concept of civil and political rights, on its own, was lost on children because children do not share the same direct relationship with their government as adults. Although more in tune with the *needs* of children, it was also believed, that the concept of socio-economic rights alone did not adequately deal with the child as an *independent* rights-holder. As Jaime Sergio Cerda has pointed out, for example, for a country like Poland, it was particularly important that the civil, political, social, cultural and economic rights of children be balanced sufficiently given “the historical problem of the separation of children from their families”⁹⁰ during various wars. Eugene Verhellen has also remarked on the numerous examples which exist to suggest an evolution in the interpretation of the child’s need to be seen as *both* an object of protection and as an independent rights-holder.⁹¹ Among his examples, he includes the input to the CRC from the European Charter for Children’s Rights, which states: *Children must no longer be considered as parents’ property, but must be recognised as individuals with their own rights and needs.*⁹² And, as Lawrence LeBlanc has commented “[T]he substantive articles of the Convention on the Rights of the Child reflect this “new” way of thinking because they affirm a broad range of civil, political, economic, social, and cultural rights while making no formal distinctions among them.”⁹³ No longer was it acceptable to organize human rights into the

⁹⁰ Jaime Sergio Cerda, (1990) “The Draft Convention on the Rights of the Child: New Rights,” in *Human Rights Quarterly* 12 (1): 115-119.

⁹¹ Eugene Verhellen, “Changes in the Images of the Child,” chapter 7 in M. Freeman and P Veerman (eds.) *The Ideologies of Children’s Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992): 79-94.

⁹² Council of Europe, Parliamentary Assembly, 31st ordinary session: Recommendation 874 (1979) on a European Charter of the Rights of the Child.

⁹³ LeBlanc (1995), introduction.

polarized categories of negative civil-political rights and positive socio-economic rights; new categorizations emerged, like Thomas Hammarberg's three-P's of children's rights:

Provision – the right to get one's basic needs fulfilled – for example, the rights to food, health care, education, recreation and play.

Protection – the right to be shielded from harmful acts or practices – for example, to be protected from commercial or sexual exploitation, physical or mental abuse, or engagement in warfare.

Participation – the right to be heard on decisions affecting one's own life.⁹⁴

This fits into the more general classification of rights, offered by Jack Donnelly and Rhoda Howard, into groups that represent:

“Survival” rights, which guarantee individual existence: rights to life, food and health care.

“Membership” rights, which assure one an equal place in society: family rights and the prohibition of discrimination.

“Protection” rights, which guard the individual against abuses of power by the state: rights to *habeas corpus* and an independent judiciary.

“Empowerment” rights, which provide the individual with control over the course of his or her life, and in particular, control over (not merely protection against) the state: rights to education, a free press, and freedom of association.⁹⁵

As already mentioned, the CRC, through much deliberation and public consensus-building, made available a minimum set of vitally needed considerations which should be granted to any child as a matter of decent treatment. By incorporating these more contemporary

⁹⁴ LeBlanc (1995), xviii. Taken from Thomas Hammarberg, (1990) “The UN Convention on the Rights of the Child – and How to Make it Work,” in *Human Rights Quarterly* 12: 97-105.

⁹⁵ LeBlanc (1995), xviii. Taken from Jack Donnelly and Rhoda E. Howard, (1988) “Assessing National Human Rights Performance: A Theoretical Framework,” in *Human Rights Quarterly* 10: 214-48.

groupings of rights into the CRC, children were formally recognized as both objects of protection *and* as independent rights-holders.

To begin, the preamble of the CRC maintains the traditional and commonsense view that the child's situation is one of needing special safeguards and care, including appropriate legal protection due to physical or mental immaturity, or perhaps even exceptionally difficult living conditions. In addition to this, Article 3 emphasizes: *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.* So, first and foremost, the CRC is a document concerned with acting in the best interests of the child.

In regards to the child's education, one of the most direct and most widely cited statements regarding the right to education is Article 28 of the CRC. Like Principle 7 of the DRC and Article 13 of the ICESCR, this Article stipulates the right of all children to free, compulsory, basic primary education, and it stipulates the responsibility of the States Parties to recognize this right. In addition to the need to provide a basic minimum education, this Article also encourages States Parties to make available further educational options so that the full potential of the child can be developed. Although not as comprehensive as Articles 13 and 14 of the ICESCR, there is also the suggestion that the most effective educational approach is one which embraces international cooperation and resource sharing, while at the same time emphasizing the importance of regular attendance and continuous studies. To achieve this end, Article 28 recommends the need for an educational environment built and

administered on a public foundation which respects human dignity and the principles espoused by the UDHR.

Prior to the CRC, most UN documents commenting on the right to education stopped at this point. To fulfill the CRC's goal of preparing a child to live an individual life in society, and to do this in the spirit of the ideals proclaimed in the UDHR, however, the creators of the CRC further suggested that two things were required. First, it required the understanding of the minimum educational opportunities to which a child should have access as stated above. In addition to this, it required an understanding of the aims which these educational opportunities are intended to address, as outlined in Article 29. According to *General Comment 1* of the Office of the UN High Commissioner for Human Rights, where Article 28 stipulates what educational opportunities governments are obliged to provide for children, Article 29 stipulates the nature of the educational programs to which it would be worthwhile for children to have secure access.⁹⁶

The UN further recommends that all countries who have agreed to participate in recognizing the CRC, must be committed to providing an educational environment which is child-centred, child-friendly, and empowering. Such an environment is necessary to shift from the traditional parent-centred, or state-centred, educational models to one which represents the rights of children. To do this is to recognize, as the UN does, that a right to education “goes beyond formal schooling to embrace the broad range of life experiences and

⁹⁶ Office of the United Nations High Commissioner for Human Rights, “The Aims of Education”, *Convention on the Rights of the Child, General Comment 1* (2001). Available at the University of Minnesota Human Rights online Library, <http://www.law.wits.ac.za/humanrts/crc/comment1.htm>.

learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities and to live a full and satisfying life within society.”⁹⁷ To this end, Article 29 stipulates the importance of promoting and protecting an educational environment which strives to balance the child’s ability with the child’s familial and cultural identity, and which strives to be directly relevant to the child’s socio-economic circumstances. By focusing on the need to develop the diverse, evolving capabilities of each child, Article 29 stipulates the need to recognize both the human dignity and the inalienable rights of each child, and the need to establish appropriate educational environments capable of promoting and modeling this as well.

While Articles 28 and 29 are dedicated most directly to education, four other articles in the CRC round out the need to establish an educational environment that is both rights-respecting and child-friendly. Article 2, for example, specifies the importance of respecting and ensuring the rights of all children regardless of background, ability, sex, or any other factor which might distinguish one child from the next. This is a stipulation that is particularly important when it comes to the education of girls in the developing world, and the education of minorities in the developed world. As already mentioned, Article 3 stipulates the best interests of the child should be the primary concern of all actions and decisions which may affect his or her life. To ensure that educational decisions are made in the best interests of the child, however, it is necessary for the child to be a participant in that

⁹⁷ Office of the United Nations High Commissioner for Human Rights, “The Aims of Education”, *Convention on the Rights of the Child, General Comment 1* (2001), comment 3.

decision-making process, not necessarily as an equal participant, but as an *age-appropriate contributor*. Article 5 addresses the need to consider the significant role parental guidance can play in influencing the development of the child. The family, both the immediate and the extended community 'family', can and should be allowed to contribute positively to the evolving capacities of the children that they come into direct contact with, a condition which complements Article 6 and its stipulation that the child has an inherent right to life and to healthy development. These four Articles, in conjunction with Articles 28 and 29, suggest that, to realize the full rights a child is entitled to as a member of the human family, a holistic approach must be taken which recognizes the interconnected nature of this convention and, above all, the objects it specifies as necessary for a child to live a minimally decent life.

To complement the need to establish an educational environment that is child-friendly, there are additional Articles which support the child's right to an educational environment which is also empowering. Article 12, for example, stresses the rights of those children, capable of forming their own views, to express those views when they are relevant to decisions which will affect them directly. In accordance with appropriate consideration of the child's age and maturity, children should be given the opportunity to participate in school life, including involvement in the creation of student councils, peer-mentoring programs, and the creation of curriculum materials which are both meaningful and relevant to their interests and experiences. The CRC also recognizes that having a voice is a meaningless entitlement if there is not a corresponding entitlement for children freely to access information. Article 17, for example, highlights both the importance of access to information, as well as the

importance of access to information that remains open and flexible. Article 17 (a), in particular, highlights the value to be gained by encouraging *the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of Article 29*. Article 17 (b) maintains the desire to advance intercultural understanding and education through *international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources*. Finally, Article 17 (e) reinforces the importance of recognizing that any rights granted to children must also account for the role parents play in the upbringing and development of their own children, and the role public authorities, as stipulated in their laws, play in the protection and promotion of public order and national security. That is, the CRC recognizes the role which the state must play in enabling children/families to develop their own cultural identities freely and fully while, at the same time, recognizing the role which children/families play in the establishment of a peaceful and stable society.

1.4. Implications for Policy, Both in the US and Internationally

This chapter has described the development of children's rights throughout the 20th century, with a specific emphasis on the child's right to education. At the beginning of this century, the primary concern was directed at the responsibility of humanity to ensure that the immediate needs of children in desperate circumstances be taken care of unconditionally. This interest in the plight of desperate children translated into an interest to protect the rights of all children to a happy and fulfilling life, an interest which translated again into the responsibility to promote the rights of children to the same set of objects (including

education, as highlighted here) to which each individual, as a member of the human family, is entitled.

From this careful consideration of the historical progression of the rights of children, it is possible to conclude that not only is education clearly considered a right from which all children can benefit, but education is a *human* right that is indispensable in the realization of other human rights. This is a conclusion which has influenced the recent UN challenge to the world to participate in *an education revolution* which would see every child in school, participating in a child-centred environment designed to meet his or her own unique needs. Defenders of this global action plan suggest that, by embracing such a human rights-respecting agenda, individual countries will be able to coordinate and improve international and national efforts to provide children with the skills and knowledge necessary to maximize their personal and intellectual development which, in turn, will maximize each individual country's social and economic returns. Moreover, they also suggest that, by embracing the language of rights, as outlined in the CRC, it is possible to apply rights to children in an appropriate way. According to defenders of the CRC, it makes no sense to talk about the civil and political rights children have because they do not have the same direct relationship with their governments as adults do. Also, it makes no sense to limit children's rights to only those concerned with welfare obligations because children do have a unique status outside of dependency – an individuality, an emerging autonomous personhood – which also needs to be considered.

As Kofi Annan confidently asserts: “Education is a human right with immense power to transform. On its foundation rest the cornerstones of freedom, democracy and sustainable human development.”⁹⁸ To this, however, he regretfully acknowledges, many millions of “children in the developing world are denied this right – almost two thirds of them girls. Nearly 1 billion people, or a sixth of the world’s population, are illiterate – the majority of them women.”⁹⁹ Such a powerful assertion, by the then-Secretary-General of the United Nations, supported by such deplorable statistics, would seem to provide compelling reasons for accepting education as something from which *all* individuals should be allowed to benefit. If education can provide a stable foundation for freedom, democracy, and sustainable human development – as Annan and the UN assert – and if so many people are being denied this foundation, who would choose not to support the right of all children to be educated? After all, even those uncomfortable with the notion of fully endorsing a *UN-driven* human right to education usually acknowledge that it is in the best interests of children to have at least *some* form of education. Providing a more satisfying understanding of what it means to have access to an education is not so simple. Furthermore, providing a justification for the stipulation, in the CRC, that basic primary education is a fundamental human right to which all children are entitled, *and* which governments and civil society are duty-bound to provide, as a free and compulsory public endeavour, is even more controversial.

⁹⁸ Kofi Annan, introduction to *The State of the World’s Children 1999* Carol Bellamy, Executive Director (UNICEF Publishing, 1999). Available online, <http://www.unicef.org/sowc99/>.

⁹⁹ Ibid.

For example, Christopher Klicka and William Estrada argue that: “On February 14, 1995, war was declared on parental rights in America.”¹⁰⁰ What was their concern? It was on this day that the Clinton Administration announced the United States would send Madeleine Albright, acting as the US Delegate to the UN, to sign the CRC, and to send it to the US Senate for ratification. The opposition from the ‘Religious Right’, as noted by Klicka and Estrada, was so overwhelming¹⁰¹ that, while Albright did *sign* the CRC on behalf of President Clinton, as of 2007, the CRC still has not been *ratified* by the US. The US remains one of only two countries worldwide to fail to ratify the CRC (Somalia being the second). If Kofi Annan is correct to declare that “the Convention on the Rights of the Child – the most widely ratified human rights treaty in history – enshrines the right of all children to a primary education that will give them the skills they need to continue learning throughout life,”¹⁰² and if he is correct to suggest that a solid institution of public education forms the foundation for freedom, democracy and sustainable development, then to what are opponents of the CRC (like Klicka and Estrada) so opposed? Why is the CRC seen as a threat to the well-being of children (and parents), rather than as a means to ensuring greater social benefits and securities?

¹⁰⁰ Christopher Klicka and William Estrada “The UN Convention on the Rights of the Child: The Most Dangerous Attack on Parents’ Rights in the History of the United States,” in *Home School Legal Defense Association Special Report* November 1, 1999. Available online at <http://www.hslda.org/docs/nche/000000/00000020.asp>

¹⁰¹ See also T. Jeremy Gunn, (2006) “The Religious Right and the Opposition to the Ratification of the Convention on the Rights of the Child,” in *Emory International Law Review* 20 (Special Spring Symposium on “What’s Wrong with Rights for Children). Available online at <http://www.law.emory.edu/current-students/law-journals/emory-international-law-review/issues-online/archives/volume-20-spring-2006.html>

¹⁰² Annan (1999), introduction.

To begin, American objection to the CRC rests on two main issues: the restrictions it places on things like corporal punishment for children under the age of 18; and the degree to which it is believed to undermine both parental sovereignty in particular and American sovereignty in general. According to opponents like Klicka and Estrada, the CRC gives children (to their detriment) protected freedoms: to express themselves; to choose their own religious beliefs, moral values and educational influences; to associate with others of their own choosing; and to privacy, such that parents could be prevented from directing or safeguarding their own children's actions. Moreover, according to Klicka and Estrada, the CRC takes away parental freedom to discipline their own children by making things like spanking a legally enforceable offence.¹⁰³ They do acknowledge that 'attempts' are made to bridge parental concerns with the rights of children within the CRC, but they recommend that these concessions simply pay 'lip-service' to the primacy of parents. For Klicka and Estrada, Americans should reject the CRC, despite its widespread acceptance, on the basis that Americans already have "a massive child welfare system in place throughout the country,"¹⁰⁴ a system which, they believe, will only be weakened and destabilized if the US ratifies the CRC.

It is Klicka's and Estrada's belief that ratification of the CRC by the US is too damaging to the sovereignty of parents, too costly to implement, and too irrelevant to a

¹⁰³ Klicka and Estrada reference the recommendation by the *Committee on the Rights of the Child* directed at the Canadian Government to take action to remove section 43 of the Criminal Code, which allows corporal punishment. The full text of the Committee's findings is available online at <http://www.unhcr.ch/tbs/doc.nsf>

¹⁰⁴ Klicka and Estrada (1999).

country which is already uniquely poised at the top of human development. Klicka and Estrada argue, “the cost of ratification of the UN *Convention on the Rights of the Child* and its subsequent implementation would be staggering.”¹⁰⁵ Furthermore, they argue that if the US ratifies the CRC, “for the first time, America will have its domestic policy subjected to foreign control through the arbitrary whims of this Committee of Ten.”¹⁰⁶ Similarly, Bruce Hafen has also cautioned that, “the CRC’s widespread acceptance seems surprisingly uncritical – especially for a convention that includes an unprecedented approach to the legal and personal autonomy of children.”¹⁰⁷ Hafen claims any country which accepts the CRC is essentially “abandoning children to their rights”¹⁰⁸ – for example, leaving them free to make major, life-impacting decisions about things like abortion or other potentially harmful medical treatments, in isolation and without parental advice or consent. Another opponent to the CRC, David Gregory, encourages children’s rights advocates not to forget the simple fact that children are not adults and, as such, should not be granted the same rights and privileges as adults. Gregory warns:

In an over-extensive effort to raise children to adult status, the CRC disregards a key fundamental right of every child – the right to responsible parenting, ideally by biological parents in a stable marriage and family dynamic. By denying this right/reality, the CRC’s egalitarian calculus is exposed as fundamentally flawed.¹⁰⁹

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Bruce Hafen and Jonathan Hafen, (1996) “Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child,” in *Harvard International Law Journal* 37 (2): 449-491.

¹⁰⁸ Bruce Hafen, (1976) “Children’s Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their Rights,” in *Brigham Young University Law Review* 3 (Family Law Symposium).

¹⁰⁹ David Gregory, (2002) “The United States’ Concerns About the Convention on the Rights of the Child,” in *Education and the Law* 14 (3): 141-152.

Have these opponents of the CRC correctly identified, however, why the CRC should be rejected? Does the CRC really ‘unburden’ parents from responsible parenting? Moreover, does the CRC give children the protected freedom to do as they (perhaps irrationally) please?

A comprehensive analysis of the CRC, like the one recently published by the UN,¹¹⁰ can demonstrate how the CRC accounts for childhood vulnerability, while avoiding the reckless desire to merely ‘abandon children to their rights’. As Shulamit Almog and Ariel Bendor have correctly pointed out, however, “there is an immanent incongruity between perceiving children’s rights as human rights – which are based upon principles of autonomy and subjective choice – and constructing them according to the ‘best interest’ doctrine, which is based upon an objective paternalistic and protectionist approach.”¹¹¹ While Almog and Bendor are themselves in favour of a US ratification of the CRC, they suggest that it is easy to fall into the trap of perceiving that the CRC goes too far in the direction of giving autonomy or liberty rights to children while not sufficiently protecting the traditional safeguards associated with the parent/child bond.

Almog and Bendor recommend that, despite some passionate (yet somewhat undeveloped) reasons for Americans to forgo recognizing the CRC, the unifying potential to be gained from even a symbolic signing of the CRC outweighs the effect of current

¹¹⁰ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, volumes 1 and 2 (New York, 2007). Available on line at http://www.ohchr.org/english/about/publications/docs/history_crc1.pdf and http://www.ohchr.org/english/about/publications/docs/history_crc2.pdf.

¹¹¹ Shulamit Almog and Ariel Bendor, (2004) “The UN Convention on the Rights of the Child meets the American Constitution: Towards a Supreme Law of the World” in *International Journal of Children’s Rights* 11: 277.

American silence on the topic of children’s rights, especially in regard to their fundamental right to education. To this, Almog and Bendor add – not only will American ratification elevate the status of the CRC to a supreme law of the world – American ratification can have a long-term impact (both practically and morally). Almog and Bendor conclude that the gap between the CRC and current American laws regarding children has been exaggerated. By ratifying the CRC, the US government (including its resources and expertise) can be engaged once again, as an active member on the Committee on the Rights of the Child. Moreover, they recommend that any possible gaps which might exist, such as those highlighted by Hafen or Gregory for example, can be addressed sufficiently by the flexible nature of the CRC, which allows countries (even non-democratic ones) to ratify with reservations.

According to Philip Alston and John Tobin, for example, there are two reasons why American non-participation can be ignored no longer. First, Alston and Tobin suggest “the US is not a country which can be ignored and its opposition to the CRC will, over time, manifest itself in a more damaging and destructive way *vis-à-vis* the overall enterprise of promoting children’s rights in general and the Convention in particular.”¹¹² Second, Alston and Tobin suggest, echoing Almog and Bendor, “the reasons for US opposition, which by definition have never been officially spelled out, are frequently either exaggerated or misrepresented, or are assumed to be synonymous with the views of radical groups of one

¹¹² Philip Alston and John Tobin, *Laying the Foundations for Children’s Rights: An Independent Study of some Key Legal and Institutional Aspects of the Impact of the Convention on the Rights of the Child* (Florence: UNICEF Innocenti Research Centre, 2005), 11.

type or another, whose agency is wholly antithetical to any reasonable notion of children's rights."¹¹³

Cynthia Price Cohen has also suggested it is time for the US to reignite its connection to the "instrument that it fervently labored to create."¹¹⁴ According to Price Cohen, herself a participant in the drafting of the CRC, by ratifying the CRC two important advancements to children's rights will occur. First, ratification of the CRC will enable the US to reconfirm its commitment to children as rights-bearing individuals, thus establishing a world-wide commitment to both the contents of the CRC and to the progressive realization of those contents. Second, the American leadership which proved instrumental in the drafting of this comprehensive and thoughtful document could once again participate in the next stage in the progression of children's rights.

Finally, consideration needs to be given to Patricia Marino's suggestion that, for progress, particularly moral progress, to occur it is not enough to accept simply that we have certain obligations to each other (or to our own children), because it is not always clear what form those responsibilities will take. Marino suggests that, over time, obligations change and our mutual interdependencies shift. For example, while Klicka and Estrada may think they are correct to assume that a massive child welfare system is already in place throughout the US, including a system of education, and while they may think they are correct to assume

¹¹³ Ibid.

¹¹⁴ Cynthia Price Cohen, (2006) "The Role of the United States in the Drafting of the Convention on the Rights of the Child," in *Emory International Law Review* 20: 185-198. Available online at <http://www.law.emory.edu/current-students/law-journals/emory-international-law-review/issues-online/archives/volume-20-spring-2006.html>

that the parent/child bond within the US is stable and appropriately nurturing, the current data on child abuse and children's rights violations suggests something different. According to Sarah Fass and Nancy Cauthen, for example, nearly 13 million American children live in families with incomes below the federal poverty level, which is \$20, 650 (USD) a year for a family of four – an 11 % increase in poverty from 2000-2006.¹¹⁵ While the CRC is not a magical document which can make statistics such as these disappear, the CRC can be a positive mechanism in maintaining social stability and uncovering unwarranted inequities. By ratifying the CRC, it will be possible to constantly, and consistently, reflect upon what kind of education is the best option available for children. According to Marino:

At first, there may be nothing morally wrong with the system in place, in the sense that it may not flout any of the obligations we are used to recognizing. Then over time, we come to understand those obligations differently, where, for example, there are limited resources or unequal wealth. Our sense of those obligations then change, as the occurrence of dilemmas forces us to see where we are failing. In the school example, we might come to feel that the system we have created is unfair in ways we hadn't considered when we started.¹¹⁶

The insight, which Marino offers with regard to how we should deal with our collective responsibilities, is particularly relevant to why it is time for the US to ratify the CRC.

Despite the confidence that advocates of children's rights and defenders of the CRC have, in the ability of a universally ratified CRC to achieve great things for children, it is

¹¹⁵ Sarah Fass and Nancy K. Cauthen. *Who are Americas's Poor Children? The Official Story*, (New York: National Center for Children in Poverty, 2007). Available online www.nccp.org/publications/pub_787.html. See also, Katarina Tomaševski Commission on Human Rights Fifty-eighth session Item 10 of the provisional agenda ECONOMIC, SOCIAL and CULTURAL RIGHTS. Report on the right to education Mission to the United States of America 24 September – 10 October 2001.

¹¹⁶ Patricia Marino, (2001) "Moral Dilemmas, Collective Responsibility, and Moral Progress," in *Philosophical Studies* 104: 218-219.

important to reflect upon a recent UNICEF report on the impact of the implementation of the CRC.¹¹⁷ This report asks an important (albeit not so inflamed) question: *Is the impact of the CRC, fifteen years after its near universal ratification, real or rhetorical?* To answer this question, and to translate the normative claims found in the CRC (such as the one directed at the child's fundamental right to free and compulsory education) into the actual conditions and working forces of community life, two things need to occur: one symbolic, one dynamic. First, as already stated, the CRC needs to be ratified by all countries, including the US. More importantly however, with this need to establish an unconditional endorsement of the CRC, comes a further need to look beyond the all-inclusive rhetoric (inherent in any formalized document), toward the kind of action necessary to bring about attainable reforms to children's rights in general, and to the institution of education in particular – reforms which can intrinsically benefit children, and instrumentally benefit society. Before doing this, however, it is important to consider the merits of three alternative arguments to the UN claim that basic primary education is a fundamental right.

¹¹⁷ UNICEF, *Study on the Impact of the Implementation of the Convention on the Rights of the Child*, (Florence: UNICEF Innocenti Research Centre, 2004). Available online at www.unicef.org/irc.

Chapter 2

Some Alternative Arguments Regarding the Education of Children

This chapter looks at three arguments that question the widely held notion, as developed in chapter 1, that it is in the best interests of both children and society to view free and compulsory basic primary education as a right. To begin, section 2.1 considers the liberationist movement and the desire to secure rights equally for both children and adults alike. The liberationist fully endorses the child's right to all of the same rights as adults. This position is taken, however, not because the liberationist wants to protect something which the child cannot protect for himself. The liberationist suggests that children have the same right as adults to be free – free from constraints, free from coercion, and free from arbitrary age-ism. Section 2.2 will look at the rival libertarian view, which suggests that, when rights language is engaged it refers to negative rights alone, that is, the right for me to act without the interference of others and vice-versa. As such, the logic of granting rights to children is minimal to non-existent. It is far better, according to the libertarian, to assume that children belong to their parents, and then to grant any rights intended for the child to the adult who is in the best position to act on behalf of that child. Section 2.3 will examine another rival view, which comes from protectionists and their desire to secure equal social benefits for children (like education and health care) by focusing on the duties we owe to children, not on what rights they have or should have. Finally, section 2.4 will recommend that, while deliberate paternalism seems inevitable (even prior to any discussion of rights), securing a child's right

to education requires more than acting in the best interests of children alone. Sustained consideration also needs to be given to the role that children play in their own development.

2.1. Free the Children

The mid-twentieth century witnessed a movement to secure rights legitimately for all individuals regardless of gender, race, status, or age. It was believed that, if there is going to be a concept of rights, it must be a concept of rights for all, not just for some, and certainly not for some *to the exclusion of* an entire group of individuals (like women, racial minorities, or children). No longer was it acceptable merely to promote the rhetoric of rights: for these liberationists, having rights meant refusing to accept compromise or tokenism until such time that real rights were granted to all.

In the case of children's rights, two vocal supporters of the need to liberate children were Richard Farson and John Holt.¹¹⁸ Their chief concern was the nature of the institution of childhood, which they claim to be both arbitrary and artificial. Holt, for example, defines the institution of childhood as:

All those attitudes and feelings, and also customs and laws, that put a great gulf or barrier between the young and their elders, and the world of their elders; that make it difficult or impossible for young people to make contact with the larger society around them.¹¹⁹

¹¹⁸ Richard Farson, "The Children's Rights Movement," in LaMar Empey (ed.) *The Future of Childhood and Juvenile Justice* (Charlottesville: University Press of Virginia, 1979). Another notable supporter is Howard Cohen, *Equal Rights for Children* (N J: Rowman & Littlefield, 1980).

¹¹⁹ John Holt, *Escape from Childhood* (New York, E. P. Dutton, 1974), 25-26.

For Holt and Farson, rather than seeing this ‘barrier’ as an essential means to protect the delicate nature of childhood, they took it to be an artificially constructed outcome of the desire of adults to control children. According to Holt and Farson, their desire to eliminate this artificial construct by establishing rights for children, however, was *not* to eliminate *all* adult/child distinctions, as some of their critics have suggested.¹²⁰ Their goal was to eliminate only those ‘double messages of distrust and contempt’ which they believed exist to lock children away in a “walled garden”¹²¹ of childhood. For example, Holt believed that, if these double messages were removed, it would be possible to give children back their childhood, to improve the adult/child relationship and most importantly to vitalize education, or at least the act of educating oneself.¹²² Holt believed this to be true because he believed that often teachers teach even when uninvited to do so. According to Holt:

Anytime that, without being invited, without being asked, we try to teach somebody something, anytime we do that, we convey to that person, whether we know it or not, a double message. The first part of the message is: I am teaching you something important, but you’re not smart enough to see how important it is. Unless I teach it to you, you’d probably never bother to find out. The second message that uninvited teaching conveys to the other person is: what I’m teaching you is so difficult that, if I didn’t teach it to you, you couldn’t learn it.¹²³

Further to his belief that uninvited teaching should be avoided, Holt also believed that, by giving equal rights to children, children would no longer be cut off artificially from the adult

¹²⁰ David Archard, *Children: Rights and Childhood* (London: Routledge, 1993); David Archard and Colin Macleod, “Philosophical Views of Children: A Brief History,” in David Archard and Colin Macleod (eds.) *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2002); see also in the same text: Barbara Arneil “Becoming versus Being: A Critical Analysis of the Child in Liberal Theory.”

¹²¹ John Holt, *Escape From Childhood: The Needs and Rights of Children* (New York: Dutton, 1974), 26.

¹²² John Holt, “Doing, not “Education,” in John Holt *Instead of Education: Ways to Help People Do Things Better* (New York: E. P. Dutton & Co., Inc., 1976).

¹²³ John Holt, *Learning All the Time* (Reading, Mass.: Addison-Wesley, 1989), 129.

world, thus empowering them to see through these double messages and beyond what he believed to be the artificial world of childhood.

With this notion of liberation in mind, Holt questioned the traditional belief that children are to be protected at the expense of giving them rights by promoting a list of rights and privileges which should be made available to children. His list of children's rights included rights: to equal treatment, to vote, to be legally responsible for one's life, to work, to privacy, to financial independence, to choose one's living arrangements, to travel, and to direct and manage one's own education.¹²⁴ Holt believed that, until such time as children are granted such rights, they will continue to be controlled and manipulated. Similarly, Farson famously created a list of rights – “birthrights”¹²⁵ that each individual is owed regardless of age. His list includes rights like: the right to alternative home environments (for example, multifamily communes, child exchange programs, or children's residences), the right to economic power, the right to justice, the right to sexual freedom, and the right to educate oneself. He felt that recognition of these rights was the only way to shift the adult/child relationship from one that was consumed by the need to nurture, to one that could successfully guide the child to independence. For Farson, the greatest challenge for children is to break free from the controlling, over-protective environment that adults have created for them. Likewise, the greatest challenge for adults is to concede that, “to the extent that we

¹²⁴ Holt, (1974).

¹²⁵ Richard Farson *Birthrights* (New York: Macmillan Publishing Co., 1974), 58.

spend time with children, we spend it protecting, teaching, controlling, and disciplining them in the service of institutions which care little about their best interest.”¹²⁶

This desire to avoid manipulation is the key to the liberationist’s claim that children are entitled to the same rights as adults. According to Farson, for example, “the issue of self-determination is at the heart of children’s liberation. It is, in fact, the only issue, a definition of the entire concept. The acceptance of the child’s right to self-determination is fundamental to all rights to which children are entitled.”¹²⁷ Article 13 (1) of the ICESCR, however, makes a similar claim that everyone has the right to *the full development of the human personality and the sense of its dignity* and that children, in particular, have the right to access education to develop their own respect for *human rights and fundamental freedoms*. If this document was already in place, what did Farson and Holt believe they were adding to the debate?

They believed that, while documents like the ICESCR may have stipulated the child’s right to an education, what such documents fail to address is the need to recognize that having a right to education means having the freedom to develop one’s natural autonomy and curiosity. It does not mean to have the right to education *as directed, or provided for*, by the actions of others. Holt, for example, urges that: “Education is something a person gets for himself, not that which someone else gives or does to him.”¹²⁸ When asked what the most important thing American schools could do for children, Holt responded by suggesting:

¹²⁶ Farson (1974), 2.

¹²⁷ Farson (1974), 27.

¹²⁸ John Holt, “True Learning” in John Holt *The Underachieving School* (New York: Pitman Publishing, 1969), 1.

It would be to let every child be the planner, director, and assessor of his own education, to allow and encourage him, with the inspiration and guidance of more experienced and expert people, and as much help as he asked for, to decide what he is to learn, when he is to learn it. How he is to learn it, and how well he is learning it. It would be to make our schools, instead of what they are, which is jails for children, into a resource for free and independent learning, which everyone in the community, of whatever age, could use as much or as little as he wanted.¹²⁹

Holt argues that, when the rules of education are formalized in documents like the ICESCR, artificial environments, like schools, are also formalized. When this happens, education no longer represents what a child stands to gain in the way of a greater understanding of the world around him, or of his own personal role in that world. When this happens, education represents what society asks schools to do – namely to pass on traditions and higher values of a society’s particular culture, to acquaint the child with the world in which he lives, and to prepare the child for employment suitable to the needs of that particular society. Arguably, socialization is an important aspect of school but, according to Farson for example: “The only people in our society who are incarcerated against their will are criminals, the mentally ill, and children in school.”¹³⁰ For Holt and Farson, it is this forced confinement, in the name of socialization, to which they object. They argue that, if educators assume that socialization must be prior to self-determination, they assume that children are incompetent and that it is their role as educators to compensate for this fact. Holt suggests, however, that if children are capable of gaining mastery over language prior to going to school, why should educators assume childhood incompetence. Moreover, he laments that:

¹²⁹ John Holt, *The Underachieving School* (New York: Pitman Publishing, 1969).

¹³⁰ Farson (1974), 96.

Almost every child, on the first day he sets foot in a school building, is smarter, more curious, less afraid of what he doesn't know, better at finding and figuring things out, more confident, resourceful, persistent, and independent, than he will ever again be in his schooling or, unless he is very unusual and lucky, for the rest of his life.¹³¹

For Holt and Farson, the most appropriate method to secure the rights of children is to allow them to develop their own natural talents and abilities without the confining interference of a formal school environment – which they argue has been established on the assumption that children need to be compensated for their incompetence. It would be important to note, however, that while Holt and Farson may be correct to observe that children can already communicate when they enter school (a notably difficult task), being able to communicate with others does not automatically imply that they have knowledge of the world or the cognitive skills to be able to make important, potentially life-altering decisions.

Despite this potential weakness, Farson and Holt argue further that, when the rules of education are formalized in this way, education becomes arbitrary and oppressive. For the liberationist, schools are only one resource of many necessary for someone to develop his or her natural ability to learn. While schools can be a positive influence on the child's education, learning can occur anywhere and anytime. They maintain that a child learns when a child experiences something, or when the interests and concerns of an individual doing the learning are engaged. Holt and Farson recommend that one does not necessarily need a school for this kind of learning to happen. Moreover, they warn that formalizing education as compulsory schooling often converts learning into training or programming. For the

¹³¹ John Holt, "Schools are Bad Places for Kids" in John Holt *The Underachieving School* (New York: Pitman Publishing, 1969), 7.

liberationist, once this happens, schools become the last place where learning occurs. They argue that this approach to education isolates learning because children associate learning with school rather than with life experience. Moreover, when learning is isolated in this way, the liberationist argues that children come to assume either that they cannot be trusted to learn on their own, or they become unmotivated to learn on their own. Finally, the liberationist suggests that children are further unmotivated by being in school because, when children *do* learn something, they are rewarded and when they either *fail to learn* something or they *make an error* in their learning, they are punished. Liberationists conclude that the best way to protect and provide for the interests of the child is first to grant children the same rights and privileges as adults, and then to allow them to be in control of their own education and development.

Of course, not everyone is in agreement with such a radical approach. Giving children all of the same rights and privileges as adults seems, to many, not only irresponsible but also highly unusual and at odds with the clear fact of childhood immaturity. Moreover, going to school is often an enjoyable experience, which provides a broadening environment from which children can develop and grow into successful, socially competent adults. Exposure to peer children, and adults other than their parents, is often valuable. Thus, where Holt and Farson believed they were attacking paternalism and ‘pedophobia’, their critics believed they were simply promoting inaccuracy and recklessness, and an exaggerated view of a child’s capabilities.

One set of critics, like Laura Purdy and Onora O’Neill for example (whose work will be discussed in section 2.3), recommend that it would be far better to promote childhood interests by devoting resources to enforcing the obligations of adults to protect childhood vulnerability. A second set, as discussed in chapter 1, has suggested that, while the desire of Farson and Holt to liberate children is grounded in the idea that it is in the best interests of children to do so, having rights is not just about freedom. To defend an idea that children should have access to all of the same freedoms adults have, fails to acknowledge the realities of childhood vulnerability and inexperience. Documents like the ICESCR and the CRC, on the other hand, apply a precautionary principle rather than a liberty principle. This precautionary principle promotes the rights of children to participate in important life decisions *when they are capable of doing so* – thus accounting for childhood vulnerability and avoiding the reckless desire of the liberationist to ‘free the children’. A third group of critics, however, has suggested that the liberationist fails, not from the use of the liberty principle, and not from the failure to recognize childhood vulnerability, but from the assumption that children have rights at all. Jan Narveson, for example, has argued that, while it may seem obvious that children are like any other, fellow human being, entitled to have the same rights as everyone else, “children are *not* simply ‘fellow people,’ and it is therefore an open question whether they have the same rights as adults.”¹³² The next section considers this open question posed by Narveson, which has led him to conclude (despite sharing a common belief with the liberationist in the importance of being free) that any notion that children have rights directly is both illusory and fraudulent.

¹³² Jan Narveson, *Moral Matters* (Peterborough: Broadview Press, 1999), 267.

2.2. The Scope of Negative Rights Alone

Where liberationists like Farson and Holt represent the radical position that children can and should play a direct, and even controlling, role in their own development and education, there is an alternative debate that is generally accepted as being more central to the question of a child's right to education. Murray Rothbard summarizes this long-standing debate, centred on *who should be in charge of the education of children*:

The key issue in the entire discussion is simply this: shall the parent or the State be the overseer of the child? An essential feature of human life is that, for many years, the child is relatively helpless, that his powers of providing for himself mature late. Until those powers are fully developed, he cannot act completely for himself as a responsible individual. He must be under tutelage. This tutelage is a complex and difficult task. From an infancy of complete dependence and subjection to adults, the child must grow up gradually to the status of an independent adult. The question is under whose guidance, and virtual 'ownership,' the child should be: his parents' or the state's. There is no third, or middle, ground in this issue. Some party must control, and no one suggests that some individual third party have authority to seize the child and rear it.¹³³

Clearly, Rothbard has dismissed the potential 'third' liberationist position which places the authority to educate the child directly in the hands of the child himself, as considered in the last section. What he is able to capture in this description, however, is the standard and important debate which exists between those who argue that the parents should have the authority to educate their own children, and those who argue that the role of educator should be reserved for the State.

¹³³ Murray Rothbard, *Education, Free and Compulsory: The Individual's Education* (Wichita: Center for Independent Education, 1972).

In Chapter 1, an argument for state-sponsored education was considered which suggested that international law, as stipulated in UN documents like the ICESCR and the CRC, has helped to establish viable legal mechanisms, from which nation-states can and have implemented supportive and effective social structures, including the institution of formal public education. This section considers why libertarians like Jan Narveson take this position to be nothing more than ad hoc pragmatism, aimed at establishing unnecessary institutions that coerce us to do things we would not otherwise choose to do. Narveson suggests that any claim to positive rights, like the right to education, must account for why society should protect a child's right to that claim. Even if our intuitions recommend to us that we have compassionate reasons to protect a child's right to education, the inevitable costs which supporting and sustaining this right will entail make it impossible to move beyond benevolence into the realm of human rights. According to Narveson, if there is an inability to explain why the rest of us have the onerous obligation to cater to the unfortunate or the vulnerable, then we should have no interest in supporting the UN claim that every child has a right to free and compulsory basic primary education.¹³⁴

To begin, it is important to understand some of the distinctions Narveson makes concerning the individual, the public and the state.¹³⁵ As both a contractarian and a libertarian, Narveson suggests that we develop our most important and meaningful sense of society from the voluntary associations we find ourselves engaged in during our day-to-day

¹³⁴ Jan Narveson, "Education: Should We Sell the Schools?" Chapter 20 in Jan Narveson, *The Libertarian Ideal* (Peterborough: Broadview Press, 2001): 275-281.

¹³⁵ Jan Narveson, "The State, Government, Public, Associations, Us," Chapter 16 in Jan Narveson, *The Libertarian Ideal* (Peterborough: Broadview Press, 2001): 207-211.

activities. These associations are meaningful, according to Narveson, because *we choose to engage in them*. If I want to join a club or be a member of a group, for example, I do so because I am interested in the kind of activities that that particular club or group represents, and that club or group is interested in having me as a member. Likewise, if I want to work for a particular employer, I apply for a job with that company, and that company can choose to hire me or not. Narveson argues that it is interactions such as these, in liberal democracies at least, which make up the bulk of the associations which we make. When all of these associations come together, they form the public. Narveson describes the public as an aggregate of all of these voluntary sub-associations, but he also suggests that the public which you find yourself immersed in is simply that, just an aggregate. Everyone forms the public, but the concept of the public is not very meaningful to an individual because no one interacts with everyone and no one actually chooses the whole ‘public’ in which she finds herself engaged. Ultimately, it is the concept of the state where things get most interesting for the libertarian. Narveson describes the state as a public with a formal government and, for most libertarians, including Narveson, this desire to formalize some kind of governmental structure over and above the voluntary associations we make is unnecessary. For Narveson, the best that the state can offer is protection and peace of mind to get on with our own personal day-to-day activities.¹³⁶ Narveson suggests, however, that regrettably the individuals elected to make up the government within a state all too often choose to overstep their

¹³⁶ Jan Narveson, *The Libertarian Idea* (Peterborough: Broadview Press, 2001); see also “The Anarchist’s Case” in Jan Narveson *Respecting Persons in Theory and Practice: Essays on Moral and Political Philosophy* (Maryland: Rowman Y Littlefield Publishers, Inc., 2002), 185-203.

function as protector or guardian, and go on to become provider, nursemaid, counsellor and even educator. Moreover, Narveson argues that we have no choice but to accept this breach of authority and legitimacy because, once a government is in place within the public in which we find ourselves, we are obliged to accept what that government decides is in our best interests to do – a fact which Narveson suggests is most in need of reflection within the debate on rights.

Libertarians, like Narveson, suggest that the only rights to which we are entitled are negative rights. That is, we have the right to do what we want *provided* we do not interfere with someone else's right to do the same; and *provided* we do not actively demand the assistance of others in the pursuit of our own interest fulfillment. Like Hobbes, Narveson recommends that our common humanity warrants a commitment to this preservation of our own self-interest, provided we allow others to do the same. If the state is formed to protect our right to the non-interference of others, and to enforce our duty to respect the rights of others to the same claim, then according to Narveson the state is acting as it should. The state becomes controversial when it oversteps this role as a defender of negative rights to become a promoter of positive rights. When this occurs, it is controversial, according to Narveson, because the moment one group of individuals begins to make decisions on behalf of others, our voluntary actions suddenly become involuntary or coerced. When this happens, a paradox occurs because the rights we are entitled to are violated by the very organization that was given the power to defend them.

Recall that the liberationist objected to the unacceptable act of vacillating between two sets of rights: one for adults, to provide them with opportunities to exercise their own powers; and another for children, to keep them under control. For the liberationist, this double standard results in the desire to protect children at the expense of giving them rights. And according to the liberationist, this result which, despite having the intention of being in the best interests of children, actually leaves children more vulnerable to things like manipulation. Instead, the liberationist contends that the best thing to do for children is to increase the scope of rights so that, when the discourse of rights is engaged, it is extended to all human beings, including children. This desire of the liberationist to question how rights are delimited is shared with the libertarian, who also objects to the act of vacillating between two sets of rights.¹³⁷ In the case of the libertarian, however, the concern focuses on the desire to vacillate between protecting the right to the non-interference of others, and protecting the right to a potentially unlimited set of goods and services, which the state must somehow provide. This libertarian distinction is significant. Where the liberationist is interesting *in extending the scope* of rights to include things like the child's right to educate himself, the libertarian *wants to constrain the scope of rights* by limiting any notion of rights to negative rights alone. For the libertarian, the language of rights should never be engaged in order to secure something that someone else has to provide on your behalf. Formal education, for example, by its very nature requires the active and often involved assistance of others (such as teachers); therefore, the claim that education is a right to which all human beings are

¹³⁷ Jan Narveson, "Rights," Chapter 5 in *The Libertarian Ideal* (Peterborough: Broadview Press, 2001): 41-59.

entitled goes beyond the scope of what the libertarian accepts as a reasonable demand on the actions of others.

Recall also Narveson's open question regarding the rights children either do or do not have. He claims that, while it may seem obvious that children are like any other human being entitled to the same rights as everyone else, children in fact are *not* like everyone else – and any suggestion that children have rights is both illusory and fraudulent.¹³⁸ According to Narveson, it is illusory because, to be a rights-holder, one must be capable of promoting one's own interests and of taking responsibility for one's own actions. Narveson, as a contractarian, rejects the intuition that children (even as potential agents) have this ability to participate in rational decision-making and deliberation. Children, especially young children, are not fully autonomous, rational agents capable of making real choices, so they automatically require adults to stand in for them until such time that they become adults themselves capable of truly participating in rights discourse. This is not to say that Narveson believes that children are not privy to the benefits of rights; rather, Narveson suggests that, as 'moral patients' children require adult agents to make agreements on their behalf regarding the entitlements from which they will benefit – a position that, for many (outside of the liberationists) is non-controversial and widely accepted.

Narveson's second claim – that the concept of children's rights is fraudulent – is more thought-provoking and controversial. He bases this claim on his rejection of the standard

¹³⁸ Jan Narveson, "Children and Rights," in *Respecting Persons in Theory and Practice: Essays on Moral and Political Philosophy* (Maryland: Rowman Y Littlefield Publishers, Inc., 2002), 265-278.

intuition that children will somehow benefit from the social decision-making invoked when the language of rights is engaged. According to Narveson, children do not belong somehow to society; children belong to their parents, and it is only their parents who should be involved when decisions need to be made regarding their lives. He argues that parents usually know their own children best. They are usually in the best position to act in the best interests of their own children. Moreover, they are usually the most motivated to do so because of the nurturing bond which usually exists between parent and child. For Narveson, the more distant the adult/child relationship, the more likely the best interests of the child will be replaced by more efficient utilitarian calculations which maximize the benefits to society, rather than the benefits to the child or to the family.

In the case of education, Narveson rejects the typical intuition that state-sponsored education is the best way to secure a child's educational needs. For Narveson, not only is state-sponsored education too costly to support and sustain as a public service for all, but it represents a violation of the parents' fundamental right to liberty as well:

Some liberals, now known as 'libertarians,' hold that the right to liberty is the *only* fundamental right there is, and thus that respecting people's liberty is the only fundamental duty of ethics. Those theorists hold that the right of private property is a fundamental entailment of this right to liberty. And some libertarians, in turn, regard children as, at least initially, the property of their parents. The right to educate one's child is therefore, in their view a property right, and the presumption to force your child to learn something other than what you judge he or she ought to learn is contrary to your basic right to do with this item of property what you will.¹³⁹

¹³⁹ Jan Narveson (1988) "Liberalism and Public Education," in *Interchange* 19 (1): 60-69.

Although this seems to be a very strong and controversial position to take, Narveson is not suggesting that he believes that children should not be formally educated (as the liberationist does), or that he believes that the decision whether to educate children at all should simply be left in the hands of the parents. On the contrary, he fully endorses the many benefits gained by having a formal education, both for the individual to be educated and for the society in which the child will ultimately become a participating member. What he is interested in promoting by suggesting that children are the property of their parents, is that parents should have the right to be responsible for their own children's education. They are responsible for creating the children and, as such, are the largest stakeholders (of course apart from the children themselves), something which the libertarian believes qualifies them as the most eligible to manage and direct their own children's education.

This is also not to suggest that he is arguing for wholesale paternalism. Narveson is careful to acknowledge that, although he claims that children are the property of their parents, additional factors for consideration must come into play when it comes to accepting the responsibility of parenthood. First, Narveson recommends that "people should raise their children in such a way that those children do not become burdens on others."¹⁴⁰ He argues that, if respecting people's liberty is the only fundamental duty of ethics, as long as parents are mindful of this liberty principle, they should be allowed to raise their children in a manner that best suits their own cultural belief system. Such a stipulation, however, could be interpreted in radically opposed ways. It could suggest that parents are responsible for

¹⁴⁰ Narveson (2002), 272.

insulating their own child's development so that it is in line with the values and beliefs that they share within their family and within their immediate community. On the other hand, it could suggest that parents are responsible to ensure that their own children's autonomy is secured through an open reflection upon a wide variety of life choices.

It seems likely that Narveson is interested in the latter, because he cautions – as the liberationist does – that it is easy to fall into the trap of the misdirected intentions of overly nurturing or overly protective parents. He refuses to commit one way or the other, however, by suggesting that only the parent has the right to make this choice because “children are, after all, a big investment in trouble and expense, and it is hardly surprising that people would like to see a return on their investment.”¹⁴¹ Nevertheless, despite this noncommittal stance, he is quick to add that ultimately it makes little difference because it will be the children themselves who decide anyway. They will either embrace or reject the path their parents first established for their development and education. He maintains that, no matter what efforts adults choose to undertake, children establish their own boundaries quickly and it is best to “leave parents largely in charge, to be shown right or wrong when their children emerge into the world as fellow grown-ups.”¹⁴² By asserting ambiguously that the right to educate children is a right to which parents are entitled by virtue of being parents, however, does he endorse the idea that children should simply be left to the mercy of their parents?

¹⁴¹ Narveson, (2002), 276

¹⁴² Ibid.

On Narveson's own account, he does not unburden parents from educational accountability. He recommends, while parents are the first teachers, teaching is about making judgments – “judgments of intellectual merits of alternative ideas.”¹⁴³ By recommending that the parents take control of their own children's education, he is not recommending that parents have *carte blanche* in their role as educational directors. He is recommending that parents need to be able to seek out actively those individuals who are most interested and qualified to educate their children. For Narveson, if state-sponsored education is both a free and compulsory requirement that all children have to participate in, very few options are left for parents to seek out better or more suitable alternatives for their own children's particular needs. By recommending this position, however, it seems possible to conclude that on the libertarian account, much of the child's development is simply left to luck. By granting parents the exclusive right to be responsible for their own children's education, the libertarian is effectively granting the parents the right, theoretically, not to educate their children at all. Moreover, by vaguely suggesting that parental choices make little difference over the child's lifetime because ultimately the child will choose either to embrace or to reject the original choices which their parents have made for them, he seems to neglect the fact that the experiences to which the child is exposed to within the formative years are the most critical.

The libertarian views Jan Narveson offers – to reject both the concept of children's rights, and the UN claim that children have a fundamental right to free and compulsory basic primary education – are reflected in his belief that parents, as the main stakeholder, are the

¹⁴³ Narveson (2001), 286.

most eligible to act in the best interests of their own children. For Narveson, if parents meet a minimum baseline of non-violence and respect for others, they should be given as much scope in the development and education of their own children as they think appropriate. Beyond that, he suggests that any attempt to formalize education should be built on what the market allows, not on what the state deems to be necessary interference. With this belief, however, he seems to assume that parents will either automatically do the right thing, or more importantly be able to do the right thing. While Narveson may be correct to suggest that the state's role in securing and protecting a child's right to education is still open for debate, it seems that the more general question of who should be in charge of the education of children also remains an open question.

It would be important to bear in mind that both the CRC and the ICESCR reflect similar assumptions about the need to protect children. These protective measures, however, are not there to assume that children are the property of the state. Nor are they there to diminish the child's (or the parents') right to freedom or choice. They are there to acknowledge the unique relationship which exists between individuals who have interests of sufficient importance in their lives and other individuals upon whom it is appropriate to impose correlative duties for the satisfaction of these interests. What makes the nature of these obligations appropriate, however, is the idea that they should not be allowed to supersede the relevance of the child having rights directly, regardless of parental status. When a rigid distinction is assumed between the liberty rights of adults and the social benefits to which children are entitled, the unique relationship between adult and child is one

of dominance. Even if this dominance is established to be in the best interests of the child, on such a view it is possible to allow that the provision of basic primary education is an onerous responsibility which is optional. On the other hand, when it is understood that certain interdependencies exist between liberty rights and welfare rights, the unique relationship between adult and child becomes one of development. When this occurs, it is possible to accept that the provision of basic primary education is a responsibility, albeit onerous, that all adults have a duty to uphold.

In Chapter 1, it was mentioned that Onora O’Neill has suggested that there is a common assumption that we have certain duties towards children to compensate them for the inherent vulnerabilities of childhood. These vulnerabilities interfere with a child’s ability to act on his own and, as parents and adults, we have a direct responsibility to protect children until such time that they can protect themselves. According to O’Neill, one way to do this is to accept, as the liberationist does, that children have rights – and that these rights can provide children with legitimate and enforceable claims against others. But O’Neill agrees with the libertarian that it is inappropriate to support the liberationist demand for *equal* rights for children. She argues that, when we take rights as fundamental in looking at ethical issues in children’s lives, we get an indirect, partial and blurred picture. She cautions, however, that when we focus only on *perfect rights*,¹⁴⁴ as the libertarian does, there will be harmful gaps between the obligations adults have and the entitlements children are owed. The next section

¹⁴⁴ Onora O’Neill, (1988) “Children’s Rights and Children’s Lives,” in *Ethics* 98 (3): 445-463. This term will be explained in detail in the next section.

will analyze O’Neill’s concept of rights and consider why protectionists like O’Neill want to reject children’s rights as fundamental, in favour of what she believes to be a more direct, concrete account of *obligations* which can assess and monitor the institutions set up for the benefit of children and for the fulfilment of their rights. O’Neill is interested specifically in those unique situations where a child’s fundamental rights might not be violated directly, but where the child’s vulnerability is also not taken into account.

2.3. In Their Best Interests

The previous two sections considered arguments both for and against children’s rights. Interestingly, both of these arguments profess to be representing the best interests of the child. The liberationist argues it is in the best interests of children to grant them a full complement of rights – equal to adults – to enable them to pursue freely their own development and education. The libertarian, on the other hand, suggests it is in the best interests of the children to grant no rights to them directly at all – children are the property of their parents and, as such, will benefit from the rights parents have to act on their behalf. This section considers a third option which suggests it is in the best interests of the child to consider both – which rights children are entitled to *and* which agents are obliged to satisfy these entitlements. This third option comes from protectionists like Onora O’Neill¹⁴⁵ and Laura Purdy.¹⁴⁶ What distinguishes their position from both the liberationist and the libertarian is their desire to limit the scope of rights without eliminating rights altogether,

¹⁴⁵ Ibid.

¹⁴⁶ Laura Purdy, *In Their Best Interest? The Case Against Equal Rights for Children* (Ithaca: Cornell University Press, 1992).

while at the same time recognizing there are noteworthy features which distinguish children from adults and, as such, demand certain protective measures. To do this, they recommend that, rather than confine this debate to the sphere of rights; it is in the best interests of children to focus on the fundamental obligations from which children's rights are derived.

Onora O'Neill takes a broadly Kantian approach to suggest that often reflection on the concept of rights is a matter of perspective. One could choose to consider this concept from the point of view of the rights of the recipient, or from the point of view of the obligations of the agent. O'Neill contends that, in most cases, it is purely a matter of choice because these two points of view form a symmetrical ethical relationship. Much like the libertarian, O'Neill suggests that there are certain rights and obligations which can be both grasped and realized without difficulty. She refers to these obligations as *universal perfect* obligations. According to O'Neill, these obligations specify completely who is bound by the obligation and to whom the obligation is owed. Such obligations are universal because they are fundamental, that is, they are not derived from any other social arrangement or from any more basic claim. As an example, O'Neill suggests the universal obligation that we all have to refrain from child abuse and molestation. O'Neill contends that such a claim is not controversial, just as the libertarian contends that her non-harm principle is not controversial. When it comes to the overwhelming majority of adult/child interactions, there seems to be a common sense understanding of the significance of the child's right not to be abused, and of the adult's obligation not to abuse the child.

A second set of outwardly uncontroversial obligations, according to O'Neill, are ones she refers to as *special perfect* obligations. According to O'Neill, these obligations also specify completely who is bound by the obligation and to whom the obligation is owed. What distinguishes this set of obligations from the previous set, however, is the fact that they are directed towards specific relationships like that of parent and child. As a result, these rights are not fundamental, according to O'Neill, because they are derived from these special relationships. But they are perfect nonetheless, in the sense that they must be performed. She refers to these as positive obligations because they are based on social conventions we have come to know and accept. As parents, we regulate our interactions with our children based on the social conventions for parenthood which exist within our society. Likewise as educators, teachers regulate their interactions with their students based on the prescribed social conventions for education. For O'Neill, when considering either universal or special perfect obligations as they refer to children, it is acceptable for the liberationist to use the language of rights and correspondingly for the libertarian to prefer the language of responsibility, or even just that of providing benefits. There is a third set of obligations, however, which O'Neill suggests requires careful scrutiny. According to O'Neill, this set of *imperfect* obligations calls into question both the liberationist's desire to endorse rights over obligations, and the libertarian's desire to focus on the responsibility which a parent has to take care of her property.

O'Neill defines imperfect obligations as those obligations we have which may bind all agents but that are not owed to all children or even to a specified set of children. These

obligations are the result of certain contingent circumstances. As an example, O'Neill suggests the fundamental obligation we may have to be kind to children or to interact with a child in a manner specific to the fact that the individual is a child, not an adult. In this case, O'Neill claims there are no rights-holders because these obligations are not directed towards all children (as in the case of child abuse), nor are they directed towards a specified set of children (as in the case of parent/child or teacher/child relationships). In both of those cases, the obligations are clear and specific. In the case of an imperfect obligation, as outlined above, however, O'Neill contends: "If there are any fundamental obligations that are imperfect in this sense, then there are some fundamental obligations to which no fundamental rights correspond."¹⁴⁷ When this happens, according to O'Neill, there is a responsibility on the part of agents to institutionalize these imperfect obligations alongside the special perfect ones to ensure that positive obligations will be formally recognized and enforceable.

Consider the obligation to take care of children. Clearly, not all agents are obliged to take care of all children. Similarly, if you are not the parent of a child, you are not obliged to take care of that child. If you happened to see a child standing alone in the middle of the street, however, according to O'Neill you should feel compelled to do something for that child. Although you have not violated any of that child's rights, nor are you directly obliged to respect those rights, according to O'Neill you still have an obligation to that child because as an adult you are in a position to do something the child cannot do for herself. With this, O'Neill favours the perspective of *agent obligation* over the perspective of *recipient rights*

¹⁴⁷ O'Neill (1988), 448.

because she claims that universal and special obligations have corresponding rights and therefore corresponding rights-holders which make these obligations, at least in principle, enforceable. She suggests that imperfect obligations, on the other hand, rely on the institutionalisation of these imperfect obligations to enable any kind of enforcement or realization.

For O'Neill, when rights (rather than obligations) are held to be fundamental, one's 'ethical vision' is drastically narrowed, something that is particularly problematic for children. By stressing fundamental obligations instead, O'Neill contends that not only will the traditional benchmarks of universal and special rights continue to be recognized, but such an approach will also allow obligations to be identified "*successively* rather than requiring the identification of all obligations in order to identify any."¹⁴⁸ O'Neill concludes that having a model to identify obligations successively, or in turn, can address individuals who are not only rational but who are vulnerable and needy as well. While she agrees that the rhetoric of rights is an important tool for those who lack power, she cautions that children are not like other powerless minority groupings. Children do not suffer from artificially-produced dependence, or dependence resulting from their own choices; their dependence is real and does not result from their own free will. With real dependence come real obligations, not rights.

Another protectionist who argues against the strict adherence to rights for children is Laura Purdy. Where O'Neill is interested in challenging both liberationists and libertarians,

¹⁴⁸ O'Neill, (1988), 456.

however, Purdy is most concerned with the negative consequences which will result if the children's liberation movement to secure equal rights is sustained. In her book *In Their Best Interests?*¹⁴⁹ Purdy offers three potential consequences which could arise from giving children equal rights. First, like the libertarian, Purdy suggests equal rights could weaken appropriate parental authority. She makes this claim not because she believes that granting rights to children undermines parental liberty rights, rather, she claims that when one assumes that children are in need of liberation, the conventional asymmetrical parent/child relationship is weakened, such that the traditional legal ties which bind parent to child will lose their force. Moreover, she argues that the weakening of this relationship will push parents to be more reluctant to participate in the kind of training their children require for responsible and moral behaviour, and children (adolescents in particular) will be less likely to take their parent's guidance seriously.

Second, Purdy argues that granting equal rights to children would require the abolition of compulsory schooling. She expresses this worry because she believes that, if children have equal rights to adults, then they will have the right to choose not to go to school. She acknowledges that the liberationist is correct to declare that not all formal school environments are ideal, but she maintains that the liberationist's solution to this issue is not ideal either. Purdy argues instead that compulsory public schooling is an essential component of a good society. She stakes this claim for the obvious reason that it provides a public safety

¹⁴⁹ Laura Purdy, *In Their Best Interests? The Case Against Equal Rights for Children*. (New York: Cornell University Press, 1992), 214-215.

net for many children who, left to their own devices, would be unable to benefit from any educational experiences (self-directed or not). Furthermore, she stakes this claim because she objects to the liberationist's suggestion that compulsory public schooling is coerced public indoctrination. On the contrary, for Purdy, the social values public schools are able to transmit to children are essential both for the child's ability to ultimately function as an active member of that society, and for the benefit of society in general, "because their moral temperament has enormous consequences for the future of society as a whole."¹⁵⁰

Finally, she contends that, if children are granted equal rights, not only could children choose not to go to school, but they could choose to enter the workforce prematurely – a choice Purdy suggests which would not only rob children of their childhood, but which would force many children to accept menial jobs with few options for advancement, effectively ruining their futures. According to Purdy, the only way to correct the possibility of such negative consequences is to accept that there are morally relevant differences between adults and children which require *different* kinds of interaction, and an *asymmetrical distribution of rights*. This idea echoes the sentiments of the originators of the rights-for-children movement, like the International Labour Organisation, who established the *Minimum Age Convention* to place legal restrictions on employers interested in hiring children under the age of 14. By making education a compulsory, government-sponsored activity for all children under the age of 14, according to both the ILO and Purdy, it becomes

¹⁵⁰ Laura Purdy, (1994) "Why Children Shouldn't Have Equal Rights," in *The International Journal of Children's Rights* 2: 223-241.

nearly impossible for employers to rob children of their childhood and of the benefits to be gained from formal education.

The most obvious of these morally relevant differences between adult and child, which Purdy highlights, are *physical vulnerability* and *instrumental rationality*. Of course, in the case of physical vulnerability no one can deny that sometimes children require protection from danger and exploitation. It is the liberationist's attack on the traditional conception of rationality, however, which interests Purdy most. She defines instrumental rationality as "the ability to judge what steps are necessary to attain a particular goal."¹⁵¹ She challenges the liberationist claim that any dividing line between the rational and the non-rational is arbitrary and unnecessary, by suggesting that it is difficult to find any human space which is not vague or fuzzy. She claims that human interaction is replete with inconsistencies and incongruities, but that fact does not entail that one should refuse to set boundaries between what constitutes appropriate childhood entitlements, and what constitutes appropriate adult entitlements.

While Purdy is not willing to fully endorse the liberationist's demand for extreme equality, she accepts that accommodations need to be made for those children who are unusually proficient, as well as for those adults who are unusually deficient. And so, she prefers a model which incorporates "emancipation procedures" as a possible alternative to the liberationist demands for a wholesale distribution of rights, or what she refers to as "unearned freedoms". Purdy recommends that certain restrictions on liberties, especially those directed at children, are warranted because certain things are unacceptable for children.

¹⁵¹ Purdy (1994), 227.

For example, she suggests the potential “mayhem attributable to certain liberties such as unrestricted gun ownership should suffice to justify their prohibition.”¹⁵² Other examples of appropriate restrictions on childhood liberty, according to Purdy, would include any rights that are based on the presupposition that the holder of the rights understands the consequences of choosing to exercise those rights – rights such as the right to vote, drink, engage in sex, choose medical treatment, or to commit to a binding contract.¹⁵³ She is not opposed to the concept of freedom. She is opposed to the concept of freedom at all costs, or an uncritical glorification of abstract freedom which ignores practical consequences. Rather than accepting the liberationist claim that, in reality, children are no more irrational than the least competent adult, and so are entitled to equal freedoms, she contends that children are only entitled to a social environment sensitive to the degree of non-rationality that each child might possess. To this, however, she is careful to build upon the liberationist’s intuition that freedom is essential, by adding that the development of critical thinking is key to a child’s education and autonomy. “Critical thinking is something that should be introduced the first day of school and continued until the last: high-quality compulsory education (no matter what its precise form) would therefore guarantee children’s exposure to it.”¹⁵⁴ For Purdy, any protectionist measures should bear this in mind and be careful not to over-nurture or over-protect.

¹⁵² Purdy (1992), 222.

¹⁵³ Purdy (1992), 26.

¹⁵⁴ Ibid, 166.

Both O'Neill and Purdy, in my view, correctly conclude that supporting and protecting childhood freedoms must be a gradual, developmental process in which children are granted greater freedoms based either on traditional age-based assessments or on competency-based assessments that connect rights to abilities.¹⁵⁵ Further to this, however, they both prefer to endorse a view which at times favours certain paternalistic protections over freedoms, even if that protection is seen as confining or oppressive. They claim that freedom will come for children if they are guided to make the right choices in their lives, including being required to go to public school for example. Where the liberationist contends that compulsory schooling stifles the child's natural curiosity and motivation to learn, and where the libertarian contends that the parents are in the best position to take care of their own children's education, the protectionist argues instead that, given the nature of childhood, compulsory publicly-driven schooling *is* in the best interests of children. The protectionist correctly makes this claim on behalf of all children, not just the small minority of highly self-directed individuals whom the liberationist position can address, or the highly motivated parents whom the libertarian position can address. For the protectionist, *contra* the liberationist, it is acceptable to limit the freedom of children in a way which would be unacceptable for adults, to ensure a certain quality of life over a lifetime. For the protectionist, *contra* the libertarian, it is also acceptable to place limits on the role that the parents can play. Parental autonomy can sometimes interfere with the child's ability to learn things because those things interfere with parental interests/abilities. The protectionist suggests that for the child's own development, as an individual, even parental interest needs

¹⁵⁵ Ibid, 223.

limits. But what happens when the values of parents clash with those of the state? When deciding what is in the best interests of the child, which authority should have priority, parental beliefs or state obligations to maintain a stable society?

A classic case in the literature which deals with this issue is the case of *Wisconsin v. Yoder*.¹⁵⁶ In this case, the United States Supreme Court found that placing Amish children in compulsory schooling beyond grade 8 was a violation of the parental right to freedom of religion. As an isolated farming community with deep religious faith, the Amish petitioned for their children to be exempt from any compulsory public schooling beyond the age of 14 (2 years short of the State minimum). While the Amish do not reject (public) education per se, they believe that their children only require enough formal schooling to prepare them with the basic skills for farming and with literacy for Bible reading. This Amish model of education is based on their belief that any compulsory public (secular) schooling beyond these rudimentary skills will weaken their own community's faith and very existence.

In this case (and in many subsequent cases dealing with the Amish), it was determined that the Amish children should be excused from the last 2 years of compulsory schooling based in part on two key questions – a *threshold* question and a *balancing* question. The threshold question asks whether the contested practice constitutes a real burden on other rights, in this case, the right to the free expression of religion. The balancing question asks whether there are also compelling state interests which could outweigh the need to grant

¹⁵⁶ WISCONSIN v. YODER et al. Certiorari to the Supreme Court of Wisconsin 406 US 205 (1972). Argued before the United States Supreme Court December 8, 1971. Decided May 15, 1972.

accommodations. By accepting that compulsory schooling beyond grade 8 was a real burden to the beliefs of the community in which these children belong, and by acknowledging that there was no compelling state reason to outweigh an accommodation, it was determined that a *reasonable* accommodation could be made in the best interests of the children involved. Of course, there is a further question lurking as to whether the religious beliefs of a parent should trump those of a child¹⁵⁷ but as far as the child's basic education is concerned, this decision is reasonable. It is reasonable because by sending their children to a public school for 8 years, the parents acknowledge and accept the importance of exposing their children to a larger community than their own immediate one despite the risks that such an exposure might bring to their relationship with their children. Likewise, by accepting that extended compulsory schooling represents a real burden to the beliefs of the Amish community, the state recognizes the rights of its citizens to freedom of thought and conscience.

While in agreement that parents play a vital role in the lives of their children, Purdy questions: if education is something to which children are entitled because it is in *their* best interests, what priority should be given to *parental* rights? According to the protectionist, a clear demarcation between rights as free choices and rights as protected interests might lead one to assume, prematurely, that overall parents should always be allowed to trump the rights of their children because parents can actively claim certain primary rights which children clearly cannot. In a case such as the Yoder one, for example, Purdy concurs with the liberationist to suggest that, in the interest of protecting the ability of the child to develop *her*

¹⁵⁷ A good topic for another dissertation.

own rationality, it is sometimes necessary to override parental autonomy. She strengthens this claim even further to suggest that, not only do children have *a positive right* to an education which provides them with appropriate knowledge about the society in which they live, children “have *a duty* to learn it, even at the cost of some loss of liberty.”¹⁵⁸ Purdy concludes that accepting education as a fundamental social good to which all children are entitled is essential to ensuring that the child’s interests and full development are the primary focus.

While the protectionist offers a broad, pragmatic justification for the obligations we have toward children and their positive right to education, her desire to favour ‘grown-up’ obligations, over the rights children have, seems puzzling. On the one hand, the protectionist claims to be defending the child’s place in society; on the other hand, the protectionist contends that the best way to do this is to focus on the adult’s role in the child’s life. Moreover, the protectionist does this by further specifying that if the role which the child’s parents adopt conflicts with the role that society adopts, then certain protective measures need to be in place to control the choices the parents are allowed to make as well.

It is important to recall the motivation behind the creation of the CRC. Prior to the drafting of the CRC, many people felt that the ICESCR represented an appropriate commitment made by the participating members to defend and protect both the autonomy *and* the social security of each of its members. In the case of children’s education, for example, the traditional view (as supported by the ICESCR) held, much like the protectionist’s view, that education is a social benefit that societies have an obligation to

¹⁵⁸ Purdy (1992), 166. Italics added.

recognize and support through official channels. Critics of this view, however, felt that, while such a document was an important advancement in the area of human rights promotion, it relied too heavily on particular kinds of social structures, which already recognized and supported a liberal, human rights-respecting worldview.

In an effort to remedy this oversight, the creators of the CRC believed that, to address the needs and interests of all children, regardless of existing social structures, certain factors required more sustained consideration. Positive rights and obligations are important but, to address the needs and interests of all children (regardless of the social structures they find themselves embedded in) consideration must be given to the moral rights each child is owed as a matter of decent treatment *independently of any external attachments*. It is only after such moral rights are understood that one's genuine obligations can be derived. Protectionists like O'Neill and Purdy establish a vitally important understanding of fundamental positive obligations. The CRC's focus on the fundamental rights of children broadens this, however, not only to take into account the obligations of both parents and adults in general, but also to consider the rights of the child independently of whatever attachments he or she may have to those adults to be able to determine more effectively which authority should have priority when values or beliefs clash. In the Yoder case for example, while it may seem on the surface to be a battle between parental rights and state obligations, the compromises which had to be made by both the parents and the state indicate that the authority which was ultimately driving the decision was that of the child's right to an education which can prepare him for an individual life within the society in which he is embedded.

To recap, this chapter has considered three alternative arguments which address what is in the best interests of children outside of the standard blanket UN assertion that every child has a right to free and compulsory basic primary education. The liberationist defends a position which recommends that it is in the best interests of the child to release her from the artificial 20th century concept of childhood, including the UN demand for compulsory schooling. For the liberationist, such a release is necessary to stimulate the development of the child's own natural curiosity and desire to learn. The libertarian, on the other hand, defends a position which enables the child's parents, not an 'arbitrary' state authority, to provide the education her parents believe to be correct for her. In so doing, the libertarian argues the child will be able to benefit from the 'natural' desire of the parents to act on behalf of their own dependents. Finally, the protectionist defends a position which recommends that codified responsibilities, like the ones listed in the ICESCR for example, be put in place to protect and positively support a child's claim to tangible material goods and obvious social benefits, including education. According to the protectionist, however, if adults are encouraged to recognize their fundamental obligations towards children, then there is no need for the further stipulation that children have a human right to education. Ostensibly, each of these positions defend a best interests principle; in so doing, however, they also place demands upon children and adults which might not feasibly apply to the circumstances of all children.

In proposing a model of equal rights for all, the liberationist is imposing upon all children the duty to design and engage their own educational plan. In insisting upon parental

control of all decision-making directed toward their own children, the libertarian is imposing upon all parents the duty to be available (e.g. not dead), knowledgeable and economically qualified to secure an education for their own children. In demanding all agents recognize and act on their positive obligations, the protectionist is imposing upon all agents the duty to be altruistic or to 'do the right thing'. All three of these positions are correct to suggest that children are entitled to certain considerations, including their need to have an education. On the other hand, all three positions fail to recognize something which the UN has been careful to recognize, namely that the child has an identity – one which will inevitably be tied to the child's parents or guardians, and which also represents the child directly as an individual and as a rights-holder.

Thus the standard, blanket UN statement that every child has a right to free and compulsory basic primary education, as supported by the CRC and the current MDG of education for all by 2015, is directed toward children and their need to be able to access a basic minimum education which is of benefit to them. Rather than isolate rights from obligations because children belong to a set of transitional or incomplete rights-holders, the UN recommends that, as members of the human family, children are entitled to certain *human* rights which are indivisible. It is correct to caution that children have a greater chance than adults do to harm themselves if left to their own devices, but it is incorrect to maintain that it is in the best interests of children to avoid or disapprove of a social context that progressively enables them to develop into independent, rational decision-makers within the communities in which they find themselves. For the same reason, it is correct to assume that

children have the right to develop progressively, but it is incorrect to maintain that children do not need the proactive assistance of others to guide this development. The next section will propose that, while some deliberate paternalism seems inevitable even prior to any discussion of children's rights, securing a child's right to education requires more than sound policy or sound intentions: sustained consideration also needs to be given to the role that children play in their own development.

2.4. Beyond Paternalism – Children as Meaning-Makers

The argument from paternalism stresses that children are likely to do harm to themselves because they are vulnerable, uninformed and inexperienced. As the previous section outlined, it is common to believe that children are incapable of rational choice and so are incapable of promoting their own good if given liberty rights. Proponents of this position, as seen in the protectionist position at least, choose to favour instead rights which can be derived from fundamental responsibilities or obligations that fully autonomous agents can fulfill on behalf of their less autonomous dependents. This position is often taken, however, under the assumption that while children may be ill-equipped today, they will inherit the world tomorrow and so it is in their own best interests, and in the interests of society in general, to deliberate on what would be appropriate adult/child interactions to ensure this transition can happen. If children will ultimately become autonomous agents, it would be important to consider whether the intuition of the liberationist is correct to recommend that children are not just future-performers waiting for life to begin, but are capable of acting as meaning-makers in this development as well. With this in mind, this

section returns to the CRC and its stipulation that education is a fundamental human right, to determine what role the child should ultimately play in her own development.

Recall the CRC and its demanding claim that a child's right to education must meet the needs of three different interest groups: the state, the parent/educator, *and* the child. While critics of a right to education correctly suggest that vulnerability and inexperience render children less capable of engaging their rights than adults, it does not follow that they do not have any rights or that they must relinquish their own rights to their parents or to the state. Similarly, recognizing a child's fundamental right to education does not necessarily mean that the CRC recommends that children should be free to do whatever they are moved to do, either. It is possible to reformulate the traditional division of establishing either liberty rights or welfare rights into a model which recognizes a child's fundamental right to education based on the need to provide both, as noted in section 1.3. Not only should education be recognized as a fundamental right to which all children are entitled, any desire to provide children with education is going to have to balance the need for societal/parental protection with the need for self-determination.

Where the liberationist suggests that children should be completely free to govern their own lives, and where the protectionist suggests that children require adult intervention until such time that they are capable themselves of governing their own lives, the CRC takes a combined approach to the liberty and the welfare of children. It fulfills not only the protectionist's need to stipulate specific claims that children have against the actions of others (so that they can grow up) but also the liberationist's need to allow children to

participate actively in their own development and growth. This emphasis on a child's fundamental human rights, built upon a framework of rights-respecting education, recognizes that it is possible to grant liberty rights to children – but liberty *in the sense of improvement or independence rather than liberation*. As Ann Palmeri has suggested:

Our problem here is not in 'liberating children' but what we often take the notion of 'liberty' to mean. 'Liberty,' in the classical liberal sense, has meant the absence of external impediments. Yet, the other sense, deriving from that tradition, is the sense of being a person, meaning being responsible, having reasons, acting with intentions and purposes. We want a society that enhances the liberty of a person to develop (creatively) in the fullest sense possible.¹⁵⁹

The liberty that Palmeri refers to is essential to our understanding of what it means for a child to have a right to education. Recall that one of the stated aims of education in the CRC is to go beyond formal schooling to embrace the broad range of life experiences and learning processes which enable children, individually and collectively, to develop their personalities, talents and abilities to live a full and satisfying life within society. To suggest that the right to education represents a fundamental liberty right for children is to suggest that children have both a right to grow up, and a right to help determine the direction of that development.

Joel Feinberg offers a similar justification for a child's right to grow up or to have an open future. He suggests that it is important to grant rights to children not only to protect the child from her own vulnerability, but also to protect the autonomy of the adult whom the child will become:

¹⁵⁹ Ann Palmeri, "Childhood's End: Toward the Liberation of Children," in William Aiken and Hugh LaFollette (eds.) *Whose Child? Children's Rights, Parental Authority, and State Power* (New Jersey: Rowman and Littlefield, 1980), 119.

It is the adult he is to become who must exercise the choice, more exactly, the adult he will become if his basic options are kept open and his growth kept ‘natural’ and unforced. In any case, that adult does not exist yet, and perhaps he never will. But the child is *potentially* that adult, and it is that adult who is the person whose autonomy must be protected now (in advance).¹⁶⁰

Here Feinberg is arguing for children’s rights not because he believes in the liberation of children as children, or the protection of children as dependents, but because he believes in the autonomy rights of children as future adults. He argues, however, that where it is unacceptable to interfere with an adult’s autonomy and ability to make choices, when it comes to children a unique understanding of autonomy is required. For example, allowing an adult to become an alcoholic despite knowing that such a choice will ultimately shorten his life is an acceptable acknowledgment of that adult’s right to choose. In such a case, an adult’s autonomy prevents others from interfering in his present choices for the sake of protecting his future liberty. When it comes to children, however, Feinberg contends – in agreement with the libertarian and the protectionist – that different decisions are required to ensure that the child’s future liberty is protected prior to giving way to his present desire to make free choices. Despite this consensus, Feinberg contends that children have rights nonetheless: not the full-fledged autonomy rights of adults that the liberationist is demanding, rather, children have what Feinberg refers to as ‘anticipatory autonomy rights.’

According to Feinberg, these anticipatory autonomy rights are necessary to place a greater moral weight on the child’s future than one would place on an adult’s future. For

¹⁶⁰ Joel Feinberg, (1980) “The Child’s Right to an Open Future” in Aiken and LaFollette (eds), *Whose Child: Children’s Rights, Parental Authority, and State Power* (New Jersey: Rowman and Allenheld,), 127.

Feinberg, the need to distinguish between the significance of the child's future and that of an adult is necessary to manage the free choices of children rather than simply accepting them (as you would with an adult) or outright rejecting them (as you would with an infant, for example). Children represent unique philosophical challenges because they are neither completely incompetent nor are they completely capable of freely making choices. To complicate this further, children pass through observable stages of development and it is important to take this evolving nature of childhood ability into account. Consequently, Feinberg contends that the only reasonable thing to do is to recognize the child's "right to an open future" and to manage actively the autonomy that children are granted throughout this process to maximize the potential life-choices that will be available when the child becomes an adult.

To avoid what he refers to as 'blameable paternalism', he is careful to specify the kind of management to which he is referring. By 'blameable paternalism', he is referring to the notion of "treating the child at a given stage as if he were at some earlier, less developed, stage."¹⁶¹ Feinberg recommends that, while there is a need to protect children from their own harmful choices, and while it is perfectly acceptable for parents in particular to act paternalistically, there is also a need to reflect on the degree to which the adult can interfere. For example, he suggests that coerced educational experiences are not a violation of the child's rights because attending school is essential to the child's future well-being. On the other hand, he warns that educational experiences can be over-managed if anticipatory rights

¹⁶¹ Ibid, 141.

are not taken into account. When this happens, as in the case of the education of Amish children, as raised by Purdy for example, Feinberg suggests that coerced educational experiences can be as confining as they can be broadening. According to Feinberg, cooperative partnerships between children, their parents and the state are necessary to ensure these anticipatory autonomy rights are protected and promoted, and that children are provided with an educational experience which is both neutral and flexible. More importantly, Feinberg warns, if these anticipatory autonomy rights are not protected and promoted, as in the case of fundamentalist groups like the Amish, “critical life-decisions will have been made irreversibly for a person well before he reaches the age of full discretion when he should be expected, in a free society, to make them himself.”¹⁶² For Feinberg, children’s rights represent their claim against others for an open door to the future. If Feinberg is truly after manageable paternalism, however, then why engage the language of rights for children?

As seen in this chapter, both the libertarian and the protectionist provide valid justification for such an account and, by focusing on benefits or obligations rather than rights, they seem to provide certain enforceable claims. Parents have a vested interest or an obligation to care for children, including the provision of education, and children are entitled to expect their parents and teachers will act on this duty. In the case of the protectionist, her claim goes even further to place certain conditions on appropriate parent/child interactions which consider not only the primary rights of the parents to parental sovereignty, but also the

¹⁶² Ibid, 133.

secondary rights of the child to the provision of fair and accessible social benefits. Given such a view, it seems reasonable for the protectionist to question: what is to be gained by granting liberty rights to children prematurely, provided parental obligation is understood, enforceable and supportable through the resources of the state? Similarly, it seems reasonable for the libertarian to question: why establish the need for positive rights at all, provided adults respect the non-harm principle and are free to do what they do best, namely, take care of their own property?

Recall the standard definition of rights that was given at the beginning – *a right is a justified claim on someone, or on some institution, for something, which one is owed*. On this definition, to have a right to education means children have a right to claim against others, namely adults, the educational opportunities which they are owed. In the case of the right to education, the claim to education is usually justified because there is a good reason for others to honour it, namely, that children will fail to thrive without an education. Recall also, to this standard definition of rights, it was suggested that a further stipulation could be made about a particular set of rights which go beyond social conventions to represent the *human* rights each individual is owed as a matter of decent treatment. These rights go beyond any particular attachments we might have within our day-to-day interactions, to represent more generally the standards for reciprocal tolerance and mutual forbearance in any human interaction. Feinberg's demand for the child's right to an open future, including an education that promotes the child's self-fulfillment at every stage of her development, represents this same desire to go beyond social conventions to establish a more secure voice for children.

While it is true that Feinberg opts for the language of paternalism (albeit managed paternalism), he prefers the language of recipient rights over the language of agent obligations (which O'Neill and Purdy prefer) because only a stipulation of fundamental human rights can provide all children with a potential claim against others. Nonetheless, his desire to focus on the future life of the child places an undue emphasis on the maintenance of adult intervention. In Feinberg's model, there is the danger of adults feeling compelled to 'shop around' continuously for new experiences and opportunities just for the sake of maximal exposure, without recognizing why such maximal exposure is vital. Having an open future requires not so much being exposed to *all* options; rather it requires matching appropriate options to the unfolding of the child's unique personality, talents, mental and physical abilities and social circumstances.

Consider again the CRC and its demanding stipulation that the child, the parent/educator and the state should be actively engaged in mutually supporting an interdependent alliance. This document is compatible with Feinberg's recommendation that children should be able to claim the kind of educational choices necessary for the protection of their own inexperience and vulnerability, not to mention for the promotion of the self-fulfillment of the adult that the child will become. What the CRC offers in addition to this, however, is the idea that children themselves should be allowed to participate actively in decisions that will ultimately affect their own lives. The *human* right to education which the CRC stipulates fulfills not only the protectionist's need to insist on specific claims that children have against the actions of others so that they can grow up; it also fulfills the

liberationist's demand that, as fellow human beings, children should be allowed to participate actively in their own development and growth.

Eugeen Verhellen has suggested that this nature of the CRC is what makes it a revolutionary document. It is designed to move legislators and lawyers to read it *interactively* and *comprehensively* rather than article by article. No longer is the focus on particular positive or negative rights that a child may or may not have; the CRC addresses both the child as a child *and* as a child who will ultimately transition into adulthood. This provision, Verhellen suggests, brings “children back into society by recognizing them as ‘meaning-makers’ – by recognizing their citizenship.”¹⁶³ He argues that the near universal ratification of the CRC – the most ratified international human rights document – suggests that there is already a “geo-political social contract”¹⁶⁴ at least in principle, to the idea that children have a right to education and that others have a responsibility to recognize this right. He adds to this that, to respect children as human beings and as legitimate rights-holders, what is called for is the establishment of not only rights *to* education but the establishment of rights *through* and *in* education as well.¹⁶⁵ He recognizes that significant progress in the production of important policy documents and international laws have ‘guaranteed’ a right to education for many children, but he cautions that other obstacles¹⁶⁶ stand in the way of their actually

¹⁶³ Eugeen Verhellen, “Facilitating Children’s Rights in Education: Expectations and Demands on Teachers and Parents,” in Hart et al., eds. *Children’s Rights in Education*, (London: Jessica Kingsley Publishers, 2001), 181.

¹⁶⁴ *Ibid.*

¹⁶⁵ Eugeen Verhellen, (1993) “Children’s Rights and Education: A Three-Track Legally Binding Imperative,” in *School Psychology International* 14: 199-208.

¹⁶⁶ For example, a lack of legal recognition as a person, abuse, discrimination, early marriage (especially for girls), poor governance, armed combat, poverty, hazardous labour conditions, and exploitation (including sex tourism and other child labour practices).

realizing this right. Like Feinberg, Verhellen agrees that the right to education includes having one's interests protected from the power of others by the provision of basic social welfare benefits, including education. Contra Feinberg, however, he also suggests that the right to education must include having the opportunity to participate actively as 'meaning-makers', not just 'future performers'. Once this role of children is recognized, adults can move *from* a model of providers of education *to* a model of promoters of a child's right to participate actively in her own growth and development.

In her role as UN special rapporteur on the right to education, Katarina Tomaševski concurs with Verhellen's observations:

Mere access to educational institutions, difficult as it may be to achieve in practice, does not amount to the right to education. Rather the right to education requires enforceable individual entitlements to education, safeguards for human rights in education, and instrumentalization of education to the enjoyment of all human rights through education.¹⁶⁷

Both Tomaševski and Verhellen recognize that a document like the CRC is significant because it provides a comprehensive statement of the role of the parents/educators, the state and the child in the promotion and protection of children's rights. They also recognize that the CRC confirms the fundamental role which education plays in the establishment of these rights. They both agree, however, that it is essential to move beyond the establishment of official legislative channels like the CRC to address the kind of social context necessary to establish a right to education for all children.

¹⁶⁷ Katarina Tomaševski, (2004b) "The Right to Education" United Nations report submitted by the Special Rapporteur, (January 15, 2004), 22.

Obviously, it is not possible to do the impossible. If a child needs to pay to go to school and her family has no money then, clearly, she will not be able to go to school, even if there is full acceptance of her right to such an entitlement. Likewise, if a government is in the middle of a civil war or a famine then, clearly, it will not be possible for that government to secure the funds for compulsory schooling, or to allow schooling as a public service to trump other, more immediately pressing, needs. For Tomaševski and Verhellen, however, such realities do not diminish the fact that education should be viewed as a fundamental human right to which all children are entitled. On the contrary, it simply makes their claim more urgent. Nevertheless, saying that something is a fundamental human right, even if such a statement is found in a comprehensive and well-supported document like the CRC, does not make it a human right.

Tomaševski has argued that respecting the right to education is a primary public responsibility, and she stakes this claim on the belief that, to realize education as a fundamental right, three things need to be considered: the *denial* of the right to education, the *violation* of the right to education, and the *distortion* of the right to education. Obviously, the denial of the right to education is an unfavourable obstacle which can be overcome by establishing and fully ratifying human rights codes, like the ICESCR and the CRC, which recognize the right of all children to basic primary education. Nevertheless, a right to education is not just about access. Much of Tomaševski's work as special rapporteur focuses on developing what she refers to as a 4-A scheme of making education: Available,

Accessible, Acceptable, and Adaptable.¹⁶⁸ Establishing that the right to education exists symbolically through national and international law is important, but, Tomaševski argues, to ensure that the right to education is as acceptable as it is accessible requires input from both an official institutional point of view like the UN and an individual point of view which comes from the children and adults who actually participate in the institution of education. *People and resources make the difference, not abstractions.* There are ample cases where ‘trophy laws’ exist but where individuals do not benefit from the principles stipulated in those laws. Mechanisms need to be in place to deal with those circumstances where the right to education has been distorted and where children’s rights have been violated by this distortion. While the CRC offers the most complete formal statement of this integrative approach to protecting not only the child’s right to access an education, but also to promoting the child’s right to take ownership of that educational experience, the CRC has not been universally endorsed. American non-ratification, in particular, remains an alarming avoidance of issues related to the rights of children. Chapter 7 considers Tomaševski’s efforts to deal with these distortions and violations in greater detail, but before this can be done, it is important first to consider the nature of social institutions. After all, education is but one social institution. The next chapter considers what kind of institutional structure should be dedicated to the provision and promotion of education for all – in particular, the kind of

¹⁶⁸ Katarina Tomaševski, (2006b) *Human Rights Obligations in Education: The 4-A Scheme* (The Netherlands: Wolf Legal Publishers, 2006).

structure which would be necessary to establish and support the kind of basic primary education to which the UN claims all children are entitled.

Chapter 3

Rawlsian Social Institutions

Education is a social institution which typically is established through a collective social desire to have civil and supportive societies. With this in mind, many societies traditionally view education (at least primary and secondary education) as a public service which adults and educators provide for children until such time that they outgrow their childhood vulnerabilities and inexperience to become contributing members of society themselves. And, as the first chapter of this dissertation highlighted, it is for this reason that the UN has claimed free and compulsory basic primary public education to be a fundamental right to which all children are entitled. This belief – that free and compulsory basic primary public education should be recognized and supported as a fundamental right – is not universally accepted, however, and, as chapter 2 highlighted, there are at least three alternative perspectives which argue, strongly, why being able to have access to an education is important for children, but not necessarily a right, much less a *human* right.

For example, it was suggested that the liberationist's interest in education is based on the intrinsic good which comes from having an education that is directed and supported by one's own hand. For the liberationist, any interference in achieving this end – like the UN's additional stipulation that education must be a compulsory, publicly-directed activity – has the potential to convert the intrinsic value to be gained from having access to an education into ideological indoctrination. Second, it was suggested that the libertarian's interest in education is based on the belief that having an education will enable children to become fully

autonomous, rational individuals. For the libertarian, however, it is the sole responsibility of the parent or guardian to protect and support this privilege. Education is not something which can be equalized effectively within a publicly directed institutional scheme. Finally, it was suggested that the protectionist's interest in education is based on both the intrinsic good which comes from having an education, and the role having an education can play in the child's future. The protectionist supports this claim, however, based on the obligations adults have to protect the vulnerable and the needy, and not, she claims, on the need to endow upon the immature certain fundamental rights. These rights, to the protectionist, seem unnecessary and potentially disadvantageous. For the protectionist, the prime reason for establishing a public institution of education is to transmit particular social values to the next generation of citizens.

While all of these positions seem to provide thoughtful and committed accounts of why having an education is important for children, this chapter examines one further element necessary to understand what it means for a child to have a right to education. More specifically, this chapter is going to consider an element which none of these positions have looked at sufficiently – namely, the concept of a social institution itself. An understanding of the basic structure of social institutions is essential to reflect on both the UN's ardent belief that free and compulsory basic primary public education is a social institution to which all children are entitled, and the counter-claims that, while education is certainly important for children, it is not something which should necessarily be either free, or compulsory, or public, nor perhaps even a justified entitlement.

One of the most famous and influential articulations on the concept of social institutions and the basic structure of society comes from John Rawls and his *Theory of Justice*.¹⁶⁹ According to Rawls, the basic structure of society can be defined as “the way in which the major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arise through social cooperation.”¹⁷⁰ At the time of its publication, Rawls’ commitment to understanding the basic structure of society and his firm focus on moral and political philosophy – most specifically “his spirited defense of liberalism”¹⁷¹ – represented an important re-awakening in philosophy (at least within contemporary Western liberal theory), a re-awakening which secured Rawls a position as one of the most influential political philosophers of the 20th century. In general, his theory represents a pivotal shift from the view that society should maximize the general net benefit achievable by social institutions to one that should also secure the rights and liberties of all individuals to access those institutions.

In particular, according to Allan Bloom, for example, the work of Rawls represents “the most ambitious political project undertaken by a member of the school currently dominant in academic philosophy; and it offers not only a defense of, but also a new foundation for, a radical egalitarian interpretation of liberal democracy.”¹⁷² What makes Rawls so important, however, is not the fact that everyone agrees with his theory, as Bloom

¹⁶⁹ John Rawls *A Theory of Justice* (Cambridge: Belknap Press of Harvard University, 1971).

¹⁷⁰ John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 258.

¹⁷¹ Benjamin R. Barber, (1975) “Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls,” in *The American Political Science Review* 69 (2): 663-674.

¹⁷² Allan Bloom, (1975) “Justice: John Rawls Vs. The Tradition of Political Philosophy,” in *The American Political Science Review* 69 (2): 648-662.

pointed out when he suggested, “the magnitude of [Rawls] claims, deserves to be measured by standards of a severity commensurate with its proportions.”¹⁷³ Nor is Rawls’s theory important because all liberals agree with him either, as John Chapman pointed out when he suggested, “[Rawls’] theory has been and will continue to be criticized by both libertarians and egalitarians.”¹⁷⁴ The work of John Rawls is pivotal, as Martha Nussbaum¹⁷⁵ has noted, because he revived an interest in two age-old philosophical fascinations – what makes a society just, and how social justice connects with an individual’s pursuit of a good life. Although Rawls himself is somewhat silent on the topic of education, education is one of the primary social institutions which Rawls assumes is essential to the development of a well-ordered just society. Thus, to validate more completely the claim that education is a human right, it is important to understand both what Rawls suggests is required for a well-ordered just society, and how Rawls connects this notion of social justice with an individual’s pursuit of a good life.

At the beginning of *Justice as Fairness*, Rawls describes four key contributions he suggests political philosophy makes to the discipline of philosophy in particular, and to social-political thought in general. First, Rawls takes *the role of political stabilizer* to be of primary importance. Rawls argues political philosophy plays this practical role in that it provokes reasoned reflection on what are often deeply disputed, hot-button political issues.

¹⁷³ Ibid.

¹⁷⁴ John W. Chapman, (1975) “Rawl’s Theory of Justice,” in *The American Political Science Review* 69 (2): 588-593.

¹⁷⁵ Martha Nussbaum, “The Enduring Significance of John Rawls,” in *The Chronicle Review* (Chronicle of Higher Education, July 20, 2001). Available on line at <http://chronicle.com/free/v47/i45/45b00701.htm>.

According to Rawls, such reasoned reflection enables us to look beyond the issue itself, to determine if some overlooked philosophical or moral common ground actually exists. In the case of the right to education for example, Rawls would argue that reasoned reflection may uncover a new space between the polarized debate of those who either defend or deny the child's right to education.

Related to this are three explanatory roles, which Rawls suggests are both informative and relevant to the primary desire for socio-political stability. First, Rawls argues, the theoretical space of political philosophy can orient or familiarize individuals with many possible personal and social ends which they pursue. Again, in the case of the right to education, Rawls would argue that political philosophy can provide an informative conceptual space to explore the scope of educational experiences necessary to enable both individuals *qua* individuals, to realize their own sense of a good life, *and* individuals *qua* citizens, to recognize their role in society. To this, Rawls adds that, with reasoned reflection and conceptual awareness, political philosophy can also encourage what he refers to as reconciliation. For Rawls, an understanding of how institutions 'hang together' over time is essential to understand two things. First, the idea that it is never good simply to be resigned to the often discouraging and trying effects of the social institutions in which we might find ourselves engaged. Second, while acquiescence can be potentially risky, it may be possible to come to understand how these social institutions developed over time, and to accept these institutions as both reasonable and indispensable. With this notion of reconciliation, he is careful to caution, however, that it is essential to maintain a prudent level of reasoned

reflection to avoid a corrupt justification of the status quo in the name of rationality alone.¹⁷⁶ Finally, Rawls suggests that, within the discourse of political philosophy, it is possible to “probe the limits of practical political possibility,”¹⁷⁷ to view society through realistically utopian eyes. Of course Rawls recommends this not because he wants to advance an ideal or perfect society, rather Rawls wants to establish a reasonably accurate account of what political ideals and principles a society would found under social conditions which are favourable to a decent social and political order, and yet still within the realm of actual social possibility.

As already mentioned, education is not the primary focus of Rawls’ work. Nevertheless, education is one of the primary social institutions which Rawls includes as essential to the development of a well-ordered just society. For this reason, this chapter considers the Rawlsian model, of “justice as fairness” to illustrate how this Rawlsian framework might apply to our understanding of education as a human right. Section 3.1 considers how Rawls applies these three explanatory roles of political philosophy in the development of his own theory of justice as fairness. Of course, these explanatory roles feed into Rawls’ primary assertion that, to institute fair social-political structures – even ones that have been ‘established’ to be just – these institutions must uphold a commitment to reasoned reflection or public justification, and not some form of authoritarian, or dictatorial, or supernatural decree.¹⁷⁸ Section 3.2 will analyze this notion of Rawlsian public justification,

¹⁷⁶ John Rawls *Justice as Fairness: A Restatement* (Cambridge: The Belknap Press of Harvard University Press, 2001), 4 (especially footnote 4).

¹⁷⁷ Rawls (2001), 4.

¹⁷⁸ Rawls (2001), 27-28.

to understand two things. First, to understand how this notion supports the Rawlsian claim that rational agents will opt for a risk-averse distribution of fair and equitable treatment: then, to understand how this notion can support the claim of an organization like the UN, which suggests rational agents will opt to support education as a human right as well. Finally, according to Rawls, the most fundamental idea in his concept of just social institutions is “the idea of society as a fair system of social cooperation over time from one generation to the next.”¹⁷⁹ With this in mind, section 3.3 will examine the role Rawls, and Rawlsian supporters, assign to education within a just society, and what this role means for children and their rights.

3.1. The Basic Structure of Society

To begin, what does the basic structure of a Rawlsian just society look like? In both *Theory of Justice* and *Political Liberalism*,¹⁸⁰ for example, Rawls states that he rejected prior political theories like utilitarianism, and its desire to maximize net social benefits exclusively, to move toward a theory founded on principles of social justice instead.

According to Rawls:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust. Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. For this reason, justice denies that the loss of freedom for some is made right by a greater good shared by others.¹⁸¹

¹⁷⁹ Rawls (2001), 5.

¹⁸⁰ Rawls (1996).

¹⁸¹ Rawls (1971), 3.

Thus, for Rawls, any conception of a just society must be built upon two fundamental ideas – the idea of a well-ordered society *and* the idea that all individuals within such a society are seen as equally human (that is, entitled to the same basic rights and liberties as anyone else). With this in mind, Rawls suggests that, if we accept that societies are a mixture of different individuals with different interests and potential, then the principles of social choice, which govern a just social system, cannot be utilitarian alone. Rawls recommends instead that: “a just social system defines the scope within which individuals must develop their aims, and it provides a framework of rights and opportunities and the means of satisfaction within and by the use of which these ends may be equitably pursued.”¹⁸² For Rawls, then, a just society must reflect both the desire to ensure that no one is left to fall below a basic social minimum while, at the same time, it must provide individuals with as much social freedom as possible to achieve their own desired ends.

To realize this just social framework, according to Rawls, the basic structure of a society must include certain stabilizing mechanisms or social institutions. For example, Rawls recommends that a well-ordered just society requires: a political structure, legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production, and (monogamous)¹⁸³ families.¹⁸⁴ He also recommends that these stabilizing mechanisms should be established, despite the inequalities they are

¹⁸² Rawls (1971), 28.

¹⁸³ In the original *Theory of Justice*, Rawls recommend that families be monogamous, an idea he later amended to include any form of family. See John Rawls, (1997) “The Idea of Public Reason Revisited,” in *The University of Chicago Law Review* 64 (3): 765-807, especially footnote 60.

¹⁸⁴ Rawls (1971), 6.

likely to create or permit. Rather than allowing social inequities simply to run their course, Rawls importantly suggests that societies have an obligation to develop a concept of social justice which avoids (whenever possible) morally arbitrary social inequities within these institutions. In the case of education, section 3.3 will show that much of the commentary Rawls does direct towards the institution of education is focused on the role education can play in achieving this end of reducing or eliminating some harmful inequalities. It is also important to note that, while education is not often discussed in detail, Rawls assigns the role of primary educator *to the family*. In so doing, he recommends that “a central role of the family is to arrange in a reasonable and effective way the raising of and caring for children, ensuring their moral development and education into the wider culture.”¹⁸⁵

Following the work of thinkers like Hobbes, Rousseau and Kant, Rawls describes the basic structure of a well-ordered society as one in which the main political and social institutions fit together into one system of social cooperation. Rawls revived this contractarian tradition in the 1970s to suggest that any society built upon such a system of social cooperation could use this system to designate basic rights and duties, and to regulate just distributions of the potential benefits to be gained through such social cooperation.¹⁸⁶ To this, Rawls adds that the basic structure must fit within a general conception of justice – a conception of social justice where, according to Rawls, “all social values – liberty and opportunity, income and wealth, and the bases of self-respect are to be distributed equally

¹⁸⁵ Rawls (1997).

¹⁸⁶ Rawls (2001), 10.

unless an unequal distribution of any, or all, of these values is to everyone's advantage."¹⁸⁷

This will be discussed in greater detail in a moment but, as Brian Orend has suggested, "Rawls asserts that it is a rule of rational choice to insist on certain bedrock guarantees for the worst position in society."¹⁸⁸ Rawls takes this minimalist understanding of justice as a plausible starting point for his theory, because he accepts this notion of justice as something which people have naturally – it is an essential element of being human without which, Rawls argues, we would be incapable of such moral feelings as resentment and indignation, trust and affection.¹⁸⁹

To further support his notion of justice, Rawls considers two concerns that such an intuitive appeal may raise: *to whom* is this obligation of justice owed, and what causes an average individual *to adhere to* this obligation.¹⁹⁰ To answer the first question, Rawls recommends that justice is owed to anyone who is capable of a sense of justice. Of course, Rawls is primarily referring to self-interested rational agents but, ultimately, he suggests that all individuals are capable of a sense of justice and are, therefore, entitled to certain basic rights and liberties. Rawls leaves room for the inclusion of children for example, by recommending, "in the instance of children, one supposes that the capacity for a sense of justice is there and only awaits development."¹⁹¹ For Rawls, children are "prospective citizens"¹⁹² and not merely the property of their parents, as the libertarian asserts. According

¹⁸⁷ Rawls (1971), 54.

¹⁸⁸ Orend (2002), 83.

¹⁸⁹ John Rawls, (1963) "The Sense of Justice," in *The Philosophical Review* 72 (3): 281-305.

¹⁹⁰ *Ibid.*, 281.

¹⁹¹ *Ibid.*, 303.

¹⁹² *Ibid.*

to Rawls, “just as the principles of justice require that wives have all the rights of citizens, the principles of justice impose constraints on the family on behalf of children who as society’s future citizens have basic rights as such.”¹⁹³

To answer the second question, Rawls recommends (like other contractarians), that anyone who chooses not to abide by the principles of justice removes herself unnecessarily from certain essential elements of social or political interaction – namely, friendship and trust. For Rawls, it is a matter of common sense to accept the principles of justice because it is reasonable to expect that adherence to these principles will lead to results which are advantageous. Moreover, it is irrational not to accept them. Rawls believes this to be so because he suggests that social interaction is full of situations where individuals have to coordinate their behaviour to arrive at the rules which define their interactions and which can determine both the benefits they can enjoy and the burdens they have to bear. Rawls famously yet controversially suggests, however, that, from these interactions, it is possible to arrive at two primary principles of justice by which each (self-interested rational) individual ought to abide. Of course, the now famous principles of justice he recommends are:

The liberty principle: each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all.

The difference principle: social and economic inequalities are to satisfy two conditions: first they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society.¹⁹⁴

¹⁹³ Rawls (1997) “The Idea of Public Reason Revisited,” in *The University of Chicago Law Review* 64 (3): 790.

¹⁹⁴ Rawls, (2001), 42-43. A revised statement of the principles of justice found in Rawls (1971): 52-78.

By probing the limits of social bargaining, Rawls confidently asserts that these principles will be the result of “the considered judgments of competent persons concerning the justice of political and social institutions,”¹⁹⁵ under favourable conditions. He makes this assertion because, along with the establishment of the principles of justice, he also establishes a contemporary version of the Hobbesian hypothetical pre-political bargaining device – what Hobbes called “a state of nature”¹⁹⁶ and which Rawls calls “the original position” or “veil of ignorance”.

Rawls devises the veil of ignorance to answer his main question: *what is the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens, regarded as free and equal and as both reasonable and rational?*¹⁹⁷ It is a veil of ignorance because the veil conceals any information that could possibly bias the selection of the principles of justice – such as social standing, gender, race, intelligence, natural endowments, religion, income, and partisan political attachments.¹⁹⁸ Rawls argues for the inclusion of this veil to ensure that the ground rules for the political institutions which form the foundation of the basic structure come from *the reasoned reflection of individuals* who are unaware of their own eventual social standing within society. Rawls assumes that, if decision-makers understand that there is a possibility they could end up in the least-desirable position, they will make every effort to make the least-desirable position at least minimally acceptable.

¹⁹⁵ Rawls (1963), 282.

¹⁹⁶ Thomas Hobbes *Leviathan* C. B. Macpherson (ed.) (New York: Penguin Books, 1968).

¹⁹⁷ Rawls (2001), 8.

¹⁹⁸ Orend (2002), 82-87.

3.2. Public Justification

As the previous section highlighted, Rawls begins with the basic concept of a fair system of social cooperation. From this, Rawls recommends that, when such a system of social cooperation is fully realized, the result will be a well-ordered society which not only protects, but also promotes, a basic structure built upon his two principles of liberty and equality. Given such a framework, it is possible to allege, as Allan Bloom does for example, that Rawls has simply described and defended the makings of a modern egalitarian liberal democracy. In fact, Rawls himself carefully stipulates that his theory is limited to a *political*, not metaphysical, conception of justice. More specifically, Rawls stipulates three features of the kind of political conception he takes to be most supportive of his claim to justice as fairness:

While it is, of course, a moral conception, it is worked out for a specific subject, namely, the basic structure of a democratic society. It does not apply directly to associations and groups within society, and only later do we try to extend it to connect it with the principles of local justice and to cover the relations between peoples.

Accepting this conception does not presuppose accepting any particular comprehensive doctrine. A political conception presents itself as a reasonable conception for the basic structure alone and its principles express a family of political values that characteristically apply to that structure.

A political conception of justice is formulated so far as possible solely in terms of fundamental ideas familiar from, or implicit in, the public political culture of a democratic society; for example, the idea of society as a fair system of cooperation and the idea of citizens as free and equal. That there are such ideas in their public culture is taken as a fact about democratic societies.¹⁹⁹

¹⁹⁹ Rawls (2001), 26-27.

Rather than taking these stipulations to be a weakness of Rawls' theory, as Bloom does however, it is important to recall Martha Nussbaum's suggestion that what makes the Rawlsian theory of justice so significant is its dual focus on just societies *and* on the connection between social justice and an individual's pursuit of a good life. The notion that the Rawlsian model represents a defence of liberal democracy, or even more robustly of liberal egalitarianism, reflects only the Rawlsian commitment to arrive at the political model which can best describe a just society. A full understanding of the value of the Rawlsian model (and of its importance to our understanding of education as a human right), however, also requires an understanding of the further Rawlsian commitment to substantiate, through reasoned reflection and public justification, how the terms of fair cooperation governing free and equal individuals should be validated. According to Rawls, while it may be acceptable or intrinsically reasonable to believe that justice as fairness and political liberalism represent a workable political conception of justice, to have a public validation that it is so, it must also pass a test of reflective equilibrium. That is, it must be supported by sound and resonating first principles *and* it must be able to demonstrate persuasively any good expected consequences of implementing the principles in practice.²⁰⁰

According to Rawls, in the search for the most acceptable political conception of justice for specifying the fair terms of cooperation between citizens, regarded as free and equal and as both reasonable and rational, it is important "to work from both ends."²⁰¹ That

²⁰⁰ Brian Orend, "Health as a Human Right" (delivered as a conference paper at University of Crete, May 27, 2006), 10.

²⁰¹ Rawls (1971), 18.

is, we need a workable method for determining the principles of justice to which all members of a society can agree and, in so doing, establish a set of principles which do not distort any member's sense of justice in the process. Rawls importantly emphasizes the need to recognize that when discrepancies of opinion occur (and in modern pluralistic societies, they will) we must have two choices available to us:

We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted.²⁰²

Rawls is not seeking Utopia.²⁰³ He is seeking an understanding of justice which recognizes (through public deliberation) that, from social cooperation, advantages follow. Moreover, he is seeking an understanding of justice which also publicly recognizes that, from these advantages, individuals (all individuals), should receive their fair share. Rawls cautions, "the most reasonable political conception for us is the one that best fits all our considered convictions on reflection and organizes them into a coherent view."²⁰⁴ According to Rawls, however, this can only happen if two things occur. First, societies must recognize their obligation to develop a concept of social justice which avoids (whenever possible) morally arbitrary social inequities within the institutions they create. Second, societies must

²⁰² Ibid.

²⁰³ John Rawls, (1985) "Justice as Fairness: Political not Metaphysical," in *Philosophy and Public Affairs* 14 (3): 223-251.

²⁰⁴ Rawls (2001), 31.

determine what the most reasonable political institutions and policies will be through public justification, so that each individual recognizes, and accepts, these institutions and policies to be the best ones available to them:

Public justification is not simply valid reasoning, but argument addressed to others: it proceeds correctly from premises we accept and think others could reasonably accept to conclusions we think they could reasonably accept.²⁰⁵

For Rawls, public justification is the best method to resolve, or at least to sort out, the inevitable disagreements which will arise when individuals try to coordinate their behaviour for mutual advantage. By appealing to the need for each individual to have at least a minimally good life, Rawls can importantly recommend this notion of public justification to ensure just and fair principles and policies, and to ensure that these principles and policies are realized through reason, not coercion or force.

In the case of the basic structure of society, for example, Rawls confidently asserts that most individuals would accept as political essentials those rights listed in a document like the *International Covenant on Civil and Political Rights* (ICCPR) – essentials like accountable political processes and institutions, basic civil rights and liberties, freedom of thought and conscience, and personal security. He asserts this because he believes that any reasonable individual will recognize that there are certain common political essentials which must be in place to have at least a minimally decent society. To this, Rawls also confidently asserts that most individuals will agree to a minimum set of social essentials like those listed

²⁰⁵ Rawls (1997).

in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) – essentials like freedom from discrimination, an adequate standard of living, health care, and basic primary education. He asserts this because he believes that any reasonable individual will not be willing to risk themselves not having at least a basic minimum set of social essentials or primary goods from which to pursue freely the things in life they wish to pursue.²⁰⁶

To endorse the so-called negative rights listed in the ICCPR, it seems intuitively correct to endorse Rawls' confidence that most individuals would be willing to accept these rights and liberties, granted other individuals do the same. Moreover, as Chapter 1 suggested, to endorse a protected sphere which can grant all individuals personal freedom and autonomy to make choices about what is in their own personal best interest, typically, only demands that others not interfere with those choices. In the case of the economic, social and cultural rights listed in the ICESCR, on the other hand, this Rawlsian confidence seems more problematic. To endorse the so-called positive rights listed in this document is to endorse a commitment to an unconditional provision of the concrete benefits necessary to live a minimally decent life. And, according to Brian Orend for example, it is this *requirement of provision* which leaves many sceptical about both the concept, and the cost, of socio-economic rights.²⁰⁷ Given that education is usually taken to be such a positive socio-economic right, the next section considers if a Rawlsian understanding of social institutions,

²⁰⁶ Orend (2002): 82-87.

²⁰⁷ Brian Orend, "Justifying Socioeconomic Rights," chapter 1 in Rhoda E. Howard-Hassmann and Claude E. Welch Jr. (eds.) *Economic Rights in Canada and the United States* (Philadelphia: University of Pennsylvania Press, 2006).

and the role education plays within these institutions, and within our understanding of the good life, can provide sufficient justification for the UN claim that education is a fundamental human right despite this requirement of provision and its associated costs.

3.3. Is The Claim To A Right To Education Reasonable?

According to Rawls, everyone has both the *capacity for a sense of justice* and the *capacity for a conception of the good*. Rawls argues that, if a society treats all individuals as free and equal citizens, and establishes a basic structure built upon the principles of justice as fairness, they can use these capacities for mutual advantage to create a social infrastructure which can produce social benefits for everyone, and which can manage those benefits in a fair and equitable way. Rawls takes this to be the most reasonable model for the basic structure of society because, not only can such a model provide individuals with greater opportunities for a meaningful life, but such a model can provide societies with greater opportunities for ongoing prosperity and permanence as well.

But, Benjamin Barber, for example, criticized Rawls and this desire to defend a model which encourages both personal ambition and social benevolence.²⁰⁸ For Barber, this blending of what he takes to be contrary ideals makes the Rawlsian theory of justice untenable, rather than reasonable. In response to this criticism, however, Rawls does provide one potential method for dealing with this seemingly noticeable incongruity. According to Rawls, his desire to blend ambition with benevolence is only untenable if one assumes that

²⁰⁸ Benjamin Barber, (1975) "Review: Justifying Justice: Problems of Psychology, Measurement, and Politics in Rawls," in *The American Political Science Review* 69 (2): 663-674.

individuals will come to mutually beneficial social arrangements spontaneously. Rawls recommends instead that, while the capacity for social justice may be inherent to everyone (and clearly there are many outstanding examples of altruistic individuals who place the greater good of society before their own immediate needs), it is something which requires development, development which must come from education and experience. That is, “acquaintance with and participation in that public culture is one way citizens learn to conceive of themselves as free and equal, a conception which, if left to their own reflections, they would most likely never form, must less accept and desire to realize.”²⁰⁹

For Rawls then, to maintain a fair system of social cooperation from one generation to the next, children must be seen as ‘prospective citizens’ in training, and their education must reflect and encourage the ideals of political justice. Rawls supports this need for formal education because he argues that only a public system of education can enable a child to develop both her own sense of worth and her own sense of citizenship. And so, Rawls recommends:

The value of education should not be assessed solely in terms of economic efficiency and social welfare. Equally if not more important is the role of education in enabling a person to enjoy the culture of his society and to take part in its affairs, and in this way to provide for each individual a secure sense of his worth.²¹⁰

Rawls concludes that a societal focus on education can lead to the obvious benefits of economic efficiency and improvements in social welfare. More importantly, however, he

²⁰⁹ Rawls (2001), 56.

²¹⁰ Rawls (1971), 87.

argues education can enable a person to enjoy and to participate in the culture of her society as well. Ultimately, however, a societal focus on education can lead to the main benefit which Rawls suggests can be derived from participating in a public system of education – the ability to coordinate with others for mutual social advantage.

While the Rawlsian emphasis on the importance of education may deal with how to develop citizens who are both ambitious and benevolent, and, in so doing, answer Barber's criticism, we might ask: does this provision leave Rawls with a different problem – namely, an ongoing commitment to social indoctrination? Recall from Chapter 2, that the liberationist and the libertarian acknowledge that a socio-economic right, like the right to education, is nice to have when there is a feasible infrastructure to support it but, as a fundamental, publicly-administered right, it is both economically prohibitive and inherently unwise – especially if the motivation for claiming this is to create future *citizens*. For these critics, not only is a free public system of education expensive, but also a compulsory system of public education indoctrinates children into a particular system of thought with little room for choice, and the desire to grant the same opportunities to all leaves little room for excellence. Given such scepticism, how can Rawls maintain that, not only is education a public good, but basic primary education is a fundamental public good which should be provided to all children? Is Rawls correct to claim that this is the most reasonable understanding of the role which education should play within the basic structure of society, given the inevitable costs (social and economic) that such a role will entail?

To answer this question, it seems prudent to begin by suggesting that the liberationist's belief that children should be allowed to direct and support their own education is, at the least, incomplete. Granting complete autonomy rights to children fails to account for the fact that children are inherently unable to provide for their own formal education (at least at the basic primary level). With this in mind, it seems that the protectionist's assertion that, there is a responsibility on the part of someone else to bear the burden of this right which children are not capable of fulfilling themselves, seems correct. Thus, the opponent of the claim to a publicly directed and funded system of education should, at least, be willing to acknowledge there is a duty on the part of someone else to fulfill the child's need for an education. Of course, such an acknowledgement fails to support the further claim that this responsibility should be realized through a public institution (as the libertarian has so forcefully asserted). Thus, to understand why a publicly directed and funded system of education is the most reasonable model, it is important to consider further the concept of the duties correlative to the realization of a child's right to education.

In Chapter 2, it was suggested that the protectionist offers a reasoned and reflective understanding of the obligations which adults have to care for and protect children. O'Neill and Purdy, suggest that it is the responsibility of adults to provide things like education for children. O'Neill and Purdy also recommend that, while children are entitled to certain positive rights, like the right to education, it is the obligations adults have with regard to these rights that ultimately ensure that children are able to fulfill their entitlements. From a strictly pragmatic point of view, this notion of obligation which ties children's rights to what

the protectionist takes to be the more fundamental obligations of adults, seems correct because children, especially young children, are dependent on adults for their care and for their education. And as Rawls has noted, it is necessary to have a public system of education to ensure that children develop the skills and knowledge to participate effectively in society.²¹¹ As society's future citizens, however, Rawls also notes that children have basic rights which impose constraints even on the family to act in such a way as to respect and fulfill those rights. To establish that the claim to a system of public education is the most reasonable claim, then, a broader understanding of both the rights children have *and* the duties adults have toward those rights is required. And, as mentioned in Chapter 2, this is a notion that both O'Neill and Purdy do recognize, despite the fact that they are reluctant to acknowledge children as independent rights-holders.

As this chapter has already outlined, according to Rawls, the most important duty we have is to protect and promote the rights of all individuals to social institutions which are just. According to Rawls, this is achieved by first complying with and actively participating in public institutions, including one dedicated to education, which takes this into account. Beyond this, Rawls adds that we also have a duty to support, when it is feasible to do so, the institutional reforms necessary to bring about justice as fairness. It is not the institutions which create the rights (as O'Neill for example contends), it is the fact that human beings have certain unchallengeable rights that enables us to coordinate for mutual advantage to create social institutions. For Rawls, a public system of education is the most reasonable role

²¹¹ Rawls (1997).

for education to play within society because it recognizes both the inherent rights children have to live a life of meaning, and the obligations others have (including children themselves) to fulfill those rights and to ensure that through their fulfillment, society as a whole benefits.

Recall from Chapter 2 that Joel Feinberg supports the claim to education as a fundamental right by pointing out that rights are not meant to be divisive devices necessary to protect the “demands for things the claimant desires.”²¹² Rather, according to Feinberg “rights give us *control* over other parties’ duties to us and (sometimes) over their duties to third parties.”²¹³ According to Feinberg, it is important for children to have an acknowledged ‘anticipatory autonomy right’ like the right to education, so that children can control (even indirectly through concerned secondary parties), the kind of education to which they should be exposed, to maintain an open door to their future.

With this in mind, John Rawls, Joel Feinberg²¹⁴ and James Nickel²¹⁵ all recommend that the claim to public education is the most reasonable claim, because it addresses the needs of children, both as dependents and as “potentially rational and autonomous creatures whose potentials need to be developed through education.”²¹⁶ For Rawls, Feinberg and Nickel, rights must be seen as both *claims to* some benefit or freedom, and *claims against* some

²¹² Feinberg (1992).

²¹³ Ibid.

²¹⁴ Joel Feinberg, (1992) “The Social Importance of Moral Rights,” in *Philosophical Perspectives* 6 (Ethics): 175-198.

²¹⁵ James Nickel (1993) “How Human Rights Generate Duties to Protect and Provide,” in *Human Rights Quarterly* 15 (1): 77-86

²¹⁶ James Nickel (1982) “Equal Respect and Human Rights,” in *Human Rights Quarterly* 4 (1): 76-93.

agent to act, so as to make available a particular benefit or freedom. And, according to Nickel, it is reasonable to claim a right to education provided this claim is focused on, and limited to, the fulfillment of educational essentials like “literacy, numeracy, and preparation for social participation, citizenship, and economic activity.”²¹⁷ Thus, the burden of the requirement of provision often associated with education becomes an exaggerated claim, provided the requirements for the fulfillment of a child’s basic right to education are not too demanding, economically or socially. After all, many countries prioritize military expenditures which far exceed any costs which may be entailed by the provision of appropriate educational resources necessary for basic literacy, numeracy and socialization. If one considers the difference between societies which only focus on the requirements of survival, and those which broaden this focus to include the minimum requirements necessary to lead a life of meaning, it is easy to support at least the claim to basic primary public education. Clearly, the ability to read, write and socialize provide many significant and essential personal and social benefits for both children and society. Furthermore, as Nickel has pointed out, it is often the case that critics of publicly directed and funded basic primary education assert that providing education for all is too onerous because these critics only see the child’s claim as a *claim to* education. Nickel contends, however, if the child’s claim to education is considered to be both a *claim to* education, and a *claim against* some agent to act, so as to make available an education, then it is difficult to deny that there is an obligation to respond appropriately to this claim. For Nickel:

²¹⁷ James Nickel, *Making Sense of Human Rights* 2nd edition (Malden, MA: Blackwell Publishing, 2006).

Advocates and theorists of human rights have spent plenty of time defending the claims-to that human rights contain, but have devoted much less effort to developing accounts of claims-against. This is not surprising since dealing with the duty side is harder and less fun. It is harder because general duties are more difficult to justify than claims about the moral value of something. And it is less fun because it deals with the production rather than the consumption side of rights, the side where people bear burdens rather than receive liberties, protections, or benefits.²¹⁸

These burdens which Nickel refers to, however, are not the onerous burdens that have been suggested historically as a reason for neglecting certain socio-economic rights. As Brian Orend has commented, the costs associated with human rights are costs which we cannot reasonably avoid – “rights, to be made real, cost real time, effort and resources.”²¹⁹ And, as Nickel has highlighted, education is not one of the most expensive rights from which societies can choose to support, but it is one of the most essential.

For Rawls, Feinberg and Nickel, then, one reason to support the claim to education as a reasonable claim is the idea that adults have certain duties which they must fulfill on behalf of children to compensate for their inherent vulnerability. A second reason to support this claim as a reasonable one is the idea that particular adults (parents/educators) and institutions (publicly directed and funded elementary schools), have duties which they must fulfill on behalf of children to satisfy societal demands, and to foster societal cooperation. Most importantly, however, according to Feinberg and Nickel, echoing Rawls, the claim is a reasonable one because all children have rights to certain fundamental social and political essentials (including education) necessary for them to have a meaningful life. Moreover, for

²¹⁸ Nickel (1993).

²¹⁹ Brian Orend (2006), 12.

Feinberg and Nickel, as for Rawls, the claim is a reasonable one because there is a social obligation to ensure that these rights can be realized through fair and just social cooperation, and not simply through the caring actions of the benevolent, or the coercive actions of the powerful. Children are dependents, and educating children entails certain unavoidable costs, both economic and social, but, as this chapter has demonstrated, these costs do not negate the rights which children have to an education. Moreover, these costs should not be used to diminish, or somehow to downgrade, the claim to a fundamental right to basic primary education.

To conclude this chapter, a Rawlsian framework recognizes basic primary education as the necessary link to increasing individual functioning and contentment within society. If individuals are happier and more able to interact socially, not only are their lives more meaningful, but society in general is more productive and more connected. To suggest that the cost of providing free and compulsory basic primary public education is too onerous is *to fail to recognize* these benefits and the role education should play in society. Moreover, it fails to recognize that, for certain social benefits to exist, they must be integrated with both a fair system of social cooperation *and* a publicly directed and funded system of basic primary education. Instead of asking if we can afford to provide basic primary education as a free and compulsory public good and service, we should be asking *can we afford not to* – a question which the next chapter considers further.

While a Rawlsian understanding of the role of education in society provides a justifying framework for establishing education as a public good, it fails to provide a

satisfying justification for why society in general should actively support the millennium development goal to achieve free and universal basic primary education *for all* by 2015. The next chapter considers how Thomas Pogge applies the Rawlsian conception of a just society to a *global* institutional framework to determine what the most reasonable role education should play in *every* society, not just a developed Western democracy.

Chapter 4

Pogge's Challenge to Social Institutions

Thomas Pogge, like John Rawls, is interested in analyzing social institutions. More specifically, Pogge is interested in establishing how such an analysis can be used to support cooperative social institutions, and to justify the need for reform when these institutions are demonstrably unjust. To do this Pogge recommends that it would be beneficial to adapt Rawls' theory of justice to the complexities of the real world – the real world, which is interconnected and global in scope.²²⁰ Pogge chooses to adapt the Rawlsian theory of justice in this way because, while he is in favour of Rawls' account of our natural duty to remove injustice through institutional reform, he also wants to question how far our moral concern for social institutions should extend.²²¹ That is, like Rawls, Pogge is interested in how we should assess the institutional framework necessary to provide and manage the primary goods and services which result from social cooperation. Further to this, however, Pogge is also interested in reflecting on this from a global human rights point of view. Given that the Millennium Development Goal (MDG) to achieve basic primary education for all is also a goal which is global in scope, this chapter considers Pogge's rights-respecting model, to reflect upon whether the MDG to achieve free and universal basic primary education for all by 2015 is a reasonable and justified goal.

²²⁰ Thomas Pogge, (1988) "Rawls and Global Justice," in *Canadian Journal of Philosophy* 18 (2): 227-256.

²²¹ Thomas Pogge, (1994a) "An Egalitarian Law of Peoples," in *Philosophy and Public Affairs* 23 (3): 195-224.

It is important to note that Pogge is most interested in how to achieve *another* MDG,²²² one which focuses on the important and worthwhile task of cutting the world's extreme poverty in half by 2015. Given such a focus, Pogge is often more 'silent' than Rawls on the topic of education specifically. Nonetheless, this silence is not an indication that education is not relevant to Pogge's research, nor does it indicate that Pogge's research is not relevant to our understanding of the role which education should play within society. While Pogge's desire to reform unjust social institutions is not explicitly aimed in the first instance at the institution of education, clearly his overall approach is germane in this regard.

With this in mind, section 4.1 begins with Thomas Pogge's conception of human rights as moral human rights. This is followed in section 4.2 by a clarification of Pogge's conception and analysis of social institutions. These Poggeian distinctions will be used to understand his unique approach to human rights, which builds upon the concept of Rawlsian reflective equilibrium to combine the *libertarian* desire to limit rights discourse to negative rights alone, with the *protectionist* desire to secure positive rights for all. Further to this, section 4.3 considers why it is important for Pogge to suggest that, with regard to the institutional reform necessary to achieve the MDG to eradicate poverty, we all have to recognize our responsibility to fulfill our *negative* duty of justice to ensure that the social institutions, in which we participate, are just. This chapter concludes by considering how the

²²² Thomas Pogge, (2004b) "The First United Nations Millennium Development Goal: A Cause for Celebration?" in *Journal of Human Development* 5 (3): 377-397.

second MDG of achieving free, and compulsory, basic primary public education for all by 2015 nicely complements Pogge's desire to fulfill the first MDG aimed at world poverty.

4.1. Moral Human Rights

In his book *Making Sense of Human Rights*²²³ James Nickel suggests that our current understanding of human rights is the result of the natural progression from the domain of theologians to the domain of philosophers and, finally, to the domain of lawyers and politicians. This is so, according to Nickel, because a claim to a human right is a specific stipulation about what is, and is not, permissible within a given society or within a given legal framework. Further to this, Nickel contends that, for such a claim to be enforceable, it cannot be tied abstractly to some vague characteristic of human nature or divine law but must be tied to minimum standards for the concrete evaluation of legal and political norms.

After World War II, the UN established an international political movement to create laws to govern the unjust actions of nation-states and to provide a mechanism, namely human rights, for individuals to be able to make claims against these unjust actions. For Nickel, this “political project, embodied in the contemporary human rights movement, aspires to formulate and enforce international norms that will prevent governments from doing horrible things to their people and thereby promote international peace and security.”²²⁴ As mentioned in the summary of the creation of the UDHR in chapter 1, the UN created the UDHR as a human rights instrument designed to provide a standard against which the actions of

²²³ Nickel (2006).

²²⁴ Ibid, 7.

individual countries could, and can still, be held to account. Nevertheless, Thomas Pogge has also pointed out that, beyond these legal and political instruments, it “has come to be widely acknowledged that there are also moral human rights, whose validity is independent of any and all governmental bodies.”²²⁵

According to Pogge, while Nickel is not incorrect to suggest that the creation of positive law can support the realization of human rights, this legal compulsion will be valid only if respect is given to moral human rights as well – only if, so to speak, the legal lines up with the moral. Pogge goes further, to suggest that the very phrase ‘internationally recognized human rights’ indicates this extra-legal sense of rights, which exist even outside of the UN’s framework for human rights law. This section focuses on this clarification, which Pogge makes regarding the important distinction that can, and should, be made between moral human rights and legal human rights.

What does it mean for a human right to be *moral*? According to Pogge, to establish an internationally acceptable conception of human rights, including a universally acceptable conception of the right to education, “we should conceive human rights primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions.”²²⁶ He does not deny the importance of the legal rights and enforceable obligations to which Nickel refers, but Pogge recommends that even “human-rights lawyers can acknowledge that the legal rights and obligations they draft and interpret are meant to

²²⁵ Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge: Polity Press, 2002), 52.

²²⁶ *Ibid.*, 45.

give effect to preexisting moral rights.’²²⁷ The importance of recognizing this for Pogge is not to chart a change within rights discourse – as Nickel does – it is to establish common links and ideas among the three concepts of natural law, natural rights and human rights, and to establish how these commonalities have contributed to our understanding of the moral notion of human rights. Pogge claims that, while it is noteworthy that the idea of natural law progressed to the idea of natural rights, which progressed again to the idea of human rights, what is more important is that each of these ideas shares some key concepts regarding the nature of moral claims and social interaction. Among these is the idea that we stand in a certain moral relation to each other – a relation which is outside of any societal structure in which we may find ourselves – which make human rights claims unique and universal.

This is an important distinction for Pogge because he believes that, if the legal dimension of human rights is emphasized over this moral dimension at least two complications will occur. First, Pogge contends that it is often possible to realize one’s human rights without the need to appeal to legal support to do so.²²⁸ For example, Pogge suggests that if an individual is able to satisfy his or her nutritional requirements independently, then his or her human right to an adequate supply of food has been satisfied without the additional need to call upon legal support to do so. It may be the case that the social structure is already set up to recognize and support the particular human rights of its members through a system of mutually beneficial social cooperation. Stressing the need to

²²⁷ Ibid, 53.

²²⁸ Ibid, 45.

legalize these rights, in a society where individuals can already freely access these rights, is not only an additional step that is unnecessary for that society (except maybe for the lawyers), but can be potentially damaging as well, by establishing the need for costly bureaucracies and, in general, wasting resources on things which have already been established and enjoyed.

The other complication, according to Pogge, occurs when a country drafts a trophy constitution that highlights all of the legal rights citizens are entitled to claim, but fails to enable all citizens actually to realize them – a complication Pogge extends even to countries which have established constitutions but fail to address the rights of all citizens within their borders.²²⁹ For example, it is often the case that countries have elaborate constitutions, outlining the details of the rights and benefits to which the country's citizens are entitled, but these countries fail either to enforce these rights or to include those members who exist on the social periphery. In the case of educational laws, for example, Katarina Tomaševski, whose work will be discussed in detail in chapter 7, is driven by the fact that there are many cases where children are said to 'have' an education but the particular educational experience they are exposed to actually violates their human rights.

An example, from Canadian history, is those Aboriginal children who were forced to give up their native language and culture to attend compulsory mainstream public schools.²³⁰

²²⁹ Ibid, 45.

²³⁰ Gregory Dickinson, (2004) "The Right to Education in Canada," in *International Journal for Education Law and Policy* 1 (1-2, special conference edition). See also Pamela O'Connor, (2000) "Squaring the Circle: How Canada is Dealing with the Legacy of its Indian Residential Schools Experiment," in *Australian Journal of Human Rights* 9. See also, James Rodger Miller, (1987) "The Irony of Residential Schooling," in *Canadian Journal of Native Education* 14 (2): 3-14 and James Rodger Miller, *Shingwauk's Vision: A*

According to the *Report of the Royal Commission on Aboriginal Peoples*, it was believed that Aboriginal children could benefit from these ‘residential schools’ because it was deemed that public education held the greatest promise for nation-building. According to this Report, the minister of Indian affairs, Frank Oliver, predicted in 1908 that education could “elevate the Indian from his condition of savagery and make him a self-supporting member of the state, and eventually a citizen in good standing.”²³¹ At the time, the government of Canada believed (or at least espoused) that by providing Aboriginal children with access to a residential school experience, not only would it be possible to build a stable and united nation, it would be possible to provide Aboriginal children with the ‘same’ educational opportunities as all Canadian children. Unfortunately, however, as the Royal Commission was to uncover, these well-meaning intentions to provide Aboriginal children with an education were built upon four false assumptions – namely that:

1. Aboriginals were believed to be inherently inferior and incapable of self-government;
2. Treaties were seen merely as bureaucratic memoranda of understanding, to be formally acknowledged but frequently ignored;
3. Wardship was appropriate for Aboriginals, so consent was not always necessary;
4. The concept of development could be defined by non-Aboriginal values alone.²³²

History of Canadian Residential Schools (Toronto: University of Toronto Press, 1996).

²³¹ Indian and Northern Affairs Canada, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996). Available online at http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html

²³² Nevertheless, with this unfortunate revelation, came some important recommendations for dramatic change, including most notably the elimination of the residential school program (with the last federally run residential school closing in 1996). For more, see Indian and Northern Affairs Canada, *Backgrounder: The Residential School System, An Historical Overview*. Available online at http://www.ainc-inac.gc.ca/gs/schl_e.html

For both Pogge and Tomasevski, the significance of the human rights movement is severely threatened by the fact that assumptions such as these – made in the name of human rights – are both possible and real.

With these complications and false assumptions in mind, Pogge recommends that a human rights claim must not be exclusively limited to regulatory devices aimed at the actions of government officials to prevent them from doing horrible things to their people. Instead, human rights claims should be viewed as ethical guidelines aimed at the actions of all members of a society to monitor the design of the basic social structure in which all members participate.²³³ Moreover, according to Pogge, they should be ethical guidelines which can fulfill both Article 25 and Article 28 of the UDHR specifically. Article 25 stipulates: *Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.* Article 28 stipulates: *Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.*

In light of this, Pogge suggests that, for a claim to be a human rights claim, it must be a *vital concern* relevant to humans, to *all and only* humans, and must be *sufficient to outweigh other concerns* which may also require action. In addition to the obvious stipulation that human rights are rights for humans, Pogge suggests that, if a claim is identified as a human right, then it is a claim that everyone should be able to make regardless of their

²³³ Pogge (2002), 47.

economic or social status. The external attachments, group memberships, or social conventions to which an individual belongs should have no bearing on the ability of that individual to make a human rights claim. Not wanting to establish an absolutely egalitarian understanding of human rights, however, Pogge suggests further that he does not mean to exclude certain *permissible* biases. That is, while it is important to the concept of human rights that we should treat everyone with equal consideration, it is also permissible, for example, for an adult to respect the rights of all children while at the same time expressing greater partiality toward her own children.²³⁴ This partiality, however, is limited in that Pogge also recommends that, for a claim to be a human rights claim, it cannot be driven by particular moments in time, or by particular cultures or traditions. Moreover, human rights must be broadly understandable and applicable. Parochial and narrow-minded approaches to social interaction would fail to meet Pogge's criterion.²³⁵ For Pogge, then, human rights are not about fairness of treatment and consideration exclusively, nor are they about designing a specific way of life for all of humanity. Pogge's realistically utopian approach to human rights represents a dynamic plan for the establishment of "a *single, universal* criterion of justice which all persons and peoples can accept as the basis for moral judgments about the global order and about other social institutions with substantial international causal effects."²³⁶

²³⁴ Thomas Pogge (2000) "The International Significance of Human Rights," in *The Journal of Ethics* 4:45-69, his reference to permissible partiality can be found in footnote 1.

²³⁵ Pogge (2002), in particular chapter 2 "How Should Human Rights be Conceived?"

²³⁶ *Ibid*, 33.

In a desire to avoid the uncontrolled individualism which critics correctly charge some rights advocates with, Pogge is also careful to highlight what he claims is the ‘official’ nature of human rights. Where the liberationist in chapter 2, for example, was interested in simply securing equal rights for all to enable all individuals, including children, to be completely free to govern their own lives, Pogge is interested in establishing a criterion of social justice, which confirms the need for equal consideration *within a reasonable social context*. More specifically, for Pogge, human rights claims are ethical guidelines aimed at the actions of all members of a society to monitor the design of basic social institutions, and to protect all members from arbitrary violations as a result of the actions of others within that basic structure. According to Pogge, however, we do not classify every unjust action as a human rights violation. To claim that your human rights have been violated is a special and especially serious claim which should be reserved for certain specific kinds of unjust actions.

One example that Pogge offers is the important distinction between having one’s car arbitrarily stolen and having one’s car arbitrarily stolen by one’s own government.²³⁷ According to Pogge, the first violation of one’s property, while unfortunate and a crime, does not qualify as a *human rights* violation. This kind of violation is simply a violation of the laws, which exist, in a given society for the protection of property. For such a violation, it is inappropriate to contact the UN to file a grievance. Usually, there are appropriate local and national legal remedies which must be exhausted before a human rights complainant can go to the UN to file a grievance. The second violation, on the other hand, represents a more

²³⁷ Ibid, 57.

substantial violation because the individual doing the violating is in a position of authority, a position granted under the assumption that, in return for that authority, certain protective measures will be in place.

In the interest of capturing a single, universal conception of social justice which can be accepted by all as the most reasonable foundation of the basic structure of society, Pogge suggests that only a concept of moral human rights makes sense. With this in mind, however, he also suggests²³⁸ a further, but related distinction which needs to be made – the distinction between an *interactional* approach and an *institutional* approach. The traditional interactional approach within political philosophy takes human rights as constraints on the conduct of individuals or collective agencies. According to Pogge, this is the wrong approach for meaningful social reform. He claims this to be so because an interactional account is concerned directly with the criterion of ethical conduct of individuals and collective agencies, rather than with the degree to which the social practices and institutions, in which those individuals find themselves, are just or unjust. By claiming a criterion of institutional justice instead, Pogge claims he is able to develop an approach that, while ultimately interested in the ethical conduct of individuals and collective agencies, pragmatically places the burden of human rights fulfillment on the design of the social institutions in which those individuals participate.

²³⁸ Thomas Pogge (1992b) “An Institutional Approach to Humanitarian Intervention,” in *Public Affairs Quarterly* 6 (1): 89-103. Also Thomas Pogge, “What is Global Justice?” in Andreas Follesdal and Thomas Pogge (eds.) *Real World Justice* (Berlin: Springer, 2005), 2-11 or online at <http://www.etikk.no/globaljustice/>.

Recall the desire to create, in the CRC, a document which avoids the divisive nature of negative and positive rights, in favour of a more inclusive language, which can be used to develop an understanding of what is needed for any child to have a decent standard of living. Recall also the Rawlsian desire to bridge this gap, through reflective public deliberation, between individuals who are both reasonable and rational. By focusing our moral judgments on shared social practices, rather than on individual ethical conduct as the proper content of human rights claims, Pogge also affirms a position between two extremes – between the libertarian account of negative rights and the welfarist or protectionist account of positive duties. When human rights are the focus of moral claims, Pogge recommends that the libertarian claim to negative rights can be *inappropriately minimal* because it allows us to ignore or disregard many human rights violations simply because our causal role in the establishment of those violations is not obvious.²³⁹ Similarly, Pogge recommends that the protectionist claim to positive duties can be *inappropriately burdensome* because it suggests that the affluent have an automatic responsibility to feed, save or rescue the impoverished, regardless of their causal role.²⁴⁰ Instead of linking his own view with either the libertarian or the protectionist, Pogge suggests that we need to recognize a manageable method to limit human rights claims while at the same time establishing a conception of human rights which is both meaningful and universal. The fact that an *exact* line cannot be established between the acts and omissions by which we should abide is unproblematic for Pogge. What is more

²³⁹ Pogge (2002), 66-67.

²⁴⁰ Thomas Pogge, (1992c) "O'Neill on Rights and Duties" a review of Onora O'Neill, *Constructions of Reason* in *Grazer Philosophische Studien* 43: 233-247.

important for Pogge is to come to an agreement regarding the nature of human rights and responsibilities which can sustain “a near-universal conviction that the detrimental relative impact of our acts is morally more significant than the (equal) detrimental relative impact of our omissions.”²⁴¹ With this in mind, Pogge defines human rights thusly:

Human rights are, then, moral claims on the organization of one’s society. However, since citizens are collectively responsible for their society’s organization and its resulting human-rights record, human rights ultimately make demands upon (especially the more influential) citizens. Persons share responsibility for official disrespect of human rights within any coercive institutional order they are involved in upholding.²⁴²

This institutional focus of Pogge’s builds upon his belief²⁴³ that we must begin with the recognition of the personal and ethical value of human life to establish a broad range of possible options for a minimally worthwhile life. He claims that it is natural for most individuals to want a moral point of comparison from which to assess the social situations in which we find ourselves. Moreover, he suggests that this moral point of comparison is necessary to build a social structure, which incorporates what he deems to be the most essential presuppositions of just social institutions – namely the need to establish the right of all to liberty of conscience and to political participation.²⁴⁴ If this foundation, which he refers to as the *formulation of an internationally acceptable core criterion of basic justice*,²⁴⁵ is taken as the most reasonable option, Pogge contends that other basic fundamental rights and

²⁴¹ Thomas Pogge, “Severe Poverty as a Human Rights Violation,” in Thomas Pogge, (ed.) *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007), 10.

²⁴² Pogge (2002), 64.

²⁴³ Which is broadly based on the same Kantian principles both Rawls and O’Neill follow as well.

²⁴⁴ Pogge (2002), 48-49.

²⁴⁵ Ibid, 48.

freedoms can be secured – like the right to education – to establish a viable human rights-respecting community.

Following Rawls, Pogge suggests that consideration needs to be given to the basic structure of a society to understand how the distribution of the fundamental rights and freedoms affects the ability of a society as a whole to determine the division of institutional advantages which result from social cooperation. Where Rawls included in his list of basic social goods things like basic rights and liberties, equality of opportunity, a minimal level of income and wealth, and the social bases of self-respect,²⁴⁶ Pogge suggests a similar set including physical integrity, subsistence supplies (food, shelter, health care), freedom of movement and action, basic education and economic participation.²⁴⁷ As mentioned in the previous chapter, Rawls stipulates that it is how a society distributes these basic primary goods which will determine how just the society is and what the chances are of its members realizing at least a minimum standard of living. Pogge carefully nuances this idea, however, to suggest that, although Rawls frames his work on the concept of distributive justice, designing institutions which respect human rights is not just about redistribution of goods and services within a closed national boundary.²⁴⁸ Pogge claims that the importance of this Rawlsian vision of a just society is its focus on a dynamic plan for the future. For Pogge, however, this plan must include three things.²⁴⁹

²⁴⁶ Rawls (1972), 54.

²⁴⁷ Pogge (2002), 49.

²⁴⁸ Thomas Pogge, *Realizing Rawls* (Ithaca: Cornell University Press, 1989)

²⁴⁹ Pogge (2002), 54-56.

First, it is important to recognize the Rawlsian idea that institutions should be responsible for maintaining the “fair value of political liberties”²⁵⁰ so that individuals who are similarly motivated and endowed can actively participate in, and appropriately influence, these institutions, and the social and political decisions which are made through these institutions. Pogge also suggests that it is important to recognize the Rawlsian notion that this should be based on first securing some advantages for the least well off. Most importantly for Pogge, however, it must also be based on a plausible conception of *global* justice, which is sensitive to *international* social and economic *inequalities*, as well as a reasonable assessment of how involved any individual’s moral concerns should be with regard to the nature of the institutions in which she participates. While he does not mention the relevance of education to this goal, it is reasonable to suppose that Pogge, like Rawls, assumes that at least a minimum level of basic primary education be made available for all. It is possible to make this assumption because Pogge recommends that:

We have gradually come to understand how deeply the structure of our society shapes our conduct – not merely by determining in large part a person’s menu of options and the various incentives and disincentives attached to them, but also by influencing rather profoundly what interests, desires, and abilities persons develop in the first place. Moreover, human lives are increasingly interdependent, affecting one another through highly complex networks of interrelations.²⁵¹

With this in mind, it is important to understand what Pogge means for something to be a social institution.

²⁵⁰ Ibid.

²⁵¹ Thomas Pogge, (1995) “Three Problems with Contractarian-Consequentialist Ways of Assessing Social Institutions,” in *Social Philosophy and Policy* 12 (2).

4.2. Just Social Institutions

For Pogge, social institutions are not specific corporations or agencies, rather they are social *systems* that have been designed to determine and deliver the appropriate level of goods or services deemed necessary, particularly by governing authorities, for the individuals within that society to carry out day-to-day activities and social interactions. He states:

Institutions are a social system's practices or 'rules of the game,' which govern interactions among (individual and collective) agents as well as their access to material resources. Institutions define and regulate property, the division of labor, sexual and kinship relations, control over and responsibility for children, as well as political and economic competition; and how they govern how collective projects are undertaken and executed, how conflicts are settled, and how social institutions themselves are created, revised, interpreted, and enforced.²⁵²

The most basic and fundamental of these institutions form the *basic structure*, or *institutional scheme*, of a society.

Further to this understanding of social institutions as social systems, Pogge suggests that it is important to distinguish between what he refers to as the 'ground rules' and the 'institutions'. The 'ground rules' are the official rules, or conduct-guiding codes of values, of a particular social system. They form the foundation for the entire system. The 'practices' or 'institutions', on the other hand, represent how these ground rules have been interpreted by and applied to a given society. To understand how a society has interpreted the ground rules, however, Pogge recommends that we have to do more than simply identify the basic structure of a given society. We have to understand the causal role that the basic structure

²⁵² Ibid, 241.

plays in determining whether an individual gets the objects of her vital needs, and we have to understand the implicit attitudes which make up the basic structure. With this in mind, Pogge carefully distinguishes between ethics and justice.

Pogge's conception of *ethics* is directed towards the traditional idea that ethics is the moral evaluation of the kind of life one should lead, or the kind of individual one should strive to be. His conception of *justice*, on the other hand, is directed towards the moral evaluation of the social institutions which inform and support human interaction. As already mentioned, Pogge favours a human rights discourse which emphasizes the moral nature of human rights but this emphasis is directed towards holistically evaluating social institutions, not towards judging individual acts.²⁵³ This is important for Pogge because he believes that *ultimately, it is the design of our social institutions which determine whether we get the objects of our vital needs or not.* For Pogge, the need to strive to be a virtuous person, or to strive to lead a virtuous life is secondary to striving to design and maintain just social practices. Pogge's interest in shared practice rests in his belief that "social arrangements tie their members together through normative expectations that are based upon special ties, including moral ties, which define special rights and obligations, powers and responsibilities"²⁵⁴ – an observation which has led Pogge to base his conception of moral human rights on the need to focus on the ethical nature of social practices, rather than on the ethical conduct of individuals.

²⁵³ Pogge (2002), 33.

²⁵⁴ Ibid, 76.

Pogge further divides his understanding of justice into passive and active justice. According to Pogge, when we analyze institutions to determine whether the prospective recipients are able to obtain the goods or services which a particular institution is responsible for producing or providing, we only gain insight into the *passive* justice of that institution. Pogge contends that, to develop an understanding of both the causal role that institutions play, and the implicit attitudes which are upheld in institutions, we need to look beyond the partial understanding of rights violations to be gained by analyzing a society's distributional scheme alone. To discern whether the institution itself is just or unjust, Pogge recommends instead that we should consider the *active* justice of a social institution.

Pogge has a concern that many people, especially the powerful, are not motivated to change unjust social institutions. They do not find it morally compelling. According to Pogge, a more comprehensive understanding of both the rules necessary to achieve the best distributional scheme of goods and services, and the harms in which we participate in imposing upon others, would provide a more promising alternative necessary to mitigate unjust social institutions.²⁵⁵ One advantage Pogge offers for adopting this active sense of justice is that it helps to clarify which potential causes of harm should be judged as just or unjust. Consider, for example, a murderer who is killed randomly by a tiger. Under a passive conception of justice, it is possible to claim that such an act is a just act. But, in reality, it should be viewed as neither a just nor an unjust act. While it is possible to describe the death

²⁵⁵ Thomas Pogge, "Relational Conceptions of Justice: Responsibilities for Health Outcomes," in Anand, Peter and Sen (eds.) *Health, Ethics, and Equity* (Oxford: Clarendon Press, 2003), 8.

as a tragic event, human hands did not cause the death, so it is not possible to classify it as a just act or just retribution for the crimes that the murderer committed; it is simply a random act of nature. *Only the foreseeable consequences of intentional human actions and practices can be labeled just or unjust.* Justice is (only) about our social world; it is not also about nature and the cosmos in general.

A more significant advantage which Pogge offers for adopting an active account of justice is the possibility to reflect more accurately upon who bears responsibility for human rights violations which, in turn, allows for a more dynamic understanding of the complex nature of the types of social interaction which led either to the protection of human rights or their violation. This is a consequence which he suggests supports his justification for why human rights violations should not be judged solely by the distribution of goods and services to which individuals have access within a society. Human rights violations should also be judged based on the positive relational opportunities which a society can, and should, afford to its members.

For Pogge the relational opportunities which social institutions are able to offer to their members are essential, not because he believes that social institutions necessarily shape us directly as a totalitarian state would, but because he believes that social institutions, regardless of the degree to which they have been liberalized, *exert profound influence over the social context* in which we find ourselves immersed. With this in mind, however, Pogge expresses two worries about social institutions.²⁵⁶ The first worry concerns cases where

²⁵⁶ Pogge (2002), chapter 3 “Loopholes in Morality”.

social institutions are entrenched but people still fail to get what they need, or that to which they are entitled. The second worry concerns the fact that, often, the traditional conception of social institutions, or the basic structure of a society, is confined to a view with closed or national boundaries. This is a conception which inadvertently causes some people to be unaware of the impact of their actions on others, leaving Pogge to conclude that some – many – individuals neglect their duty not to interfere with the choices of others. Pogge suggests that this occurs for a variety of reasons, but one of the most significant factors worth considering is the concept of moral loopholes, which Pogge suggests have been built into the basic structure of most societies.

According to Pogge, moral loopholes are commonplace within the existing social practices and institutions in which we currently participate. For example, it is ethically acceptable under many circumstances to choose to treat your *own* differently than how you would treat *others*. As already mentioned, Pogge himself suggests that certain permissible biases are acceptable to maintain a viable understanding of human rights to which universal, or at least near-universal, agreement can be attained. While group formation may be natural, and may provide people with a sense of belonging and value, the degrees of separation between the various groups also reinforce the distance between our moral concern for those who are in our direct vicinity, and those with whom we have no direct contact. We are at a distance from some people, and so we put them at a distance in our minds and concerns. But our actions can – especially in today’s globalized world – still impact upon these people. Pogge recommends that the only adequate method to deal with this natural tendency of

human thinking and of social institutions is to recognize that, while there are identifiable and important differences among social groupings, these differences are not absolute, nor are we so isolated that our actions within one social grouping do not affect another in some way.

To move beyond the customary notion of ‘us versus them’, Pogge recommends that we need to break up such traditional aggregates to determine whether social groupings are genuine or merely superficial. That is, whether they are social groupings which have unconsciously developed as a result of meaningful social interaction or whether they are social groupings which have been artificially forged or artificially maintained. Once such a determination can be made, according to Pogge, it is easier to reflect on the possibility that rights violations are not only about the unjust distribution of the goods and services which a society has to offer to its own members. Pogge recommends that we also need to reflect upon how we structure our social institutions and moral codes, and how that structure interferes with our ability, and the ability of others, to apply these codes in any effective, or rights-respecting, way. On Pogge’s account, it is no longer acceptable for countries to agree to disagree. The impoverished (and the illiterate and unschooled) masses of the world are entitled to have a proper justification for why human rights violations continue to be a problem for them.²⁵⁷ Moreover, those who participate in social institutions which cause such unjust effects have a duty both to understand the nature of their social interaction, and to participate actively in bringing about change in this regard.

²⁵⁷ Thomas Pogge (2000) “The International Significance of Human Rights,” in *The Journal of Ethics* 4:45-69.

Pogge suggests that we all have an obligation to recognize our negative duty of justice to refrain from upholding institutional structures which avoidably violate human rights. We have this obligation, according to Pogge, because “nearly half of all human beings alive today are living in severe poverty,”²⁵⁸ severe poverty which he believes to be in many cases the result of *avoidable* human rights violations. While it is important to recognize that Pogge acknowledges the need for broad-based philosophical reflection on what a conception of severe poverty entails, he often identifies people living in severe poverty as those who lack secure access to adequate quantities of basic necessities like food, shelter, and medical care. To alleviate such extreme poverty, he recommends better access to these basic necessities for everyone, but he makes this recommendation based on the further need to compel some morally, particularly socially influential individuals, to avoid thoughtless approval of the existing institutional schemes, which seem to perpetuate, not alleviate, global poverty. Of course, for Pogge, this is in the first instance an economic issue but, as the next chapter suggests, it is more deeply seen as an issue of weakness of will, and/or of a severe shortage of social or academic awareness. The next section considers what relevant connections can be made between the establishment of Pogge’s abstract institutional approach and the practical desire to meet the MDG to achieve free and universal, basic primary public education for all by 2015.

²⁵⁸ Pogge (2007).

4.3. What Role Can Education Play?

To recap, Pogge takes human rights to be ethical guidelines aimed at the actions of all members of a society to monitor the design of the basic social structure in which all members participate. He approaches human rights in this way because he believes that it is ultimately the design of social institutions which determine whether people get the objects of their vital needs or not. As mentioned in section 4.1, Pogge states that, “this institutional understanding can draw support from Article 28 of the UDHR.”²⁵⁹ He chooses to emphasize this particular article because, for Pogge, it is more than just a finite list of what human rights there are; it is a simple statement about the concept of human rights itself which clearly establishes who is entitled to claim human rights, what kinds of rights should be considered as legitimate entitlements, and how we can measure their success. Again, Article 28 of the UDHR states: *Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*

For Pogge, this simple statement includes four key ideas.²⁶⁰ First, Pogge endorses the reference in Article 28 to the UDHR itself, as a sufficient set of guidelines to assist us in understanding what it means for something to be a human right. He is not interested in establishing a definitive list of specific human rights, beyond what is found in the UDHR, because he is not so much interested in particular instances of human rights violations *per se*. Pogge is much more interested in (what he takes to be) the unique and universal moral

²⁵⁹ Pogge (2002), 64.

²⁶⁰ Thomas Pogge “Human Rights and Human Responsibilities,” in Pablo de Greiff and Ciaran Cronin (eds.) *Global Justice and Transnational Politics* (Cambridge, MA: MIT Press, 2002). Also Pogge (2002), 65.

relationships which we have with each other, and in the benefits which can be derived from those relationships when they thrive. Second, he suggests that Article 28 is careful to limit the scope around which any institutional structure should be organized. This article does not stipulate the need for absolute guarantees to human rights fulfillment; rather, it stipulates the need to recognize the rights and freedoms which *can* be fully realized. Moreover, he suggests that Article 28 indicates that any declaration that a particular institutional scheme is a human rights-respecting scheme should be recognized only when the human rights of *all* of its members have been realized – an idea which, according to Pogge, is only relevant if the further stipulation of Article 28 (that everyone is entitled to a rights-respecting social and international order) is not just realized but also *fulfilled*.

Pogge perceptively chooses to highlight this article because he advocates a universal, or near-universal, agreement that human rights are real and indivisible. Additionally, he advocates a conception of rights which is focused on the kind of rights that are not only essential to the survival and success of individuals, but also to the survival and success of societies. As already mentioned, Pogge chooses to combine the libertarian and the protectionist views to provide a more inclusive justification for the moral obligations we have to uphold regarding the protection of human rights. His interest in such a combined approach is not to present a utopian theory of ‘everything for everyone’; rather, he is most interested in establishing a more inclusive, morally compelling approach to human rights which neither demands individual rights at all costs nor demands responsibility for the provision of those rights at all costs. In so doing, Pogge wants to answer the question: “Have

we organized our moral commitments in a way that reflects, and helps effectively achieve, what by our own lights matters?”²⁶¹ Moreover, he fine-tunes this query further by also questioning: “Can the fact that a morality gives incentives toward regrettable conduct constitute at least some reason to revise this morality?”²⁶² Of course, his abstract interest in having a justification to revise ‘this morality that gives incentives toward regrettable conduct’ is rooted in his genuine interest in the need to engage the institutional reform necessary to achieve the first MDG to eradicate poverty. He suggests that to do this, however, we all have to recognize our responsibility to fulfill our negative duty of justice not to impose severe and preventable harms upon others.

Recall the distinction that was made in section 4.2 between what Pogge takes to be *the ground rules* of a society and what he takes to be a society’s *institutions*. The ground rules are the actual conduct-guiding codes, and the institutions represent how a society has interpreted these codes to varying degrees of consistency, success and sometimes perversion. Recall also that Pogge recognizes that, to bring about effective social change, there needs to be compelling reasons to do so. For Pogge, these reasons need to be *morally* compelling, since he is interested in legitimate and long-lasting social change, not social change by force or coercion. With this in mind, Pogge’s institutional approach seems to offer a significant development in both our understanding of what makes an institutional scheme one which is rights-respecting and in our understanding of who should be held accountable to ensure that

²⁶¹ Pogge (2002), 72.

²⁶² Ibid.

social institutions are set up to respect human rights and to limit, whenever possible, violations of those rights. Nonetheless, has Pogge assumed too much? By accepting the UDHR as a sufficient base, or a sufficient set of ground rules, from which to develop his own conception of human rights, has Pogge simply assumed a particular set of ground rules from which all societies are supposed to build their social infrastructure? While Pogge does of course include education within his list of basic social goods, without an understanding of the role which education can, and should, play in this regard, Pogge seems simply to assume that individuals will be engaged and motivated by the UDHR as it stands. The rest of this section considers how a more comprehensive understanding of the role which education plays in society can contribute to, and complement, Pogge's desire to establish mutually beneficial social institutions, and to modify those which are not.

The MDG to achieve free and universal primary public education for all complements Pogge's commitment to the kind of institutional reform necessary to eradicate poverty and transition to global justice, but advocates of this MDG take the additional step of looking to the contributions which all individuals can make, including children. At the Dakar World Education Forum in 2000, for example, individuals and agencies committed to achieving education for all (EFA) included in their framework for action the stipulation that:

Education is a fundamental human right. It is the key to sustainable development and peace and stability within and among countries, and thus an indispensable means for effective participation in the societies and economies of the twenty-first century, which are affected by rapid globalization. Achieving EFA goals should be postponed

no longer. The basic learning needs of all can and must be met as a matter of urgency.²⁶³

By recognizing that the basic learning needs of all must be met, supporters of EFA are not only suggesting that this stipulation is a matter of urgency for the needs and interests of children. They also make this suggestion in light of the kind of institutional reform to which Pogge refers. To achieve and maintain stable and cooperative social institutions, and to rectify those existing social institutions which seem merely to perpetuate social injustices, requires an unyielding commitment to the development, implementation and maintenance of every child's right to basic primary public education. Moreover, it requires a commitment to an education which will not only provide children with the basic skills of literacy and numeracy necessary to make something of themselves in the world, but a human rights-respecting education which will also enable children to make something of their citizenship. If Pogge's assertion that the institutions a society develops represent how a society has interpreted these codes, then the institution of education should reflect a rights-respecting foundation also.

For Pogge, rights-respecting institutional schemes are those which – among other things – allow all citizens to participate, at least to some proportional degree, in the social decision-making process, and that provide all citizens with secure access to certain necessary goods and services for those citizens to do this in a meaningful way. As in the case of the

²⁶³ Office of the Assistant Director-General for Education, "The Dakar Framework for Action, Education for All: Meeting our Collective Commitments" (France: UNESCO, 2000), 8. Available online at <http://unesdoc.unesco.org/images/0012/001211/121147e.pdf>.

CRC, and its desire to promote both the liberty and the welfare of children to enable them to develop and grow into rights-respecting adults, Pogge also recommends such an approach in the realization of just social institutions. To develop and maintain just social institutions, it is necessary for individuals to have the freedom to participate in the social decision-making process, and to have access to the necessary resources to be able to do this effectively. Not wanting to assume a position which recommends that it is possible to design social institutions in such a way that everyone affected by the institutions has absolutely guaranteed access to all of the goods and services which they want, Pogge is careful to qualify that he advocates a concept of secure access (to be discussed in a moment). An important qualification which seems to be missing, however, is the need to connect the desire to promote the liberty and welfare of children (as stipulated in the CRC) with that of adults. Why assume that each group belongs to its own unique world, with its own unique set of rights and responsibilities? Why not assume, instead, that there is a continuum of learning and experience which needs to develop gradually over time? Not only do individuals require the freedom to be able to participate in the social decision-making process, they require a free and compulsory system of basic education which can develop the skills and knowledge necessary to participate in and maintain those just social institutions.

With regards to secure access, on Pogge's account, a person has secure access to the objects of her rights based on the degree to which she is able to obtain the social goods and services which are most essential to her well-being. Recall his list of basic social goods, which included physical integrity, subsistence supplies (food, shelter, health care), freedom

of movement and action, basic education and economic participation. To this list, he is also careful to recommend that an institutional scheme should be assessed on the degree to which such social goods are *accessible*, not on the level of actual goods that an individual receives. Most importantly, for Pogge, “a person has secure access to the object of some human right only when she is not prevented by social obstacles from acquiring the knowledge and know-how necessary to secure this object for herself.”²⁶⁴ Clearly, Pogge is interested in how deficits in social goods should be measured, but he is not interested in all deficits, nor is he interested in all potential harms that an individual can experience. It would not be possible to imagine, outside of ideal theory, an institutional scheme which did not experience any deficits or harms whatsoever. With that being said, however, the key to Pogge’s institutional account is the need to measure *institutionally avoidable deficits* to determine whether what he refers to as ‘core injustices’ have occurred.

Depending on what the ground rules are, when a government official violates one of the main principles found within his or her country’s ground rules, individual citizens will likely experience harms against them. Likewise, when an individual is unable to obtain some good or service which that individual believes to be her entitlement, she will experience a violation of her personal well-being. A core injustice, however, occurs when some individuals neglect their negative duty of justice not to interfere with the choices of others, provided others do the same. To reiterate, according to Pogge, “human rights are not supposed to regulate what government officials must do or refrain from doing, but are to

²⁶⁴ Pogge (2000), 50.

govern how all of us together ought to design the basic rules of our common life.”²⁶⁵ For Pogge, the greatest injustice occurs when some individuals suffer from avoidable or foreseeable human rights violations. To prevent or at least alleviate core injustices, he suggests that it is necessary to accept that “human agents are not to collaborate in upholding a coercive institutional order that avoidably restricts the freedom of some so as to render their access to basic necessities insecure without compensating for their collaboration by protecting its victims or by working for its reform.”²⁶⁶ Pogge contends that, if more individuals (particularly those from the wealthy Western countries) recognize both the role which they play in contributing to core injustices and the role which they can play in alleviating these injustices, then achieving the MDG to cut the world’s poverty in half by 2015 will become a morally motivating goal worth attempting to achieve.

This focus on core injustices, however, address only the first stipulation which Pogge makes regarding the social obstacles which prevent an individual from obtaining secure access to the objects of her vital needs. To address the further stipulation which Pogge suggests, regarding the individual’s ability to acquire the knowledge and know-how necessary to secure these objects for herself, requires recognition of the need for free and compulsory basic primary public education. Most individuals, despite what the liberationist claims, are unable simply to figure everything out on their own – even Rousseau acknowledged this. To achieve the kind of social reform which Pogge deems to be necessary

²⁶⁵ Pogge (2002), 47.

²⁶⁶ Ibid, 70.

to alleviate world poverty requires *both* the economic infrastructure which Pogge emphasizes *and* an educational infrastructure which can prepare people for this task.

Of course, economic resources are essential, and Pogge's suggestion of a *Global Resources Dividend* (GRD) is intriguing. The GRD is a proposal by Pogge which posits that individual governments should not have absolute libertarian property entitlements to the natural resources which fall within their borders, because natural resources belong to the world in general, not to nation-states which have been artificially created over time. According to Pogge, since the resources belong to everyone, everyone should be entitled to share in the benefits which can be derived from these resources. To this effect, he recommends, all governments which would like to utilize or sell the natural resources from within their territory should be required to pay a small user fee, a user fee which would contribute to a global resource fund. Once established, this global resource fund could provide the global poor with a *dividend* or share representative of their own inalienable claim to a fair share of the economic benefits derived from the natural resources used. Nevertheless, even with this proposal for a GRD, Pogge himself expresses great concern over the traditional view which simply accepts the duty of the wealthy to deliver hand-outs to the needy.²⁶⁷ Providing individuals with a fair share of the natural resources which should be available to all is one contribution which can be made to enhancing the lives of individuals, especially those who are impoverished. *Providing a share of the knowledge-based resources*

²⁶⁷ Thomas Pogge, "A Global Resources Dividend," in David Crocker and Toby Linden (eds.) *Ethics of Consumption* (Tokowa, NJ: Roman and Littlefield, 1999).

which we have collectively been able to ascertain and use to our advantage, is another.

Therefore, Pogge's suggestion that we all have a responsibility to recognize our negative duty not to interfere with the choices of others should not be limited to economic choices alone.

According to Pogge, "fully one-third of all human beings still die from poverty-related causes,"²⁶⁸ a massive statistic, which Pogge suggests is at least diminishable, if not avoidable. The MDG to cut the world's poverty in half by 2015 represents the commitment of the UN to improve upon this statistic; Pogge urges that now it is important for everyone else to realize this commitment. While he recognizes that reducing severe poverty is not an easy goal, he suggests that it is a goal which is easier to achieve than reducing other sources of human misery (like violence due to military or despotic manoeuvres, for example). Why does he believe this to be the case, when it is possible to suggest that extreme poverty arises from a variety of sources which are inherent to each individual country, including civil strife, dictatorships, and poor governmental planning? It would be easy for a sceptic – especially one from a wealthy country, which is not suffering from extreme poverty – to question why his prosperity should be undercut to alleviate another country's internal difficulties.

In response to this, Pogge suggests that, while some extreme poverty is the result of internal impediments, it is possible to identify at least three major factors of note²⁶⁹ which international society as a whole has contributed to the problem of poverty. First, Pogge looks

²⁶⁸ Pogge (2002), 195.

²⁶⁹ Thomas Pogge (2001) "Priorities of Global Justice," in *Metaphilosophy* 32 (1/2): 6-24.

to the massive grievous wrongs, which multiple countries contributed to throughout history, like slavery, imperialism and genocide.²⁷⁰ Second, Pogge suggests that wealthy countries should be careful when they disown the problem of poverty without first considering that we all depend on a single natural resource base. While it may be profitable in the short term to use freely the resources from a needy or corrupt neighbour's country, sustainability should also be a consideration. Finally, Pogge suggests that we need to recognize that we coexist within a single global economic order. The social and economic transactions which we participate in on a daily basis have an impact which ripples throughout the entire world, a fact that is slowly becoming more apparent as advocates raise our awareness of issues such as child labour, global warming, extreme inequities between the global rich and the global poor and, of course extreme inequities between the literate and the non-literate children of the world.

With these factors in mind, Pogge concludes that there should be no further reason to deny the existence of the problem of poverty, and the role society as a whole plays in perpetuating this problem. The solution that he offers, however, is not to assert that we have a positive duty to do whatever is necessary to reduce extreme poverty. Nor is the solution to allow impoverished countries to demand just retributions from wealthy countries for all grievous harms which have ever been committed. The solution which Pogge offers is a pragmatic one which he believes morally compels those in positions of influence to look

²⁷⁰ Not only does Pogge suggest that these grievous wrongs contribute to direct harms to the individuals at the time of the crime, but also they continue to influence the well-being of the descendents of the victims through hereditary social and economic inequities.

beyond the status quo to initiate global institutional reforms, and to motivate those in positions of need to actively participate in this transition to global justice. As previously mentioned, however, one factor which Pogge fails to account for sufficiently is the role which education can and should play in positive global institutional reform necessary to at least partially alleviate the inequities which Pogge has so clearly highlighted.

According to Rhoda Howard-Hassmann, for example, the fact that “no international law obliged the West to protect human rights during its own era of economic expansion,”²⁷¹ can be interpreted both disapprovingly and constructively. Of course, the application (dominance) of Western norms upon much of the world has resulted in many grievous wrongs, including (most definitely) the ones to which Pogge refers. For Howard-Hassmann, however, this negative consequence has led to at least one positive consequence – namely the fact that not only has globalization sped up the process of capitalist expansion, globalization has led to a greater ability to resist the negative effects of capitalism. This is possible, according to Howard-Hassmann, because the process of globalization has enabled a ‘leapfrogging’ effect for human rights. According to Howard-Hassmann:

In the contemporary global society, oceans are crossed and centuries ignored as all sectors in the world engage in a giant debate about what human rights are or ought to be, what people from different parts of the world are entitled to, and who or what agencies are expected to respect or implement those rights. Over the Atlantic and Pacific Oceans, the Mediterranean and Black Seas, human rights leap from developed to underdeveloped regions. Over the centuries of the first Great Transformation, human rights leap to the Second Great Transformation. And as in the children’s game of leapfrog, the last are often the first.²⁷²

²⁷¹ Rhoda E. Howard-Hassmann, (2005) “The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization,” in *Human Rights Quarterly* 27 (1): 1-40.

²⁷² *Ibid*, 38.

Where Pogge correctly identifies the need for persons to share the responsibility for official disrespect of human rights within any coercive institutional order they are involved in upholding, Howard-Hassmann correctly identifies the need to recognize that this occurs both within trans-national institutions and corporations *and* in the form of ‘grass-roots globalization’. Pogge is correct to assert that the wealthy West should recognize and understand the impact that their actions have had on the both the world in general, and on the lives of those who inhabit this world. But, as Howard-Hassmann has pointed out, the world can also benefit from the networks and interrelationships which have resulted through this process of globalization – networks and interrelationships which in my view can be enhanced by advancements in rights-based educational reform.

In summary, Pogge’s institutional approach to the promotion and protection of human rights is both thorough and commendable. He provides a comprehensive explication for the need to reflect on both social institutions in general and on the specific causal effects which we bring to bear upon those social institutions in particular. He also provides a morally compelling justification for why we should make every effort to participate in, and to maintain, just social institutions, and what effect this kind of active justice-seeking participation can have on achieving the MDG to eradicate poverty. Moreover, Pogge’s conception of global social justice suitably addresses the concern raised in chapter 2, that, while it is important to understand the obligations we have towards others, such an understanding will only be applicable to all individuals, if there is also an understanding of why we have these obligations in the first place – namely an understanding of moral human

rights. Despite all that can be taken from the work of Pogge, he fails to provide an adequate account of how individuals, even influential ones, develop the capabilities to act on this knowledge. Rather than assuming that documents like the UDHR, and encouragement from ‘moral leaders’, can provide appropriate guidelines and models to assist us in this endeavor, this chapter has suggested the additional need to look to the structure of educational institutions to determine what having an education can contribute to our ability to create and sustain just social institutions.

Advocates of Education for All, recommend, first, the obvious need to secure the political will to bring about such reforms (as championed by Pogge), like securing full ratification of the CRC (including the US). They also recommend, however, that civil society should also be included as active, participating agents in these reforms. Such an approach requires a model for institutional reform which not only compels us to reflect upon the design of social institutions but which also compels us to reflect upon the capabilities that individuals have actually to contribute to just institutions. Before considering how the EFA has applied these ideas in practice, it is important first to consider the work of Amartya Sen. Sen, like Pogge, is interested in how to eradicate poverty, but he approaches this goal from the perspective of what individuals can do with the choices and resources that are available to them. He contends that while it is correct to have concern for how certain institutional structures can deprive individuals of their means to well-being, it is equally important to look to achieving certain levels of basic capabilities, below which people count as “scandalously

deprived.”²⁷³ Sen suggests that: “The capability of a person corresponds to the freedom a person has to lead one kind of life or another.”²⁷⁴ If Pogge is correct to suggest that individuals should, to the best of their ability, ‘(re)design’ institutions which avoidably fail to fulfill human rights, then it is important to understand how it is that individuals come to be capable of acting in this way. Pogge is correct to challenge our understanding of the basic structure of society and to highlight the impact social institutions have on individuals. Sen, however, is equally correct to challenge our understanding of human rights, to suggest that, “any affirmation of social responsibility that *replaces* individual responsibility cannot but be, to varying extents, counterproductive.”²⁷⁵ The next chapter considers Sen’s solution to this problem of counter-productivity which he bases on his belief that, to understand one’s capability to act in a certain way is to understand the difference between what an individual *values doing or being*, and what *capabilities or freedoms* an individual has to achieve what she values. Where Pogge under-develops the role which education can and should play in the design and maintenance of just social institutions, the next chapter will demonstrate how Sen’s capability theory nicely complements Pogge’s institutional theory. That is, the next chapter will demonstrate how Sen integrates the need for children to have secure access to basic rights (like education) for which Pogge has forcefully argued, with the need for children to have secure access to the kind of educational experiences which will enable them to act on these basic rights.

²⁷³ Amartya Sen, “Capability and Well-Being,” in Martha Nussbaum and Amartya Sen (eds.), *The Quality of Life* (Oxford: Clarendon Press, 1993).

²⁷⁴ *Ibid*, 3.

²⁷⁵ Amartya Sen, *Development as Freedom* (New York: Alfred A. Knopf, 1999), 283.

Chapter 5

Sen's Challenge to Human Rights

To realize the Millennium Development Goal to achieve free and compulsory basic primary public education for all, it has been suggested that at least two things need to occur. First, the right itself needs to be acknowledged as a right worthy of recognizing and supporting. That is, all rights have associated costs (even if they are minimal) which must be met for their realization. If a right is *real*, then the individuals, who have to bear the burden of the right, must be morally compelled to act in such a way as to enable the claimant to realize his or her claim. Second, for the right to be *meaningful* for the claimant, there needs to be a social context in which the claimant can do something with the right, once it has been obtained.

As the last chapter indicated, valuable insight is gained by considering the importance of social institutions and the role that these institutions can, and should, play in securing rights for individuals. Rawls and Pogge have substantial contributions to make to our contemporary understanding. In particular, their approach provides a greater understanding of the role which social institutions should play in the creation and maintenance of a basic social infrastructure which is both mutually beneficial and rights-respecting. With regard to the institution of education in particular, their approach provides general insight into why we should be morally moved to recognize and support the right of every child to an education as an essential element of the child's ability to develop both as an individual and as a member of a larger social whole. This chapter considers the work of another philosopher interested in

reforming social institutions, namely Nobel Laureate Amartya Sen, to address the further and more specific task of understanding the social context which is necessary to translate the abstract claim that a child has a right to education into a claim which is practically meaningful for every child.

Like Rawls and Pogge, Sen recommends that, “one of the characteristics of human agency is the ability to scrutinize and re-examine our values and priorities in the light of fresh information and new understanding. The process of institutional reform depends on such scrutiny and critique.”²⁷⁶ Where Pogge places the burden of institutional reform on *the obligation of some to achieve secure access for all* to a universal set of fundamental human rights, Sen recommends the additional stipulation that, while having these rights is essential to our well-being, they will only be effective in influencing our standard of living if individuals are in a position to do something with those rights. Thus, Sen’s focus is more on individual empowerment, as opposed to Pogge’s strategic plea to the powers-that-be.

For Sen, one’s level of poverty can be identified in more than one way – most obviously, through the assessment of one’s ability to secure basic necessities. Most important, though, is the assessment of *one’s ability to convert these necessities into meaningful action*. Sen’s approach looks beyond the question of whether or not we have fulfilled our duty not to interfere with the choices of others to consider whether the choices that people make are genuine choices, that is, choices which will enable them to achieve

²⁷⁶ Amartya Sen and Sudhir Anand, “Sustainable Human Development: Concepts and Priorities,” in *United Nations Development Programme* (Office of Development Studies, 1996), 25.

what they value. Sen claims that “a right gives a person a certain opportunity.”²⁷⁷

Importantly, he adds to this a caution: “A right may be of no use at all to a person for various reasons.”²⁷⁸ This chapter considers some of the reasons Sen offers for this distinction. In particular, section 5.1 considers Sen’s recommendation that, to understand the minimum standard of living below which no individual should have to exist, we need to look beyond rights, and beyond the provision of resources, to acknowledge that poverty is a much more complex notion of capability deprivation. That is, poverty is not just about rights violations and economic deprivations (as championed by Pogge), it is about any kind of deprivation which may stand in the way of an individual obtaining the things she both values and needs. By considering poverty in this way, it is possible to gain information which is intrinsically relevant to the realization of the two articles of the UDHR which Pogge has highlighted – Articles 25 and 28. Moreover, it is essential to understanding the inescapable connections between poverty and education. Thus, to implement fully a global human right to education, an understanding of what it means to be deprived of capabilities is essential.

Sen recommends that a broader understanding of the capabilities necessary to convert rights into something meaningful provides the appropriate metric from which to gain information about the fundamental rights and freedoms societies should support. Sen is careful to emphasize, however, that not being able to use effectively a right which someone has does not necessarily diminish the right itself; it merely points out that more careful

²⁷⁷ Amartya Sen (1992) “Minimal Liberty,” in *Economica*, new series 59 (234): 141.

²⁷⁸ *Ibid.*

reflection is required, either with regard to the nature of the right, or to the nature of the individual's particular situation.²⁷⁹ With this in mind, section 5.2 considers how a focus on human capabilities can influence not only whether someone has access to a particular set of rights, including a right to education, but whether those rights enable that individual to participate effectively within society – presumably the reason to want to recognize our rights in the first place.

While an understanding of whether an individual can convert her right to education into meaningful action is important and informative, it is also important to have an understanding of whether such an approach is sustainable. To this end, section 5.3 considers why the use of Sen's capability approach can provide the proper content to a rights-based theory like Pogge's, which not only allows for the effective realization of certain essential human rights, like the right to education, but which also allows for sustainable development of a rights-respecting social infrastructure.

5.1. Human Capabilities

Recall that Article 25 of the UDHR states *everyone has the right to a standard of living adequate for the health and well-being of himself and of his family*, and Article 28 states *everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized*. Recall as well that Pogge recommends that articles such as these become more plausible on his 'institutional

²⁷⁹ Amartya Sen (2004) "Elements of a Theory of Human Rights," in *Philosophy and Public Affairs* 32 (4): 320.

understanding' because he can avoid unwieldy claims to positive rights which everyone must somehow fulfill, while maintaining that "each member of society, according to his or her means, is to help bring about and sustain a social and economic order within which all have secure access to basic necessities."²⁸⁰ Moreover, he strengthens this claim further by suggesting that Article 28 in particular identifies:

The crucial human-rights-based responsibility in this world: the responsibility of the affluent states and their citizens for the global economic and political order they impose. This order is the key obstacle to the realization of human rights. Our preeminent moral task is to reshape this order so that all human beings have secure access to the basic goods they need to be full and respected members of their communities, societies, and of the wider world.²⁸¹

With this, Pogge presents a lucid and morally compelling justification for why we all have a responsibility to recognize and value certain fundamental human rights to which we are all entitled. Beyond this, however, it is necessary to give consideration to Sen's important caveat that we need to distinguish what we value doing or being from the capability or freedom which we have to achieve what we value.²⁸²

Sen's qualification is significant because it is important to understand that we are inescapably affected by the social, political and economic opportunities which are available to us, as Pogge has so eloquently articulated. To achieve the kind of institutional reform to which Pogge refers, however, an understanding of how human agency correlates with this

²⁸⁰ Pogge (2002), 69

²⁸¹ Thomas Pogge "Human Rights and Human Responsibilities," in Pablo de Greiff and Ciaran Cronin (eds.) *Global Justice and Transnational Politics* (Cambridge, MA: MIT Press, 2002).

²⁸² Amartya Sen, *Inequality Reexamined* (Cambridge MA: Harvard University Press, 1992), chapter 2.

institutional support is necessary. Where Pogge focuses on human rights and the effect realizing these rights can have on the standard of living which individuals can achieve, Sen carefully converts these rights into a notion of having capabilities to achieve personal well-being and human agency. If we have real opportunities, according to Sen, we can achieve certain *functionings* or *beings and doings* which we value (like being nourished, being educated, or being confident to participate actively in one's own social environment). Sen defines capability, then, as "the alternative combinations of functionings from which a person can choose. Thus, the notion of capability is essentially one of freedom – the range of options a person has in deciding what kind of life to lead."²⁸³ With Sen's definition of capabilities in mind, though, it is possible to suggest that having a certain amount of material resources available to you will also present you with certain freedoms from which to make life choices. What value is added by considering which *capabilities* an individual has over which *rights or resources* they have?

An emphasize on capabilities or open-ended freedoms, in this way is important because not only is it important for individuals to be able to achieve a certain level of well-being, it is important to be able to distinguish having a certain standard of living from the value which can be gained from achieving that standard. For example, Sen suggests that, if you consider two persons with identical functionings in a certain respect – they are both starving, say – the correct thing to do, if you are able, is to offer them some food. If, on the

²⁸³ Jean Drèze and Amartya Sen, *India: Economic Development and Social Opportunity* (Delhi: Oxford University Press, 1995), 10-11. Also Amartya Sen, "Rights and Capabilities," in Amartya Sen, *Resources, Values and Development* (Oxford: Basil Blackwell Publishing Ltd., 1984).

other hand, you discover that one person is starving because they live in a country that is experiencing a famine, and the other is fasting to make a political statement, how you respond to this additional information is significant.²⁸⁴ It is significant because only one individual truly requires assistance. Thus by understanding both the things which an individual values, and the freedoms which that individual has to achieve that which he values, more appropriate decisions can be made regarding the kinds of assistance which should be provided to that individual.

As already mentioned, Sen utilizes a conception of poverty which is not limited to a single economic dimension of an individual's impoverished state. His is a much broader notion of *poverty as an unfreedom*, or as a lack of *real* opportunities, both in the form of personal misfortune and social constraints. He believes this to be the case for a variety of reasons; most notably, however, he claims that a capability approach should be favoured over one which highlights, for example, income levels or resource allocation because such an approach can provide a broader informational base from which to 'sensibly identify' one's level of poverty and the consequent aid necessary to address that poverty.²⁸⁵ Sen echoes Pogge in his belief that "the usefulness of wealth lies in the things that it allows us to do – the substantive freedoms it helps us to achieve."²⁸⁶ Moreover, he shares Pogge's desire to understand more completely the social infrastructure which is needed to make a positive difference in people's lives. Sen argues, however, if more information is available to

²⁸⁴ Amartya Sen, (1985) "Well-Being, Agency and Freedom: The Dewey Lectures 1984," in *The Journal of Philosophy* 82 (4): 169-221.

²⁸⁵ Sen (1999), 87-110.

²⁸⁶ *Ibid*, 14.

determine one's level of poverty or capability deprivation then, presumably, more information is also available to determine the level of social infrastructure which is necessary. Where it is traditional to give consideration to the obvious rights which individuals are entitled to – like life, liberty and property – an understanding of one's level of capability deprivation makes the need for a right to education or health care, for example, more obvious.

In light of this, Sen argues, the unfreedoms which an individual may suffer from arise from two sources: inadequate processes and inadequate opportunities. For Sen, a theory like Pogge's is essential for analyzing the social processes which we engage in, but it fails to develop fully the two-way relationship between processes and opportunities, which Sen believes to be necessary for effective human agency and development. To establish this two-way relationship, Sen differentiates his approach from other, more traditional, methods of establishing a public criterion of social justice. Where some focus on the primacy of income and wealth, or on subjective psychological satisfaction, or on procedures for justice, Sen recommends that we need to focus on a person's freedom to choose from possible livings:

[f]reedom is not only the basis of the evaluation of success and failure, but it is also a principal determinant of individual initiative and social effectiveness. Greater freedom enhances the ability of people to help themselves and also to influence the world, and these matters are central to the process of development.²⁸⁷

As Sen points out, an understanding of an individual's freedom to choose is important to be able to evaluate *appropriately* an individual's, or group's, well-being or standard of living.

²⁸⁷ Ibid, 18.

This is so because an assessment of changes in income level, or in preference-fulfillment, may not be able to assess the value of those changes to the individual who experiences them. People often have adapted preferences, which might indicate that they are experiencing an improvement in their standard of living but which, in reality, reflect false improvements in their standard of living because these improvements bear no meaning on their actual situation or circumstances. A good example of this is the case of Aboriginal children mentioned earlier, who in fact experienced an improvement in their standard of living based on the Canadian Government's standards, but in reality, it was a false increase because they lost so much of the things which were of real value to their community. With this kind of a situation in mind, Sen argues that aggregative measurements of a society's general well-being may hide or mask the reality of the individuals within that society. Moreover, blanket statements of the rights which individuals have can also hide or mask the reality of the opportunities which an individual has to act on those rights. At the very least, the rights talk only begs the further question of how to make rights real, and it is here that Sen can add importantly to the debate. To determine whether an individual is actually experiencing an improvement in her standard of living requires a general sense of societal well-being, an understanding of the norms to which the society aspires, *and* the additional information to be gained from assessing the real opportunities or freedoms which an individual has.

It is important to note that the freedom Sen refers to is not the same kind of freedom which the liberationists, as discussed in chapter 2, were attempting to capture. Sen is not interested in a notion of freedom built upon a complete lack of restrictions, or on the

exclusive desire for self-satisfaction. For Sen having an entitlement to a set of freedoms is not simply a claim against others for something which one is somehow owed, nor is it about demanding certain objects or services which others must provide. The conception of freedom which Sen wants to capture is based on his understanding that: 1) *more freedom gives us more opportunity to achieve those things that we value, and have reason to value* (opportunity freedoms); and 2) *the process through which things happen may also be of importance in assessing freedom* (process freedoms).²⁸⁸ According to Sen, both grounds give us reasons to value freedom. Beyond this, though, they give us reasons to reflect further on what we can do with the freedoms we have available to us.

According to Sen, when one type of freedom is taken to be more vital, as in the debate between utilitarians and libertarians, the ability to make appropriate ‘trade-offs’ between what one values and what the system can allow is lost:

To give unconditional priority to the demands of processes can be quite inviable since they could, quite possibly, lead to terrible effects on the lives of people, in which case sticking to them – come what may – would not be reasonable. On the other hand, to treat processes as not being relevant for valuation is also not very plausible since we do attach importance to processes and have reason to value the fulfillment of appropriate processes.²⁸⁹

Sen argues instead that, for freedom to be a meaningful concept, these two features of freedom – processes and opportunities – must be allowed to share the same space to provide

²⁸⁸ Amartya Sen, “Freedom and Social Choice: The Arrow Lectures,” in Amartya Sen, *Rationality and Freedom* (Cambridge MA: The Belknap Press of Harvard University, 2002), 585.

²⁸⁹ Sen (2002c), 269.

individuals with as many ‘freedoms’ from which to choose as possible, given their own individual circumstances.

Thus, Sen is not simply referring to Rawls’ sense of ‘equal liberties for all’. Sen advocates a more robust concept of freedom which takes the “freedom of individuals as the basic building blocks of development”²⁹⁰ – building blocks which should integrate into a functioning whole the personal concerns which an individual has regarding his own life with the general concerns of society. According to Sen, then:

The capability perspective concentrates on what actual opportunities a person has, not the means over which she has command. More particularly, the capability perspective allows us to take into account the parametric variability in the relation between the means, on the one hand, and the actual opportunities, on the other.²⁹¹

For Sen, these “parametric variations”²⁹² are the contingent personal and social circumstances unique to each individual. They are important, however, not because they represent the uniqueness of individuals; they are important because they can have an impact upon an individual’s standard of living of equal significance to the impact individuals may also endure from the more traditional constraints like deficiencies in income or commodities. As a result, these variations need to be accounted for, and addressed, within public policy intended to support the creation and distribution of socio-economic goods and services, like education.

²⁹⁰ Sen (1999b), 18.

²⁹¹ Sen (2004a), 332.

²⁹² Sen (1999b), 70-72. Also Amartya Sen, (1990) “Justice: Means versus Freedoms,” in *Philosophy and Public Affairs* 19 (2), 111-121; and *Rationality and Freedom* (Cambridge, MA: Harvard University Press, 2002), essays 1-5.

Sen identifies five key categories of variation within the personal and social circumstances of individuals. First, there are what he refers to as *personal heterogeneities*, or the wide variety of physical differences which can be found in any given society. Sen includes in this group some obvious distinguishing features, like age and gender, which can have an impact on an individual's opportunities and choices. For Sen, the issue of gender in particular is most important to the question of educational rights as discussed in further detail in chapter 6. He also includes some more complicated physical differences like disability or susceptibility to illness which not only have an impact on an individual's ability to obtain a certain standard of living, but which might not be fully correctable in any social scheme. The second group Sen refers to concerns the *environmental diversities* which may not be intrinsic to an individual, but which nevertheless can affect an individual's well-being. In this group, he is referring to things like the ability to control one's climate, severe disturbances in the weather, or the presence of disease or pollution. Third, Sen emphasizes that not only do environmental factors influence an individual's ability to function in society, *variations in social climate* are equally influential. Within this category, Sen includes things like availability of educational services (which again is discussed in chapter 6), public security or health care. Related to this, Sen offers a fourth set of differences found in the general nature of *relational perspectives* in which we find ourselves engaged. In this category, Sen includes Adam Smith's famous statement that to "appear in public without shame" requires different resources for different kinds of societies. For example, having a low income in a wealthy country might have a greater impact on an individual than having an even lower income in a poor country. Finally, Sen suggests that there are *distributional differences within families*

which should be included within any comparative evaluations of individual advantage. For example, girls may have fewer opportunities than boys – like going to school – based on distributional factors which are specific within a particular family, but which may not be reflected in the larger social distributions.

As already mentioned, for Sen, a person's actual freedoms depend on two things: the kind of resources and goals he or she has; and the ability he or she has to convert these available resources into the achievement of those goals.²⁹³ According to Sen, the fact that such a wide-ranging set of parametric variations exists is both meaningful and informative – a feature which supporters of Sen's capability approach, like Martha Nussbaum, have emphasized by suggesting that while “very closely linked to rights, the language of capabilities gives important precision and supplementation to the language of rights.”²⁹⁴ For instance, the desire to alleviate global poverty, or to reduce human rights violations by ensuring that everyone has secure access to an equal set of basic goods, is only valid if what matters is for everyone simply to have primary goods. If, on the other hand, it matters what actual freedoms people have to use those primary goods, then the disadvantages, which can often be perpetuated due to noteworthy inequities in social and personal contexts, even if individuals have access to the same bundles of primary goods, also need to be taken into account. Sen's recommendation to include the idea that “the variable conversion rates of primary goods into capabilities can be quite crucial”²⁹⁵ is clearly important to our

²⁹³ Sen (1990)

²⁹⁴ Martha Nussbaum, (2003) “Capabilities as Fundamental Entitlements: Sen and Social Justice” in *Feminist Economics* 9 (2-3): 37.

²⁹⁵ Sen (1990), 116.

understanding of whether individuals can meaningfully convert their rights in general. More notably, however, it is important to our understanding of whether individuals can meaningfully convert their rights into the kind of action necessary to fulfill what Pogge takes to be our pre-eminent moral task.

Recall Pogge's claim that our pre-eminent moral task is to reshape the global economic and political order so that all human beings have secure access to the basic goods they need to be full and respected members of their communities, societies, and of the wider world. To achieve this task, and to avoid unwieldy and unpopular claims to positive rights, Pogge correctly and pragmatically emphasizes that we have a negative duty of justice to ensure that the social institutions in which we participate are just. Pogge is in fact critical of Sen in this regard because Pogge suggests that staking claims to compensation for greater needs based on inherent differences makes establishing positive rights and freedoms an even more controversial responsibility, which has the potential to become even less morally motivating for many individuals to want to recognize.²⁹⁶ Given Sen's understanding of an individual's ability to convert rights into capabilities, however, it is possible to argue (as Sen himself does)²⁹⁷ that, to fulfill Pogge's desire to morally move individuals to re-design and reorganize unjust social schemes requires a further stipulation that this needs to be done in light of how social institutions correlate to human agency. Individuals must be able to judge how important a particular freedom or right is in relation to other claims or actions.

²⁹⁶ Thomas Pogge (2002) "Can the Capability Approach be Justified?" in *Philosophical Topics* 30 (2): 29.

²⁹⁷ Amartya Sen, (2005) "Human Rights and Capabilities," in *Journal of Human Development* 6 (2): 151-166.

Similarly, individuals must be able to judge the extent to which they can make a difference. According to Sen, if individuals are given real opportunities to develop capability sets from which they can make such informed choices, the two-way relationship between processes and opportunities can be realized. Thus by accepting capabilities as the proper content of rights, Sen's theory nicely complements Pogge's desire for an active theory of global justice.

Without the inclusion of Sen's understanding of the freedoms necessary for individuals to convert their rights into capabilities, Pogge's desire to morally motivate individuals to recognize their negative duty of justice remains simply (though significantly) a prescription for what should happen to achieve a mutually beneficial just global society. According to Sen, though, while he is not suggesting that the capability approach can adequately deal with the process aspect of freedom on its own, it can provide essential information which is relevant to the assessment of the opportunity aspect of freedom. That is, for Sen, a theory like Pogge's is essential for analyzing the social processes which we engage in, but it fails to develop fully the two-way relationship between social processes and social opportunities which Sen, following Rawls, argues is essential to our understanding of what "the fairness or equity of the processes involves, or about the freedom of citizens to invoke and utilize procedures that are equitable."²⁹⁸

By considering poverty as a broader notion of capability deprivation, Sen's capability approach provides additional validation for Pogge's claim that we have a negative duty of justice to avoid interfering with the choices of others. Moreover, we have additional

²⁹⁸ Sen (2004b), 336.

validation for the kinds of social institutions to which we should collectively devote energy and resources. In particular, Sen provides important validation for the establishment of education as a fundamental right which is not only beneficial to an individual's ability to have a life which that individual values, but which is also beneficial to influence that individual's ability to convert other rights into positive action. The next section considers whether having basic human capabilities, like the capability to be educated, can further enable an individual to participate effectively within the society in which she finds herself.

5.2. Effective Participation

As the previous section highlighted, Sen firmly endorses a belief which favours a combination of individual agency and institutional support as essential to understanding both the role which society must play in aiding individuals to live meaningful and rewarding lives as well as the personal responsibility which individuals must also recognize in achieving this goal. This reciprocal relationship, according to Sen, is the most promising way to justify human rights as a viable mechanism for poverty alleviation and positive human development. He, like Pogge, highlights the ethical nature of human rights, that is, the need for human rights to exist outside of tight political or bureaucratic boundaries. Sen also calls attention to the need to acknowledge that simply because a fundamental human right is not automatically realized does not mean that the right itself should be rejected or dismissed:

Human rights can include significant and influenceable economic and social freedoms. If they cannot be realized because of inadequate institutionalization, then, to work for institutional expansion or reform can be part of the obligations generated by the recognition of these rights. The current unrealizability of any accepted human

right, which can be promoted through institutional or political change, does not, by itself, convert that claim into a non-right.²⁹⁹

Thus, Sen, like Pogge and Rawls, recommends that there are fundamental human rights to which all individuals should be entitled and should have the benefit of, but the universality of these rights rests on public discussion or *interactive processes*. For Sen, a meaningful understanding of human rights, capable of actually modifying social circumstances, is the result of on-going open public discussion and debate, or what Sen (echoing Rawls) refers to as “global public reasoning.”³⁰⁰ For this public scrutiny to be effective, however, Sen cautions that advocates of human rights must accept that maintaining a ‘domain of continued dispute’ is not indicative of a failure of the theory behind human rights, it is an acknowledgement that:

A theory of human rights can, therefore, allow considerable internal variations, without losing the commonality of the agreed principle of attaching substantial importance to human rights (and to the corresponding freedoms and obligations) and of being committed to considering seriously how that importance should be appropriately reflected.³⁰¹

This is an idea which Sen suggests highlights the need to reflect more seriously on the capabilities (and related educational opportunities) which individuals have to act or to participate in society, rather than on the rights or resources which are available to them.

According to Sen, both good quality governance and community-based public action are thoroughly interdependent. He claims that, “the role of the public is not confined to

²⁹⁹ Ibid, 320.

³⁰⁰ Ibid, 320.

³⁰¹ Ibid, 323.

influencing or challenging the decisions of the government. The agency of the public is also directly important in many fields of economic and social activity.”³⁰² This is a notion of agency, which Sen argues demonstrates the two-fold need to establish what resources people have, and to develop what they can do with those resources. Moreover, as already mentioned, it is a notion of agency which also seems to support Pogge’s desire to fulfill what he deems to be the crucial human-rights-based responsibility – namely to reshape institutional schemes so that everyone can have secure access to the basic goods they need to be full and respected members of their communities. Not only does a focus on capability play an indirect economic role, through enhancing the choices available for people, a model that develops human capabilities like Sen’s also has direct relevance to the well-being and substantive freedoms of an individual. And it is these substantive freedoms which are necessary, according to Sen, if the ultimate goal is like that of Rawls or Pogge, namely, to have agents who can contribute to positive social change.

With this in mind, it is important to recall the discussion on perfect and imperfect rights and obligations. On Onora O’Neill’s account, it was suggested that she posits the need to institutionalize our imperfect obligations so that there is, at least in principle, an enforceable understanding of imperfect rights to which we have a corresponding obligation to recognize towards others. Recall also that it was suggested that, while the work of Pogge improves upon O’Neill’s understanding of moral obligation by providing a more morally compelling account of human rights, he relies too heavily on the UDHR as the justification

³⁰² Sen (1995), 190.

for this account. Within this line of thought, Sen provides an argument for accepting rights as goals which not only contributes to Pogge's morally compelling account for why we should act on our moral obligations, but which also provides the additional justification necessary to support Pogge's rights-based position over O'Neill's duty-based one:

If rights are fundamental, then they are also valuable, and if they are valuable intrinsically and not just instrumentally, then they should figure among the goals. If rights-realizations are goals, then they can systematically enter moral calculations of anyone who can help. This is of obvious advantage when dealing with what has been called 'positive freedoms' (e.g., the right to medical attention, employment, etc., even the right not to be hungry.)³⁰³

By matching fundamental rights to positive freedoms in this way, Sen offers a justification for our moral obligations which is not only instrumentally beneficial to institutional reform but which is also intrinsically beneficial to personal well-being.

This is an idea which Onora O'Neill unexpectedly supports in her discussion of justice as it relates to women: "*The weak risk recurrent injustice unless institutions are structured to secure the option of refusal or renegotiation for those whose capacities and opportunities are limited.*"³⁰⁴ Rather than unconditionally endorsing Sen's capability approach to secure these options, however, O'Neill maintains that an approach which can establish "which arrangements a plurality of interacting agents with finite capacities *could* consent to"³⁰⁵ will provide the most satisfying results. These results, according to O'Neill, can avoid the

³⁰³ Amartya Sen, "Rights as Goals," in Stephen Guset and Alan Milne (guest eds.) *Equality and Discrimination: Essays in Freedom and Justice* (Stuttgart: Granz Steiner Verlag Wiesbaden GmbH, 1985), 15.

³⁰⁴ Onora O'Neill, "Justice, Gender, and International Boundaries," in Nussbaum and Sen (eds.) *The Quality of Life*. (Oxford: Clarendon Press, 1993), 321. Italics in original.

³⁰⁵ *Ibid*, 318.

relativist demand for oversensitivity to difference as well as the idealist demand to abstract that difference entirely away. As a result, despite acknowledging that her account of vulnerabilities is fully compatible with Sen's account of capabilities,³⁰⁶ she arrives at a different conclusion. O'Neill concludes: "The most significant features of actual situations that must be taken into account in judgments about justice are the security or vulnerability that allow actual others to dissent from and to seek change in the arrangements which structure their lives."³⁰⁷ This is a conclusion which reflects the suggestion, found in section 2.3, that O'Neill favours the perspective of agent obligation over the perspective of recipient rights. She favours such an approach because she claims that, while the rhetoric of rights is an important guide for establishing what it is that individuals could consent to, meaningful rights claims require a corresponding 'official' understanding of the obligations which are involved.

This slight diversion from the capability-rights debate is necessary to suggest that it is important to reflect on Sen's suggestion that "responsibility *requires* freedom."³⁰⁸ Both O'Neill and Pogge have suggested that there are certain responsibilities or obligations which some have towards others to ensure that avoidable violations of the rights or the well-being of others are not supported or allowed to proliferate. This idea is also reflected in Sen's belief that "as people who live – in a broad sense – together, we cannot escape the thought that the terrible occurrences that we see around us are quintessentially our problems. They are our

³⁰⁶ Ibid, footnote 29.

³⁰⁷ Ibid, 321.

³⁰⁸ Sen (1999b), 284. Italics in original.

responsibility.”³⁰⁹ Thus, Sen, Pogge and O’Neill all share the same belief that the institutional structure of a society plays a profound role in determining whether an individual gets the objects of her vital needs. From this idea, they all argue that there is a moral duty or obligation to reform, to the best that one can, the avoidable wrongs in which one may find oneself engaged. Sen expands upon this even further by suggesting: “without the substantive freedom and capability to do something, a person cannot be responsible for doing it.”³¹⁰ Thus, by combining the ideas of these philosophers – rather than treated them as opponents – it becomes possible to recommend that we have certain obligations to assist others in achieving a certain standard of living, or level of security, and we have an account of how to engage actively the impulses and habits of the individuals necessary to achieve the positive social reforms which they recommend. All that remains is to answer the libertarian challenge that, even if we did have compassionate or pragmatic reasons to support a notion of human rights which protects positive welfare (including the right to education), the inevitable costs associated with providing such social benefits make it impossible to move beyond acts of charity or benevolence . In section 2.2, it was noted that Jan Narveson maintains that, if there is an inability to explain why the rest of us have the onerous obligation to cater to the unfortunate or the vulnerable, then we should have no interest in supporting claims to positive human rights, especially ones which cater to, or attempt to overcompensate for, individual differences.

³⁰⁹ Ibid, 282.

³¹⁰ Ibid, 284.

First, it has already been explained that it is in reply to such criticisms that Pogge uses *a negative rights-respecting framework* – that is, the framework used by libertarians like Narveson – in his justification of why we should make every effort to participate in, and maintain, just social institutions, including ones which may require the provision of positive human rights like having an education. Sen completes this by providing an account of positive freedoms which is based on the promotion of individual capabilities rather than positive rights or obligations. And it is this focus on individual capabilities which can explain not only why we need to cater to the vulnerable, but also that does so in a way which can avoid the “nanny-state”³¹¹ that the libertarian, in my view, rightfully rejects.

For example, in a review of Sen’s work on inequality, G. A. Cohen has commented that, “apart from the sheer quantitative question of what income is needed, in different conditions, to generate a given amount of capability, attention to capability desiderata suggests improvements for comparatively little expenditure.”³¹² What Cohen is referring to here specifically are Sen’s observations on Kerala, a poor state in India with a socialist government which has been able to provide basic goods and services to its citizens in a relatively cost-effective way. At the time of Sen’s study, Kerala was one of the poorest states in India but one with a very high life expectancy.³¹³ In an effort to explain how this was possible, Sen compared Kerala to other Indian states (and later more globally to include for

³¹¹ Sen and Anand (1996), section 4.

³¹² G. A. Cohen, (1994) “Amartya Sen’s Unequal World,” review of Sen’s *Inequality Reexamined* in *New Left Review* I, 203 (Jan/Feb): 117-129.

³¹³ Jean Drèze and Amartya Sen, *Hunger and Public Action* (Oxford: Clarendon Press, 1989), 221.

example African Americans in the US).³¹⁴ Through this comparative analysis, Sen concluded importantly that the time-honoured tradition in Kerala to support basic positive freedoms like general education (especially literacy), basic healthcare, and the elimination of gender inequities (most specifically those related to female education), seems to be linked to the improvements in standard of living which citizens of Kerala experienced. According to Sen:

The success of Kerala in achieving support-led security adds force to the plausibility of following this route even when the economy is very poor. The fact that Kerala has achieved such success through careful and wide-coverage public support shows how much can be achieved even at a low level of income, if public action is aimed at promoting people's basic entitlements and capabilities.³¹⁵

Sen argues that, because things like basic education and health care are labour-intensive, these public services actually have costs which are relative to the labour markets in which they are being used. Therefore, waiting until a country is wealthy enough to support such public services is a step which need not delay vital progress. *It is manageable for countries to deliver these essential services regardless of the 'wealth' of the country.* Rather than focusing on the cost of goods and services, Sen recommends, it is more important to focus on the level and quality of education which individuals can access to be able to contribute ultimately to the basic structure of society as educated and active citizens.

By focusing on capabilities in this way, Sen is able to defend the idea that, for individuals to participate effectively in the societies in which they find themselves, they need the substantive freedom to assume the responsibility to act "as citizens who matter and whose

³¹⁴ Sen (1999b), section on Income and Mortality, 21-25.

³¹⁵ Drèze and Sen (1989), 225.

voices count, rather than living as well-fed, well-clothed, and well-entertained vassals.”³¹⁶

With this in mind, Sen accounts for the cost of providing certain positive freedoms, by suggesting that the opportunity to develop capability sets is necessary to outweigh the greater costs that would be incurred by placing the burden of protecting the interests of one onto another over an entire lifespan. Moreover, he accounts for the limits which are necessary to make the provision of positive freedoms possible, by stipulating that individuals are not passive recipients waiting to receive a bundle of goods, which others are required to provide for them. On the contrary, individuals must be ultimately in charge of their own well-being but, for this to occur, they require a particular kind of social context, which acknowledges and supports both the process freedoms and the opportunity freedoms through which an individual is able to make genuine choices and genuine contributions. That is, a social context, including the right to basic education, the right to basic healthcare and the right to political/civil participation is central to satisfying the need to expand human freedoms and to develop and maintain stable societies.

Is Sen’s capability approach sustainable? The libertarian has correctly identified why it is important to curb the level of assistance that one individual is required to provide for another. Such a view, however, fails to take into account the important, and often avoidable, social and economic disparities that exist. Sen, Pogge and Rawls have offered counterarguments that attempt not only to recognize this libertarian worry that unchecked positive rights can do more harm than good, but that also attempt to balance this worry with

³¹⁶ Sen (1999b), 288.

the more urgent worry that many human rights violations are the result of *avoidable and unjust* human interactions. With that being said, however, it would be important to consider some of Sen's critics who have questioned if his capability approach is operational at all. The next section considers if the highly flexible and widely adaptable nature of the capability approach positions it as a theory which is essential to the establishment of a human rights-respecting community necessary to enable positive human agency and sustainable development through social mechanisms like education and preventative health care, or if its breadth and flexibility actually reduce the potency of its human development agenda.

5.3. Sustainable Development

Sen is fond of the work of Mary Wollstonecraft, and he often refers to the significant advancements that she spearheaded both for the rights movement in general, and for women's rights in particular (not to mention her unfailing desire to expand access to education for girls and women). For example, he begins his discussion paper on sustainable human development³¹⁷ with a reference to her belief that "it is justice, not charity, that is wanting in the world."³¹⁸ Like Wollstonecraft, Sen's interest in justice does not lie in a 'head-in-the-clouds theory', with which some of his critics have charged him.³¹⁹ His interest in justice lies in his desire to establish a sustainable understanding of justice, based on fairness, that "must be deeply and directly concerned with the *actual freedoms* enjoyed by different

³¹⁷ Sen and Anand (1996), 1.

³¹⁸ Mary Wollstonecraft, *A Vindication of the Rights of Woman* (London: Penguin Classics, 2004), 92.

³¹⁹ Andre Béteille, "Amartya Sen's Utopia," in *Equality & Universality: Essays in Social and Political Theory* (USA: Oxford University Press, 2003), appendix 1.

persons – persons with possible divergent objectives – to lead different lives that they can have reason to value.”³²⁰ In addition to this, he is also careful to highlight another idea that he has embraced from the work of Wollstonecraft, namely the notion that “some recognized human rights are not ideally legislated, but are better promoted through other means, including public discussion, appraisal and advocacy.”³²¹ He recommends this to be so because, like Pogge and Rawls, Sen realizes that ‘strategic distortion’ of information (similar to Pogge’s moral loopholes) is both common and pervasive. Sen, however, argues that the most effective method for dealing with such distortions is through the establishment of interactive and educative processes, which are interested in avoiding partisanship in favour of human development:

Partisanship is avoided not so much by taking either a conjunction, or an intersection, of the views respectively held by dominant voices in different societies across the world (including very repressive ones), but through an interactive process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view.³²²

According to Sen, this free flow of information – described in quite a Rawlsian way – is essential to understand that we have a shared claim to certain basic capabilities necessary to lead worthwhile lives. Moreover, to sustain this claim, Sen asserts that “the utopian image of a benevolent state looking after the interests of everyone with equity and justice has little impact today. The need for individuals to look after themselves, rather than relying on the

³²⁰ Sen (1990), 112.

³²¹ Amartya Sen, (2004b) “Elements of a Theory of Human Rights,” in *Philosophy and Public Affairs* 32 (4): 320.

³²² Sen (2004b), 320.

state, is well understood.”³²³ To achieve this end toward sustainable development of human capabilities, however, Sen does not attempt to establish the precise boundaries around certain essential moral compromises, nor does he offer a decisive notion of what a minimally good life, to which everyone is entitled, should look like, and it is this imprecision which many of his critics question.

Given such an imprecise and vague assertion that social well-being and sustainability are dependent on the real freedoms individuals are able to convert into real opportunities, and given Sen’s recommendation that, to achieve such freedoms requires a commitment to some form of deliberative democracy and public intervention, critics, like Robert Sugden³²⁴ have questioned the feasibility of Sen’s capability approach. Most importantly, Sugden wonders whether “given the rich array of functionings that Sen takes to be relevant, given the extent of disagreement among reasonable people about the nature of the good life, and given the unresolved problem of how to value sets, it is natural to ask how far Sen’s framework is operational.”³²⁵ Moreover, both Bernard Williams³²⁶ and David Crocker³²⁷ point out that, if the construction of an action-guiding ethic is the justification for establishing a capability

³²³ Sen and Anand (1996), 23.

³²⁴ Robert Sugden (1993) “Welfare, Resources, and Capabilities: A Review of *Inequality Reexamined* by Amartya Sen,” in *Journal of Economic Literature* 31: 1953.

³²⁵ *Ibid.*, 1953.

³²⁶ Bernard Williams, “The Standard of Living: Interests and Capabilities,” in Amartya Sen *et al.* *The Standard of Living (Tanner Lectures in Human Values)* (Cambridge: Cambridge University Press, 1987)

³²⁷ David Crocker, “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, Part 2,” in Martha Nussbaum and Jonathan Glover (eds.) *Women, Culture and Development* (Oxford: Clarendon Press, 1995).

framework, it would be important to know which functional capabilities are most valuable and why.³²⁸

While Sugden, and others,³²⁹ are correct to suggest that Sen is somewhat elusive about which specific capabilities would count as essential basic capabilities, Sen does offer some insight into what he deems to be an essential combination of certain individual and positive freedoms to be gained from having the basic capabilities of survival, and of education (literacy in particular) – crucial insights which are explored in more detail in chapter 6, together with the insights of Martha Nussbaum, regarding how a society should proceed with the achievement of universalized literacy and sustained schooling.³³⁰ It is important to note here, however, that while Sen is unwilling to go beyond this loose understanding of the kind of capabilities that would be most essential to well-being and sustainable human development, he is very specific about his justification as to why he does not stipulate a more satisfying or substantial list of which capabilities are essential:

The problem is not with listing important capabilities, but with insisting on one predetermined canonical list of capabilities, chosen by theorists without any general

³²⁸ It should be noted that this is a task that individuals like Martha Nussbaum have taken to be essential and have created such a list, see Martha Nussbaum, (2003) “Capabilities as Fundamental Entitlements: Sen and Social Justice,” in *Feminist Economics* 9 (2-3): 33-59. See chapter 6 for more.

³²⁹ Mazaffar Qizilbash, (1996) “Capabilities, Well-Being and Human Development: A Survey,” in *The Journal of Development Studies* 33 (2): 143-162; David Crocker, (1992) “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic,” in *Political Theory* 20 (4): 584-612 and “Functioning and Capability: The Foundations of Sen’s and Nussbaum’s Development Ethic, part 2,” in Martha Nussbaum and Jonathan Glover (eds.) in *Women, Culture and Development* (Oxford: Clarendon Press, 1995); Stuart Corbridge, (2002) “Development as Freedom: The Spaces of Amartya Sen,” in *Progress in Development Studies* 2, 3: 183-217.

³³⁰ Amartya Sen, *Commodities and Capabilities* (Amsterdam: North-Holland, 1985), 76. In this comparative study of the standard of living in five developing countries (India, China, Sri Lanka, Brazil and Mexico), Sen does highlight what he suggests to be some possibilities of essential basic capabilities: the ability to live long, the ability to avoid mortality during infancy and childhood, and, most significantly in relation to education, the ability to read and write, and the ability to benefit from sustained schooling.

social discussion or public reasoning. To have such a fixed list, emanating entirely from pure theory, is to deny the possibility of fruitful public participation on what should be included and why.³³¹

Sen wisely believes that, any workable notion of basic capabilities must be established based on the need to develop individual values which respect each other's personal choices and cultural dependence. This is a stipulation which has led Sen to insist upon the need for open-ended public reflection based on the relevance of information to be gained from situated evaluations rather than ones that are detached, or 'evaluator-independent', despite the fact that such evaluations are much more imprecise to define theoretically.

Another worry raised by critics, according to Sabine Alkire, concerns the problem of "how to make strategic economic decisions that weight and prioritize capabilities."³³² For critics of Sen's leftist leanings, like Andre Béteille,³³³ without a more explicit statement of the values and principles needed to develop capability sets for individuals, all Sen has to offer is yet another example of unattainable egalitarian idealism, which favours misdirected compassion and generosity over the realities of what can feasibly be achieved in the area of manageable human development. According to Sen, however, while it may be the case that his cause has been misappropriated by a few 'soft-minded' individuals, careful consideration of his own theory of human capabilities suggests that, in fact, he is interested in something far less unwieldy. For example, in reference to his work on famines, Sen suggests that:

³³¹ Amartya Sen, (2004a) "Capabilities, Lists and Public Reason: Continuing the Conversation," *Feminist Economics* 10 (3): 77. Also "Elements of a Theory", footnote 31.

³³² Sabine Alkire, *Valuing Freedoms: Sen's Capability Approach and Poverty Reduction* (Oxford: Oxford University Press, 2002), 11-14 in particular.

³³³ Béteille, (2003).

The ability to acquire food has to be *earned*. What we have to concentrate on is not the total food supply in the economy but the “entitlement” that each person enjoys: the commodities over which she can establish her ownership and command. People suffer from hunger when they cannot establish their entitlement over an adequate amount of food.³³⁴

Furthermore, Sen suggests that what determines one’s entitlement includes three factors: 1) endowment (basically, labour power based on varying levels of skill, experience, property); 2) production possibilities (technologies, knowledge, ability to convert these into something useful); and 3) exchange conditions (ability to sell and buy goods). Sen stresses the need to support certain positive freedoms for all, not because he is interested in blindly maximizing what benefits individuals can gain from collective social activities; on the contrary, Sen is interested in probing the social factors which determine one’s entitlement or ability, so that the positive freedoms, which an individual is able to secure and which others are obliged to make available, are meaningful.

It is important to note, as G. A. Cohen does, that given such obvious grounds for determining entitlement it would be possible to conclude that Sen is simply stating a truism. Many people assume that famines, for example, occur when individuals lose their legitimate entitlement to secure food. Upon further reflection though, Cohen himself concedes that the practical implications of Sen’s understanding of inequality and capability deprivation are significant. In the case of famines, for example, according to Cohen, the significance of Sen’s work lies in his clarification that famines are rarely the result of a dwindling supply of resources alone, “the immediate cause of loss of access to food is, necessarily, the fracturing

³³⁴ Sen (1999b), 162.

or withering of individual entitlement to it through wages, trading relations, personal production, and so on.”³³⁵ In the case of education, this is also a reality. There are many instances where the immediate cause of loss of access to education is the lack of individual entitlement through things like language barriers, gender barriers and geographical barriers, rather than simply a lack of resources.

Recall Pogge’s assertion that our pre-eminent moral task is to reshape the global economic and political order so that all human beings have secure access to the basic goods they need to be full and respected members of society. If one were to act on this assertion as it stands, it is possible to neglect, as Cohen did, the importance of Sen’s insight. That is, it is possible to take for granted that one’s duty towards others who are impoverished simply rests in supporting official channels in their efforts to replenish dwindling supplies of resources. This is a point of view which seems especially likely if one does not have any immediate experience with extreme levels of poverty or injustice. For example, as Cohen points out, in the case of famines, there is “an unthinking presumption, still widespread at least in countries where famines are unknown, that they occur if and only if, and because, food supply shrinks.”³³⁶ While this is neither Pogge’s intention nor his own personal construal, to avoid the possibility of translating the moral value of Pogge’s theory into the kind of unthinking understanding to which Cohen refers, an integrative approach is needed. Integrating Pogge’s challenge to redesign the basic structure of society to minimize avoidable human rights

³³⁵ G. A. Cohen (1994), 126.

³³⁶ Ibid, 126.

violations with Sen's challenge to maximize the basic capabilities from which individuals can choose a life of meaning and value, provides additional information necessary to make the kind of informationally-rich assessments which Sen suggests are indispensable to drive sustainable public action. To validate this claim further, however, it would be helpful to put the capability approach into practice.

Two applications which have developed out of Sen's capability approach worth considering in particular are: the development of an appropriate set of multidimensional economic tools to assess and compare the achieved well-being of different countries or subgroups; and the development of the interconnections between basic human capabilities (like having an education) and full, or at least fuller, human development. With this in mind, the next chapter considers Sen's collaboration with Mahbub ul Haq to create a capability-sensitive economic framework, and his collaboration with Martha Nussbaum to create a capability-sensitive *educational* framework, the main concern of this thesis.

Chapter 6

A Capability-Sensitive Educational Framework

To refocus our understanding of human rights and capabilities back onto specific applications relevant to education, this chapter translates Sen's capability approach into a capability-sensitivity educational framework. To do this, however, it is first necessary to understand the connection which Sen makes in his own work between human development and education. Because Sen favours a complex notion of poverty based on capability deprivation, he also favours the use of a multidimensional index necessary to measure these deprivations. Section 6.1 considers this index, to examine why it is important to be able to measure the vital link which Sen suggests exists between a society's ability to deliver basic education and a society's ability to contribute to human development and security. Regarding this desire to measure how the socio-economic successes of a society reflects that society's contributions to human development and security, Sen is careful to caution that statistics are only useful if the relevant information, to which they correspond, can be acted upon. With this in mind, section 6.2 considers Sen's insistence upon the need to close the educational gaps which an index like the Human Development Index (HDI) can reveal. In particular, this section considers Sen's involvement in the creation and maintenance of the Pratiche Trust. The final section will address the enduring issue of cost and sustainability by considering Martha Nussbaum's three-part model for the development of capabilities in education to determine if it is possible to deliver a capability-sensitive educational framework in a universally cost-effective way.

6.1. The Human Development Index

First, it is important to discuss briefly the establishment of the Human Development Index (HDI).³³⁷ A more thorough understanding of this index can be gained from individuals with expertise in economics, such as the authors of the index themselves, Mahbub ul Haq³³⁸ and Amartya Sen.³³⁹ That being said, however, it is important to sketch why the HDI was created as an alternative to other standard, one-dimensional measures of well-being and socio-economic progress. Furthermore, it is important to consider how this evaluative aspect is related to Sen's desire to improve an individual's standard of living by expanding the range of things which that individual can do and be. As will be noted, education, for example, is especially valuable in providing information about such a range and is thus vital to both human development and security.

In the late 1980's and early 1990's, ul Haq, in conjunction with Sen's capability theory, and with the annual publication of the Human Development Report (HDR),³⁴⁰ established a new composite index of socio-economic progress. The goal was to develop a broader index than the traditional one-dimensional indices of gross national product (GNP) or gross domestic product (GDP). According to ul Haq, this new index was developed to satisfy the need "for a more comprehensive measure of development that could capture all, or

³³⁷ United Nations Development Programme, *Defining and Measuring Human Development*. (New York: Oxford University Press, 1990). See also UNDP website, <http://hdr.undp.org/>.

³³⁸ Mahbub ul Haq "The Birth of the Human Development Index," in Sakiko Fukuda-Parr and A. K. Shiva Kuma (eds.) *Readings in Human Development* (Oxford: Oxford University Press, 2003), 127-137.

³³⁹ Sudhir Anand and Amartya Sen, (1994) "Human Development Index: Methodology and Measurement" in *Occasional Papers* (Human Development Report Office); Amartya Sen (2000) "A Decade of Human Development," in *Journal of Human Development* 1 (1): 17-23.

³⁴⁰ Published by the United Nations Development Programme (UNDP). Available at <http://hdr.undp.org/reports/>.

many more, of the choices people make – a measure that would serve as a better yardstick of the socioeconomic progress of nations.”³⁴¹ Moreover, according to ul Haq, it was developed to work *in combination with* indicators like the GNP to integrate one’s level of education and standard of health with one’s level of purchasing power, a combination which he correctly argues is necessary to “capture far more reality than GNP does.”³⁴² For example, according to ul Haq, by focusing on three basic, though broadly-based indicators (life expectancy at birth, proportion of literacy among the adult population and individual purchasing power) the HDI is able to capture not only income levels but also other important social factors which affect the quality of life for both individuals and for society as a whole. As a result, the HDI has greater potential for determining how societies should support and distribute goods and services, like education, among its members.

Some of the features that ul Haq highlights as benefits to be gained from the use of HDI over GNP include a greater awareness of important social influences like: national priorities; potential economic growth; and disparities between individuals and between various subgroups within a society. Furthermore, ul Haq recommends that the insight to be gained from the HDI can not only help to inform positively the various policy makers or ‘levers of control’ which manage these social influences, but also act as an ‘early warning system’ or diagnostic tool both for individual countries to address their own social

³⁴¹ ul Haq (2003).

³⁴² Ibid, 132.

disparities, as well as for the international community to monitor countries more effectively and to aid those in need.

Of course, ul Haq is also quick to acknowledge (and accept) the criticisms, or at least the recommendations for modification, which such a multi-dimensional measurement tool has inevitably received. But he does not acknowledge that these criticisms or recommendations represent fatal flaws in the HDI; they simply point to the unique and flexible nature of this device – a flexibility which ul Haq recommends is essential when dealing with the highly complex nature of either an individual's, or of a society's, quality of life. For example, he acknowledges that some critics have suggested that an even greater number of variables should be included, not only to address the basic human needs of knowledge, health and income but to address things like political freedoms. In addition, he acknowledges that some critics have questioned the need to develop a composite index, when perhaps a series of independent indicators might provide a more focused informational base from which to develop specific policy initiatives. To this, ul Haq suggests that, while a focus limited to an aggregate measure of basic human needs is essential to obtain manageable results which can be delivered universally, there is no reason why the HDI cannot also be disaggregated to highlight a profile more applicable to an individual country. According to ul Haq, for those countries at the bottom of the scale, for example, the HDI can be a highly effective tool. With that being said, he also acknowledges that, for the many countries which have successfully, or at least sufficiently, established the basic social structures necessary for

an acceptable standard of living, it is necessary to continue to refine the information in such a way that it can be adapted to the particular needs of individual countries more effectively.

According to Sen, it is this commitment to flexibility which makes the HDI significant because, through the HDI, “the world of evaluation was open to pragmatic reasoning, invoking different kinds of argument within a broad and permissive framework of reasoned social evaluation.”³⁴³ Sen proposes that the HDI can assist in addressing not only our most basic needs (like being nourished, being disease-free, and being knowledgeable), but it can address some more complex needs (like self-respect, dignity, and human solidarity).³⁴⁴

According to Sen, the elegance of the HDI is its ability to measure governments against the concrete capabilities of their citizens based on the three basic, though broadly-based, indicators.³⁴⁵ According to Sen, being able to measure the ability of societies to achieve these human capabilities has a direct influence on human capital, and a direct relevance to the well-being and freedom that individuals can achieve throughout their lives. Further, it is also important to highlight that, by including literacy within the set of basic indicators, Sen and ul Haq establish a direct link between the need for individuals to be literate and the need for societies to provide necessary public resources like schools for this to happen. Thus, in this sense, Sen is actually one of the most important theorists writing on the right to education today.

³⁴³ Sen (2000), 22.

³⁴⁴ Sen (1992a), 5.

³⁴⁵ Anand and Sen (1994).

Sen also acknowledges the importance of the indirect role that these capabilities can play in social change and in economic production. As has already been mentioned, for Sen sustainable human development is not a question of the resources that one has, it is a question of what one can do with those resources and, according to Sen the HDI is “an illuminating concept that serves to integrate a variety of concerns about the lives of people and their well-being and freedom.”³⁴⁶ Moreover, it is a clear indication that education, especially the basic educational skill of reading, is essential. With that being said, however, Sen also cautions that it is important to distinguish the information to be gained from using a socio-economic indicator like the HDI from “the real merit of the human development approach [which] lies in the plural attentions it brings to bear on developmental evaluation, not in the aggregative measure it presents as an aid to digestion of diverse statistics.”³⁴⁷

For Sen, the development of appropriate socio-economic tools to assess and compare the achieved well-being of different countries or subgroups is only one of the essential components of sustainable human development. Sen also recommends the need to develop socio-economic interconnections between things like basic public freedoms and human development. That is, sustainable development is about capability expansion, a concept which requires both a measure of existing states of affairs (the HDI), and a means to expand or improve upon those measures (that is, basic primary education, healthcare and gender parity). Obtaining an informationally-rich picture of social well-being is an inert exercise if

³⁴⁶ Sen (2000), 17.

³⁴⁷ Ibid, 22.

no reflective thought is given to what to do with that information once it has been obtained. With this in mind, it is important to highlight a second major focus of Sen's work – namely, his focus on the agency aspect of human development – in particular, how the capability approach connects agency to basic public education and human security.

6.2. Human Development, Security and Education

In a speech that Sen delivered to the 2003 Commonwealth education conference in Edinburgh, he asked the following question: “Why is it so important to close the educational gaps, and to remove the enormous disparities in educational access, inclusion and achievement?”³⁴⁸ This is an important question, given the enormous public burden typically associated with the public provision of formal education.³⁴⁹ To this question, Sen responds by providing six potent reasons why formal public education is both intrinsically and instrumentally important, and why the public should be interested in supporting it by closing the educational gaps that currently exist around the world.

First, Sen highlights the connection between education and security. For Sen, human insecurity is related to the obvious insecurities which result from the potential physical harms which others can inflict upon us, through things like terrorism and violence. But insecurity is multidimensional in nature. Not having the basic skills of being able to read, write and calculate imposes insecurities upon individuals which are, at the least, equally significant, in

³⁴⁸ Amartya Sen, “The Importance of Basic Education” full text of the speech to the Edinburgh Commonwealth education conference in *The Guardian*, Tuesday October 28, 2003.

³⁴⁹ For example, in Ontario the ministry of education has budgeted for an investment of \$18.45 billion for 2007-2008.

that they also cause life-long, inescapable capability deprivation. Not everyone is directly affected by terrorism, but all illiterate individuals are directly and constantly affected – and negatively so – by their lack of skill in this regard. If a country is willing to support the military and policing initiatives to protect the *physical* security of a society, then that country should be willing also to support the educational initiatives to protect the *knowledge-based* security of that society. Second, Sen highlights the obvious potential for economic empowerment which comes from being literate and numerate. Related to this potential for job skill development, Sen suggests further that with literacy comes understanding. Sen, however, is interested in a notion of understanding which goes beyond the factual information typically associated with schooling (like improvements in one’s level of social, historical and geographical awareness), to being able to understand the social information typically associated with human rights and the concurrent obligations to those rights, which should be fulfilled. Fourth, Sen suggests that being able to read is essential to being able to participate in political decision-making. Fifth, Sen suggests that, not only is formal education important for political participation, it is also important for accessing a wide variety of public services. For example, according to Sen, being educated can translate into being able to utilize, more extensively and more knowledgeably, the public health services which are available.³⁵⁰ While providing free public education is a significant public burden, maintaining a society’s general health and well-being is an equally significant encumbrance. Sen argues, however, if the observable correlation between level of education and level of general physical well-being is recognized, the indispensable influence that educational

³⁵⁰ Drèze and Sen (1989), in particular chapter 13 “The Economy, The State and The Public”.

opportunities (especially those directed towards women) can have on preventative healthcare can go a long way to achieving general sustainable social well-being, and to alleviating a significant portion of the public health burden. According to Sen, “The basic level of education of the public can play an important part in the utilization of communal health care and of general medical facilities, and female education in particular is especially important in this regard.”³⁵¹

Finally, Sen highlights the significance of recognizing the benefits to be gained from demanding that women receive the same educational opportunities to men. While it is true that having an education is highly relevant to men, because often men take on the role of economic provider for the family,³⁵² this reality does not diminish the need to recognize the relevance of having an education to women. It is the women, after all, who often carry the burden of being the prime role-model and mentor to children, especially in the formative years. If the education of women is not taken to be of equal significance to that of men, then the potential for all children (male and female), to benefit from a comprehensive set of capabilities will be diminished. Thus, according to Sen, if you want to build a country, it is important to begin by building a school:

The contribution of basic education to development is not confined to economic progress. Education has intrinsic importance; the capability to read and write can deeply influence one’s quality of life. Also, an educated population can make better use of democratic opportunities than an illiterate one. Further, an ability to read

³⁵¹ Amartya Sen, “Public Action to Remedy Hunger” full text of the Arturo Tanco Memorial Lecture given in London on August 2, 1990, arranged by The Hunger Project and CAB International, in association with *The Commonwealth Trust and The Royal Institute of International Affairs*.

³⁵² This claim is made on a global understanding, recognizing that in the developed Western countries this is not as relevant.

documents and legal provisions can help subjugated women and other oppressed groups make use of their rights and demand more fairness. And female literacy can enhance women's voices in family affairs and reduce gender inequality in other fields, a benefit to men as well as women, since women's empowerment through literacy tends to reduce child mortality and very significantly decrease fertility rates.³⁵³

Despite these seemingly persuasive reasons to want to support basic primary education, Sen's own appraisal of the current state of basic primary education in India, for example, is not very positive because, in many parts of India, education remains neither free nor compulsory, despite the fact that the Indian government is committed to ensuring universal elementary education.³⁵⁴

To this end, in 1999 Sen devoted half of his Nobel Prize (approx. \$400 000) to establish the Pratiche Trust for development in the areas of basic education, gender equity and basic health in both India and Bangladesh. The main objective of the Indian wing of this Trust is to aid development in the areas of elementary education and health care, and the important interconnections between the two. In 1999, however, the district that this Trust is established to aid was severely damaged by the Orissa cyclone, and more recently (2001) by the Gujarat earthquake. As a result, much of the effort of the Trust to date has been dedicated to aiding the victims of these devastating events. Nonetheless, some preliminary findings

³⁵³ Amartya Sen, "To Build a Country, Build a Schoolhouse," in *The New York Times* (May 27, 2002).

³⁵⁴ Parliamentary Research Service, *The Right Education Bill* The 86th Constitution Amendment Act added Article 21A affirming that every child between the ages of 6 and 14 years has the right to free and compulsory education. (New Delhi, November 21, 2005). Available online at <http://education.nic.in/elementary/RighttoEducationBill2005.pdf>. For more information on the background of this amendment see Niranjana Aradhya and Aruna Kashyap, *The 'Fundamentals' Right to Education in India* (Bangalore: Books for Change, 2006). See also Philip Alston and Nehal Bhuta, "Human Rights and Public Goods: Education as a Fundamental Right in India" in Philip Alston and Mary Robinson (eds.) *Human Rights and Development: Towards Mutual Reinforcement* (Oxford: Oxford University Press, 2005).

have been made from an initial investigation on three districts of West Bengal³⁵⁵ – a region in desperate need of reform because not only is it one of the most densely populated regions of India, it is also home to over 11 million children below the age of 6 and approximately 26 million under the age of 14.³⁵⁶ Of those children, only about 71% (girls) and 72% (boys) attend school, leaving more than 1.3 million children out of school completely. And of those children who do attend school, 34% drop out before they complete the primary level.

In this investigation, 18 elementary state schools and 17 Sishu Siksha Kendras (SSK) child development centres were examined to determine both what is already being achieved and what barriers and drawbacks impede progress and development. It is important to note that the SSK are government sponsored educational centres, launched in 1999, to improve the educational opportunities for impoverished children in West Bengal. According to Sen, the SSK is a unique program which relies on community-based action to provide flexible educational alternatives at extremely low cost.³⁵⁷ When 20 or more out-of-school children exist in a community, an SSK can be formed. Once formed, the government, in conjunction with UNICEF, provides mid-day meals for the children, salaries and training for the teachers, academic supervisors and books. As of 2006, 16,000 such learning centres have provided educational opportunities for more than 1 million children.³⁵⁸ While very similar to state schools, in that the SSK centres are also fully recognized elementary schools capable of

³⁵⁵ Pratiche Research Team, (2002) *The Pratiche Education Report (Number 1): The Delivery of Primary Education in West Bengal*. Introduction by Amartya Sen. (New Delhi, TLM books/Pratiche (India) Trust.

³⁵⁶ Based on the 2000 census data, UNICEF *Shishushiksha Karmasuchi (SSK) Education Project for Working Children: West Bengal, India* (Toronto: February 2007), <http://www.maharaj.org/pdf/ssk.pdf>.

³⁵⁷ From Sen's introduction to the "Pratiche Education Report".

³⁵⁸ UNICEF (Toronto: February 2007).

conferring upon children the same status as the state school, these centres distinguish themselves by catering to marginalized children (the hours are flexible, the services are more cost effective, the management is local, and the teachers come from the community).

What did this study uncover? To begin, this study uncovered positively that the desire to have free and compulsory education is not the primary issue. Of the parents surveyed, 96% stated that they supported their male child's attendance in school and 82% supported their female child's attendance, despite possibly being illiterate and unschooled themselves, suggesting that the problem is not simply one of motivation. Moreover, 84% agreed that elementary schooling should be compulsory, suggesting that at least there is great interest in the idea that children should be educated in a formal setting. Also, it was found that many of the educators involved in these schools and learning centres were motivated and enthusiastic about the prospects for improvements in the performance of the schools in which they work. With these reasons for optimism, however, this study also uncovered some crucial barriers and drawbacks which must be addressed before any significant improvements can be made to act on this interest.

For example, it was found that only 41% of the parents surveyed were satisfied with the quality of the teaching at the state schools and only 54% at the SSK. Also, according to Sen, on the day of a visit to one of the schools, only 51% of the registered students were actually in attendance at the state schools and only 64% at the SSK, and a significant number of teachers were absent. Another challenge uncovered by this study was the ongoing practice of paying private tuition to supplement the education of those children who can afford to do

so. Moreover, it was found that the students who were able to pay the extra tuition, were able to do simple tasks (like writing their names) that the other children could not, leaving Sen to question: “what, then, do they learn in school?”³⁵⁹ According to Sen, the most important implication of this study is that public action requires radical thinking and patience to overcome the deep-rooted class barriers and social obstacles which exist and which will not go away overnight.³⁶⁰ With this in mind, Sen offers a few suggestions for change which he thinks will help to improve the current state of elementary education in India but which are equally applicable to any public action directed toward education in general. Some of the recommendations which Sen offers in this regard include:

1. Educators need to reflect more deeply upon their profession and the kinds of internal reforms which they can initiate, the unions in particular need to apply the bargaining power, which has successfully promoted and improved the economic rights of teachers, to promote and improve the teaching profession more generally.
2. School inspectors should work together with teachers and unionists to establish a strong and accountable profession dedicated to human development through education.
3. An unequivocal end to the practice of private tuition at the elementary level, as it not only disadvantages the underprivileged but it encourages teacher apathy as well.
4. The creation and development of strong parent-teacher collaborations, including ones which bridge different class backgrounds.
5. Monitor the development and maintenance of the SSK learning centres to ensure that the inherent differences between the SSK and the public schools do not isolate the underprivileged children further.
6. Develop the existing mid-day meal program so that it actually works to feed children at school.³⁶¹

³⁵⁹ From Sen’s introduction to the “Pratichi Education Report.

³⁶⁰ Amartya Sen, “India’s Poor Need a Radical Package,” in *The Hindu* September 1, 2005.

³⁶¹ From Sen’s introduction to the “Pratichi Education Report.

While the work being done by the Indian wing of the Pratichi Trust is only in its beginning stages, it represents a good example of what can be done to support and maintain over the long-term institutional reform to basic primary education, especially in India.³⁶² According to Sen, beyond the obvious financial constraints that befall any densely populated and needy society like India, these organizational and conceptual changes are necessary to close the educational gaps to which he refers. Of perhaps even greater concern, according to Sen, is the challenge of overcoming (or at least modifying) the class and gender barriers which deeply impair a child's ability to be educated, not just because they cannot afford to go to school but because they are not welcome to go to school either.

With this in mind, Sen established the Bangladesh wing of the Pratichi Trust with a slightly different, though complementary, focus. This trust is devoted to gender equity – another area of development which Sen correctly argues is deeply interconnected with education but which he chooses to support in a slightly different manner. In particular, in 2004, the Bangladesh Pratichi Trust, in partnership with BRAC (Bangladesh Rural Advancement Committee), began awarding annual Salma Sobhan Fellowships to women interested in pursuing a career in journalism. This fellowship takes literate women from all of the districts of Bangladesh, exposes them to well-known journalists, requires them to write at

³⁶² While the information to be gained from Sen's work in India is easily transferable to other countries throughout the world, the priority given to India is important because 19% of the world's children live in India and they comprise 42% of India's total population. See "India's Financial Commitments to the Child" (HAQ: Centre for Child Rights as submission for the Day of General Discussion, September 21, 2007), available online at <http://www.crin.org/docs/BfC%5B1%5D.%20India.pdf>.

least 24 published or broadcast stories and compensates them with a small stipend for their work. The goal of these fellowships is, first, to encourage Bangladeshi women to enter this non-traditional profession to correct the existing gender imbalance in the public media and, as recipient Selina Kabir Chowdhury proclaimed, to become ‘soldiers of the pen’ ready to challenge corruption, wrongdoing, and injustice. More important, however, by supporting women in this way, there is a ripple effect which can influence positive reform in education which would not be possible by simply supporting basic primary education alone. That is, by choosing journalism, rather than education alone, as the focus of the scholarships, this Trust can increase the number of positive public female role models, offer new career opportunities to women, alter the perspective of the media, and most importantly encourage literacy among women and girls, thus making it more difficult to silence particular sub-groups within society. After its first year, 32 women successfully completed the program and almost all of them obtained jobs at Bengali language newspapers, including nine hired by *Prothom Alo*, the largest newspaper in Bangladesh.³⁶³ And the ongoing commitment of this trust to grant fellowships to at least 500 women will continue to empower women by not only providing them with meaningful employment opportunities, but by continuing to raise awareness of what women can and should be doing in society through both the act of granting the fellowships and through giving women a voice.

³⁶³ Indrani Sen, “Journalists, Recruited from Provinces, Train in Bangladesh,” The Women’s Media Center (March 15, 2006).

By supporting these Trusts, Sen has demonstrated his desire to act on his own belief that, “human security stands, on the shoulders of human development with a particular adaptation of its rich vision and perspective, and this applies especially strongly to the critical role of elementary education.”³⁶⁴ He cautions, however, that not just any form of education will achieve the kind of social development that either he or, for that matter, Pogge is interested in achieving. To this end, Sen advocates the urgent need to recognize the correlation between non-sectarian, non-parochial education and well-being. For Sen, it is essential that the principles which embody the human rights movement also embody the educational reform necessary to establish education for all. According to Sen, “the question of openness of curriculum and the reach of reason can be quite central to the role of education in promoting human security. If the schools fail to do that by “thrusting smallness” on young children, we not only reduce their basic human right to learn widely, but also make the world much more incendiary than it need be.”³⁶⁵ And with this recommendation, it is possible to acknowledge that not only does Sen argue for the importance of basic primary education, he makes the important connection between supporting some higher, ‘elite’ education necessary to indirectly support the cause of primary education.

This smallness to which Sen refers is similar to Holt’s suggestion that, all too often, adults choose to lock children up in walled gardens, rather than recognizing and supporting

³⁶⁴ Amartya Sen, (2002b) “Basic Education and Human Security,” prepared as a background paper for the workshop on “Basic Education and Human Security,” jointly organized by the Commission on Human Security, UNICEF, the Pratichi (India) Trust, and Harvard University, in Kolkata. Available online at www.humansecurity-chs.org/activities/outreach/Kolkata.pdf.

³⁶⁵ Sen, (2002b), 9.

their right to transition gradually from immaturity to adulthood. An important distinction needs to be made, however, regarding the decidedly different solutions which Sen and Holt offer. Recall that Holt advocated an arrangement of equal rights for children, so that they can manage and direct decision-making regarding issues of significant importance in their lives. In the case of education specifically, for Holt, formal education is yet another unnecessary barrier between generations, which he claims prevents children from acting on their innate, unquenchable drive to understand their world. While sympathetic to, and aware of, the impact that static and lifeless schools can have on the well-being of children, Sen maintains that the solution is not to isolate children by removing them from public education, and from the opportunity to reflect openly on potential educational reforms which should be put into place to re-animate such schools.³⁶⁶ For Sen, while it is essential to recognize that education can engage and support the natural curiosity of children, it is even more essential to recognize that “in promoting friendship and loyalty, and in safeguarding the commitment to freedom and peace, basic education can play a vital part. This requires, on the one hand, that the facilities of education be available to all, and on the other, that children be exposed to ideas from many different backgrounds and perspectives and be encouraged to think for themselves and to reason.”³⁶⁷ The only way to ensure this multiplicity of ideas is to establish at least a minimal level of basic primary education which is compulsory to all. Thus, where the liberationist defends an approach to education which can free children so that they can

³⁶⁶ The Praticchi Research Team,(2002) *The Praticchi Education Report (number 1): The Delivery of Primary Education: A Study in West Bengal* (New Delhi: TLM Books and Praticchi (India) Trust; Drèze and Sen (1995) Chapter 6, “Basic Education as a Political Issue.”

³⁶⁷ Sen (2003b).

quench their thirst to understand their world whatever that world may be, Sen's capability approach defends a system of education which not only recognizes the child's need to quench his thirst to understand his world, but which also understands that to do so, requires a public environment where informed and reflective choices can be made.

Of course, it is one thing to make grand suggestions about the things societies should do, but it is a completely different challenge to actually make things happen. Recall Brian Orend's important caution regarding the *requirement of provision* which has left many sceptical about both the concept, and the cost, of socio-economic rights like the right to education which, while nice to have, brings with it many associated costs – costs which for some countries would be impossible to bear. To this, Sen recommends that, when faced with the daunting task of equalizing educational opportunities for all children in a country even as large, and as impoverished, as India, there is a responsibility to ensure universal attainment of literacy and basic educational skills at least in the younger age groups. There are important strategic questions to consider in implementing such a social commitment, but according to Sen (as Pogge also recommends), the primary challenge is to make it a more compelling political issue.³⁶⁸

For Sen, as already mentioned, the easiest way to make the provision of education a morally compelling political issue is to recognize that the provision of education is a labour-intensive activity and thus many of the associated costs are relative to the labour market of the particular country in question. And, as the work being done through the Pratiche Trust has

³⁶⁸ Drèze and Sen (1995), 139.

demonstrated, sometimes the simplest solutions (like the SSK) can bring about rewarding results. Beyond this, Sen recommends that, while there are obvious public burdens associated with the establishment of universal literacy and basic schooling (for example, provision of material resources like books and writing supplies, the people resources like teachers, or the bricks and mortar resources like the physical structures necessary to create a safe and nurturing educational environments), these burdens are necessary to avoid even greater burdens like mounting social insecurities and unnecessary inequities, particularly those related to gender and the larger health costs Sen enumerates. With this in mind, it is possible to recommend that Sen's challenge to bring about a collective commitment to the provision of basic fundamental human capabilities, like education, complements Pogge's challenge to reshape society's institutions so that all human beings have secure access to fundamental basic goods. As a result, any requirement of provision which may be the result of achieving this goal is related to our negative duty of justice not to interfere with the ability of others (children) to achieve at least a basic primary education. Moreover, it is a duty which those in a position to do something have an urgent responsibility to carry out. The next section considers Martha Nussbaum's more detailed specifications about what kind of education is necessary to support the capabilities needed for human development.

6.3. Capabilities and Education

In her work, Nussbaum states that “the basic claim I wish to make – concurring with Amartya Sen – is that the central goal of public planning should be the capabilities of citizens

to perform various important functions.”³⁶⁹ However, while Nussbaum acknowledges her immediate connection to the work of Sen, and even the suggestion of being “closely allied to, but in some ways superior to, the familiar human rights paradigm,”³⁷⁰ she differentiates herself on the grounds that her own Aristotelian approach to capabilities is more suited to dealing with inequities and injustices, particularly those based on gender. Recall that critics of Sen accused him of developing an approach which lacks a complete theory of human well-being and development. For these critics, Sen’s understanding of capabilities and functionings is too vague and imprecise to be of any practical value outside of an exercise in moral reasoning. In addition, critics have suggested that Sen’s notion of freedom in the capability approach focuses too much on the range of choice available to people, and too little on other human needs, like the non-rational aspects of humanness including emotions and empathy.³⁷¹ This section considers how Nussbaum has countered such criticisms and what this means to both the establishment of the capability approach, and to the establishment of education as something fundamental to which all individuals can stake a claim.

For Nussbaum, the greatest complications occur when one wants to translate moral reasoning into public policy. This is so, according to Nussbaum, because the distinction

³⁶⁹ Martha Nussbaum, “Human Capabilities, Female Human Beings,” in Martha Nussbaum and Jonathan Glover (eds.) *Women, Culture, and Development: A Study of Human Capabilities* (Oxford: Clarendon Press, 1995): 61-104.

³⁷⁰ Martha Nussbaum, (2003) “Capabilities as Fundamental Entitlements: Sen and Social Justice” in *Feminist Economics* 9 (2-3): 36.

³⁷¹ Steven Pressman and Gale Summerfield, (2002) “Sen and Capabilities,” in *Review of Political Economy* 14 (4): 429-434.

between the threshold of functionings below which no individual should be allowed to live, and the somewhat higher threshold of capabilities or beings and doings which we deem to be essential to a *good* life, is really quite significant – especially with regards to public policy. Nussbaum acknowledges that often, and importantly, the leap from human life to *good* human life is the result of individual choice and action. Echoing Aristotle, she asserts further that, to ensure that the first threshold is met and that individuals are encouraged to surpass it, the role of public policy is crucial and, the role of public policy directed at the lives of children and their education is even more crucial.³⁷²

To begin, one important feature of Nussbaum’s work which separates her from Sen, is her effort to create a list dedicated to particular, basic, and indispensable human capabilities to which, she claims, no human being should be denied access. Where Sen’s main focus is on making a social commitment to the achievement of the most basic functionings of survival and literacy for all, Nussbaum is interested in capturing these basic capabilities *and* the higher functionings which she argues we can grow into if given the correct opportunities. Included in Nussbaum’s central human capabilities are:

Life – the ability to live to the end of a human life of normal length,

Bodily Health – the ability to have good health, shelter and adequate nourishment,

Bodily Integrity – the ability to move freely from place to place and to be secure against violent assault,

³⁷² Martha Nussbaum, (1992) “Human Functioning and Social Justice: In Defense of Aristotelian Essentialism,” in *Political Theory* 20 (2): 202-246. See also Aristotle, *Politics* in Richard McKeon (ed.) *The Basic Works of Aristotle* (New York: Random House, 1941); and Aristotle *Nicomachean Ethics* in Richard McKeon (ed.) *The Basic Works of Aristotle* (New York: Random House, 1941).

Senses, Imagination and Thought – the ability to use the senses, to imagine, think and reason,

Emotions – the ability to have emotional attachments,

Practical Reason – the ability to form a conception of the good and to engage in critical reflection about the planning of one’s life,

Affiliation – the ability to affiliate with others including the social bases of self-respect and non-humiliation,

Other Species – the ability to live with concern for and in relation to the world of nature,

Play – the ability to laugh, play and enjoy time of leisure,

Control over one’s Environment – the ability to be able to engage with and participate in one’s environment (political and material), to exercise political choice, to speak freely and to hold property.³⁷³

With this list, Nussbaum suggests she is able to counter the critics by providing a comprehensive understanding of the human capabilities fundamental to any human life, and which need to be developed, nurtured and furthered, or at least initially sparked though one’s education. She claims it is an improvement over other lists, like the fundamental human rights that individuals like Pogge for example have championed, because it is not as Eurocentric or as malecentric.³⁷⁴ Moreover, she claims to enhance Sen’s capability approach by maintaining his insight into the need for individual choice, and the need to recognize that being able to achieve certain human functionings has both intrinsic and instrumental value,

³⁷³ She has presented this list in many of her writings but a few papers of note include: Martha Nussbaum, (2003) “Capabilities as Fundamental Entitlements: Sen and Social Justice,” in *Feminist Economics* 9 (2-3): 33-59; (2001) “Adaptive Preferences and Women’s Options,” in *Economics and Philosophy* 17: appendix; (2000b) “Women’s Capabilities and Social Justice,” in *Journal of Human Development* 1 (2): 231-233.

³⁷⁴ Nussbaum (2003), section II “Capabilities and Rights”.

while, at the same time, placing a careful limit on the kinds of capabilities that should count for human flourishing.

A second feature of Nussbaum's work that separates her from Sen, is her three-part model for development of capabilities in education.³⁷⁵ Sen, although completely cognisant of the advantages of advanced schooling and life-long learning, recommends only a minimalist understanding that sustained schooling (especially in the areas of basic literacy and numeracy) is essential to well-being and human capability development. Nussbaum, on the other hand, stipulates the need for one's educational experience to include more broadly at least three things: *critical thinking*; *world citizenship* and *narrative imagination*; and *liberal education*.

By critical thinking, Nussbaum is referring to the ability to reflect judiciously and analytically upon one's own circumstances and one's social environment. Nussbaum adopts the classic Socratic view of the 'examined life' to suggest that, not only is the ability to think critically *instrumentally* important for good citizenship and political participation, it is *intrinsically* important for personal introspection. For example, Nussbaum comments on one educational experience she encountered while in India.³⁷⁶ She witnessed a group of women in an adult literacy program called "Reflect" which encourages both literacy and critical thinking among its participants. Nussbaum describes what she witnessed:

³⁷⁵ Martha Nussbaum, (2006) "Education and Democratic Citizenship: Capabilities and Quality Education," in *Journal of Human Development* 7 (3): 385-395; (2002) "Education for Citizenship in an Era of Global Connection," in *Studies in Philosophy and Education* 21: 289-303; *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge MA: Harvard University Press, 1997).

³⁷⁶ Martha Nussbaum, "Education and Democratic Citizenship: Beyond the Textbook Controversy," a Ravinder Kumar Memorial Lecture Delivered at Jamia Milia University, New Delhi, January 17, 2005.

With around twenty women from the village, we sit on the ground in a barn (where rats occasionally run across our feet). The women have made a map of the power structure of their village, and we discuss this map, as they identify possible points of intervention that may change the deal they have from the landlords for whom they currently work as sharecroppers. Everyone is animated, and the idea of criticizing entrenched structures of power has obviously led these women to attach great importance to the associated task of learning to read and write.³⁷⁷

While this example is one in which women are involved rather than children, she uses it to highlight the essential role that the capacity for critical examination of oneself, and of one's situation, can and should play in the establishment of an educational context to which every child is entitled. For Nussbaum, this is especially important in societies which differ by ethnicity, caste, and religion. Recall Sen's suggestion that one substantial obstacle standing in the way of educational reform in India (and in many countries around the world), is the challenge of overcoming (or at least mitigating) the class and gender barriers which deeply impair a child's ability to be educated. Nussbaum's insistence upon the need for an educational context which endorses critical thinking – that is *an educational foundation which develops critical and self-critical capabilities which can free children from the authority of tradition to think for themselves* – is one component necessary to overcome social obstacles like the ones to which Sen refers. Nussbaum contends that critical thinking on its own, however, can still be parochial and dogmatic if one's educational experience does not also include world awareness.

By world awareness, Nussbaum asserts students must be given the opportunity “to see themselves as not simply citizens of some local region or group but also, and above all, as

³⁷⁷ Ibid, 1.

human beings bound to all other human beings by ties of recognition and concern.”³⁷⁸ And it is this understanding of Nussbaum’s which ties her substantially to the human rights community. Like both Pogge and Sen, Nussbaum is motivated by the idea that we are bound to each other as human beings and our actions should reflect our interconnectedness. By establishing an educational context which can expose children to the historical traditions, cultures and religions of others through literature, story-telling and reflective discussion of these stories another component necessary for the development of each child’s capabilities through education can be realized. To this end, Nussbaum recommends the urgent need to look beyond the rudimentary skills of basic reading, writing and arithmetic (which Sen deems to be essential) to embrace a multicultural education that can also develop the *narrative imagination*. For Nussbaum this is important, because she urges – echoing Richard Rorty³⁷⁹ – that children, who have been exposed to another person’s story, can connect more deeply with the emotions and wishes of another.

Finally, Nussbaum highlights the value to be gained by ensuring that the time-honoured tradition of liberal education is not only maintained, but is accepted as an essential component of human flourishing and capability development. By liberal education, Nussbaum is careful to make an important distinction between two approaches to liberal education – one to be rejected and one to be embraced and cultivated.³⁸⁰ First, she

³⁷⁸ Nussbaum (2002), 295.

³⁷⁹ Richard Rorty, “Education as Socialization and as Individualization,” in Richard Rorty *Philosophy and Social Hope* (New York: Penguin Books Ltd., 1999); Richard Rorty, “Human Rights, Rationality, and Sentimentality,” in Stephen Shute and Susan Hurley (eds.) *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993).

³⁸⁰ Martha Nussbaum, “The New Liberal Education,” in Martha Nussbaum *Cultivating Humanity: A Classical*

acknowledges (and rejects) a long-standing and traditional conception of liberal education, historically favoured by ‘the freeborn gentlemen of the propertied classes’ – a conception of education which, according to Nussbaum, was intended to ‘initiate’ gentlemen into the time-honoured traditions of their elite society and to free them to do as they please in the world. The conception of liberal education which Nussbaum prefers – and which corresponds directly with Sen’s educational vision – is a conception of liberal education which Nussbaum claims is intended to “*produce* free citizens, citizens who are free not because of wealth or birth, but because they can call their minds their own.”³⁸¹ Nussbaum has included a commitment to this ‘new’ vision of liberal education within her list of essential basic capabilities because she asserts that it is through the use of the senses, the imagination, and one’s ability to think that one is able to act as a truly free human being. She does not deny that wealth and social status are significant enablers (as the ‘old’ conception of liberal education asserts). But, according to Nussbaum (echoing Sen) if a ‘new’ conception of liberal education can cultivate a child’s ability to use her mind, then it can be possible for her to achieve a good life even without wealth or social status. For Nussbaum, such an educational context would include basic literacy, basic mathematical and basic scientific training (to which Sen refers). It would also include opportunities to use one’s “imagination and thought in connection with experiencing and producing works and events of one’s own choice, religious, literary, musical, and so forth.”³⁸² For Nussbaum, imaginative

Defense of Reform in Liberal Education (Cambridge MA: Harvard University Press, 1997): 293-301.

³⁸¹ Nussbaum (1997), 293.

³⁸² Martha Nussbaum (2000b), 232.

understanding and the use of the arts can provide an enhanced educational experience which not only provides students with the knowledge and skills necessary for gainful employment, but for human compassion and understanding.

Beyond the importance of this three-way educational model, Nussbaum (like Sen) also recommends that, to develop a more complete understanding of human capabilities, it is necessary to nurture habits of mind which are open to dialogue and deliberation. According to Nussbaum, then, while Pogge may be correct to suggest that the capability approach is not able to exclusively address the horrific injustices of the world in which we live, it does much more than simply postulate a “natural hierarchy in order to claim greater resources for the *worse* endowed so as to make up for their natural deficiencies and to provide them access to the full range of valuable human functionings.”³⁸³ According to Nussbaum, the capability approach cultivate freedoms such that everyone can respect each person’s struggle to flourish, and can treat each person as an end and as a source of agency and worth in her own right.³⁸⁴ For Nussbaum, capabilities are “basic powers of choice that make a moral claim for opportunities to be realized and to flourish.”³⁸⁵ By highlighting certain inequities then, as the capability approach does, Nussbaum recommends that it is possible to highlight the need to recognize that the inability of some to attain certain levels of functionings is a problem of justice – a problem of justice which requires more than an equal distribution of resources, or a universal set of rights on paper. It requires a social environment which favours human

³⁸³ Pogge (2002b), 54.

³⁸⁴ Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (New York: Cambridge University Press, 2000), 69.

³⁸⁵ *Ibid*, 298.

capabilities, and that fosters those capabilities through essential public freedoms like education.

With this, it is possible to conclude that Nussbaum has correctly claimed that the capability approach, which she developed with Sen, gives important precision and supplementation to the language of rights because it moves away from the concept of a society's basic structure to focus on the further concept of individual capabilities. According to both Sen and Nussbaum, it is pointless to talk about having a right to something without also thinking about what capability an individual has to realize that right— an important and worthwhile claim. That said, however, while Nussbaum provides a more comprehensive and precise statement of capability than Sen, this statement seems to assume a particular standard of the good life that might not feasibly apply to the desires, needs or resources of all. Moreover, by suggesting that the language of capabilities clarifies the role that the state *must* play in aiding individual flourishing, Nussbaum neglects Sen's sensitivity to the need for both state assistance and individual responsibility.

For example, while premature death is an unfortunate occurrence, many essential occupations – medical, military, and law enforcement to name a few – expose individuals to events that might bring about a sudden death. Should we refrain from participating in these occupations because they will interfere with our capability to benefit fully from a good life? Moreover, if Nussbaum's list represents a minimum standard of care below which no human life should go, how should a society provide the resources necessary to meet all of these central human capabilities which Nussbaum includes, given such a wide diversity of

individuals? While her list is an excellent list, and certainly one worth aspiring to cultivate, it would be important to recall both Pogge's and Sen's desire to establish a cost-effective conception of socio-economic rights and freedoms suitable for both the developed world and the developing world. Finally, her three-way educational model (though arguably an essential component of established democratic societies, necessary for the development of reflective, active citizens and ideally worth striving for), places far too great a burden on developing countries to achieve a system of free education for all because it goes well beyond the basics to which Sen refers. Thus, while Nussbaum may have provided a more exacting account of which capabilities are essential, in so doing, she establishes the very kind of model which Pogge, for example, believes requires indefinite increases in expenditures on those with the greatest capability shortfalls.³⁸⁶ Consequently, on Nussbaum's account, Pogge's charge of oversensitivity to inequities may be valid. If, on the other hand, the capability approach is taken to be simply the endorsement of alternative combinations of basic functionings, from which a person can choose, then endorsing Sen's claim for the need to support the basic capabilities of survival and literacy is a manageable and meaningful stipulation necessary to support the claim that education is a human right to which all children are entitled. Moreover, it is possible to maintain that Sen's challenge to bring about a collective commitment to the provision of basic fundamental human capabilities, like education, complements Pogge's challenge to reshape society's institutions so that all human beings have secure access to fundamental basic goods, and ultimately *can be encouraged to aspire to* Nussbaum's three-way educational model, despite Pogge's own suggestion to the contrary.

³⁸⁶ Pogge (2002b), 62.

As James Nickel has pointed out, “human rights are not ideals of the good life for humans; rather they are concerned with ensuring the conditions, negative and positive, of a minimally good life.”³⁸⁷ Like Nickel, Brian Orend agrees that the domain of *human* rights should be reserved for those entitlements which secure the “vitally needed material goods, personal freedoms, and secure protections” each individual is owed simply by virtue of being human. With this in mind, Orend proposes a set of what he refers to as the “³⁸⁸foundational five” objects of human rights that include: personal security, material subsistence, elemental equality, personal freedom, and social recognition as a person and a rights-holder. By including the importance of recognizing our initial moral status and our membership within the human community, prior to our national communities, Orend establishes a compelling pre-political set of human rights objects. By stressing the need to focus on the idea of securing vital needs, he is also able (like Sen) to promote a more effective – realizable and cost-sensitive – set of criteria than Nussbaum. Despite these important qualifications however, this list seems to favour disproportionately, as does Pogge, security and material subsistence needs over an equally important social consideration like education. To be fair, Orend does put the question of “basic” education on the table for further discussion by suggesting, “that some provision of education may be claimable as a matter of human right”³⁸⁹ but even Orend asserts that education is more controversial than either basic social security, or preventative health care.

³⁸⁷ James Nickel (2005) “Poverty and Rights,” in *Philosophical Quarterly* 5:385-402.

³⁸⁸ Orend (2002).

³⁸⁹ Orend (2002), 116.

Why should this be the case? Giving a needy child another food handout or regular immunization without also teaching the child some rudimentary academic skills is only going to prolong an already miserable life. If human rights are meant to protect an individual's right to a minimal standard of life, then it seems essential to make an amendment to the "foundational five" – namely the inclusion of basic public education. That is not to suggest that a starving child is going to learn if forced to go to school. Rather, if Orend is correct to state that not having one of his set of core elements can cause real damage to one's ability to function as a human being, then a minimum level of education should also be included in that set. But it should not be based on Nussbaum's utopian claim alone that education should be focused on creating "Socratic citizens capable of thinking for themselves, arguing with tradition, and understanding with sympathy the conditions of lives different from their own."³⁹⁰ It should be based on Sen's careful admonition that, while the capability approach cannot adequately deal with the process aspect of freedom exclusively, it can provide individuals with a greater opportunity to convert the rights that they have into something meaningful to them through recognizing everyone's claim to fundamental capabilities like basic public education.

Therefore, providing children with access to free basic primary public education that can make available the basic skills of literacy and numeracy, and which can raise an awareness of others is an essential component of human development and of the human

³⁹⁰ Martha Nussbaum (2002) "Education for Citizenship in an Era of Global Connection," in *Studies in Philosophy and Education* 21: 289-303.

rights which are required to positively support that development – an idea which is reflected further in Katarina Tomaševski's recommendation that

From the perspective of the rights of the child, education constitutes the child's perception of human rights. Specific courses in human rights education are located at the top of the education pyramid and are unlikely to be effective if the child was earlier taught about her or his own unworthiness because the child happens to be female or disabled. One important educational experience of any child between the ages of three and five is being taught to perceive a viewpoint different from the child's own, because small children perceive only one side of everything: their own. Many political and armed conflicts are founded upon each side perceiving only one side of everything: its own. The ability of education to socialize children into understanding and accepting views different from their own is an important lesson for all human rights education.³⁹¹

With this, Tomaševski advocates that respecting the right to education is a primary public responsibility. Further to this appeal, she suggests that, to realize this claim, three things need to be addressed – the *denial* of the right to education, the *violation* of the right to education, and the *distortion* of the right to education. According to Tomaševski, people *and* resources make the difference, not abstractions. To effectively deal with situations where one's right to education has been denied, violated, distorted, or any combination of these three interferences, requires not only formal laws and procedures to adjudicate such abuses, but also individuals committed to endorsing the achievement of certain educational functionings for all. As Tomaševski has pointed out (echoing Sen, Nussbaum and the liberationist), children cannot wait to grow up.³⁹² When children are faced with educational deprivations, as

³⁹¹ Katarina Tomaševski, *Annual Report of the Special Rapporteur on the Right to Education*, E/CN, 4/2001/52 (submitted in accordance with Commission on Human Rights resolution 2000/9). <http://right-to-education.org/sitemap/index.html>.

³⁹² Katarina Tomaševski, *Manual on Rights-Based Education: Global Human Rights Requirements Made Simple* (Bangkok: UNESCO, 2004).

when individuals are faced with capability deprivations in general, they suffer often irremediable harms. According to Tomaševski, “the rationale behind global human rights standards is to assist with their incorporation in national education strategies, because education has a multiplying effect: where the right to education is effectively guaranteed it enhances the enjoyment of all other rights and freedoms, while when the right to education is denied it precludes the enjoyment of many, if not all, other human rights.”³⁹³

Throughout chapters 3-6, it has been argued that Rawls and Pogge provide a human rights-based institutional framework which can protect the child’s right to access basic primary education. To this, it has also been argued that Sen and Nussbaum provide an important social context which complements, in a realistically utopian way, the moral challenge which the rights movement directs at society to reshape unjust social practices. The final chapter of this dissertation will add to this a consideration of the current Education for All movement in general, and of Katarina Tomaševski’s field work in particular, to provide some concrete examples of this integrative approach. It is important to reflect on these practical applications because they support the philosophical work of Rawls, Pogge, Sen and Nussbaum. Ultimately, however, it is important to reflect on these practical applications because they also provide important insight into the vigilance which is required to ensure that a human rights object, like education, can become a universally respected and supported object which does not itself become a vehicle for violations.

³⁹³ Ibid, 57.

Chapter 7

Education as a Human Right and Public Policy

I have argued that to defend education as a fundamental human right which is both meaningful and manageable requires both the provision of educational resources *and* the freedom to do something with those resources once they have been obtained. I have also argued that this is essential because human rights legislation on its own is not enough, and neither are the good intentions of duty-bound adults acting in the best interests of the child. To complete this validation of the child's right to education, this dissertation concludes by considering the current Education for All (EFA) revolution and the field work of Katarina Tomaševski. By considering these practical applications of the right to education, it is possible to demonstrate both why it is correct to promote and protect UN law governing the right to education, and why it is also correct to continue to challenge what is to be gained from doing this.

As a human rights lawyer and professor of international law, and as an avid promoter of human rights obligations in education, Tomaševski's work is motivated by what she refers to as the *paradox of human rights* – that is, the double role of the government as both *protector* of human rights and *violator* of human rights.³⁹⁴ While a keen and dedicated champion of human rights (until her sudden death in 2006) she was also an uncompromising critic of misdirected and abusive uses of human rights for personal and powerful gain. For

³⁹⁴ Katarina Tomaševski, *Human Rights Obligations in Education: The 4-A Scheme* (The Netherlands: Wolf Legal Publishers, 2006), introduction.

Tomaševski, only a new human rights perspective, one from outside of the bowels of international law and governance, can avoid such an inconsistency. To this end, section 7.1 considers the UN challenge to shift the existing robust worldwide commitment from the *idea* that children require special consideration of their right to have an education, to a robust worldwide commitment to *public action* which supports and sustains this right. This will be followed, in section 7.2, by consideration of Tomaševski's own comprehensive commitment to the institution of education and her vigilant understanding that, while it is correct to suggest that education is a human right with immense power to transform, such an assumption fails to acknowledge that such transformations can be both positive and negative. For example, while many people, including many supporters of the EFA movement, assume that with more education comes more opportunities, Tomasevski demonstrates that this can *only* occur if a trilateral relationship between parent/educator, state, and child (as stipulated in the CRC) is recognized, and a rights-respecting methodology is enabled. This dissertation will conclude by suggesting that the UN desire to create a 21st century learning society, as defended by Tomaševski, represents an important new human rights perspective. It is a new perspective which can support the goal of securing access to educational resources suitable to enable all children to develop a set of capabilities to lead their lives in a meaningful and fulfilling way. Further to this, it is also pragmatically – and crucially – a perspective which can ultimately enable children to play a positive role in the social institutions, in which they find themselves embedded, throughout their lives.

7.1. Education for All

In 1990, the same year that the CRC entered into force, codifying the right to education for all children into international law, UNESCO held a world conference on education in Jomtien, Thailand. The theme of the conference was Education for All (EFA). Of course, establishing the CRC as an international law also meant establishing education for all, but the organizers of the EFA conference recognized that to establish the right to education as a *human* right, it was also necessary to influence how the world looks at both children and their right to education, outside of these international legal channels. To do this, governmental representatives from 155 countries, and an additional 150 representatives from various educational organizations, agreed that the traditional goal of improving access to educational opportunities was insufficient to adequately deal with the complex nature of securing a child's right to education, especially for those children in impoverished, war-torn, or developing countries. The participants at this conference argued that two additional ideas needed to be debated. First, they suggested that there is an urgent need to acknowledge and deal with the fact that, despite major efforts to address the needs and rights of children in national and international law, millions of children continue to go without schooling, to be illiterate, and to lack the basic knowledge necessary to make their way in the world. Second, they suggested that there is also an urgent need to acknowledge that basic education is not only about formal schooling; rather, having an education is also about having a 'passport for life':

Every person – child, youth and adult – shall be able to benefit from educational opportunities designed to meet their basic learning needs. These needs comprise both

essential learning tools (such as literacy, oral expression, numeracy, and problem solving) and the basic learning content (such as knowledge, skills, values, and attitudes) required by human beings to be able to survive, to develop their full capacities, to live and work in dignity, to participate fully in development, to improve the quality of their lives, to make informed decisions, and to continue learning.³⁹⁵

Recall that the architects of the CRC insisted upon the need to understand both the necessary educational opportunities and the nature of the aims that these opportunities intended to address. The participants at this conference also insisted upon the need to address the quality of educational opportunities and the need to establish a few specific key goals, especially focused on the nature of ‘basic education’.

The first of these goals was to expand early childhood care and development. Other UN documents, prior to this conference, highlighted the need for basic primary or elementary education, but this conference highlighted the need to understand that the learning environment a child is exposed to in the first five years of life is equally, if not more important, especially for children in impoverished situations. In addition to this goal, there was the continuing desire to enhance the opportunities for all children to access basic primary education. This time, however, the stated goal was much more specific – to achieve by the year 2000³⁹⁶ universal access to primary education and satisfactory proof that there was universal completion of primary education. Recognizing that addressing questions of access was not enough to satisfy the achievement of education for all, a third goal was established to ensure that notable improvements in learning achievement occurred based on agreed-upon

³⁹⁵ UNESCO, “Education for All,” *Jomtien Framework for Action* (1990), Article 1, paragraph 1.

³⁹⁶ This goal would subsequently become the Millennium Development Goal to achieve free and compulsory education for all by 2015.

measures of specified learning outcomes: for example, setting a goal of having 80% literacy by the time a child reaches the age of 14, and then following up with appropriate testing mechanisms to ensure that in fact the goal has been met. As with the need to look to early childhood education, another goal was included which focused on the need to consider adult education. Here, the interest was to focus primarily on improving the 1990 adult literacy rates, especially among women, so that adult illiteracy would be cut in half by the year 2000. A fifth goal, set to look beyond the provision of basic primary education, was the provision of basic education and training for youth and adults. The final goal of this conference was to improve the dissemination of the knowledge, skills and values required for better living and sustainable development.

Not surprisingly, these six ambitious goals, directed toward achieving an education for all, have been slow to achieve progress and, in the case of some of the time-sensitive goals, the hoped-for timelines have come and gone without effect. The UN remains optimistic, however, that despite these setbacks, the revolution to achieve education for all has begun. In 1999 for example, UNICEF published its annual State of the World's Children report (SOWC), dedicated specifically to education. As a document, it is another report on the efforts of the international community to ensure that all its children enjoy their human right to a high-quality education. As a catalyst, however, it provides positive examples of working models and practical strategies to manage these efforts and to empower other policy-makers and teachers to activate this educational revolution within their own local communities. With the assumption that education represents an essential force for social change, defenders of the

right to education and the EFA movement suggest that the need to recognize education as an essential human right can no longer be restricted to the rhetoric of UN documents like the CRC. The world's commitment to the principle of education for all must become a reality that local communities act on as well. To this end, the SOWC includes a simplified list that represents the five key elements UNICEF deems necessary for the pursuit of local level educational improvements including: 1) learning for life; 2) access, quality and flexibility; 3) gender sensitivity and girls' education; 4) the State as key partner; 5) care for the young, pre-school age child.

Rather than discuss each element in order, it would be useful to consider the importance of the care for the young child first. Although it is listed as the fifth element for consideration, it is a central complementary area for consideration in securing basic primary education for all. The need to deliberate on the care of the young child is not only important for the child's immediate well-being, it is also essential to ensure the dynamic *educational foundation* necessary for life-long learning and socialization. That is, to complement considerations regarding basic primary school, UNICEF argues that a focus on Early Childhood Care and Development (ECCD) will also improve the child's health care, nutrition, future childrearing, future ability to exercise civic duties in an informed and effective way and, ultimately, the future ability to contribute actively to a stronger, more vibrant national economy. The SOWC clearly highlights the strength of this commitment to early childhood education by stipulating:

The world is finally recognizing that a child's rights to education, growth and development – physical, cognitive, social, emotional and moral – cannot be met

without a comprehensive approach to serving their needs from birth. It is acknowledging that the mental, social and emotional development of pre-school children has a huge impact on their ability to thrive in the classroom and later in the adult world.³⁹⁷

While the importance of this claim has the potential to undermine the importance of the claim to the child's fundamental right to basic primary education, some aspects of this claim are relevant to, and derive both causally and logically from, recognition of a human right to basic primary education. For example, as in the CRC, this commitment to ECCD stipulated in the SOWC highlights the need to recognize and support the parent as the child's first teacher. This is followed by stressing the need to recognize and support the 'intersectoral links' between educationalists, health professionals, nutritionists, and social workers.

Historically these sectors have worked independently, often with the health and social professionals forging the first links, followed by the educationalists. The SOWC suggests, however, that if these intersectoral links are fostered, the burden of achieving basic primary education for all does not fall onto one overstressed, overburdened, under-resourced system designed to focus on the cognitive development of children who have already passed through some of their most formative years. Instead, the whole child can be addressed by a system that has the capacity to tackle not only the cognitive but also the physical, the social, and the cultural. More recently, even psychologists and cognitive scientists have been added to the list of important intersectoral links because physical, cognitive and social development all directly depend on the vitality of the rapid brain development which occurs in early

³⁹⁷ UNICEF, *The State of the World's Children 1999* (New York: UNICEF, 1998), 72.

childhood.³⁹⁸ Paul Thagard and Keith Holyoak, for example, have examined how children learn and reason to conclude, much like Nussbaum has assumed, that children (even young children) are complex learners capable not only of basic educational tasks but of analogical thinking as well.³⁹⁹ As such, children should be entitled to a more broadly based primary educational experience which has been informed by the input of this broader spectrum of intersectoral professionals interested in the development and well-being of young children. Thus, understanding and establishing the proper educational environments for children from birth, rather than the traditional elementary school age can improve the child's ability to develop effectively life-long learning habits. Moreover, it can also improve the ability of the parents to participate successfully in their child's educational development. Finally, it can enhance what the child is able to gain from claiming her right to basic primary education.

The second key element suggests that, to defend the right to education for all is to defend the right to life-long learning. That is not to say that one must spend a lifetime in school, nor is it to say that the government is somehow responsible for providing life-long educational training; rather, it is to emphasize the fact that, while it is obvious to question *what is being taught*, it is equally important to question *what is being learned*. For those children who either do not go to school at all, or who fail to complete enough education to

³⁹⁸ See also Howard Gardner, *Multiple Intelligences: Theory in Practice* (New York: Basic Books, 1993). Eric Jensen, *Teaching with the Brain in Mind* (Alexandria VA: Association for Supervision and Curriculum Development, 1998) and Eric Jensen (2000) "Brain-based Learning: A Reality Check," in *Educational Leadership* 57 (7): 76-80.

³⁹⁹ Keith Holyoak and Paul Thagard, (1997) "The Analogical Mind," in *American Psychologist* 52 (1): 35-44; Also Holyoak and Thagard *Mental Leaps: Analogy in Creative Thought* (Cambridge MA: The MIT Press, 1995); Thagard "Analogy, Explanation, and Education," in *Journal of Research in Science Teaching* 29 (6): 537-544.

get them past illiteracy and innumeracy, this is an obvious question. This question is equally important, however, for the many children who actually spend a considerable amount of time going to school, but who, upon graduation, remain unprepared for life. According to the SOWC, “Learning for life in the 21st century requires equipping children with a basic education in literacy and numeracy, as well as the more advanced, complex skills for living that can serve as the foundation for life – enabling children to adapt and change as do life circumstances.”⁴⁰⁰

Of course, stating that learning for life is required, and actually *establishing* a learning-for-life attitude are two different things. With this in mind, new assessment projects like the joint UNESCO-UNICEF Monitoring Learning Achievement (MLA)⁴⁰¹ have made significant improvements to how we measure student achievement and learning. This kind of assessment guide no longer follows the traditional methods of recording exam results or maintaining school attendance roles; the MLA attempts to gain information which will both uncover weakness within any given system and will provide insights for meaningful improvements. What kinds of meaningful improvements are these assessment tools interested in? Traditionally, student tests have measured things like student achievement in reading, writing and mathematics, or they have measured a student’s level of competence necessary to gain entry into a system of education or to promote a student to the next level. With these new projects, the focus has shifted to measuring not only whether a student has acquired the

⁴⁰⁰ SOWC (1998), 23.

⁴⁰¹ Vinayagum Chinapah and Florence Migeon (eds.), *Monitoring Learning Achievement: Towards Capacity Building, Final Report* (Paris: UNESCO, 1995).

appropriate reading, writing and arithmetic skills, but also whether students can apply these skills in a flexible way to a wider variety of situations necessary for living. For example, all of the pioneer nations in the original set of countries being monitored for their performance in meeting “minimum basic learning competencies” (China, Jordan, Mali, Mauritius and Morocco) identified the need for students to be able to recognize the symptoms of the major childhood diseases.⁴⁰² By focusing on three major areas of life skills – health/hygiene/nutrition; everyday life; and the social and natural environment – in conjunction with basic reading, writing and mathematics skill, not only are children trained to be good students, but also they are taught to learn how to learn. That is, how to adopt habits of mind that will ultimately enable them to adapt to the variety of life circumstances in which they should find themselves.

Education ought to be accessible to every child. Having a right to education, however, does not mean having a right to the same education for all; it means have the same right for all to an education. With this in mind, according to the SOWC, “The challenge for schools is to be flexible enough to adapt to the needs of the most disadvantaged children while offering education of sufficient quality to keep all students once they have arrived.”⁴⁰³ Recall Article 14 of the ICESCR and the need to address the concern that some under-developed countries, given their lack of resources, would automatically be unable to secure compulsory basic primary education. According to the general comment on the implementation of this Article,

⁴⁰² SOWC (1999), 24.

⁴⁰³ SOWC (1999), 32.

the inclusion of the element of compulsion was necessary, not to penalize directly those countries which are incapable of fulfilling this treaty, but to highlight the non-optional, interdependent nature of basic primary education and the need to increase the level of awareness with regard to “international assistance and cooperation” to achieve this end.⁴⁰⁴ Similarly, the inclusion in the SOWC of the child’s right to access a high quality education within a framework that is flexible to meet each child’s unique needs, is not to burden educational systems inappropriately. The inclusion of this right to access is to highlight the non-optional nature of the child’s right to education. Even in countries that have well established educational programs, many children cannot realize their right to education because they are members of a group that is marginalized within its own society. To achieve the UN goal of education for all, however, consideration needs to be given to all children, including those children who have traditionally been hard to reach. This includes: girls, especially in predominately patriarchal societies; rural children, who might not have the means to get themselves to school; ethnic minorities or indigenous groups who do not speak the common language taught at school; disabled children; street children who do not officially belong to a school district; and children caught in armed conflict. It is the hope of the EFA movement, that by encouraging reflection on the need to reach currently ‘unreachable’ children, especially among policy-makers and teachers, two important developments will result. First, there will be an increase in the level of awareness concerning the plight of desperate children. More importantly, there will also be an increase in

⁴⁰⁴ Committee on Economic, Social and Cultural Rights, *Plans of Action for Primary Education* (General Comment 14, 1999). [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.1999.4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.1999.4.En?OpenDocument).

information-sharing among educators so that the successful solutions by some can motivate others to experiment with and apply innovative solutions to their own seemingly insurmountable circumstances.

In conjunction with the need to address levels of access, another top priority of the EFA movement is to raise awareness of the impact of gender sensitivity on educational initiatives. According to the SOWC, recognizing the importance of gender sensitivity is the first step to recognizing education for all because of the ripple effect associated primarily with the education of girls. Women around the world are the primary caregivers of children; if the mother is educated, the lives of her children will likely benefit. For example, in 1997 UNICEF examined a variety of factors that contribute to the health and well-being of infants and children under the age of five. While the impact of health, nutrition, water quality, hygiene, and education were all considered, it was found that maternal education had the greatest impact on the life expectancy of these children.⁴⁰⁵ This study also found that, in addition to improving the life expectancy of young children, there were other notable impacts of maternal education including: a mother's ability to act as a role model, especially for her daughters; a decrease in the number of children she will have; an improvement in a mother's ability to recover from complications in childbirth; and an increase in a mother's ability to avoid exploitation and/or abuse within her family.

Reflecting on the effect of improved gender sensitivity in the ability of individuals to access education is not limited to females either. In countries where children are required to

⁴⁰⁵ SOWC, figure (8), 54.

perform agricultural or labour responsibilities for their families, or in countries where children are expected to be soldiers in ongoing armed conflicts, it is often the male children who are called upon to fill these roles.⁴⁰⁶ By collecting information regarding attendance records and drop-out rates, defenders of the SOWC argue it will be possible to track these educational imbalances and to rectify them by enforcing existing truancy laws or by reasserting the greater value to be gained by insisting on compulsory education. Other strategies the SOWC offers for improving gender sensitivity include the need to establish child-centred learning environments like those highlighted in the CRC, and the need to ensure that teachers, policy-makers and resource providers are properly trained not only to create appropriate educational environments but also to model appropriate gender-sensitive actions. Defenders of the SOWC argue that, if such measures are taken, not only will educational environments be more amenable to both boys and girls, but those hard-to-reach children will have one more reason to feel safe, welcome, and necessary.

The final key element necessary to realize the EFA movement, according to UNICEF, is the need to recognize the essential role that the State must play to ensure that every child can access her right to education. By emphasizing the role of the State in the SOWC however, UNICEF is careful to suggest that the “most critical role of the State in education is as a guarantor of children’s right to basic education. Experience in the last few years has led to a more textured understanding of the role of the State, and of the State itself.”⁴⁰⁷ The

⁴⁰⁶ Helen Brocklehurst, “Kids ‘R’ Us? Children as Political Bodies,” in Mark Evans (ed.) *Ethical Theory in the Study of International Politics* (New York: Nova Science Publishers, Inc., 2004): 89-102.

⁴⁰⁷ SOWC (1999), 64.

stipulation of this *textured* understanding is important to highlight the need for State involvement without full State control. According to the SOWC, the State is in the best position to direct the entire system including involvement in curriculum development and design, in teacher training and management, and in seeking out and promoting creative partnerships for the betterment of the system as a whole. The SOWC also recommends that while the State's role as 'educational director' is an essential element, the State cannot and should not act alone. The same intersectoral links which the SOWC suggests should be established to guide ECCD should also remain intact throughout the entire system of education.

The SOWC optimistically concludes by suggesting that the world is on the "cusp of an education revolution." The defenders of this document suggest that this revolution has been (and will continue to be) fuelled by three things. First, the near universal acceptance of a document like the CRC demonstrates a near worldwide commitment to the idea of the indivisibility of human rights, including a child's right to education. And full ratification – particularly by America – of the CRC will only continue to strengthen the value of this document. Second, the current efforts by a wide variety of vocal individuals (including those examined in this dissertation) to ensure that children can enjoy all of their human rights help to demonstrate that UNESCO's endorsement of education as a human right is not only correct but also vital to the success of human rights fulfillment and human development. Finally, the documented interest of some States – like India – to accept, and to invest (even minimally) in their role in the protection and promotion of the child's right to an education

suggests that, while the political will to support the education revolution may not be universal, significant inroads are being made. Moreover, these inroads have encouraged supporters of UNICEF and UNESCO to recommend two things. First, the SOWC recommends that, “we may be entering an era of investment in ‘human and social capital’ that will make the task of spreading the education revolution worldwide much easier.”⁴⁰⁸ Second, the SOWC recommends that, while it may have taken more than fifty years to transform the principles found in the UDHR from ideas into actions, those principles are no longer negotiable. Basic primary education must be viewed as a fundamental *human* right that each child is owed as a matter of minimally decent treatment, and it is everyone’s responsibility to do something to make this a reality.

Clearly, supporters of EFA have deliberated at length to arrive at conclusions which they believe to be not only reasonable but inescapable. Their enthusiastic desire to promote and engage an *education revolution*, however, underscores the need to recall the caution asserted by Rawls that, no matter how well-arranged or economical a theory may be, the institutions which result from such moral deliberations must uphold a practical commitment to ongoing reasoned reflection and public justification of that theory. Recall from section 3.3 the suggestion that Rawls defended the need, much like EFA, for a public system of education based on the need to develop citizens who can coordinate with others for mutual advantage. For Rawls, children are ‘prospective citizens’ and require a free and compulsory public system of elementary education which publicly deliberates on the role which

⁴⁰⁸ SOCW (1999), 86.

education should play in the establishment and maintenance of a mutually beneficial, rights-respecting social infrastructure and on the scope of educational experiences necessary to enhance an individual's life prospects.

Recall as well that Rawls defended this understanding of the role which education should play within society despite the obvious slippery slope toward social indoctrination. In response to this challenge, it was suggested that both Rawls and Pogge recommend that the only way to avoid such a difficulty is to adopt a system of education which understands and accepts two things. First, the idea that children have rights both as human beings and as 'prospective citizens' of the society in which they will ultimately become active members. With this in mind, the publicly-funded education which they receive must prepare them for this role. Second, the idea that adults have duties which must respond appropriately to those rights so that the idea of society as a fair system of cooperation can be achieved. The next section considers Katarina Tomaševski's caution that with this laudable defence of the right to education, there remains one last unresolved question – can education itself violate human rights?

7.2. Tomasevski's 4-A Scheme

As the previous section has indicated, the EFA is a comprehensive, human rights-respecting approach to establish a 21st century learning society. And, as this dissertation in general has argued, the CRC is one of the most comprehensive and universally accepted human rights documents which has been established to aid in the achievement of this end. Moreover, it has been suggested that many significant outcomes can be gained by

recognizing the importance of the role which the right to education plays as a foundational element in achieving these outcomes – outcomes like an increased standard of living both for the individual and for society, inter-generational transmission of cultural heritage, development of national consciousness, enhanced economic and social development, and enhanced individual development.⁴⁰⁹

Beyond these noteworthy outcomes, this dissertation has also highlighted the value associated with Thomas Hammarberg's assertion, for example, that the innovative approach to the creation of the CRC was instrumental in overcoming (at least within rights discourse related to children) the traditional division between socio-economic rights and political rights which previously plagued UN discussions on human rights in general. According to Hammarberg, the CRC is designed to be a nice bridge between this traditional divide, because rather than focusing on *either* protected choices *or* protected interests in a counterproductive polarized way, the CRC focuses on three broader categories: to *provide* for the basic needs of children, to *protect* children from harm, and to allow children to *participate* in decisions which will ultimately affect their lives. And, as this dissertation has argued, these broader categories have been instrumental in shifting the debate from one of the need to protect children versus the need to free children, to one which can importantly realize both the child's capabilities and the child's status as a rights-holder.

As already mentioned, full ratification of the CRC can provide long-term international protection of, and influence upon, the child's right to access vitally needed human rights

⁴⁰⁹ Douglas Hodgson, *The Human Right to Education* (Ashgate Publishing Company Ltd.: Aldershot, 1998), 72.

objects like education through the public action inspired by EFA for example. Beyond full ratification, however, this dissertation has also recommended the equally important need to work toward ensuring that public action directed toward the implementation of documents like the CRC and, movements like EFA, maintain a focus dedicated to realizing educational opportunities which can enable children to make choices which they value regarding the kind of life which will enable them to live in society as full and contributing members. With this in mind, final consideration will be given to one of the most significant contemporary advocates of our need to fine-tune public action in this regard – Katarina Tomaševski.

Tomaševski fought passionately for the inclusion of education within the set of human rights objects that are indispensable not only for human survival, but for the chance to achieve something in one's life more significant than mere survival. For example, she recommends:

An important obstacle to universalizing the right to education is a view that education is not indispensable for human survival nor required for subsistence. The absence of education for victims of armed conflicts and disasters dooms them to remain recipients of assistance while preventing them from becoming self-sustaining. Water, sanitation, medical services, shelter, clothing and food constitute the survival package which is offered through humanitarian relief. Including education in this package is a development of the 1990s, but overcoming the previous ideology of survivalism has yet to become institutionalized.⁴¹⁰

For Tomaševski, provisions for education must be included within these survival packages because education is both a “passkey for unlocking other human rights,”⁴¹¹ and also a

⁴¹⁰ Katarina Tomaševski, *Annual Report of the Special Rapporteur on the Right to Education*, E/CN, 4/2001/52 (submitted in accordance with Commission on Human Rights resolution 2000/9), 18.

⁴¹¹ Katarina Tomaševski, (2005) “Girls’ education through a human rights lens: What can be done differently, what can be made better?” in *Rights in Action Series, Meeting 1: Human Rights and the Millennium*

‘multiplier’ for enhancing the freedoms one has to enjoy one’s life. Tomaševski carefully cautions that the damage of denying a rights-respecting education to children while they are growing up – wherever they are growing up – is difficult, if not impossible, to remedy retroactively. With this, Tomaševski concurs with the EFA that children have a prioritized right to education.⁴¹² Moreover, she argues, it must be acknowledged universally that the human rights safeguards which result from the availability of a rights-respecting educational environment not only enhance other rights for children, but for all members of society.⁴¹³ With this in mind, Tomaševski offers a comprehensive plan for the realization of education as a human right which goes beyond mere questions of availability alone. Her 4-A scheme emphasizes the obvious need to make education *available*, as discussed above, but she also recommends that, truly to secure a child’s right to education, education must be *accessible*, *acceptable*, and *adaptable*.

Tomaševski, like Pogge, suggests that, to achieve this goal, there is the obvious need to address the child’s ability to access the institutions which support this goal – that is, the level of availability of schools and of educational resources to which each child has access. Tomaševski makes this stipulation because she, like Pogge, believes that it is of primary importance to address those situations where children are not in school because governments have violated their right to education by failing to provide adequate educational resources, or by failing to acknowledge their contributions to the establishment of a viable institution of

Development Goals: Contradictory Frameworks? www.odi.org.uk/rights.

⁴¹² Katarina Tomaševski, (2005) “Globalizing What: Education as a Human Right or as a Traded Service?” in *Indiana Journal of Global Legal Studies* 12 (1): 74.

⁴¹³ Tomaševski, (2006b).

education. Tomaševski adds to this a caution: there is a deeper, and often more unpopular need, to address the further question of whether having the right to access educational institutions can itself be a violation of the child's human rights. That is, for Tomaševski, echoing Sen and Nussbaum, it is not enough simply to defend the child's right to access education, one must defend the child's right to an education *which is focused on the need to develop the child's own autonomy and potential for independence*.

Recall the suggestion in section 4.1 that Tomaševski's work is driven by the fact that there are many cases where children are said to 'have' an education but the particular educational experience to which they are exposed actually violates their human rights. The example that was offered was the case of Aboriginal children in Canada, who were provided with 'an education' but it was an education that clearly violated the rights of those children. Not only were they physically removed from their families and communities, they were forced to adopt a new language, and a new set of values and beliefs, at the expense of their own. The result, it seems widely agreed, was not successful. To date, in the case of Aboriginal children at least, some changes to public policy have been, and continue to be, made. Nonetheless, according to Tomaševski, there remain many more instances where children may 'have' access to schools and teachers, but their rights continue to be violated because the kind of educational opportunities to which they have access are not acceptable. And, this is a fact which seems to highlight the importance of Sen's and Nussbaum's views on educational content focussing on developing more culturally-sensitive or situation-specific capabilities. In addition, according to Tomaševski, historical instances of rights

violations are not confined to impoverished or corrupt nations either (as the Canadian case demonstrates). Tomaševski found that there is no automatic association between a country's wealth and its ability to perform in the area of education.

Recall Pogge's suggestion that the institutions which a society supports reflect how the ground rules or conduct-guiding codes have been interpreted by, and applied to, that particular society. For Tomaševski, the failure of the US, for example, to acknowledge the CRC, by ratifying it and making itself accountable to the rights of children, is reflected in its failure to realize effectively *every* American child's fundamental right to free basic primary education, despite easily having the wealth to do so. And for Tomaševski, such a blatant disregard for accountability toward children's rights is unacceptable.

Of course, it has been suggested, in chapter 1, for example, that there are those who believe that the United States does respect the rights of children, it simply chooses to do so with its own legislation, such as, the *No Child Left Behind* (NCLB) Act⁴¹⁴ designed to raise educational standards and to ensure that no child is left behind.⁴¹⁵ The NCLB (similar to the *Common Sense Revolution* of the Mike Harris Conservatives in Ontario), focuses primarily

⁴¹⁴ Available online at <https://www.whitehouse.gov/news/reports/no-child-left-behind.pdf>.

⁴¹⁵ It is important to note that Tomaševski was aware of NCLB and, in fact, she commented on it in her report on the status of education in the United States, but because she carried out her American fieldwork in the days immediately following the tragic events of September 11, 2001, the adoption of NCLB had been postponed due to the war on terrorism. Katarina Tomaševski, *Report of the Special Rapporteur on the Right to Education: Mission to the United States of America* September 24-October 10, 2001 (submitted in accordance with Commission on Human Rights). Available online at <http://www.right-to-education.org/content/unreports/unreport6prt1.html>. With that being said, since the publication of Tomaševski's report, the NCLB was passed in the House of Representatives on May 23, 2001⁴¹⁵ and was signed on January 8, 2002. It passed 384 to 45, a final vote result can be found online at <http://clerk.house.gov/evs/2001/roll145.xml>.

on accountability and assessment issues within the public school system in the United States (Canada).⁴¹⁶ The NCLB was drafted in this way to reflect the belief of the existing American administration that, to bring about desired improvements in student achievement, standards must be established for curriculum content, especially in the areas of math, reading and science. Moreover, the NCLB also emphasizes the need for those standards to be tested to provide a workable snapshot of the nation in those subject areas. According to Linn *et al*, however, while the goals of the NCLB to improve the educational standards of America's youth are laudable, the NCLB fails to achieve its goal of no child left behind because the requirements of the law enforcing these accountability measures have made it prohibitive for many states to comply. So, while the legislation claims to be representing an educational model where no child is left behind, it actually leaves the most vulnerable in the most precarious position. It is important to note that this sub-optimal nature of the NCLB is being debated in the House again as the current administration seeks to reauthorize NCLB⁴¹⁷ – a fact which seems to support Tomaševski's initial criticism of the inadequate governmental support for the rights of every American child to an education.

While it is doubtful that Tomaševski would grant that the unequal consequences of legislation like NCBL is acceptable, some actions were taken in response to her American report which Tomaševski endorsed. For example, the Center for Economic and Social Rights (CESR), working with the Institute for Education and Social Policy (IESP), prepared a

⁴¹⁶ Robert Linn, Eva Baker and Damian Betebenner (2002) "Accountability Systems: Implications of Requirements of the No Child Left Behind Act of 2001," in *Educational Researcher* 31 (6): 3-16.

⁴¹⁷ For information on the administration's proposal for reauthorization see <http://www.ed.gov/nclb/overview/intro/reauth/index.html>.

document entitled *Civil Society and School Accountability: A Human Rights Approach to Parent and Community Participation in NYC Schools*.⁴¹⁸ This document is a proposal by a non-governmental organization interested in ‘exposing and opposing human rights violations’ in the American system of public education through the creation of an Ombudsperson for the right to education. According to Tomaševski this document and its desire to establish a more permanent presence of active and involved civil defenders of public institutions and human rights represents a more adaptable approach to education than the NCLB by effectively addressing things like racial discrimination, opaque educational bureaucracies, and language barriers within the school system.⁴¹⁹

In addition to Tomaševski’s concern for the importance of interpreting and applying the CRC so as to capitalize on its comprehensive arsenal of provisions and protections for the rights of children (not of governments or of parents), she expresses another concern for the recent escalating desire to view education as a traded service. According to Tomaševski, the biggest challenge to education as a human right is to stop the current progressive liberalization of trade in education⁴²⁰ – a sentiment which echoes Sen’s concern for the ongoing practice of private tuitions in elementary schools in India for example. To prevent a

⁴¹⁸ Elizabeth Sullivan, *Civil Society and School Accountability: A Human Rights Approach to Parent and Community Participation in NYC School* in Catherine Albisa, Norm Fruchter and Kavitha Mediratta (eds.) (New York: Center for Economic and Social Rights, 2003).

⁴¹⁹ Tomaševski wrote the forward to this document.

⁴²⁰ Katarina Tomaševski (2005), “Unasked Questions about Economic, Social, and Cultural Rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard S. Rubenstein, and Mary Robinson,” in *Human Rights Quarterly* 27:709-720.

change in the discourse related to education as a human right from one of entitlements to one of purchasing power, Tomaševski emphasizes her strong belief that:

The insistence on the rule of law in human rights stems from the fact that governance is exercise of power and human rights are safeguards against abuse of power. The *raison d' être* of the right to education is to act as a corrective to the free market. Governments have human rights obligations *because* education should not be treated merely as a commodity.⁴²¹

It is important to note that Tomaševski's claim that education is a right and not a commodity, is not a reaction of distaste to the free market *per se*, rather it is a reaction to the need to reflect upon the original objective which advocates of rights for children took to be their focus. These pioneers of the children's rights movements, as discussed in chapter 1, focused on the need to make education free and compulsory for all (especially the most impoverished), so that abuses such as child labour, child marriage/pregnancy, child poverty and child illiteracy could be effectively controlled, if not abolished.⁴²² Tomaševski concurs by suggesting education should not be allowed to become a traded commodity despite the fact that it is important to recognize that the provision of basic education services is a tradable product which can provide children with the skills and knowledge necessary to become active, contributing members of society. According to Tomaševski what is more important to recognize is the fact that education is much more than this. The provision of a free and compulsory, publicly-supported system of education represents a vital means

⁴²¹ Tomaševski (2006c), 36.

⁴²² Katarina Tomaševski (2005) "Removing obstacles for the right to education: Where are we today, how we got where we are and what next?" in *Human Rights Tribune des droits humains* 11 (3): special feature on Economic, Social and Cultural (ESC) Rights.

necessary to protect children (presumably) from their own vulnerabilities and from the abuses of power which are often inherent in adult-child relationships. That is, while the starting point for establishing a right to education is virtually undisputed – children need assistance to survive and they need development to thrive – *how* this starting point gets translated into practice is an entirely different matter – a matter which should not be left to the random nature of the free market (at least at the most vital early childhood, and basic primary, levels).

Tomaševski has argued that, throughout the 20th century, a human rights toolbox has been formed to enable people to challenge the actions of both their governments and of each other to end human rights violations.⁴²³ For human rights in general, this toolbox includes Donnelly's and Howard's suggestion that we all require and are entitled to the recognition of our rights to *survival, membership, protection* and *empowerment*. For human rights relating to children specifically, this toolbox includes Hammarberg's suggestion that children in particular all require and are entitled to the recognition of their rights to *provision, protection* and *participation*.

Tomaševski's challenge for the 21st century is to recognize that, for these toolboxes (which support and sanction human rights in general and children's rights in particular) to be properly utilized as a means to human development rather than as a means to human manipulation and exploitation, another toolbox needs to be forged. This new toolbox would support the fundamental right to an education which is *available, accessible, acceptable* and

⁴²³ Tomaševski (2006b), preface.

adaptable (and of course, *affordable* – recalling Sen’s important evidence in this regard). In making this claim, Tomaševski does not deny that the provision of universally available, free and compulsory basic primary education entails certain costs. In fact, she often criticizes organizations like the UN for chronically making promises about the entitlements that children have without having either the authority, or the means, to follow through on those promises.⁴²⁴ Moreover, in making this claim, Tomaševski is also careful to acknowledge that the right to education does not translate into an entitlement to have an unlimited source of educational resources and services which a government is obliged to provide. She carefully limits her claim to education to suggest that governments have a human rights obligation to guarantee free and compulsory basic education for children up to the minimum age⁴²⁵ for legal employment, with a corresponding progressive realization of the availability of more substantial educational resources and services available for those who would choose to utilize them independently and self-sufficiently. For Tomaševski, the options for children to work or to marry prematurely must be severely curtailed through governmental commitments to, and enforcement of, compulsory schooling. Moreover, it is essential that the educational experiences in which children are compelled to participate are responsive to both the child’s immediate reality and to the rapidly changing global realities in which the child is embedded.

⁴²⁴ Katarina Tomaševski (2005) “Has the Right to Education a Future Within the United Nations? A Behind-the-Scenes Account of the Special Rapporteur on the Right to Education 1998-2004,” in *Human Rights Law Review* 5 (2): 205-237; and also (2005) “Unmasked Questions about Economic, Social and Cultural rights from the Experience of the Special Rapporteur on the Right to Education (1998-2004): A Response to Kenneth Roth, Leonard Rubenstein, and Mary Robinson,” in *Human Rights Quarterly* 27: 709-720.

⁴²⁵ According to Tomaševski, the minimum recommended age for employment is sixteen, and the globally accepted minimum is fourteen. See “Education has become a traded service,” in *Human Rights Features* (5-12 April 2004).

7.3. A 21st Century Learning Society

UNESCO's aim to construct a 21st learning society by promoting the Millennium Development Goal to achieve free universal basic primary public education for all by 2015 is both an important and worthwhile objective. Currently more than 70 million children of primary school age do not, or cannot, attend school⁴²⁶ – a staggering statistic which suggests that the establishment of a right to education is a high priority claim in today's world. To address the fact that so many children are unable to attend school, this dissertation has provided an account which integrates two philosophical approaches – one which focuses on human rights and one which focuses on human capabilities and individual actions. Of course, independently, the human rights-based approach and the human capability approach are both significant and valuable schools of thought worthy of separate scholarship. To address the issues related to the validation of the human right to education, however, I have argued that it is both necessary, and highly advantageous, to combine these views.

I begin by suggesting that John Rawls and Thomas Pogge offer an important framework which recommends that to achieve a mutually-beneficial, rights-respecting society citizens should recognize their obligation to avoid morally arbitrary social inequities to determine, through a process of public justification, which policies are the best ones available to them. Given such a framework, according to Rawls, individuals should have the social freedom to maximize their own desired ends, provided no one is left to fall below a

⁴²⁶ Nicholas Burnett (Director), "Education for All by 2015: Will We Make It?" *EFA Global Monitoring Report 2008* (Paris: UNESCO, 2007). Available online at www.efareport.unesco.org.

basic social minimum. Consequently, this Rawlsian framework represents a dual focus on just societies *and* on the connection between social justice and an individual's pursuit of a good life.

This dual focus is significant, because the establishment and maintenance of a stable society depends on social norms and institutions which all members can accept as reasonable. And can accept as reasonable without unnecessarily distorting their own sense of justice in the process. Moreover, this Rawlsian dual focus is important to our understanding of the basic structure of society because it can achieve two things. First, it can deepen our understanding of the role which institutions should play in the creation, and maintenance, of a mutually-beneficial, rights-respecting social infrastructure. Second, it can deepen our understanding of why we should be morally motivated to recognize and support these institutions. But, neither Rawls, nor Pogge, provide an explicit account of the institution of education, in particular. So, this dissertation provides an informative conceptual Rawlsian space necessary to openly and critically consider: 1) the role education should play within the larger social structure of a stable society, and 2) the scope of educational experience necessary to enhance an individual's life prospects.

Typically, the institutions which are deemed to be essential to a society are institutions which govern property, security, politics and the economy, but, I have argued that education is an essential institution as well. Education plays a large role in achieving just societies because education can develop a child's sense of self, and her sense of citizenship. While it is true that the provision of education is costly and multifaceted, a public institution of

education needs to be in place to manage the kinds of educational opportunities which are available, and to secure the kinds of resources which are necessary, because not all children are as highly motivated and self-directed as the liberationist would have us believe. Nor are all parents as available, knowledgeable or economically capable to secure an education on behalf of their children as the libertarian would have us believe. Moreover, to address the 70 million children worldwide who do not, or cannot, claim their right to education, an understanding of what a public institution of education should entail is essential.

With this in mind, the first part of this integrative account articulates the value to be gained from endorsing an institution of education through the formalization and unanimous acceptance of documents like the CRC which emphasizes that children should have a protected voice – a human right – to basic necessities like education. This human rights-based approach stipulates that there is a duty on the part of all governments, especially wealthy governments, to influence and support the institutional reforms necessary to achieve at least the provision of free basic primary education for all children – an important claim, but one which cannot stand alone. It cannot stand alone because it fails to address adequately those cases where children are said to have a ‘right’ to education but are unable to act on that right.

To address this concern requires the insight to be gained from the capability approach which accounts for the further responsibility on the part of all individuals to ensure that the kinds of educational reforms which governments undertake can provide children with the freedom to act on their rights. Thus, to achieve the MDG of free and compulsory basic

primary education for all requires both the active involvement of official channels as represented by advocates of human rights *and* of civil society as represented by the actions of interested and involved individuals. So, the second part of this integrative account suggests that while it is important to secure and protect a right to education, it is equally important to be able to convert this right into meaningful action.

Here I draw upon an important qualification which Amartya Sen and Martha Nussbaum offer. This qualification suggests that having rights will only be effective in influencing an individual's standard of living if that individual can do something with that right as well. Thus, to implement fully a global human right to education, an understanding of what having an education should be able to do for individuals is necessary also. It is essential, because an unyielding commitment to capabilities as the proper content of children's rights encourages us to look beyond securing rights to determine whether an individual is actually experiencing an improvement in her standard of living. That is, it encourages us to seek out a deeper understanding of the norms to which a society aspires. Also, it encourages us to seek out a richer measure of existing states of affairs, like the Human Development Index or the joint UNESCO-UNICEF Monitoring Learning Achievement programme. Finally, a commitment to capabilities encourages us to seek functional solutions which can assist children in achieving a level of well-being which is of value to them because it enables them to act on the rights that they have within the societies in which they exist.

Of course, the desire to make basic primary public education free to all is a demanding goal economically, socially and culturally. To address the demanding nature of this goal, a simple suggestion which has been offered in this dissertation, is to forcefully restate the need to ratify fully the CRC. Although this suggestion is largely symbolic, it is worthwhile because the United States is one of the remaining two countries who have yet to sign (the other being Somalia). Given that the US is as powerful and influential as it is, an endorsement of the CRC by the US is significant. With regard to its own domestic responsibilities to the establishment of a stable and supportive system of education for its children, the significance of full ratification may have a limited effect. Although Tomaševski has highlighted that, even within American borders many children go without education, or are at least unable to benefit from educational opportunities which are meaningful to their own individual development. With regard to the responsibilities to the MDG to achieve free and universal basic primary education for *all* children, however, the significance of full ratification is noteworthy for a variety of reasons. For example, full ratification of the CRC would represent: a universal acknowledgement of children's rights; a universal acknowledgment of the need for greater awareness of and accountability to the plight of all children; greater opportunities for resource sharing; and most importantly a universal endorsement of the key role which education plays in the development of children and of societies.

A more complex suggestion which has been offered in this dissertation is the need to look beyond the symbolic act of full ratification of the CRC toward individual public actions.

To answer the question – how should public action be directed to respond to the UN claim that education is a fundamental human right to which all children are entitled? – this dissertation has argued that it is essential to recognize that basic primary education is a fundamental right which is of equal significance to the traditionally accepted rights to security and political freedom. This is so, because education is necessary for both individual initiative and social effectiveness. Further to this, I have argued that to realize this right to education for all in a meaningful and manageable way, it requires a Rawlsian model for institutional reform which motivates us to reflect upon the design of social institutions and upon the capabilities individuals have to contribute to those social institutions. Finally, by applying this model more directly to the institutional reform dedicated to education in particular, I have articulated a more robust Rawlsian notion of the role education should play in the establishment of a just society *and* in an individual's pursuit of a good life. To conclude, by integrating the concept of human rights with the concept of human capabilities in this way, I have also reflected Katarina Tomaševski's challenge for the 21st century to establish a new human rights perspective from outside of the bowels of international law and governance – a perspective which takes education to be a vital human rights object which is as significant to an individual as food or freedom, but which is also significant to society as an indispensable means of realizing sustainable development, prosperity and permanence. It is not enough simply to defend the child's right to access education, one must defend the child's right to an education which is focused on the need to develop the child's own autonomy and potential for independence and individual action both within the immediate

society to which the child belongs, and within the global society in which the child will interact.

Appendix A

International Documents Most Relevant to the Human Right to Education (in whole or in part)

Geneva Declaration of the Rights of the Child (1924)

By the Present Declaration of the Rights of the Child, commonly known as the 'Declaration of Geneva,' men and women of all nations, recognizing that mankind owes to the Child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

1. The child must be given the means requisite for its normal development, both materially and spiritually;
2. The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored;
3. The child must be the first to receive relief in times of distress;
4. The child must be put in a position to earn a livelihood, and must be protected against every form of exploitation;
5. The child must be brought up in the consciousness that its talents must be devoted to the service of fellow men.

Constitution of the United Nations Educational, Scientific, and Cultural Organization (1945)

The Governments of the States Parties to this Constitution on behalf of their peoples declare:

That since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be constructed;

That ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war;

That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place through ignorance and prejudice, of the doctrine of the inequality of men and races;

That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern;

That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fail, upon the intellectual and moral solidarity of mankind.

For these reasons, the States Parties to this Constitution, believing in full and equal opportunities for education for all, in the unrestricted pursuit of objective truth, and in the free exchange of ideas and knowledge, are agreed and determined to develop and to increase the means of communication between their peoples and to employ these means for the purposes of mutual understanding and a truer and more perfect knowledge of each other's lives;

In consequence whereof they do hereby create the United Nations Educational, Scientific and Cultural Organization for the purpose of advancing, through the educational and scientific and cultural relations of the peoples of the world, the objectives of international peace and of the common welfare of mankind for which the United Nations Organization was established and which its charter proclaims.

Article 1 – Purposes and Functions

1. The purpose of the Organization is to contribute to peace and security by promoting collaboration among the nations through education, science and culture in order to further universal respect for justice, for the rule of law and for the human rights and fundamental freedoms which are affirmed for the peoples of the world, without distinction of race, sex, language or religion, by the Charter of the United Nations.
2. To realize this purpose the Organization will:
 - a. Collaborate in the work of advancing the mutual knowledge and understanding of peoples, through all means of mass communication and to that end recommend such international agreements as may be necessary to promote the free flow of ideas by word and image;
 - b. Give fresh impulse to popular education and to spread of culture;
By collaborating with Members, at their request, in the development of educational activities;
By instituting collaboration among the nations to advance the ideal of equality of educational opportunity with out regard to race, sex or any distinctions, economic and social;
By suggesting educational methods best suited to prepare the children of the world for the responsibilities of freedom;
 - c. Maintain, increase and diffuse knowledge;
By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions;
By encouraging co-operation among the nations in all branches of intellectual activity, including the international exchange of persons active in the fields of education, science

and culture and the exchange of publications, objects of artistic and scientific interest and other materials of information;

By initiating methods of international co-operation calculated to give the people of all countries access to the printed and published materials produced by any of them.

3. With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States members of this Organization, the Organization is prohibited from intervening in matters which are essentially within their domestic jurisdiction.

Universal Declaration of Human Rights (1948)

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

1. Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit
2. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
3. Parents have a prior right to choose the kind of education that shall be given to their children.

Resolution 421 of the General Assembly of the UN (1950)

Fifth Session – Section E

Whereas the Covenant should be drawn up in the spirit and based on the principles of the Universal Declaration of Human Rights,

Whereas the Universal Declaration regards man as a person to whom civic and political freedoms as well as economic, social and cultural rights indubitably belong,

Whereas the enjoyment of civic and political freedoms and of economic, social and cultural rights are interconnected and interdependent,

Whereas, when deprived of economic, social and cultural rights, man does not represent the human person whom the Universal Declaration regards as the ideal of the free man,

Article 7

1. *Decides* to include in the Covenant on Human Rights economic, social and cultural rights and an explicit recognition of equality of men and women in related rights as set forth in the Charter of the United Nations;
2. *Calls upon* the Economic and Social Council to request the Commission on Human Rights, in accordance with the spirit of the Universal Declaration, to include in the draft Covenant a clear expression of economic, social and cultural rights in a manner which relates them to the civic and political freedoms proclaimed by the draft Covenant;
3. *Calls upon* the Economic and Social Council to request the Commission on Human Rights to take such steps as are necessary to obtain the co-operation of other organs of the United Nations and of the specialized agencies in the consideration of such rights;
4. *Requests* the Economic and Social Council to consider, at its twelfth session, the methods by which the specialized agencies might co-operate with the Commission on Human Rights with regard to economic, social and cultural rights;

Declaration of the Rights of the Child (1959)

Principle 3

The child shall be entitled from his birth to a name and a nationality.

Principle 7

1. The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgement, and his sense of moral social responsibility, and to become a useful member of society.
2. The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents.
3. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this rights.

Convention against Discrimination in Education (1960)

Article 1

1. For the purpose of this Convention, the term “discrimination” includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:
 - a. Of depriving any person or group of persons of access to education of any type or at any level;

- b. Of limiting any person or group of persons to education of an inferior standard;
 - c. Subject to the provisions of Article 2 of this Convention, or establishing or maintaining separate educational systems or institutions for persons or groups of persons; or
 - d. Of inflicting on any person or group of persons conditions which are incompatible with the dignity of man.
2. For the purposes of this Convention, the term “education” refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

Article 2

1. When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:
 - a. The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;
 - b. The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil’s parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level;
 - c. The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

European Social Charter (1961)

Article 7 – The right of children and young persons to protection

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Contracting Parties undertake:

1. to provide that the minimum age of admission to employment shall be 15 years, subject to exceptions for children employed in prescribed light work without harm to their health, morals, or education;
2. to provide that a higher minimum age of admission to employment shall be fixed with respect to prescribed occupations regarded as dangerous or unhealthy;
3. to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;

4. to provide that the working hours of persons under 16 years of age shall be limited in accordance with the needs of their development and particularly with their need for vocational training;
5. to recognize the right of young workers and apprentices to a fair wage or other appropriated allowances;
6. to provide that the time spent by young persons in vocational training during the normal working hours with the consent of the employer shall be treated as forming part of the working day;
7. to provide that employed persons of under 18 years of age shall be entitled to not less than three weeks' annual holiday with pay;
8. to provide that persons under 18 years of age shall not be employed in night work with the exception of certain occupations provided for by national laws or regulations;
9. to provide that persons under 18 years of age employed in occupations prescribed by national laws or regulations shall be subject to regular medical control;
10. to ensure special protection against physical and moral dangers to which children and young persons are exposed, and particularly against those resulting directly or indirectly from their work.

Article 10 – The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Contracting Parties undertake:

1. to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;
2. to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments;
3. to provide or promote, as necessary:
 - a. adequate and readily available training facilities for adult workers;
 - b. special facilities for the re-training of adult workers needed as a result of technological developments or new trends in employment;
4. to encourage the full utilisation of the facilities provided by appropriate measures such as:
 - a. reducing or abolishing any fees or charges;
 - b. granting financial assistance in appropriate cases;
 - c. including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment;
 - d. ensuring, through adequate supervision, in consultation with the employers' and worker's organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.

International Covenant on Economic, Social and Cultural Rights (1966)

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Article 10

The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. Marriage must be entered into with the free consent of the intending spouses.
2. Special protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.
3. Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

Article 13

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - a. Primary education shall be compulsory and available free to all;

- b. Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - c. Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - d. Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - e. The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the Present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
 4. No part of this Article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this Article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 14

1. Each State Party to the present Covenant which, at the time of becoming a Party, has not been able to secure in its metropolitan territory or other territories under its jurisdiction compulsory primary education, free of charge, undertakes, within two years, to work out and adopt a detailed plan of action for the progressive implementation, within a reasonable number of years, to be fixed in the plan, of the principle of compulsory education free of charge for all.

United Nations Declaration Regarding Social Progress and Development (1969)

Part II

Social progress and development shall aim at the continuous raising of the material and spiritual standards of living of all members of society, with respect for and in compliance with human rights and fundamental freedoms, through the attainment of the following main goals:

Article 10

- a. The eradication of illiteracy and the assurance of the right to universal access to culture, to free compulsory education at the elementary level and to free education at all levels; the raising of the general level of life-long education;

Article 11

Social progress and development shall aim equally at the progressive attainment of the following main goals:

The education of youth in, and promotion among them of, the ideals of justice and peace, mutual respect and understanding among peoples; the promotion of full participation of youth in the process of national development;

African Charter on Human and People's Rights (1981)

Article 17

1. Every individual shall have the right to education
2. Every individual may freely, take part in the cultural life of his community
3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the state.

Article 25

States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.

Convention on the Rights of the Child (1989)

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - Make primary education compulsory and available free to all;
 - Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - Make higher education accessible to all on the basis of capacity by every appropriate means;
 - Made educational and vocational information and guidance available and accessible to all children;
 - Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. State Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge

and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:
 - a. The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - b. The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - c. The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - d. The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;
 - e. The development of respect for the natural environment.
2. No part of the present Article or Article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present Article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the state.

European Social Charter Revised (1996)

Article 17 – The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1. to ensure that children and young persons, taking account of the rights and duties of their parents,
 - a. have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;
 - b. to protect children and young persons against negligence, violence or exploitation;
 - c. to provide protection and special aid from the state for children and young persons temporarily or definitively deprived of their family's support;
2. to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

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