Why It Remains Important to Take Children’s Rights Seriously

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It was Ronald Dworkin who, nearly 30 years ago, urged us to ‘take rights seriously’ (1977). It is a pity that his argument did not specifically extend to children. Indeed, that in a little noticed passage a decade later he stumbled on the dilemma of what ‘Hercules’ (the ideal superhuman judge) should do when he thought ‘the best interpretation of the equal protection clause outlaws distinctions between the rights of adults and those of children that have never been questioned in the community, and yet he . . . thinks that it would be politically unfair. . . . for the law to impose that view on a community where family and social practices accept such distinctions as proper and fundamental’ (Dworkin, 1986, 402). Nor has he ever returned to this dilemma; a pity because it beautifully encapsulates the problem of what to do when the supposedly ‘right answer’ is morally the ‘wrong answer’.

When Taking Rights Seriously was published we were in the heyday of the children’s liberation movement. This was the era of Farson (1978) and Holt (1975). Their thesis is ripe for reassessment, but it is clear that at the time its impact was limited. Dworkin was clearly unaware of it, as indeed he was of other children’s rights literature of the 1970s and earlier.1

My own first foray into writing on children’s rights was in 1980, the text of a lecture given to celebrate the International Year of The Child in 1979 (1980). The Rights and Wrongs of Children (1983) emerged four years later. Then followed the Brian Jackson Memorial Lecture in Huddersfield in 1987 (1988) which advocated that we take children’s rights seriously, and a paper at a workshop on ‘children, rights and the law’ at the ANU in 1991 which emphasised the need to take children’s rights’ more seriously’ (1992). By then, of course, there was the United Nations Convention on the Rights of the Child, which was swiftly ratified by virtually the whole world², and there were developments in legal systems which suggested that children’s rights were indeed being taken seriously or at least a lot more seriously than previously.³
There has since been a backlash: in part this is because rights themselves have come under attack. But this cannot be the sole reason. Many of today’s critics of children’s rights are passionate defenders of the rights of others, notably of the rights of parents. An example is the recent—and deeply flawed—book by the American lawyer, Martin Guggenheim (2005, and see Freeman, 2006).

The language of rights can make visible what has for too long been suppressed. It can lead to different and new stories being heard in public. Carrie Menkel-Meadow explains that ‘Each time we let in an excluded group, each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing’ (1987, 52). An illustration from a recent English case may assist.

The Williamson case revolved about whether parents (as well as teachers) could exercise their right, as they saw it, to continue the practice of corporal punishment in their Christian schools. Legislation had outlawed it, but they claimed this was incompatible with their human rights to freedom of religion and to ensure that education was in conformity with their religious convictions. The case was fought right up to the highest court in the land, the House of Lords. And throughout it was conceived as a dispute between the State—it’s right to ban corporal punishment from schools—and parents and teachers. Children were the objects of concern, not subjects in their own right. They were not represented: their views were not sought or known. Yes, there is a clear suspicion that they would have agreed with their parents—echoes of the famous U.S. Supreme Court case of Wisconsin v. Yoder. And this raises a problem, which I discuss later. But that is not the issue. More significant than what these children want is the potential impact of the decision on children as a class. The courts found against the parents and teachers. But suppose they hadn’t. Children would once again have been exposed to the rod to uphold the human rights of adults. It is significant that the state did not argue that corporal punishment necessarily involved an infringement of any of the rights of children. The practice is a clear breach of the UN Convention. But Arden L.J. was astute enough to observe that the common law ‘effectively treats the child as the property of the parent’—corporal punishment by parents is still permitted in English law—and she adds ‘the courts may one day have to consider whether this is the right approach’.

The clearest appreciation of these issues is in Baroness Hale’s judgment in the House of Lords. Her judgment begins: ‘This is, and always has been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. The battle has been fought on ground selected by the adults’. What she then has to say is ‘for the sake of the children’. From this perspective the case is about ‘whether the legislation achieves a fair balance between the rights and freedoms of the parents and teachers and the rights, freedoms and interests, not only of their children, but also of any other children who might be affected by the