

## Article

### A Genealogy of the CRC

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#### ABSTRACT

In universalizing the child, the Convention on the Rights of the Child (CRC) expels certain childhoods from human rights discourse. This article explores particular children that are marginalized, ignored, and/or stigmatized by the CRC's designation of a particular childhood as normative. This article utilizes the technique of genealogy, investigating local, discontinuous, disqualified, illegitimate childhoods against the CRC's claim of a universal childhood. This article argues that the CRC's vision of the category 'child' dictates which children matter, which children will be problematized, and which children will be ignored. This article first examines literature that critiques the CRC as only applicable to children in the West. It then argues that the critique of the CRC as inapplicable to children in the Global South is equally relevant to children in the West. Several childhoods in the West and in the Global South contradict the CRC's vision of childhood as a period of irresponsibility/immaturity and the CRC's vision of the family as responsible, happy, and safe. These contradictory childhoods will be examined. Through an examination of these excluded knowledges about childhood, these excluded children, parents, states, families, cultures, traditions, the politics within the international discourse on rights of the child will gain greater appreciation. Not only does this genealogy reveal international law's difficulty with imagining differences in childhoods, but also the politics in choosing one childhood as deserving/unproblematic and all others as undeserving/problematic.

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## I. INTRODUCTION

Human rights documents aim to recognize “the inherent dignity” and “the equal and inalienable rights of all members of the human family” by mainstreaming excluded groups and fundamental issues that affect their lives.<sup>1</sup> The underlying rationale is that “everyone is entitled to all the rights and freedoms” within human rights conventions.<sup>2</sup> Nonetheless, the way in which the United Nations Convention on the Rights of the Child (“CRC”) depicts childhood and a range of children’s issues excludes a vast swath of children in both the developing and developed world.<sup>3</sup> The CRC embraces a particular version of childhood, which stigmatizes children that do not live up to the CRC’s normative framework.<sup>4</sup> In addition, the CRC’s approach ignores certain problems of the children that do live up to its normative framework. Ennew argues that “[T]he [CRC] was drafted with a particular type of childhood in mind, and treats children outside this model as marginal. This means that children’s rights as a concept within the human rights field does not fully engage with the whole range of human beings who are defined as children.”<sup>5</sup>

Methodologically, this article engages in a limited genealogy of the CRC, inquiring as to which children, and therefore which issues, are considered problematic for childhood and which are not. The genealogical approach helps question dominant “knowledges” and the means by which they became dominant. The genealogical approach challenges so-called “objective facts” by examining “local, discontinuous,

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1. United Nations Convention on the Rights of the Child, Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

2. *Id.*

3. Some argue that some of the issues of exclusion would be resolved if one looks to the CRC’s Committee interpretation of the text of the Convention. See, e.g., Sonia Harris Short, *International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child*, 25 HUM. RTS. Q. 130, 130 (2003). Nonetheless, given the importance placed on the text of any convention, this article steers clear of the soft-law versus hard-law debate and primarily focuses on the text of the Convention.

4. See Olga Nieuwenhuys, Editorial, *Is There an Indian Childhood?*, 16 CHILDHOOD 147, 148 (2009) (arguing that the “issue-oriented research [implemented by the CRC] submerges and marginalizes the everyday life of the vast majority” in developing nations).

5. Judith Ennew, *Outside Childhood: Street Children’s Rights*, in THE HANDBOOK OF CHILDREN’S RIGHTS: COMPARATIVE POLICY AND PRACTICE 201, 213 (Bob Franklin ed., 1995).

disqualified, illegitimate knowledges” against the claims of a universal truth.<sup>6</sup> Simply put, the aim of a genealogy is to disturb the obviousness of presently understood knowledges,<sup>7</sup> “to question over and over again what is postulated as self-evident, to disturb people’s mental habits.”<sup>8</sup> This article argues that the CRC links the vision of the category “child” as physically and mentally immature,<sup>9</sup> with the construction of the child as “developing” towards maturity (in other words, adulthood), and therefore in need of adult supervision or care. This article seeks to question the CRC’s self-evident, essential, and universal child as “developing,”<sup>10</sup> and in need of adult “care.” Believing that certain political interests are served in the construction of any identity, this article considers what configuration of power constructs exists, and what forms of power restrain and regulate the category “child.” Some argue that the Convention protects the child and her/his rights only to the extent that those rights and that protection do not rupture the adult-child binary. The adult-child binary ensures a hierarchy of power where adults hold authority over the child.<sup>11</sup> By calling into question the “essence” of the identity of the “child” put forth as the “truth” through a genealogy, one is able to investigate the powers that are served in a particular “truth.”

Part II explores literature that critiques the CRC as excluding children in the Global South. Importantly, Part II argues that those same critiques can be deployed and are just as applicable to both the “Western” and “non-Western” worlds. Part II focuses on two excluded childhoods: (1) the child as head of the household, and (2) the girl-child. Through the examination of children who are head of the household, Part III (a) agitates the “truth” that all children are irresponsible and all adults are responsible. Part III (b) critically examines the

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6. MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977*, at 78, 83 (Colin Gordon ed., 1980).

7. BEN GOLDBER & PETER FITZPATRICK, *FOUCAULT’S LAW* 54 (2009).

8. *The Concern for Truth: An Interview by Francois Ewald*, *MAGAZINE LITTÉRAIRE*, May 1984, at 18, 18–23, reprinted in MICHEL FOUCAULT, *The Concern for Truth*, in *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS, 1977–1984*, at 255, 265 (Lawrence D. Kritzman ed., Alan Sheridan trans., 1990).

9. CRC, *supra* note 1, at preamble.

10. Ashleigh Barnes, *CRC’s Performance of the Child as Developing*, 14 *CURRENT LEGAL ISSUES* 392 (2012).

11. See Maria Grahn-Farley, *A Theory of Child Rights*, 57 *U. MIAMI L. REV.* 867, 867–68 (2003).

family and one's culture as a "happy" and "safe" environment by examining the ways in which the girl-child is excluded from, or marginalized by, the Convention. Ultimately, this article argues that the universalization of the category of the child sustains certain power relations, and as a result the CRC expels the vast majority of children from the international human rights discourse.

## II. LESSONS LEARNED FROM CRITIQUES OF THE CRC AS EXCLUDING THE NON-WESTERN CHILD

The critique that the CRC is a Western convention can be distilled into two main arguments. First, some argue that the notion of rights, including children's rights, is based upon Western notions of liberty.<sup>12</sup> While this viewpoint has been critiqued as un-nuanced and over reliant on the Western–non-Western binaries,<sup>13</sup> this article does not focus on the issue of rights as "Western."<sup>14</sup> This section focuses on a second argument that the CRC's normative vision for childhood is Western, and that there is a model of childhood that is universally applicable, that there are universal needs, and that there exists a consensus, both domestically and internationally, over how to realize those needs.<sup>15</sup> Numerous academics have

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12. See, e.g., Maria Grahn-Farley, *Neutral Law and Eurocentric Lawmaking: A Postcolonial Analysis of the U.N. Convention on the Rights of the Child*, 34 BROOK. J. INT'L L. 1 (2008).

13. See, e.g., John Tobin, *Increasingly Seen and Heard: The Constitutional Recognition of Children's Rights*, 21 S. AFR. J. ON HUM. RTS. 86, 92–93 (2005) [hereinafter Tobin, *Increasingly Seen and Heard*]; John Tobin, *Seeking to Persuade: A Constructive Approach to Human Rights Treaty Interpretation*, 23 HARV. HUM. RTS. J. 40–41 (2010) [hereinafter Tobin, *Seeking to Persuade*].

14. See, e.g., Tobin, *Increasingly Seen and Heard*, *supra* note 13, at 92–93. Tobin notes that "despite its alleged western bias, it still remains the most ratified international human rights treaty. Moreover the African Charter on the Rights and Welfare of the Child 1990, while recognising the duties as well as the rights of a child, largely mirrors, and in some cases extends, the rights under the Convention. . . . The point to be made, therefore, is that the recognition of children as rights bearers is not itself a concept that is either foreign to or necessarily inappropriate for developing or transitional states. It therefore remains an issue but not an insurmountable obstacle to the transformation of international standards into national constitutions." *Id.*

15. See also Jo Boyden, *Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD 184, 187 (Allison James & Alan Prout eds., 1990); Vanessa Pupavac, *Misanthropy Without Borders: The International Children's Rights Regime*, 25 DISASTERS, 95, 101 (2001).

critiqued the CRC's model of childhood as a Western conception of childhood.<sup>16</sup> Judith Ennew has argued that "in the drafting

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16. For examples of academics who critique the CRC for being exclusionary see generally Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 1, 20 (Philip Alston ed., 1994); Ennew, *supra* note 5, at 213; Norma Fields, *The Child as Laborer and Consumer: The Disappearance of Childhood in Contemporary Japan*, in *CHILDREN AND THE POLITICS OF CULTURE* 51 (Sharon Stephens ed., 1995); CHRIS JENKS, *CHILDHOOD* (2006); REX STANTON ROGERS, *STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN* 51 (1992); Martin Woodhead, *Psychology and the Cultural Construction of Children's Needs*, in *GROWING UP IN A CHANGING SOCIETY* 37 (Ronnie Carr, Paul Light & Martin Woodhead eds., 1991); Annette Ruth Appell, *The Pre-Political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703 (2009) (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Boyden, *Childhood and the Policymaker*, *supra* note 15; Jo Boyden, *Children's Experience of Conflict Related Emergencies: Some Implications for Relief Policy and Practice*, 18 DISASTERS 254, 265 (1994); Erica Burman, *Local, Global or Globalized? Child Development and International Child Rights Legislation*, 3 CHILDHOOD 45 (1996); Paolo G. Carozza, *From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights*, 25 HUM. RTS. Q. 281, 311 (2003); Farley, *Neutral Law and Eurocentric Lawmaking*, *supra* note 12, at 1 ("The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself."); Michael Freeman, *The Future of Children's Rights*, 14 CHILD. & SOC'Y 277, 282 (2000) ("The lives of too many children are glossed over in the convention.") [hereinafter Freeman, *The Future of Children's Rights*]; Michael Freeman, *The Sociology of Childhood and Children's Rights*, 6 INT'L J. CHILD. RTS. 433, 434-35 (1998) [hereinafter Freeman, *The Sociology of Childhood and Children's Rights*]; Berry Mayall, *The Sociology of Childhood in Relation to Children's Rights*, 8 INT'L J. CHILD. RTS. 243, 245 (2000) (noting that the CRC refers to "a child who is on a particular developmental trajectory"); Nieuwenhuys, *supra* note 4 at 148 ("[I]ssue-oriented research submerges and marginalizes the everyday life of the vast majority."); Frances Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INT'L J.L. & FAM. 192, 215 (1992) ("The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western-oriented document that merely purports to be universal."); Pupavac, *supra* note 15, at 101 ("Sovereign equality is eroded through how the failure to realize the model of childhood under the [CRC] becomes an indictment of societies that are unable to do so."); Short, *International Human Rights Law*, *supra* note 3, at 130 (arguing that the CRC is still subject to cultural imperialism and basing this argument on an empirical study of the discussion of the Committee on the Rights of the Child); Sonia Harris Short, *Listening to 'the Other'? The Convention on the Rights of the Child*, 2 MELB. J. INT'L L. 304,

process, the resulting text and in its implementation, [the CRC] takes as its starting point Western, modern childhood, which has been “globalized” first through colonialism and then through imperialism of international aid.”<sup>17</sup> Similarly, Robson contends that:

[W]hile acknowledging that conceptualising childhood is problematic, there needs to be less emphasis on northern myths of childhood as a time of play and innocence and more attention on defending children’s rights to work as well as to be supported in their work under appropriate circumstances.<sup>18</sup>

Three such critiques of the CRC’s vision for childhood are explored here. First, the CRC makes the fundamental assumption that childhood is a universal state of development.<sup>19</sup> The CRC assumes that there is a model of childhood development that is universally applicable and descriptive of all children.<sup>20</sup> Some within academia argue that the formidable power of disciplinary strongholds regarding childhood development have hindered childhood studies (and its recognition of childhood as a social construct<sup>21</sup>) in the West.

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334 (2001) (arguing that the Committee has “with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light”); Tobin, *Increasingly Seen and Heard*, *supra* note 13, at 91–94 (discussing the ways that the CRC and the children’s rights paradigm is in some ways western, but in other ways not); Tobin, *Seeking to Persuade*, *supra* note 13, at 1, 10 (discussing this issue in relation to both human rights generally and the CRC specifically).

17. Ennew, *supra* note 5, at 202.

18. Elsbeth Robson, *Hidden Child Workers: Young Carers in Zimbabwe*, 36 *ANTIPODE* 227, 227 (2004).

19. See Barnes, *supra* note 10, at 392; Burman, *supra* note 16, at 45; Field, *supra* note 16; Woodhead, *supra* note 16.

20. JENKS, *CHILDHOOD*, *supra* note 16, at 39; Barnes, *supra* note 10, at 392 (arguing that the CRC is a highly persuasive knowledge manufacturer, legitimating a particular set of discourses on the child. The CRC produces and legitimates its performance of childhood as a fundamental, invariable truth about the category of child. The CRC’s claim to “truth”, that a child is developing, masquerades a description of “how things merely are”, rather than detail a prescription of “how things must be”); Pupavac, *supra* note 15, at 101.

21. See generally DAVID ARCHARD, *CHILDREN, FAMILY AND THE STATE* (2003); DAVID ARCHARD, *CHILDREN: RIGHTS AND CHILDHOOD* (2d. ed. 2004); PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* (Robert Baldick trans.) (1962); *CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD* (Allison James and Alan Prout eds., 1997); ERIK ERIKSON,

These strongholds, in particular more conservative strains of developmental psychology, monopolized and solidified “irrefutable truths” about childhood by presenting them as natural “facts.”<sup>22</sup> Mayall argued that “the child development industry has cornered the market in knowledge about children.”<sup>23</sup> The CRC embraces these particularly conservative strains of developmental psychology, and fails to recognize the category “child” as a social construct. Instead, the CRC universalizes the “child-as-developing.”<sup>24</sup> As such, the CRC further naturalizes the Western conception of the childhood developmental period, by institutionalizing a particular Western version of childhood in an international human rights

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CHILDHOOD AND SOCIETY (1977); JOHN HOLT, ESCAPE FROM CHILDHOOD (1974); MARTIN HOYLES, THE POLITICS OF CHILDHOOD (1989); Allison James & Chris Jenks, Constructing Childhood Sociologically, in AN INTRODUCTION TO CHILDHOOD (Mary Jane Kehily ed., 2004); ALLISON JAMES & ADRIAN L. JAMES, CONSTRUCTING CHILDHOOD: THEORY, POLICY, AND SOCIAL PRACTICE (2004); ALLISON JAMES, CHRIS JENKS & ALAN PROUT, THEORIZING (1998); Chris Jenks, The Post-Modern Child, in CHILDREN IN FAMILIES: RESEARCH AND POLICY (Julia Brannen & Margaret O'Brien eds., 1996); Chris Jenks, Constituting the Child, in THE SOCIOLOGY OF CHILDHOOD - ESSENTIAL READINGS (Chris Jenks ed., 1982); BERRY MAYALL, TOWARDS A SOCIOLOGY FOR CHILDHOOD: THINKING FROM CHILDREN'S LIVES (2002); NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1994); ALAN PROUT, THE FUTURE OF CHILDHOOD: TOWARDS THE INTERDISCIPLINARY STUDY OF CHILDREN (2004); ALAN PROUT, THE FUTURE OF CHILDHOOD (2005); JENS QVORTRUP, CHILDHOOD AS A SOCIAL PHENOMENON: AN INTRODUCTION TO A SERIES OF NATIONAL REPORTS (1993); Jens Qvortrup, Varieties of Childhood, in STUDIES IN MODERN CHILDHOOD: SOCIETY, AGENCY AND CULTURE (Jens Qvortrup ed., 2005); ROGERS, supra note 16; PHILIP E. VEERMAN, THE RIGHTS OF THE CHILD AND THE CHANGING IMAGE OF CHILDHOOD (1992); VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1985). Freeman, *The Sociology of Childhood and Children's Rights*, supra note 16, at 433; Sarah L. Holloway & Gill Valentine, *Spatiality and the New Social Studies of Childhood*, 34(4) SOCIOLOGY 763 (2000); Allison James, *Confections, Concoctions and Conceptions*, 10(2) JOURNAL OF THE ANTHROPOLOGY SOCIETY OF OXFORD 83 (1979); Chris Jenks, *Child Abuse in the Postmodern Context: An Issue of Social Identity*, 2(3) CHILDHOOD 111, 111 (1994); Alan Prout, *Children's Participation: Control and Self-Realisation in British Late Modernity*, 14(4) CHILDREN AND SOCIETY 304 (2000); Gill Valentine, *Angels and Devils: Moral Landscapes of Childhood*, 14 ENV'T & PLAN.: SOC'Y & SPACE 581, 581-99 (1996); Gill Valentine, *Boundary Crossings: Transitions from Childhood to Adulthood*, 1(1) CHILDREN'S GEOGRAPHIES 37 (2003). Critiques have been laid in particular against CEDAW on the basis that CEDAW's representation of the universal “woman” is exclusionary. Nonetheless, the CRC does not even “intend” to promote the equality, participation, and the autonomy of children. In this way the CRC is open to different critiques.

22. Nieuwenhuys, supra note 4, at 151.

23. Mayall, supra note 16, at 245.

24. Barnes, supra note 10, at 392.

convention.<sup>25</sup> The international law promulgated by the CRC facilitates childhood development, enabling the further deployment of the “truth” of childhood as a period of development.<sup>26</sup> Burman argues that the naturalization of particular norms occurs through treating “expertise” (what has been referred to here as “knowledges”), such as developmental psychology, as culturally neutral (what has been referred to here as objective or apolitical).<sup>27</sup> Burman contends that developmental psychology, the foundation of international policy, which informs rights of the child discourse, is anything but neutral.<sup>28</sup> In fact, it is highly political. For example, the beginning of life and therefore the beginning of childhood, whether they began in utero, was hotly debated during the drafting of the Convention.<sup>29</sup> There is an almost imperceptible shift from the naturalization of childhood as a state of development to the globalization of that development in the CRC.<sup>30</sup> Notably, the “child-as-developing” concept was made the universal norm for childhood in the CRC, yet there was no discussion of this concept anywhere in the negotiations that led to the CRC.<sup>31</sup> Quite possibly, childhood, as a period of development, was too obvious a “truth” to necessitate discussion.

Second, the “truth” that children are developing rationalizes the child’s dependency on adults, to be discussed in Section II below.<sup>32</sup> By constructing the child as immature and “developing,”<sup>33</sup> the CRC largely envisions the child as lacking capacity/agency. Dominant Western disciplines have effectively

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25. Burman, *supra* note 16, at 49; Boyden, *supra* note 15, at 187; Pupavac, *supra* note 15, at 101.

26. GOLDER & FITZPATRICK, *supra* note 7, at 26–29. The authors go to great length to argue, in response to Hunt and Wickham, that the law according to Foucault, actually does not recede into unimportance in modernity.

27. Burman, *supra* note 16, at 49.

28. *Id.*

29. Deirdre Fottrell, One Step Forward or Two Steps Sideways? Assessing the First Decade of the United Nations Convention on the Rights of the Child, *in* REVISITING CHILDREN’S RIGHTS 1, 3 (Deirdre Fottrell ed., 2000).

30. Burman, *supra* note 16, at 49.

31. See generally Jaap Doek, Nigel Cantwell & Sharon Detrick, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE TRAVAUX PRÉPARATOIRES (1992).

32. See also JENKS, CHILDHOOD, *supra* note 16, at 47–48.

33. See Barnes, *supra* note 10. The Preamble “bears in mind [that] . . . the child, by reason of his [or her] physical and mental immaturity, needs special safeguards and care.”

ignored the idea that children may also be active agents, despite decades of childhood studies that show children are neither objects nor victims.<sup>34</sup> The CRC envisions the child primarily as objects or victims.<sup>35</sup> Section II explores how children must be dependent on adults and the family in order to realize certain rights. Section II posits that such immaturity, at the very least, dictates guidance from adults in the exercise of the child's right, as seen in Article 12 for example. At most, immaturity requires total relinquishment of certain rights, such as the right to work, found in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>36</sup> Section II also examines the instances where the CRC privileges the protection of the child, not through empowering children, but by making the child an object of "care." For example, the Preamble of the CRC defines childhood as a time for "happiness, love and understanding," implicitly imagining children free from work.<sup>37</sup> The child's right to rest, leisure, and play in Article 31(1) also invokes a picture of a carefree existence with limited labor. This regulation of child labor stigmatizes certain societies that factor in the child's economic contribution to the family.<sup>38</sup> In this way, the "special" care and assistance to be provided to the child is adult care. As this sometimes works well for parents and children

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34. Nieuwenhuys, *supra* note 4, at 151–52. In her final sentence, Nieuwenhuys participates in perpetuating this victim-object mentality by stating, "by opening our . . . own histories and cultures we can learn from India how to rescue our own children from modern childhood." *Id.* Her final words of the article paint a portrait of the (Global South's) child as the princess locked in a tower waiting for (Global South's) adults to take up the sword, jump on horseback and rescue their own child. This rendition of childhood is all too similar to perspectives about the category "child." It is merely an argument over which adult should be rescuing this princess.

35. *See, e.g.*, CRC, *supra* note 1, at arts. 3 (best interests), 5 (respect for parents' responsibilities), 19 (protection against abuse).

36. United Nations International Covenant on Economic, Social, and Cultural Rights, art. 6, Dec. 16, 1966. "1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right. 2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual."

37. Field, *supra* note 16, at 51; Pupavac, *supra* note 15, at 101; Woodhead, *supra* note 16, at 37.

38. Mayall, *supra* note 16, at 245; Woodhead, *supra* note 16, at 37;.

alike, in other instances, adult care is insufficient or impossible.

The third important critique is that the CRC implies a certain normative arrangement for how that dependency should take place. The CRC implies that biologically based relations between parents and children “are more fundamental and natural than other sorts of family or community relations.”<sup>39</sup> Again, the CRC stigmatizes societies where such arrangements are not the norm.<sup>40</sup> Certain authors have argued that Western society views childhood in other cultures through binaries, characterizing parts of childhood in other cultures as alternatively: (1) undesirable, and requiring reform; or (2) desirable and thus ignorable.<sup>41</sup> This binary involves the good/“Apollonian” child versus the bad/“Dionysian” child.<sup>42</sup> To rectify the undesirable aspects of childhood, various scholarly disciplines (developmental psychology, labor studies, medicine, law, and so on) compete for intervention, claiming that each alone has a solution.<sup>43</sup> This dichotomy marginalizes and stigmatizes the everyday life of a vast majority of children.<sup>44</sup> Societies in the Global South are “cast as child abusers because their children’s experiences violate the image of childhood held in the West.”<sup>45</sup> This marginalization resulted in the empowerment of “external (Western) governmental and non-governmental actors driven by a morality of conviction to act as

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39. Mayall, *supra* note 16, at 245.

40. *See id.*

41. Nieuwenhuys, *supra* note 4, at 147–48, 151.

42. Jenks described two dominant ways of thinking and talking about the child: the Dionysian child and the Apollonian child. Jenks argues that these images are informative of the shifting strategies that Western society has exercised in its increasing need to control, socialize and constrain people in the transition towards modernity. The Apollonian child is angelic, naturally good, innocent, asexual, the best of human nature untainted by the world; such children play and chuckle, smile and laugh. The Apollonian child is perceived as pre-Eve and her apple, pre-“the Fall”. Under this construction children are not curbed or beaten into submission, they are encouraged, enabled, facilitated. The Dionysian child or the “inherently bad” child, who like this prince of wine, revelry, and nature, represents the idea that children possess an innate evil or corruption, is buttressed in the doctrine of Adamic original sin. If adults allow these children to stray away (from adults), these children’s inherent evil will mobilize. The Dionysian child loves self-gratification and pleasure, and therefore requires moral guidance through physical and disciplinary direction. This headstrong and stubborn subject has to be broken, but all for his or her own good. JENKS, CHILDHOOD, *supra* note 16, at 74.

43. Nieuwenhuys, *supra* note 4, at 151–2.

44. *Id.* at 148.

45. Pupavac, *supra* note 15, at 102.

moral agents on behalf of children in the non-Western world.”<sup>46</sup> Section II will further explore how the CRC’s construction of the normative “adult” and normative “child” expels and/or stigmatizes certain versions of childhood. These critiques of the CRC’s universalist approach hinge on the argument that the CRC has limited applicability in the Global South. Jenks argues that “exportation and globalization of a singular view of childhood from advanced Western capitalist societies can have a serious impact on the lives of children in developing countries.”<sup>47</sup>

It seems that while the CRC’s vision of the category “child” is argued to have limited applicability to the Global South, there appears to be consensus that the “child,” along with the perception of the adult and the state as responsible and capable, is fully applicable to the West. Naturally, with this position, critique of the exclusionary effect of the Convention seems to focus on the non-Western world.<sup>48</sup> It is unfortunate

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46. *Id.*; see Erica Burman, *Innocents Abroad: Western Fantasies of Childhood and the Iconography of Emergencies*, 18(3) DISASTERS 238, 241 (1994).

47. JENKS, *supra* note 16, at 48.

48. For example, some authors critique the CRC as being western. See Ennew, *supra* note 5, at 201–13; JENKS, CHILDHOOD, *supra* note 16; Woodhead, *supra* note 16, at 37; Appell, *supra* note 16, at 730 (speaking about how childhood in the United States is based on a Western conception of childhood, and arguing that the CRC largely matches such a conception); Boyden, *supra* note 15, at 186; Boyden, *supra* note 16, at 265; Burman, *supra* note 16, *passim*; Carozza, *supra* note 16, at 311; Freeman, *The Future of Children’s Rights*, *supra* note 16, at 282; Freeman, *The Sociology of Childhood and Children’s Rights*, *supra* note 16, at 438; Grahn-Farley, *supra* note 12, at 1 (“The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself”); Mayall, *supra* note 15, at 245–6; Nieuwenhuys, *supra* note 4, *passim*; Pupavac, *supra* note 15, at 101; Olsen, *supra* note 16, at 215 (“The concerns of post-modern feminism that bear most closely on the Convention on the Rights of the Child include the whole notion of a universal document to deal with all children, throughout the world; the concern that such an effort will almost inevitably result in a western oriented document that merely purports to be universal. . .”); Short, *supra* note 3, *passim* (Arguing that the Convention is still subject to cultural imperialism based on an empirical study of the discussion of the Committee on the Rights of the Child); Short, *supra* note 16, at 334 (arguing that the Committee has “with only very limited exceptions, presented non-Western cultural values and practices in an entirely negative light”); Tobin, *Increasingly Seen and Heard*, *supra* note 13, at 91–4 (discussing the ways that the CRC and the children’s rights paradigm is in some ways western, but in other ways not); Tobin,

that there is little critical engagement regarding the ways in which the vision of the category “child” in the CRC is exclusive, even in the West. The inapplicability of the CRC’s Western envisioning of the child to actual children in the West strengthens the credibility of critiques of the CRC’s inapplicability to children in the Global South. This article contends that stigmatization of certain childhoods, and therefore certain adults and children, extends to the West as well. Nieuwenhuys’ deployment of binaries, the “undesirable/desirable” childhood,<sup>49</sup> proves useful in making the same critiques of the Western world. These binaries, found throughout the Convention, result in certain children and parents being labeled undesirable - and thus in need of intervention - while deeming other desirable parenting units above intervention.

The idea of the “universal child” is not merely exported from the West to the Global South. The CRC’s “universal child” is exported or “re-imported” as a colonizing force *within* the West.<sup>50</sup> This article contends that the CRC’s universal child is

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*Seeking to Persuade*, *supra* note 13, at 40–3 (discussing this issue in relation to both human rights generally and the CRC specifically). *But see* Philip Alston, *The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights*, in *THE BEST INTERESTS OF THE CHILD: RECONCILING CULTURE AND HUMAN RIGHTS* 1, 19–20 (Philip Alston, ed. 1994) (arguing that the CRC allows for the broad use of local cultural norms in the implementation of children’s rights).

49. Nieuwenhuys, *supra* note 4, at 147–148.

50. It is also notable that the only functioning state that has not ratified the CRC, the United States, is from the west. Many who support the United States’ position argue that the CRC does not reflect American notions about childhood, which allows for greater parental authority. *See* Tobin, *Increasingly Seen and Heard*, *supra* note 13, at 93 (citing Susan Kilbourne, *The Wayward Americans - Why the USA has Not Ratified the UN Convention on the Rights of the Child*, 3 *CHILD & FAM. L. Q.* 243, 243 (1998) (noting that that Convention has been variously characterized as “the ultimate program to annihilate parental authority,” “a tool for perverts” and a “malignant vampire”)); *see also* Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 *HARV. INT’L L.J.* 449, 465 (1996); *see generally* Jeffrey Blustein, *Children Rearing and Family Interests*, in *HAVING CHILDREN: PHILOSOPHICAL AND LEGAL REFLECTIONS ON PARENTHOOD* 115, 118–19 (O’Neill, O. and Ruddick, W. eds. 1979) (discussing the tension between society’s interest in the development of children and the desire of some parents to minimize state intervention in the upbringing of children); Joseph Goldstein, *Medical Care for the Child at Risk: On Supervisor of Parental Autonomy*, 86 *YALE L.J.* 645, 646–7 (1977); Michelle Z. Hall, *Convention on the Rights of the Child: has American Closed Its Eyes?* 17 *N.Y.L. SCH. J. HUM. RTS.* 923, 925–7 (2000–2001); Barbara J. Nauck, *Implications of the United States Ratification of the*

exclusionary and therefore inapplicable not just to the Global South, but also to the West. By noting the usefulness of the critiques in an analysis of the West, this article does not simply argue that the child envisioned by the CRC is also forced upon lower socio-economic groups or other racial, ethnic, and religious minorities. Rather, this article describes the CRC's articulation of childhood as exclusionary even within the Western world and even within majority cultures. Undoubtedly, certain children and adults in the West are unable to live up to the normative childhood described in the Convention. The ways in which certain children in the West are excluded, stigmatized, or silenced are relatively unexplored in the context of international children's rights. Part III (a) provides specific examples of childhoods excluded by the CRC by exploring instances within both the West and Global South where the basic assumption that children are irresponsible and adults are responsible is inapplicable. Part III (b) explores instances in both the developing world and the West where the family, considered by Western standards to be "desirable," is in fact an unhappy and unsafe environment for children.

### III. NORTH-SOUTH-EAST-WEST: THE EXPULSION OF CERTAIN CHILDHOODS FROM THE INTERNATIONAL DISCOURSE ON CHILDREN'S RIGHTS

Identity categories are fictional, drawn to fit powerful political ideologies.<sup>51</sup> As such, identity categories are exclusive.<sup>52</sup> Burman argues that the discourse of rights

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*United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family*, 42 CLEV. ST. L. REV. 675, 702 (1994); Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American children on the Altar of Third-World Activism*, 38 WASHBURN L.J. 111, 111-2 (1998-99); David P. Stewart, D. *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 164 (1997-98); Lynn D. Wardle, *Essay: The Use and Abuse of Rights Rhetoric: The Constitutional Rights of child*, 27 LOY. U. CHI. L.J. 321, 321-3 (1996) (criticizing the over-emphasis of "rights" in society, particularly when applied to children); Richard G. Wilkins, R. et al., *Why the United States Should not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 412 (2003).

51. JUDITH BUTLER, *GENDER TROUBLE*, 5 (1990).

52. GARY A. OLSON & LYNN WORSHAM, *Changing the Subject: Judith Butler's Politics of Radical Resignification*, 20.4 J. OF RHETORIC, CULTURE AND POL., 727 (2000), reprinted in *THE JUDITH BUTLER READER*, 325, 335-38 (Sara Salih, ed. 2004).

necessarily invokes general claims.<sup>53</sup> For Burman, the discourse of rights functions as an appeal to general entitlements: “the generality of which is used to strengthen demands for [the particular rights] application in a specific situation.”<sup>54</sup> Burman questions how these general statements - these rights - are applicable to children in particular contexts.<sup>55</sup> By universalizing the category “child,” the CRC may be inapplicable to children who do not or cannot live up to the CRC’s normative identity “child” as immature and in adult care.<sup>56</sup> For example, the CRC excludes street children, who are in turn pathologised and stigmatized.<sup>57</sup> According to the CRC, non-normative versions of childhood require intervention and need rescue.<sup>58</sup> On the other hand, childhoods deemed normative, such as those of children who are “in care” of a family, are viewed as relatively unproblematic. The result is that problems faced by these children, such as gender discrimination or mistreatment within traditional families, are more likely to be ignored.<sup>59</sup> As such, the description of “inapplicable” intends to convey an evaluation of the CRC as unhelpful in combating vulnerability. This section also discusses some of the various children that numerous authors have argued are either problematized or ignored by the CRC’s articulation of the category “child”; including the street child, the girl-child, the care-taker, the non-Western child, and (to some extent) the child soldier. With such a list, one is tempted to conclude that the CRC’s normative childhood applies to very few “children” indeed. Burman questions whether the CRC’s general statements can even be made about children and whether childhood is generalizable, all politically charged questions.<sup>60</sup>

Quite possibly, the vast experience of children throughout the world cannot be conceptualized in one Convention. Indeed, questioning the usefulness of the rights found in the CRC and its version of childhood is oddly met with strong resistance.<sup>61</sup>

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53. Burman, *supra* 16, at 46.

54. *Id.* (brackets added).

55. *Id.*

56. *See id.* at 47.

57. Ennew, *supra* note 5, at 201–13

58. *See generally* Nieuwenhuys, *supra* note 4, at 147–48.

59. *See id.*

60. Burman, *supra* 16, at 46.

61. It should be noted that some argue that the CRC gives children too much autonomy. *See* Goldstein, *supra* note 50, at 645; Hafen & Hafen, *supra*

The general consensus within academia and the international system is that the CRC is helpful, and at the very least, “pro-children.” Questioning otherwise is viewed as nonsensical or at the very least frivolous. Burman points out that, “[a]ll too often professionals, activists, and policy-makers get so caught up in the pain, distress and needs of children that the answers to these questions are either assumed or dismissed as irrelevant to practice, as academic luxuries for sociologists and philosophers to muse upon.”<sup>62</sup> The question of “what is a child” is continually dismissed as either an academic luxury or, as Jenks argues, a question already adequately answered.<sup>63</sup>

Butler argues that the “rush to decision-ism and to strong normativity” in the formation of identity categories<sup>64</sup> results in the failure to consider the meaning of the very basic terms the category assumes, in other words the characteristics of, in this case, children: their immaturity, incapacity, and state of development. This concern is relevant to the CRC’s category “child.”<sup>65</sup> Ironically, although the drafting of the CRC took 10 years, the discussions that led up to the CRC failed to engage in this type of questioning. This questioning of the “child” behind the CRC’s rights discourse is indeed “painful”, as doing so puts into question not only the CRC’s acceptance of the “developing child” but also entrenched (adult, cultural, and state centric) lines of power, which depend upon the “developing child” rationale. The deconstruction of the identity “child” in the Convention would mean the deconstruction (or at

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note 50, at 465; *see generally* Blustein, *supra* note 50; Hall, *supra* note 50, at 923; Kilbourne, *supra* note 50, at 243–56 (noting that that Convention has been variously characterized as “the ultimate program to annihilate parental authority”, “a tool for perverts” and a “malignant vampire”); Nauck, *supra* note 50, at 702; Smith, *supra* note 50, at 111; Stewart, *supra* note 50, at 161; Wilkins, *supra* note 50, at 412; Wardle, *supra* note 50, at 321–48. This article addresses a more dominant perception in international children’s rights that the CRC accommodates the needs of most children. *See generally* PHILIP ALSTON & JOHN TOBIN, LAYING THE FOUNDATIONS FOR CHILDREN’S RIGHTS (2005); Priscilla Alderson, *UN Convention on the Rights of the Child: Some Common Criticisms and Suggested Responses*, 96 CHILD ABUSE REVIEW 439 (2000); Anonymous, *Editorial: The CRC as a Touchstone for Research on Childhoods*, 6(4) CHILDHOOD 403 (1999); Freeman, *The Future of Children’s rights*, *supra* note 16, at 280; Freeman, *The Sociology of Childhood and Children’s Rights*, *supra* note 16, at 433; Frances E. Olson, *supra* note 16, at 192.

62. Burman, *supra* note 16, at 45

63. *See generally* JENKS, *supra* note 16.

64. Butler, *supra* note 51, at 355.

65. *Id.*

least reconsideration) of the required dependency of childhood, thus amending current roles of parents and state as having responsibility/control over all children. By privileging the family, the state and even culture, the CRC often makes an explicit choice to underline, rather than undermine, the unique forms of vulnerability proscribed to childhood. By casting the parent and state as responsible, and the family, culture, and traditions as happy and safe, the CRC fails to be helpful and applicable to many of those who the CRC categorizes as a “child”, yet fail to experience the family, culture, traditions, parents and the state in these ways. In other words, the CRC reflects social norms that provide little help to vulnerable children. As such, this article argues that the CRC’s vision of the child as “developing” and thus rightfully dependent upon adults fails to mainstream certain issues of children existing inside and outside the CRC’s normative framework.

A. CHILD AS HEAD OF THE HOUSEHOLD: THE CRC’S ARTICULATION OF THE FICTITIOUS RESPONSIBLE PARENT – IRRESPONSIBLE CHILD

The CRC privileges the “family”, and therefore the family structure, in a variety of ways. The Convention defines the family as a child in “care” of a responsible adult, thereby pathologizing childhoods where the child is responsible for the parent, responsible for her or himself, and/or responsible for other children. The CRC does not contemplate these circumstances as “appropriate” for childhood. The word “care” appears thirty-one times in the Convention. The word “care” in relation to the child appears twenty-three times, three times in the Preamble alone: 1) “childhood is entitled to special *care* and assistance,” 2) “[b]earing in mind that the need to extend particular *care* to the child,” 3) “the child . . . needs special safeguards and care.”<sup>66</sup> Article 3(2) obligates states to ensure “protection and *care* as is necessary for [the child’s] well-being.”<sup>67</sup> Article 7 gives children the right to be cared for (as far as possible) by his or her parents.<sup>68</sup> Article 19 obligates states to protect children from all forms of abuse by those charged with the child’s care.<sup>69</sup> These are but a few of the many references to

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66. CRC, *supra* note 1, at Preamble.

67. *Id.* at art. 3(2).

68. *Id.* at art. 7.

69. *Id.* at art. 19.

the forms of “care” necessary to protect the child. “Care” appears to be a fundamental right of the child in the CRC.

By assuming that children are in a family, the CRC makes available rights for and duties owed to only children who are in a family context. Many of the rights enumerated in the CRC simply do not make sense for children without a parent/family. For example, Article 5 states that the parents, extended family, and the community’s responsibilities must be protected.<sup>70</sup> Article 7(2) states that children have the right to know and be cared for by his or her parents. Article 9 elaborates the right not to be separated from the family.<sup>71</sup> Article 9(3) states the right to maintain personal contact with the family and to gain essential information regarding whereabouts of the family.<sup>72</sup> Article 10 provides for reunification of families and deals with parents who are located in a different state from that of the child.<sup>73</sup> Article 22(2) states the obligation of the party and the UN to help trace and reunify families.<sup>74</sup> Obviously, the child must have a family to enjoy such right to aid for reunification or separation. Article 29 states that the focus of education should develop respect for “parents”, in addition to cultural identity, language, values, and national values.<sup>75</sup>

The Convention does not just mandate the child to the family context. It also delineates the family structure by situating the child as dependent on the parent for the child’s everyday physical needs. The child is required to attend school under Article 28 and is not envisioned by the CRC as normally engaged in paid work.<sup>76</sup> Instead, parents are to provide for the child according to Article 18 and all state assistance is to be directed through the parents according to Articles 24 and 27.<sup>77</sup> Article 24 states that the realization of the enjoyment of the highest attainable standard of health is mediated through the child’s parents.<sup>78</sup> Article 27 states that the parents have primary responsibility, which the state must assist, for

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70. *Id.* at art. 5.

71. *Id.* at art. 9.

72. *Id.* at art. 9(3).

73. *Id.* at art. 10.

74. *Id.* at art. 22(2).

75. *Id.* at art. 29.

76. Fields, *supra* note 16; Woodhead, *supra* note 16; Pupava, *supra* note 15, at 101.

77. CRC, *supra* note 1, at art. 24, 27.

78. *Id.* at art. 24.

securing an adequate standard of living for the child.<sup>79</sup> In both articles, without parents there is no one who holds primary responsibility, and there is no one for the state, who has secondary responsibility, to assist. According to the CRC, a child simply cannot exercise such responsibility on her or his own behalf. It may be argued that the CRC obligates states under Article 20 to find or act as the parent/parent, and as such the child never requires direct assistance to support her or himself.<sup>80</sup> Certainly there are academics who argue that the only right to which the child is entitled is the right to an autonomous parent.<sup>81</sup> Yet, there are many children in both the West and Global South that have no responsible parent as envisioned in the CRC, whether through a family or as provided by the state.<sup>82</sup> There is no room for the child, who is responsible for him or herself (much less others), anywhere in the Convention. In constructing childhood in this way, the CRC makes the family/adults necessary for the realization of certain rights in the Convention. If the child desires assistance from the state, she/he must be part of a family; in other words, the child must have a responsible adult. The Convention thus provides no support or protection for a childhood that “lacks” a responsible adult, other than expelling it to the realm of illegality.<sup>83</sup>

Throughout the world, in both the West and Global South, the independent child undoubtedly exists.<sup>84</sup> This section

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79. *Id.* at art. 27.

80. *Id.* at art. 20.

81. See also Freeman, *supra* note 16, at 277.

82. Ennew, *supra* note 5, at 201; Jenny Kitzinger, *Who Are You Kidding? Children, Power and the Struggle Against Sexual Abuse*, in CONSTRUCTING AND RECONSTRUCTING CHILDHOOD: CONTEMPORARY ISSUES IN THE SOCIOLOGICAL STUDY OF CHILDHOOD 184, 187 (Allison James & Alan Prout eds., 1990); Tatek Abebe & Asbjorn Aase, *Children, AIDS, and the Politics of Orphan Care in Ethiopia: The Extended Family Revisited*, 64(10) SOCIAL SCIENCE & MEDICINE 2058, 2058 (2007); Kathryn Backett Milburn et al., *Challenging Childhoods: Young People's Accounts of "Getting By" in Families with Substance Use Problems*, 15 CHILDHOOD 461, 461 (2008); Caroline Nicholson, *The Impact of Child Labor Legislation on Child-Headed Households in South Africa*, 30 T. JEFFERSON L. REV. 407, 408 (2008); Robson, *supra* note 18, at 227.

83. CRC, *supra* note 1, at art. 5.

84. See Ennew, *supra* note 5, at 201 (stating that street children often sleep on the street, pack up their belongings, and prepare themselves to go to work); Kitzinger, *supra* note 82, at 162 (noting that many abused children learned to rebel against what was happening to them); Abebe & Aase, *supra* note 82, at 2059 (observing that children in households that have lost

focuses on parents who are incapable of being responsible for the child, and not those who are capable but unwilling. Even if this article were to assume all parents are willing, the percentage of children who live with parents who are not able to exercise responsibility for their children remains sufficiently high to be concerned about their exclusion from the Convention.<sup>85</sup> One could argue that, at least in the West, the Convention does provide for children without a responsible parent.<sup>86</sup> The Convention mandates states to intervene in such situations under Article 3, given the resources at the state's disposal to provide and be responsible for children without parents.<sup>87</sup> This response assumes a variety of conditions: 1) that the state is willing to intervene, 2) that the situation in state care and/or state intervention would be "better" than the child's current situation, and 3) that the child would rather be in state care. As to the first and second factors, indeterminacy reigns.<sup>88</sup> Even if the state is willing to intervene, there is disagreement over the best interests of the child principle that clouds the state's political will to intervene.<sup>89</sup> There are those

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breadwinners to HIV/AIDS epidemic must contribute to a family's livelihood in order to provide essential life support resources); Backett-Milburn et al., *supra* note 82, at 469 (showing that siblings can act as role models by showing the way to establish an independent life); Nicholson, *supra* note 82, at 408 (stating that households where both parents have died are often dependent solely on income generated by children for survival); Robson, *supra* note 18, at 227 (noting that young carers are often forced to care for dependent adult family members due to the HIV/AIDS pandemic).

85. Nicholson, *supra* note 82, at 408.

86. *See generally* CRC, *supra* note 1, at art. 18–19 (noting that developed states have more resources to ensure children have access to all services they need).

87. Michael Freeman, *Article 3: The Best Interests of the Child Conflicts*, in *A COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE RIGHTS OF A CHILD* 1, 25 (Andre Alen, et al. eds., 2007) [hereinafter Freeman, *Article 3: The Best Interests of the Child Conflicts*].

88. *See generally* CRC, *supra* note 1, at art. 20 (noting that if a child is deprived of a family environment, the state must ensure alternative care for the child).

89. *See* Freeman, *Article 3: The Best Interests of the Child Conflicts*, *supra* note 87, at 2–3. "The best interests principle is, of course, indeterminate. One of the dangers of this is that, in upholding the standard, other principles and policies can exert an influence from behind the "smokescreen" of the best interests principle. It can cloak prejudices, for example anti-gay sentiments. It can also be merely a reflection of "dominant meanings." *Id.* at 2. *See also* Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226, 260 (1975). Robert Mnookin highlights, "deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself." *Id.*

who believe that the child's opinion can dictate his or her own decisions;<sup>90</sup> however, given the limited resources of every state, the issue of "intervention" and when to intervene, leaves the child vulnerable to decisions that differentially interpret the child's best interests.

As to the third factor, the child's ability to have a voice in the process of intervention, Article 12 is argued to be the most controversial and paradigm-shifting article in the CRC.<sup>91</sup> It recognizes the child as a subject of rights and not merely an object of care based on needs.<sup>92</sup> Nonetheless, Grahn-Farley argues that Article 12 stops short of placing the image of the child in danger, where the incapacity of the child would be questioned.<sup>93</sup> Article 12 refrains from giving the child the right to be heard, by stating that "the views of the child [must be] given due weight in accordance with the age and maturity of the child."<sup>94</sup> Thus, far from grounding-breaking, Article 12 merely gives the child the heavily qualified right to be heard based on the perceived ability to make decisions (as measured by adults).<sup>95</sup> Indeed, General Comment No. 12 states that Article 12 of the [CRC] is a unique provision in a human rights treaty.<sup>96</sup> It addresses the legal and social status of children, who, on the one hand lack the full autonomy of adults but, on

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90. CRC, *supra* note 1, at art. 12.

91. Grahn-Farley, *Beyond Right and Reason*, *supra* note 11, at 908; *see also* Freeman, *supra* note 87, at 438.

92. *See* Freeman, *The Sociology of Childhood and Childhood Rights*, *supra* note 87, at 440. Freeman argues that many commenters on the CRC believe Article 12 to be its "linchpin." *Id.* at 438.

93. *See* Grahn-Farley, *Beyond Right and Reason*, *supra* note 11, at 908.

94. *Id.*

95. *See* Nick Lee, *The Challenge of Childhood: Distributions of Childhood's Ambiguity in Adult Institutions*, 6 CHILDHOOD, 455, 456-57 (1999). "[Article 12] finds itself juggling two different approaches towards children. These approaches have been described as the "being" and the "becoming" view of children. Although the principle of non-discrimination that the Article advances is to be applauded, in light of the considerations of age and maturity the Article remains ambivalent about children's ability to represent themselves, and thus ambivalent about their place in decision-making. *See also* Jens Qvortrup, *Introduction*, in CHILDHOOD MATTERS: SOCIAL THEORY, PRACTICE AND POLITICS 1, 21 (Jens Qvortrup et al., eds., 1994). *See generally* Alderson, *supra* note 61, at 440. Alderson argues that, "the CRC does not grant to children the liberty or autonomy rights which adults in democracies take for granted . . . Instead, the CRC enshrines some half-way-to-autonomy rights, such as Article 12." *Id.*

96. CRC/C/GC/12, General Comment No. 12, The Right of the Child to be Heard, 5 (July 12, 2009).

the other, are subjects of rights.<sup>97</sup> This double standard regarding such a fundamental right is justified on the basis of the view that the category “child” is incapable and the category “adult” capable.<sup>98</sup>

Questioning the “fundamental” child, requires re-examining the idea that children cannot and/or should not have the definitive say in matters that relate to them, as is the case for all other humans.<sup>99</sup> Even if one disagrees (as the CRC certainly does) with the argument that the child should have a definitive say in matters that relate to him or her,<sup>100</sup> one would be exceptionally hard pressed to contradict the idea that states and parents are unwilling or unable to provide the CRC’s childhood to *all children*.<sup>101</sup> Even if one clings to the CRC’s ideal childhood,<sup>102</sup> is it fair to require children to maintain their obligation of dependency under the CRC, when adults are unable to take responsibility and provide for the safety and well-being of their children?

The first obvious counterargument is that conventions such as the CRC are intended to be aspirational.<sup>103</sup> Nonetheless, in an aspirational state, policymakers too often fail to consider that some children will not and cannot have a responsible adult in their lives.<sup>104</sup> One might cling to the CRC’s version of childhood,<sup>105</sup> as it is probably appropriate for most children. However, international law founded upon this idyllic version of childhood is failing to provide for those children who are arguably most vulnerable.<sup>106</sup> Such failure is not because of their “childness,” but because of the social discrimination against

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97. *Id.*

98. See Kenneth B. Nunn, *The Child as Other: Racial Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 701 (2002).

99. See *supra* notes 93–95 and accompanying text.

100. See CRC, *supra* note 1, at art. 12 (discussing how only children, based on age and maturity, can express his or her own views freely).

101. See *supra* note 84 and accompanying text (discussing how children are sometimes forced into becoming the head of the household).

102. See *generally* CRC, *supra* note 1 (stating that one’s childhood is entitled to special care and assistance from the State when it is deemed necessary).

103. See *generally* CRC, *supra* note 1 (recognizing the importance of international cooperation for improving children’s childhoods, especially in developing countries).

104. See *supra* note 84 and accompanying text.

105. See *supra* note 103 and accompanying text.

106. See *supra* note 96 and accompanying text.

children whose lives exist outside of adult aspirations.<sup>107</sup> A second counterargument is that the real issue for the CRC is enforcement.<sup>108</sup> Society must condemn states and parents who do not provide for their children in the ways envisioned in the CRC's ideal childhood, as required by Article 3.<sup>109</sup> The response to this argument is a well-rehearsed one; states parties make conventions and international law. Conventions are politically negotiated, state-centric codes. They are created to lack enforcement mechanisms and are intended to be (most often) aspirational.

This article favors pragmatic responses to both counterarguments.<sup>110</sup> We cannot afford to ignore excluded childhoods on the basis that international conventions are merely aspirational.<sup>111</sup> Nor can we ignore the reality that international conventions are state-centric in nature, and may never facilitate enforcement in the way envisioned by positivist conceptions of law.<sup>112</sup> Blending pragmatism and aspiration, this article contends that withholding criticism of the CRC's "child" in the hope for better enforcement at some point in the future comes at the expense of the category "child" today.<sup>113</sup> It is essential that we inquire into the implications of our aspirations, particularly those that claim to seek to "protect" the "child". Nor should we demand that children wait for our aspirations to be fulfilled.<sup>114</sup> The CRC's version of childhood (the child as in the care of parents, and if not parents the state – all of which are responsible and caring) is not only impossible to obtain, but there is no commitment from states to universally obtain those conditions for *all* children.<sup>115</sup> Article 4 (realization to the maximum extent to their available resources) implies that at least *some* of the obligations under

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107. See generally Abebe & Aase, *supra* note 82, at 2059 (noting that children as orphans often suffer from discrimination in addition to their material deprivations because of the stereotype that orphan children are vulnerable, dependent, and a burden on society). *But see supra* note 84 and accompanying text.

108. See generally CRC, *supra* note 1, at art. 3 (demanding that states ensure children receive the necessary care and protection, however it does not discuss what happens if the state fails to follow through).

109. See *supra* notes 104–107 and accompanying text.

110. See *infra* notes 111–118.

111. See *supra* notes 103–104 and accompanying text.

112. See *supra* notes 108–110 and accompanying text.

113. See *supra* notes 103–118 and accompanying text.

114. See *supra* note 107 and accompanying text.

115. See generally notes 84 and 101 and accompanying texts.

the Convention are currently impossible.<sup>116</sup> Nonetheless, the CRC does not provide for children who cannot draw on responsible adults or state agencies to provide for and be responsible on behalf of the child.<sup>117</sup> Further, another issue is that states may be unwilling to provide for certain “undesirable” children.<sup>118</sup>

Some states are unwilling or unable to ensure the CRC’s version of childhood for all children within their jurisdiction.<sup>119</sup> Some parents are likewise unwilling or unable to ensure this version of childhood for all children.<sup>120</sup> Yet, according to the CRC’s visions of childhood, *all children are required* to be dependent on adults.<sup>121</sup> The following section will explore three childhoods in which the CRC’s normative framework is inapplicable, three childhoods that are, as Foucault says – “local, discontinuous, disqualified, [and] illegitimate . . . against the claims of a universal ‘truth.’”<sup>122</sup> These childhoods do not include responsible and capable adults, or children in a state of dependency, but children who are agents, not objects, exercising capacity for themselves and in caring for others, children who are rendered marginal by the allocation of rights in the CRC.<sup>123</sup>

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116. See CRC, *supra* note 1, at art. 4 (stating that State Parties shall take all appropriate measures to implement the Convention to the maximum extent possible).

117. See *supra* notes 104 and 115 and accompanying text.

118. See, e.g., Nunn, *supra* note 98, at 679–680 (arguing that “insofar as African American boys and girls are concerned, it is somewhat inaccurate to speak of an “end of adolescence....The concept of a group of young people who were entitled to special treatment because they were impetuous and immature was never extensive enough to include African American children.”); see also Mary Ann Mason, *The U.S. and the International Children’s Rights Crusade: Leader or Laggard*, 38 J. OF SOC. HISTORY 955, 957 (2005). Mason further argues that “children were divided into four classes: natural children, apprentices, illegitimate children, and slaves; each with a different status recognized by descending levels of protection and provisions rights which were enforced by colonial courts.”

119. See *supra* notes 108–109, 115 and accompanying text.

120. See *supra* note 84 and accompanying text; see *supra* text accompanying note 94.

121. See CRC, *supra* note 1, at art. 1 (defining that a child for purposes of the CRC means every human being below the legal age of majority). *But see supra* note 84 and accompanying text.

122. See *supra* note 7 and accompanying text.

123. See *supra* note 84 and accompanying text; see generally CRC, *supra* note 1, art. 12 (discussing whether or not a child is capable of forming his or her own views depending on the age and maturity of the child).

## 1. Parents with Substance Abuse Problems

Backett-Milburn notes that, as of 2003, over a million children in the United Kingdom (UK) lived with parents having either alcohol and/or drug use problems.<sup>124</sup> In her interviews with children aged fifteen years or older, Backett-Milburn focuses on how children “get by” in such situations.<sup>125</sup> While her research focuses on alcohol or drug misuse, one could presume that her observations could also be relevant to situations where parents have emotional or psychological problems.<sup>126</sup> Backett-Milburn argues that the ways in which these children “get by” not only demonstrate the agency of children, but also challenges the “compulsive urge to refer to childhood as a unitary phenomenon” as immature.<sup>127</sup> Agitating another phenomenon that adults or parents are responsible, Backett-Milburn discusses how a large majority of the children that she interviewed said that their substance-misusing parents had not always looked after their basic needs.<sup>128</sup> Half of those interviewed described themselves as the active caretakers, looking after themselves, their parents, and/or siblings.<sup>129</sup> Others described their siblings as the caretakers.<sup>130</sup> Contrary to the idea that children lack agency, children interviewed stated that they were in charge of the following tasks: 1) taking care of basic needs (cooking food, cleaning the home, washing dishes, etc.), 2) protecting themselves and/or siblings from danger (calling on neighbors or extended family), and 3) protecting the substance-misusing parent (by making sure parents did not harm themselves while intoxicated or high).<sup>131</sup>

Given the number of children who have parents with substance misuse problems in the UK alone, Backett-Milburn’s research offers insight into a version of childhood and

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124. Backett-Milburn, *supra* note 82, at 461.

125. *See id.* at 461, 465.

126. *See supra* note 84 (discussing that children are often forced to get by in situations where parents: have drug/alcohol addictions, are suffering from are already succumbed to HIV/AIDS, or perhaps where parents have emotional or psychological problems).

127. *See* Backett-Milburn, *supra* note 82, at 462.

128. *Id.* at 467. *See also supra* text accompanying notes 124–125.

129. Backett-Milburn, *supra* note 82, at 467.

130. *Id.*

131. *Id.*

adulthood that is not contemplated in the Convention.<sup>132</sup> For example, the best interests principle in Article 3 has as its basis the child as an object/victim, not an agent.<sup>133</sup> Notably, the best interest principle does not mean “best rights.”<sup>134</sup> Freeman argued that it may seem incongruous that in a convention about rights, best interests should feature so prominently.<sup>135</sup> The best interest principle is paternalistic, as it is viewed from an adult perspective; Article 3 (1) makes no reference to the child’s views.<sup>136</sup> Article 3 envisions the “best interest” of these children served by getting them into the care of a responsible adult, and all resources to ensure the best interest of the child being channeled through the responsible parent.<sup>137</sup> One could argue that in a country like the UK, the state should provide programs for rehabilitation for the parent or that these children should become wards of the state.<sup>138</sup> Obviously, such a view comes with several questionable assumptions. This argument assumes that rehabilitation is possible, that children would rather not stay in their current arrangement, and that state care is “better.”<sup>139</sup> One would have to define what “better” means, and it is possible that the child and the state agent might have quite differing opinions.<sup>140</sup>

Articles 24 (right to health) and 27 (right to adequate standard of living), which require the state to assist the parent to realize these rights for children, further illustrate the Convention’s inapplicability to such children.<sup>141</sup> The provision of assistance *directly* to the child is not contemplated in the

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132. See generally CRC, *supra* note 1 (omitting how to care for children whose parents are abusing drugs and/or alcohol).

133. See *id.* at art. 3.

134. See Freeman, *Article 3: The Best Interests of the Child Conflicts*, *supra* note 87, at 4.

135. See *id.* at 4–5.

136. *Id.* at 50–51. See also CRC, *supra* note 1, at art. 12 (requiring no State Parties to ensure that the child, who is capable of forming her or his own views, the right to expression those views).

137. See, e.g., CRC, *supra* note 1, at arts. 27–29.

138. See generally CRC, *supra* note 1, at art. 3 (stating that State Parties must take into account the rights of the parents, all well as take all appropriate measures to place children in institutions or provide the services and care that are necessary).

139. See *supra* text accompanying notes 119–120.

140. Mnookin, *supra* note 89, at 260. Robert Mnookin highlights, “deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.” *Id.*

141. CRC, *supra* note 1, at arts. 24, 27.

CRC.<sup>142</sup> Under the Convention, assistance for children is to always be realized through adults.<sup>143</sup> In instances such as those described by Backett-Milburn, Article 19 of the Convention imagines the remedy to be removal from the troubled home to that of a responsible adult, or leaving the child within the home but instituting drug treatment services upon the parents in response to their neglect of the child.<sup>144</sup> Neither of these options empowers the child to be responsible for his or herself.

Beyond the rights allocated to them in the CRC, these children might deem it more appropriate to be provided the following rights: 1) the right not to be labeled (with its ensuing discriminatory and violent practices); 2) the right to work and to do so in fair conditions and for fair wages; 3) the right to have one's own support systems (which do not privileged the modern concept of family in which many children do not exist); 4) the right to appropriate and relevant services (which middle class adults do not necessarily know what is best); and 5) the right to be protected from harm inflicted by "caring" social agencies.<sup>145</sup> Though potentially too obvious to state, Backett-Milburn is discussing a state in the West,<sup>146</sup> where children find themselves without a responsible adult, but who do not have access to or do not desire state intervention.<sup>147</sup> Further, there is no reason to assume that these circumstances would be different in other states in the West. Notably, no such discussion about the absence of a responsible adult took place in the negotiations that led up to the CRC.<sup>148</sup> Backett-Milburn's research is illustrative of the relevance and importance of deconstructing the CRC's binary that assumes the adult to be

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142. See generally CRC, *supra* note 1 (contemplating how adults, parents, legal guardians, or the State (run by adults) are to provide care necessary to all children – however, there is no discussion of how children are able to care for themselves). *But see supra* note 84 and accompanying text (noting that often times, children in troubled situations must learn to care for themselves and others).

143. See *supra* note 142.

144. See CRC *supra* note 1, at art. 19 (discussing how State Parties must take all measures necessary to protect children from abuse or neglect, including the establishment of social programmes in order to prevent or identify and follow-up on instances of child mistreatment). See also *supra* note 138 and accompanying text.

145. Ennew, *supra* note 5, at 210–13.

146. Backett-Milburn, *supra* note 82, at 461 (conducting research in the UK).

147. See *id.* at 477 (discussing that children sometimes do not want to reveal problems as it could result in unwanted interventions from the state).

148. See DETRICK ET AL., *supra* note 31, at 351–52.

responsible and the child to be irresponsible, even in the West.<sup>149</sup>

## 2. Parents with HIV/AIDS

The HIV/AIDS epidemic is another example of children existing outside of the CRC's vision for childhood. Nicholson highlights the ways in which the HIV/AIDS epidemic impacts children with parents who are sick or have died from this disease.<sup>150</sup> Before discussing Nicholson's research regarding HIV/AIDS in South Africa,<sup>151</sup> it is important to note that although HIV/AIDS is a problem of particular relevance to portions of the Global South, Nicholson's analysis is also relevant to children in the West. Additionally, her arguments are not just applicable to children whose parents have HIV/AIDS (in both the Global South and the West), but is potentially applicable to children with parents who have any chronic disease or psychological disorder.

Nicholson's research demonstrates that children in South Africa need to be allowed to work, and that these children desperately need laws that protect them as laborers.<sup>152</sup> Nicholson contends that the South African government could not, at the time of writing, administer a social welfare program that would adequately cover the basic needs of all of South African children.<sup>153</sup> It could be further argued that even developed states, such as the United States, do not cover the basic needs of all of the children in their jurisdictions.<sup>154</sup>

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149. See *supra* notes 124–131 and accompanying text.

150. While other international instruments deal specifically with the issues of child labour, such as the 1999 ILO Convention No. 182 on the worst forms of child labour and the 1973 ILO Convention No. 138 on the minimum age for admission to employment and work, this article focuses on the text of the CRC.

151. For further reading on the problem of HIV/AIDS in other countries see, for example, Abebe, *supra* note 82 (discussing HIV/AIDS in Ethiopia); Robson, *supra* note 18 (discussing HIV/AIDS in Zimbabwe).

152. See Nicholson, *supra* note 82 at 407–08. The process for determining which child may work and which may not, while considering the perpetuation of poverty through the lack of education, as envisioned by the author, remains unclear.

153. See *id.* at 407.

154. As of 2010, 22% of all children in the US lived below the poverty line. Interestingly, of those in families, 21.5% experience poverty; of those not in families, 49.8% experience poverty. Of adults between eighteen and sixty-four years old, 13.7% experience poverty. Of those over sixty-four years of age, 9% experience poverty. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU,

Nicholson's discussion of the inadequacies of the South African system can be read as a description of a situation where a child does not have a responsible adult or responsible state to care for them, but where the child is nonetheless obligated to depend on the non-existent responsible adult.<sup>155</sup> Children lacking the care of a responsible adult must then look for extra-legal means to survive. This, according to Nicholson, may result in the child engaging in exploitative work (work outside of the realms of regulation, and without legal protections that legal workers would otherwise possess) or in criminal activity to support themselves and their families.<sup>156</sup> Nicholson describes the children she discusses as underpaid and as working outside regulations that would otherwise protect them.<sup>157</sup> Equal pay regulations and constraints on working conditions may serve as examples of regulations that would otherwise protect these children. Further, Nicholson argues that orphan children whose parents are deceased as a result of HIV/AIDS are further stigmatized because their parents were infected by the disease, and are presumed prone to criminal tendencies and violence.<sup>158</sup> It appears that the non-discrimination principles of CRC Article 2 do not apply to the circumstances of these children.<sup>159</sup> Under a conception of the Dionysian child, the "bad" child, when left alone (without adults), will be consumed by innate evil.<sup>160</sup> More importantly, one wonders how the stigma of being an independent child translates to mean that this child does not receive the protections ("care" or "special assistance") given to those who are not flaunting prescriptions of childhood (immaturity and dependency). In what ways are these independent children made into adults (for example, when

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INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, 15 tbl.4 (2011), available at <http://www.census.gov/prod/2011pubs/p60-239.pdf>.

155. See Nicholson, *supra* note 82, at 411–13.

156. See *id.*, at 408, 416.

157. See *id.* at 408.

158. See *id.* at 416.

159. See generally CRC, *supra* note 1, art. 2 ("1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colo[r], sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. 2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.").

160. See JENKS, CHILDHOOD, *supra* note 16, at 62–64, 70–72.

arrested), without the rights and “responsibilities” of adulthood (for example, without the right to counsel, in regard to CRC Article 37)?<sup>161</sup> Nicholson argues that in the case of poverty-stricken children in child-headed households, the focus shifts from the problems of poverty to crime, and that this shift compounds the inadequacies of the approach to address the needs of these children.<sup>162</sup> Further, as discussed earlier, Articles 24 and 27 are not available to these children, who may not have or may not want to have an adult to act on their behalf.<sup>163</sup>

Among other solutions, these children should be legally allowed to work, and afforded the same safeguards and protections provided to all other legal workers. In addition to facilitating the self-reliance of the child, the independent child also might require other protections afforded to the head-of-the-household. Such protections may include, for example, the ability to enter into contracts (in particular, to rent a house), the ability to have those contracts enforced, and the right to have privacy of family life respected. Beyond the rights allocated to them in the CRC, street children may also deem it more appropriate to be provided the rights of the type discussed above, including the right to not be labeled, the right to work, the right to have their own support systems respected, the right to appropriate and relevant services, the right to protection from secondary exploitation, and the right to protection from harm inflicted by “caring” social agencies.<sup>164</sup> The CRC does not include such safeguards and rights.<sup>165</sup> These same arguments can be deployed in the West in regard to children with parents suffering from chronic mental or physical illness, including HIV/AIDS. These excluded childhoods are intended to highlight that CRC normatively does not contemplate anything other than the adult as responsible, and the child as irresponsible. The CRC does not envision a child “outside” of care, by the state or by a parent. The child without the responsible adult is stigmatized, and made an object of

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161. Whereas CRC Article 37 provides for the right to “legal and other appropriate assistance” when a child is “deprived of his or her liberty,” it does not provide for the right to counsel. *See* CRC, *supra* note 1, art. 37.

162. *See* Nicholson, *supra* note 82, at 416.

163. *See supra* Part II.a.

164. *See* Ennew, *supra* note 5, at 210–13; *see also* Christine Piper, *Historical Constructions of Childhood Innocence: Removing sexuality*, in *OF INNOCENCE AND AUTONOMY: CHILDREN, SEX, AND HUMAN RIGHT* 1, 4 (Eric Heinze ed., 2000).

165. *See generally* CRC, *supra* note 1.

“caring” intervention. If this child’s concerns fall outside the regime that aims to find a responsible adult for the child, then the child’s concerns are not addressed. A responsible adult must be found, notwithstanding that this may be undesirable or impossible.

### 3. Street Children

Street children are another example of children that contradict the CRC’s universal “child” as lacking maturity. Street children often exist without a responsible adult, and are often mature enough to survive on their own.<sup>166</sup> Ennew argues that, within the “Western, modern childhood,” “[t]he place for childhood to take place is inside[—]inside society, inside a family, inside a private dwelling.”<sup>167</sup> Ennew further argues that consequently street children are “society’s ultimate outlaws,” and that street children that frequent the streets at night are placed “outside childhood.”<sup>168</sup> Ennew also notes that “children are increasingly conceptualized as vulnerable and in danger from influences outside the private world of the family so they are increasingly banished from the streets.”<sup>169</sup> Street children are consequently pathologized, and intervention into their lives remains focused on their removal from the street. Ennew also analyses the articles of the CRC and argues that they are largely inapplicable to the street child.<sup>170</sup>

Similar to Nicholson’s argument that children orphaned by HIV/AIDS are often stigmatized and linked to increased criminal tendencies,<sup>171</sup> Ennew contends that street children are denied protection against discrimination in violation of CRC Article 2, and are in some cases blamed for criminal activity.<sup>172</sup> Ennew argues that in the case of street children the best interests of the child are generally not the primary consideration of state provisions, despite the requirements of CRC Article 3.<sup>173</sup> Instead, according to Ennew, the priority is “cleansing the streets of their presence,” and many end up in

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166. *See generally* Ennew, *supra* note 5 (discussing street children).

167. *See id.* at 202.

168. *See id.*

169. *Id.*

170. *See id.* at 203–06.

171. *See* Nicholson, *supra* note 82, at 416.

172. *See* Ennew, *supra* note 5, at 203.

173. *See id.* at 203. *See generally* CRC, *supra* note 1, art. 3.

adult prisons, violent and overcrowded reformatories, or in inadequate orphanages.<sup>174</sup> Ennew's work reinforces the notion that a childhood without the presence of a responsible adult is considered problematic. If that is the case, then obtaining and safeguarding this adult-over-child relationship becomes the priority. Accordingly, the "other" problems faced by children on the other side of the bright line boundary of childhood under the responsibility of an adult are ignored. Through this analysis, Ennew echoes the work of Nieuwenhuys in arguing that children who live outside of the CRC's normative context (private family care, or public care, under adult supervision; spatially restricted to home or school) are construed as "problems."<sup>175</sup> Street children are then classified as undesirable and must be rectified. Thus, it follows that the lives of street children require intervention, and removal from the streets is presented as the only solution.

In response to the problem discussed above, Ennew drafts the aforementioned rights of street children.<sup>176</sup> These rights are quite different from those in the CRC, where the child, for example, does not have the "right to work," where the traditional family is privileged, and the main goal for childhood is that it occur in the presence of a responsible adult.<sup>177</sup> Ennew's approach to children's rights also includes enabling and empowering the child to a much greater extent,<sup>178</sup> whereas the CRC is focuses on enabling others to act on the child's behalf.<sup>179</sup> Ennew's version of rights has less to do with forcing children into the "care" of adults, and more to do with providing children a greater arsenal for protection against adults, and when necessary enabling children to protect and provide for themselves.<sup>180</sup>

Ennew's approach could be useful to children in the West and Global South that find themselves without a responsible adult, and that find the "care" offered by the state (as

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174. See Ennew, *supra* note 5, at 203. See generally G.A. Res. 47/126, 47 U.N. GAOR Supp. No. 49, (Vol. I), U.N. Doc. A/47/49 (Vol. I), at 200 (Dec. 18, 1992) (discussing the plight of street children and expressing profound concern about the killings and violence against street children).

175. See Nieuwenhuys, *supra* note 4, at 147–48.

176. See Ennew, *supra* note 5, at 210–13; see also *supra* note 164 and accompanying text.

177. See generally CRC, *supra* note 1.

178. See Ennew, *supra* note 5, at 210–13.

179. See generally CRC, *supra* note 1.

180. See Ennew, *supra* note 5, at 210–13.

envisioned by the CRC) to be non-existent, utterly unhelpful, or abusive. Importantly the normative aims underlining the rights discourse places clear limits on the rights of the child, and even on the protection of childhood. By requiring “care,” and thus dependency, the CRC delimits the construction of the category of the “child,” and therefore delimits the types of rights and protections that will be offered by the CRC. This can be seen when the CRC is applied to children without responsible adults.

B. GIRL-CHILD: GENDER-NEUTRALITY AND THE CRC'S ARTICULATION OF FAMILY AND CULTURE AS HAPPY AND SAFE

While the previous section aimed to deconstruct the CRC's purported axiom that all children have or should have a responsible adult, this section aims to deconstruct the purported axiom that families and culture are always or predominately happy and safe for all children, including the girl-child. The question of whether the CRC has relevance for the girl-child has met with mixed responses. In an article titled “The [CRC]: A Feminist Landmark,” Price Cohen compares the CRC with the Convention on the Elimination of All Forms of Discrimination against Women [hereinafter CEDAW], and argues that the CRC “is so comprehensive in its protection of the girl child that it cannot be fairly compared with [CEDAW].”<sup>181</sup> In her view, CEDAW pales in comparison to the CRC in terms of protection of the girl-child.<sup>182</sup> On the other hand, Freeman has argued that, while the CRC's non-discrimination principle is indeed fundamental, there has been insufficient improvement in the position of the girl-child since the CRC entered into force.<sup>183</sup> Similarly, Backstrom and Goonesekere independently argue that neither the CRC nor CEDAW address the unique abuses encountered by the female child.<sup>184</sup> Fottrell has argued that the girl-child was simply too

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181. Cynthia Price Cohen, *The UNCRC: A Feminist Landmark*, 3 WM. & MARY J. WOMEN & L. 29, 50-51 (1997). See generally Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13.

182. Price Cohen, *supra* note 181, at 50–52.

183. See Freeman, *The Future of Children's Rights*, *supra* note 16, at 84.

184. See Kirsten M. Backstrom, *The International Human Rights of the Child: Do They Protect the Female Child?*, 30 GEO. WASH. J. INT'L L. & ECON. 541, 542 (1996); Savitri Goonesekere, *The Elimination of All Forms of*

controversial to be included in the CRC, a convention which sought wide approval.<sup>185</sup>

This section argues that the girl-child is excluded from the protection of the CRC, despite the existence of the non-discrimination principle of CRC Article 2.<sup>186</sup> Because the CRC has the family (the child in the “care” of adults) as the normative context for its vision of childhood, the girl-child and the issues faced by the girl-child within the family are all but ignored. First, far from being a “feminist landmark,”<sup>187</sup> however that might be defined, this section will argue that the CRC’s use of gender-neutral language demonstrates a lack of importance and priority given to the girl-child. Second, this section will argue that the CRC’s vision of the family and culture as a happy and safe space for children fails to address the discrimination faced by many female children within the family environment — discrimination that is fueled by well-rooted cultural norms. Finally, this section will explore the ways in which the girl-child in the West is similarly not included in the protection of the CRC.

#### 1. Debating the Efficacy of the CRC’s Gender-Neutral Language

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Discrimination and Violence Against the Girl Child: Background for the Expert Group Meeting, EGM/DVGC/2006/BP.1, at 3 (2006), *available at* <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf>; *see also* Ladan Askari, *The Convention on the Rights of the Child: The Necessity of Adding a Provision to Ban Child Marriages*, 5 ILSA J. INT’L & COMP. L. 123, 124 (1998) (arguing the CRC does not adequately protect and promote the rights of girl children); Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalization of the Girl-Child*, 17 INT’L J. CHILD. RTS. 345, 356 (2009) (“[The CRC’s] luke-warm provisions for the rights of girl-children and the omission of girl-specific issues have instituted a lacuna in the body of international human rights law.”).

185. Fottrell, *supra* note 29, at 10; *see also* Taefi, *supra* note 184, at 346 (calling for a reinterpretation of human rights documents). Fottrell further argues that steps such as the Vienna Declaration and the discussion by the Committee on the Rights of the Child [hereinafter Committee] about the girl-child in 1995 indicate that a “dynamic interpretation” of the CRC by the Committee may allow for certain obligations to be read into the CRC, that would promote the rights of girl-children. *Id.* at 11. *See generally* World Conference on Human Rights, Vienna Declaration and Programme of Action, U.N. Doc. A/CONF.157/23 (June 25, 1993); CRC, *supra* note 1, arts. 43, 44 (relating to the Committee). Nonetheless, it is the text of the Convention that is binding on state parties, not the interpretation of the Committee.

186. *See generally* CRC, *supra* note 1, art. 2.

187. *Cf. supra* text accompanying note 181.

This section argues that the CRC's use of gender-neutral language does not somehow translate into the inclusion of both sexes without distinction. In light of the focus of the CRC, and in light of the drafting history of the CRC, this section argues that the gender-neutral language instead reflects a male normative framework. Simply put, the child most predominant in the minds of the drafters of the CRC was a male, the unmarked boy child.<sup>188</sup> Price Cohen argues that the CRC is a landmark as a result of the CRC's gender-neutral language.<sup>189</sup> Notably she does not specify *how* gender-neutral language makes the CRC such a landmark.<sup>190</sup> Gender-neutral language has both potentially positive<sup>191</sup> and negative repercussions. The CRC focuses on the forms of violence and the infringement of protection rights that plague both boys and girls.<sup>192</sup> However, the CRC does not address the gender-specific violence and exploitation perpetuated against girls in their families, communities and at a national level.<sup>193</sup> Goonesekere argues that the gender-neutral approach has dominated the children's rights discourse, in which gender-neutral concerns are paramount.<sup>194</sup> She argues that this can be seen in the traditional protection areas such as child sexual abuse, child trafficking, child soldiers, and child labor, where discussions and research have focused on various forms of violence and infringements of protection rights of both girls and boys.<sup>195</sup> Such studies do not address the unique violence and discrimination faced by girls as a result of gender bias in all levels of society.<sup>196</sup> For example, while the CRC addresses the issue of child

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188. See generally Fottrell, *supra* note 29, at 10 (arguing specific provisions for the protection of girl children were not included in the CRC because the issue was considered to controversial).

189. See Cohen, *supra* note 181, at 45–49 (explaining the peculiar nature of the text of CRC by comparing CRC with other treaties that do not contain gender neutral languages).

190. See Price Cohen, *supra* note 181, at 47–49.

191. See Frances E Olsen, *Children's Rights: Some Feminist Approaches to the United Nations Convention on the Rights of the Child*, 6 INT'L J.L. & FAM. 192, 198 (1992) (“[O]ne body of opinion would commend the Convention for . . . never assuming in its language that women are the only caretakers of children, thus refusing to provide the ideological support to the status quo that language too often provides.”).

192. Goonesekere, *supra* note 184, at 7.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

soldiers, it remains silent on issues such as child-marriage.<sup>197</sup> Arguably, having a fixation on child gender-neutrality (much less neutrality of race, sexual-orientation, socio-economic status, and so on), the CRC is oblivious to the different experiences of the children not covered by the gender-neutral terminology. Neutrality is not about issues shared between boys and girls being of utmost importance, but about issues faced only by boys. Our gender-neutral child is a male, straight, white, upper class citizen of a Western state.<sup>198</sup>

To make the point that the issues faced by certain girl-children are not addressed in the CRC, both Backstrom and Goonesekere examine several articles of the Convention.<sup>199</sup> Their examination is in light of various discriminatory practices the girl-child experiences, such as female infanticide, sex-related abortions, servile marriage, dowry murder, a disproportionate work load in the home, denial of education, denial of reproductive health, and forced early marriages.<sup>200</sup> Far from including the girl-child within the purview of the CRC, the gender-neutral language of the Convention appears to only address the issues that the male child experiences.<sup>201</sup> It is one thing to state that girls are equal to boys, as the CRC does in Article 2; it is another to actualize that equality.<sup>202</sup> The Convention does not address the ways in which girls are made unequal to boys as a matter of discrimination such as

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197. *Id.*; Taefi, *supra* note 184, at 346.

198. Fottrell, *supra* note 29, at 10–11; *see generally*, Ladan Askari, *Girls' Rights Under International Law: An Argument for Establishing Gender Equity as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN'S STUD. 3, 13–15 (1998). For a similar argument regarding gender-neutrality in adult human rights, *see, e.g.*, Hilary Charlesworth, *Human Rights as Men's Rights*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVE 103, 103 (Julie Stone Peters & Andrea Wolpor, eds., 1995); *see also* Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 621–25 (1991) (“The structure of the international legal order reflects a male perspective and ensures its continued dominance.”).

199. *E.g.*, Goonesekere, *supra* note 184, at 3 (discussing Article 2 of the 1989 CRC); *see also* Backstrom, *supra* note 184, at 542 (explaining that Part IV of the article analyzes the provisions of the CRC).

200. Backstrom, *supra* note 184, at 542; *see, e.g.*, Goonesekere, *supra* note 184, at 11 (describing discriminations against girl children such as foot taboos, son preference, and female infanticide).

201. *See* Goonesekere, *supra* note 184, at 3 (explaining that articles in the CRC fail to address girl-specific issues while focusing on setting up gender-neutrality by using the words such as “he or she”).

202. Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

preferential feeding, preferential education, and so on. As a result, it is not clear what is gained from this formal equality and gender-neutrality? This article argues, as Freeman, Goonesekere, and others have argued, that the alleged gender-neutrality of the CRC is unconvincing. Article 24 is one of the few articles that do address female specific discrimination. Notably, Article 24 did not originally include any reference to what the Convention eventually calls “traditional practices prejudicial to the child” until 1987.<sup>203</sup> Only in 1987 was a sex specific practice characterized as detrimental to the girl-child’s health, considered for inclusion.<sup>204</sup> Only female genital cutting was originally the focus, suggesting that only certain discriminatory practices were considered problematic, while others were not.<sup>205</sup> Ultimately, during this discussion, it was argued that the more general “traditional practices” were preferred, as they would cover, not only female genital cutting, but also other discriminatory practices based on sex, such as preferential feeding.<sup>206</sup>

While Article 24 addresses certain forms of physical violence the girl-child might face, the Convention does not address the discriminatory practices against the girl-child that do not represent an immediate health risk.<sup>207</sup> For example, the Convention sets no minimum age for marriage.<sup>208</sup> Although early marriage may affect her right to education, for example, child marriage does not necessarily implicate a risk to the girl’s health. Finally, it is notable that while the drafting process of the CRC began in 1979, gender-neutral language was not introduced until some ten years later, just before the Convention was adopted in 1989.<sup>209</sup> One could argue that gender was hardly on the minds of the drafters as a key agenda, but rather an afterthought, as demonstrated in Article 24’s development where specific issues that the girl-child faces were not contemplated until the eleventh hour of the drafting

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203. DETRICK ET AL., *supra* note 31, at 351.

204. *Id.*

205. *Id.*

206. *Id.*, at 351–52.

207. *See* CRC, *supra* note 1.

208. Freeman, *The Future of Children’s Rights*, *supra* note 16, at 284.

209. *See* Price Cohen, *supra* note 181, at 49 (1997) (explaining that the gender confusion in the text was not clarified until the last minute of drafting process, and that the drafters began to make the convention gender-neutral after the first completion of the first draft in 1988).

the CRC when the Convention was virtually complete.<sup>210</sup> Notably, the child was a “he” for almost the entire ten-year period of the drafting of the Convention.<sup>211</sup>

The argument that the CRC privileges the gender-neutral child appears to have strength. Nonetheless, what if the limits placed on the rights and even protection of the child are not the result of male privilege and his issues? This is an especially appropriate question, given that the Convention allows for a male child to face direct combat at the age of fifteen.<sup>212</sup> What if the limits placed on the rights and protection of the girl-child are rather a reflection of very specific adult, cultural, and state centric lines of power? Undoubtedly, the CRC’s version of childhood is masculine, as also indicated, for example, by the developmental trajectory from irrationality to rationality or from dependence to independence.<sup>213</sup> The Convention privileges the family (in other words, the adult’s power over the child), cultural and traditional values, and the state.<sup>214</sup> As such, the CRC only affords protection and rights to the extent that those rights and protection do not interfere with these lines of power, even when the lines of power result in the lack of protection of the child. As this article will later discuss, this limitation on rights and protection is particularly pronounced in the instance of inter-family/cultural violence against the girl-child. One could then inquire whether the privileging of the family, culture, and the state adversely and disproportionately impacts the girl-child, particularly when those lines of power themselves are based upon masculine norms such as the public versus private domain.<sup>215</sup> There seems to be a strong argument to answer this question in the affirmative. As with the international law and human rights more generally, the CRC is

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210. See Detrick et al., *supra* note 31, at 343–52 (explaining the process of drafting and adopting Article 24 of the Convention).

211. See, e.g., DETRICK ET AL., *supra* note 31, at 110 (“[T]he child, by reason of *his* physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth, . . .”).

212. See CRC, *supra* note 1.

213. Erica Burman & Jackie Stacey, *The Child and Childhood in Feminist Theory*, 11 FEMINIST THEORY 227, 230 (2010).

214. See Backstrom, *supra* note 184, at 567 (“It also places continued emphasis on the importance of the family unit, thereby undermining the convention’s scope as it applies to the problems facing the female child.”).

215. See generally Charlesworth et al., *Feminist Approaches to International Law*, *supra* note 198 at, 625–27 (explaining that some scholars find a public/private dichotomy based on gender when evaluating the normative structure of international law).

no exception in its embrace of gender bias, despite it taking up the cause of gender-neutrality.<sup>216</sup> However, this article argues that the greatest bias is shown in the CRC not favoring the boy child (though this bias holds worrisome implications), but the family.

2. Does the CRC adequately protect the Girl-Child from Interfamily/Inter-Cultural Discrimination?

By privileging the family and cultural value, this section contends that the CRC deprioritizes the girl-child's rights as well as her protection. Although the CRC includes a prohibition on sex discrimination in Article 2,<sup>217</sup> the CRC's privileging of the family and cultural/traditional values places clear limits on the extent to which the girl-child will be given rights and protection. Price Cohen argues that the Convention effectively addresses inter-family discrimination.<sup>218</sup> To support these statements she points to language in Article 19 (right to be protected by the state from all forms of mental and physical violence) and Article 31 (right to social reintegration).<sup>219</sup> A restatement of the Convention articles, however, lacks persuasion. This article argues that there is extremely little protection provided by the Convention in relation to intra-family (parent on child) violence. This is particularly curious when, as Valentine has pointed out, statistically children are more at risk in the private space from people they know than in the public sphere.<sup>220</sup> Further, the CRC mandates protection of the child, including "support" for those who have the care of the child.<sup>221</sup> Put another way, Article 19 treats abuse, neglect, and negligent treatment between parent and child as fundamentally different from actions between strangers, focusing on "support" rather than, for example, civil or criminal action.

This lack of protection is particularly clear when

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216. See generally Charlesworth et al., *Feminist Approaches to International Law*, *supra* note 198 at, 625–27.

217. CRC, *supra* note 1 at art. 2.

218. Price Cohen, *supra* note 181, at 50–51.

219. *Id.*

220. Gill Valentine, "Oh Yes I Can." "Oh No You Can't": *Children and Parents Understandings of Kids' Competence to Negotiate Public Space Safely*, 29 ANTIPODE 65, 69 (1997).

221. CRC, *supra* note 1 at art. 19.

contrasting the protection and power given to parents and the family in the CRC with the protection given to women in relation to the family in CEDAW, where the role of women in and autonomy from the family is comparatively more respected,<sup>222</sup> if for no other reason than the fact that the woman may enter and exit the family at her own will.<sup>223</sup> According to CEDAW, a woman has the same rights of autonomy as given to men.<sup>224</sup> This is simply not true for the child.<sup>225</sup> Further, the protection provided by Article 19 assumes that the state is willing to and capable of intervening within the family when the family unit breaks down, and that if removal from the home was deemed necessary by the state that such care would be “better” for the child. More importantly, because of how the family is constructed in the Convention (natural, foundational to society, place of happiness and love, and so on), the family, at least in terms of child-parent relationships, seems to be all but immune from intervention.

The CRC does not protect the girl-child from intra-family discrimination; particularly discrimination that is often condoned by culture and communities.<sup>226</sup> For example, while female genital cutting, child marriage, or denial of reproductive health information appear to be covered by Article 24 as prejudicial practices, state parties may simply characterize these practices as cultural positives, measures aimed at

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222. Articles of CEDAW address some of these issues. *See, e.g.*, Backstrom, *supra* note 184 at 542 (arguing that CEDAW privileges the individual and non-discrimination over the family and culture, providing stronger protection against gender discrimination when it intersects with respecting cultural values).

223. Article 16 (1) of CEDAW is particularly interesting when thinking about the relationship between adult and child. *See* Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess. Supp. No. 46, U.N. Doc. A/34/46, at 193 (1979), 1249 U.N.T.S. 13, *entered into force* Sept. 3, 1981.

224. *See Id.*

225. Nura Taefi, *The Synthesis of Age and Gender: Intersectionality, International Human Rights Law and the Marginalization of the Girl-Child*, 17 INT’L J. CHILD. RTS. 345, 357 (2009) (“Whereas women are fully autonomous agents, girls’ autonomy is tempered by the need to protect their interests. The wealth of scholarship on the concept of “best interests” emphasises its highly indeterminate nature . . . One of the key concerns for girls is that the best interests principle can cloak prejudicial attitudes within public institutions and other decision-making bodies.”).

226. *See, e.g.*, Backstrom, *supra* note 184 (“Stereotypical attitudes towards women and girls in the family and community . . . often manifest themselves in domestic and intra-family violence, as well as acts of sexual violence and exploitation in the community.”).

fostering family and community solidarity, principles also reinforced by the Convention.<sup>227</sup> The education provisions of the CRC also call for the promotion of a spirit of equality among the sexes.<sup>228</sup> Yet, Backstrom notes that this goal is undermined by the Convention, which also states that education should be directed at encouraging respect for parents and cultural values, failing to take into account that the girl-child's parents and her culture's values may deny her access to education and/or solidify her secondary status.<sup>229</sup>

Backstrom argues that outside of Article 2's ban on discrimination on the basis of sex and Article 24's condemnation (but not ban) of "traditional practices," the CRC does little to combat cultural and structural discrimination the female child encounters.<sup>230</sup> Article 24 is argued to be one of the only articles that relate specifically to the issues faced by girls. The CRC's reinforcement of the sanctity of the family unit tends to disregard the fact much of the discrimination the girl-child faces often occurs within the family.<sup>231</sup> The CRC's elevation of culture also fails to acknowledge that, not only are those within the girl-child's family often the primary actors in the discrimination against the girl-child, but that it is often cultural practices that specifically discriminate against the girl-child.<sup>232</sup> Cultural values may at times justify the discrimination carried out by families and communities.<sup>233</sup> As such, the Convention arguably protects the rights of the girl-child, providing for her only to the extent that those rights and provisions do not undermine the power given to the family) and the power given to culture or traditional values. That the girl-

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227. See, e.g., *id.* (discussing how "almost all national practices theoretically could be defended on the basis of cultural tradition"); see also Michael Freeman, *The Future of Children's Rights*, 14 CHILD. & SOC. 277, 284 (noting that female genital alteration is condonable under the Convention).

228. See, e.g., Backstrom, *supra* note 184 ("The educational provisions of the UNCRC also call for the promotion of a spirit of equality among the sexes.").

229. *Id.* at 577 ("This goal, however, is undermined by the fact that the treaty also states that education should be directed at encouraging respect for parents and cultural values.").

230. *Id.* ("The UNCRC, therefore, may even excuse such discrimination on the basis of structural values in a given society.").

231. *Id.* at 577 ("[T]he UNCRC's reinforcement of the sanctity of the family unit tends to disregard the fact that infanticide, genital surgeries, and domestic abuse often occur within the family unit.").

232. *Id.* at 578 ("[T]he UNCRC does little to protect the female child from cultural abuses that occur within her family . . .").

233. Backstrom, *supra* note 184.

child experiences all forms of discrimination on the basis of gender within these spheres is all but overlooked or, condoned.

### 3. Application to the Girl-Child in the West

While many academics focus on the Global South, this paper argues that the Convention fails to consider not only the Global South girl-child, but also the girl-child from the West (and not just the Global South girl-child who lives in the West). There are manifold examples of discrimination against the girl-child in the West that go unaddressed in the Convention.<sup>234</sup> Regardless, the critiques of the CRC regarding the girl-child usually, if not always, focus on the girl-child in the Global South.<sup>235</sup> Quite obviously girls in the West face discrimination

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234. See, e.g., Savitri Goonesekere, *The Elimination of All Forms of Discrimination and Violence Against the Girl-Child*, at 3, U.N. Doc. EGM/DVGC/2006/BP.1(2006) <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf> (“In developed countries, adult women and girls may lack choices in education, especially in the technological and vocational fields, due to gender bias.”).

235. *Id.* at 1 (“This paper draws on the extensive material available on the situation of the girl-child in Asia and Africa. Discrimination and violence are experienced by girl-children in all regions but the scope of the problem is different. In general, the prevalence of stereotypical social values regarding girls and denial of access to justice and remedies, particularly for male violence, are common problems.”); accord Aquila Mazzingly Alvareng, *Who Cares About the Rights of Indigenous Children? Infanticide in Brazilian Indian Tribes*, 22 HASTINGS WOMEN’S L.J. 17, 17 (2011); Sara K. Andrews, *U.S. Domestic Prosecution of the American International Sex Tourist: Efforts to Protect Children from Sexual Exploitation*, 94 J. CRIM. L. & CRIMINOLOGY 415, 415 (2004); Amy Small Bilyeu, *Trokosi – The Practice of Sexual Slavery in Ghana: Religious and Cultural Freedom vs. Human Rights*, 9 IND. INT’L & COMP. L. REV. 457, 457 (1999); Vanessa Campbell & Theodora Van Der Zalm, *Protection of the Female Child: the Mothers of Our Future – Case Studies of India, Pakistan, Bangladesh, and Sri Lanka*, 7 TULSA J. COMP. & INT’L L. 177, 177 (1999); Sara Dillon, *What Human Right Law Obscures: Global Sex Trafficking and the Demand for Children*, 17 UCLA WOMEN’S L.J. 121, 121 (2008); Veronica Escobar, *Reclaiming the “Little Bees” and the “Little Bells”: Colombia’s Failure to Adhere to and Enforce International and Domestic Law Preventing the Recruitment of Child Soldiers*, 26 FORDHAM INT’L L.J. 785, 785 (2003); Christine Forster, *Sexual Offences Law Reform in Pacific Island States: Replacing Colonial Norms with International Good Practice Standards*, 33 MELB. UNIV. L. REV. 833, 833 (2009); Erika R. George, *Virginity Testing and South Africa’s HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities*, 96 CALIF. L. REV. 1447, 1447 (2008); Jordan A. Gilbertson, *Little Girls Lost: Can the International Community Protect Girl Soldiers?*, 29 U. LA. VERNE L. REV. 219 (2008); Karene Jullien, *The Recent International Efforts to End Commercial Sexual Exploitation of Children*, 31 DENV. J. INT’L L. & POL’Y 579, 579 (2003); Lynne

on the basis of their gender.<sup>236</sup> For example, similar to the female child of the Global South, the female child of the West is likely to be given a disproportionate workload at home, to be discouraged in her education, to earn less, to lack access to reproductive health and sex education,<sup>237</sup> (both of which impact access to education and earning potential) and to be mistreated while in detention.<sup>238</sup> It is curious, therefore, that international discourses on the girl-child rarely consider the Western girl-child. One could imagine that such lack of attention could easily be understood as: 1) the West judging the Global South without examining the situation of girls within its borders; 2) the call of the Global South to examine a group that has been

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Marie Kohhm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child has not Supported Children*, 22 N.Y. INT'L L. REV. 57, 57 (2009); Patricia J. Meier & Xiaole Zhang, *Sold Into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 87 (2008-2009); Priya Pillai, *A Call to Arms: A Gender Sensitive Approach to the Plight of Female Child Soldiers in International Law*, 15(2) HUM. RTS. BRIEF 23, 23 (2008); Susan Tiefenbrun & Christine J. Edwards, *Gendercide and the Cultural Context of Sex Trafficking in China*, 32 FORDHAM INT'L L.J. 731, 731 (2009); Justina Uram, *Les enfants de mauvais souvenir - Conceived Through Violence, Born as Outcasts, Living in Danger: Why Parentless and Orphaned Children of Rape Should Achieve Refugee or Asylum Status*, 26 PENN. ST. INT'L L. REV. 935, 935 (2008); Theodora Van Der Zalm, *Protecting the Innocent: Children's Act 38 04 2005 and Customary Law in South Africa - Conflicts, Consequences, and Possible Solutions*, 22 EMORY INT'L L. REV. 891, 891 (2008); Angela Wanak, *Educating Girls in Africa: A Case Study of a Nonprofit Organization Working to Ensure the International Human Right to Education*, 16 WILLAMETTE J. INT'L L. & DISP. RESOL. 106, 106 (2008); Elizabeth Warner, *Behind the Wedding Veil: Child Marriage as a Form of Trafficking in Girls*, 12 AM. U. J. GENDER SOC. POL'Y & L. 233, 233 (2004); Brent Wible, *Achieving the Promise of Girls' Education: Strategies to Overcome Gender-Based Violence in Beninese Schools*, 36 COLUM. HUM. RTS. L. REV. 513, 513 (2004).

236. Goonesekere, *supra* note 150.

237. See, e.g., Jaime M. Gher, *Abortion as a Human Right - International and Regional Standards*, 8 HUM. RTS. L. REV. 249, 249 (2008); Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Convention on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 TEX. J. WOMEN & L. 185, 185 (2007); Morgane Landel, *Has the U.K. Violated its International Obligations by Failing to Introduce Mandatory Sex Education in Schools?*, 35 BROOK. J. INT'L L. 369, 369 (2010).

238. See, e.g., Daniel Zeno, *Shackling Children During Court Appearances: Fairness and Security in Juvenile Courtrooms*, 12 J. GENDER RACE & JUST. 257, 257 (2008) (highlighting examples of female juveniles being mistreated while being held in custody); see also Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 983 (2008) (discussing the cruelty of sentencing child offenders to a term of life imprisonment without the possibility of release or parole).

left out the international discourse on children's rights despite the violence and discrimination that girl-child in the West faces; or 3) the perception that the girl-child in the West is better off, and therefore of less concern.<sup>239</sup>

While this article will not explore this tension in detail, there seems to be a disconnect between the domestic academic literature emerging from the West regarding the girl-child that discusses the discrimination she faces and academic literature that discusses the girl-child in the context of international children's rights. This seems unfortunate as the critique that the Western girl-child is not included in the CRC would seem to also strengthen the arguments that the CRC is exclusive. It should be noted that this article is not arguing that the girl-child from the Global South is included in the language of the CRC. This article accepts that the Global South girl-child is not represented in the Convention. Rather, the salient point is that it is not simply the Global south girl-child (and non-Western child more generally) that is excluded from the Convention.<sup>240</sup> The exclusivity of the CRC can also be seen in the context of the Western girl-child (and the Western child more generally).

By claiming gender-neutrality through the use of gender-neutral language, the CRC can masquerade as though it is privileging issues faced by both boys and girls.<sup>241</sup> The CRC's version of gender-neutrality often means that the girl-child is left unprotected.<sup>242</sup> By privileging the family (and the position of adults over the child), cultural, and state centric lines of power, many of the issues faced by the girl-child are ignored,

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239. See, e.g., Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Alter of Third-World Activism*, 38 WASHBURN L.J. 111, 111 (1998).

240. See, e.g., Savitri Goonesekere, *The Elimination of All Forms of Discrimination and Violence Against the Girl-Child*, at 3, U.N. Doc. EGM/DVGC/2006/BP.1(2006) <http://www.un.org/womenwatch/daw/egm/elim-disc-viol-girlchild/Backgroundpaper/Goonesekere.pdf> (“An examination of major international and regional human rights instruments reveals that discrimination and acts of violence against girl children are not addressed specifically; girl children are addressed within the generic category of “children”, “women” or “disadvantaged groups” who suffer discrimination.”).

241. *Id.* at 3 (“Standards in the instruments that specifically refer to children are gender-neutral and assumed to cover both boys and girls.”).

242. *Id.* at 8 (“The inclusion of gender perspectives rather than the adoption of gender neutral approaches to child rights will contribute to giving visibility to the discrimination faced by girl children and help achieve progress in addressing such discrimination.”).

lost to more important priorities.<sup>243</sup> In privileging the family and culture, those who drafted and the states that have adopted the CRC have decided that the girl-child in relation to discrimination committed by the family and/or rationalized by her culture, does not require intervention or is merely less of a concern.<sup>244</sup> Keeping the girl-child within the confines of the family, the culture, and community, as with the agenda of removal of street children discussed above, becomes more important than addressing the specific problems faced behind the cushy veils of the happy and safe family and culture. The combined forces of gender discrimination coupled with the disempowered state of dependency required for the period of childhood, leaves the girl-child often to unique forms of discrimination not addressed in the Convention, or horribly condoned.<sup>245</sup>

This section has sought to dislodge the CRC's claim to address the alleged unique "needs" of the universal category "child" by examining childhoods that are excluded from the enjoyment of the CRC's rights and protection. The CRC does not address certain children's "needs" as: 1) certain children are problematized for their failure comply with the CRC's requirements of childhood: or 2) they are ignored for they are not deemed problematic to the CRC's vision for childhood. The CRC maintains certain lines of power that are adult, cultural, and state centric. These lines of power demarcate the boundaries of the CRC's protection and rights of the child. As a result, certain children will be problematized (for example, the street child or the child who is head of the household), while others will be ignored (for example, the girl-child experiencing discrimination within the family). Far from being guided by the rights of the child, much less the protection of the child, the CRC's rights regime is dictated instead by very specific adult-centric and masculine lines of power.

## CONCLUSION

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243. *Id.* at 11 ("Stereotypical attitudes towards women and girls in the family and community, including their non-recognition as heirs to family titles and lands and as household heads, reinforce the perception of their lower status.").

244. *Id.*

245. *Id.* ("Stereotypical attitudes towards women and girls in the family and community ... often manifest themselves in domestic and intra-family violence, as well as acts of sexual violence and exploitation in the community.").

The CRC's iteration of the category "child" dictates which children matter, which children will be problematized, and which children will be ignored. The girl-child, who experiences traditional practices *prejudicial* to her health may be overlooked. The fifteen to seventeen year old soldier engaged in direct combat may be ignored.<sup>246</sup> On the other hand, the street child, who has a strong non-traditional social support network, may require adult intervention. After being "rescued," the street child and the child soldier, who may now be experiencing secondary abuse from "caring" agencies, may be overlooked, as they are perceived of as out of harm's way. Intra-family violence, discrimination by family justified by cultural and traditional values are considered low priorities in the Convention. Responsible children with irresponsible parents, children who must work because they lack both a willing or capable parent and state, may be converted into adults or alternatively must have their childhood restored. It is not that the Convention does not consider the issues of these children. The articles of the Convention that address such issues have been discussed here. Rather, the Convention as a whole, in placing strong emphasis on empowering adults under the grab of supporting families and respecting cultures, is inadequate in providing for the issues faced by children whose experiences conflict with the prevailing image of childhood in the CRC.

The genealogy developed in this article sought to investigate local, discontinuous, disqualified, illegitimate knowledges about children against the CRC's claim of a universal childhood. Children who do not fit into the CRC's normative framework reveal the identity category "child" to be highly fractured. The category "child" is indeed a fiction, constructed primarily for practical purposes, but nonetheless constructed along political and ideological lines. Far from an objective description of *the* universal childhood, the CRC is a reflection of highly political and highly controversial ideologies. There are very specific and highly political reasons for choosing one version of childhood over all others. The fact that the Convention excludes or marginalizes childhoods that do not fit

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246. Even the 3<sup>rd</sup> Optional Protocol does not bar 15-17 year old children from participating from in direct combat. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (Vol. III), (Feb. 12, 2002).

into the CRC's adult-child binary, only gives rights to the child to the extent that those rights do not disrupt the adult-child binary, and only protects the child to the extent that such protection does not disrupt the adult-child binary, exposes some harsh political "realities" of the CRC's rights regime. The CRC's absolute commitment to the adult-child binary sets limits on who counts as a child, and therefore, who is worthy of rights allocation. The CRC maintains status quo power relations where the adult is positioned over the child, where traditions and values (read inculcating proper gender, sexual orientation, patriotism, and so on) are at times deemed more important than even the protection of the child, and where the state is positioned not only over the child, but as a primary actor in families, as well as society. A decidedly political adult-child binary sets limits on what rights and protections will be afforded (by adults) to children.

Grappling with the exclusivity of the category of the "child" in the CRC is important to understanding who and what purposes are served in designating the "developing child" and the "child in adult care" as a normative framework for international law's discourse on children's rights. Further, it is essential to understand how those political ideologies are masked within the CRC through claims that the rights in the CRC are primarily for children (a slogan with exceptional political purchase) or about families (opposed to sustaining parental control). These are the ways in which the CRC defies criticism. If there is no "natural" child and the CRC instead functions to protect certain status quo lines of power, we must then ask ourselves (and/or actual children) where to from here? To continue to act as though the CRC is merely "for children," "about protection," "inclusive," "universal in its application," "possible for all children" risks being willingly blind, a far cry from "the best [humankind] has to give."<sup>247</sup> As one academic argues, "perhaps the greatest injustice done to children is claiming ownership over what childhood is or ought to be."<sup>248</sup>

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

248. Nieuwenhuys, *supra* note 4 at 151.