

**Exploring a Fragile Frontier of Justice:
A Critical Analysis of Martha Nussbaum's Capabilities
Approach as a Theory of Children's Rights**

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With my wife, Tonja

To my parents, Doug and Marilyn

For my children, Cassia, Carter, Sydney and Sophia

Contents

Abstract.....	v
Résumé.....	vi
Acknowledgements.....	viii
Abbreviations.....	xi
Introduction: Searching for Humanity on the Frontier of Children’s Rights.....	1
I. Agency, Vulnerability, and Children’s Human Rights.....	1
II. Children, Rights and Vulnerability in Nussbaum’s Thought.....	7
III. Critical Reflection on Nussbaum’s Theory as a Model of Children’s Rights.....	15
IV. Literature Review.....	17
V. Chapter Overview.....	24
Chapter 1 – Capabilities, Rights, and Children.....	27
I. Nussbaum and the Capabilities Approach.....	27
II. The Central Human Capabilities.....	38
III. Capabilities and Human Rights.....	44
IV. Capabilities and Human Flourishing.....	60
V. Agency and Flourishing at Childhood.....	69
Chapter 2 – Vulnerability and Human Flourishing at Childhood.....	75
I. The Condition of Vulnerability: Embodied encountering of the world.....	76
II. Vulnerability as Helplessness.....	85
III. Imagining Vulnerability and Agency: “the fragility, ...the beauty, of a plant”.....	94
IV. The (Not So) Special Case of Childhood Vulnerability.....	103
V. Capabilities and the CRC’s Best Interests of the Child Principle.....	109
Chapter 3 – Politicizing Familial Love and Care.....	121
I. Linking the Family to Human Flourishing.....	122
II. Opening the Family to Scrutiny.....	128
III. A Millian Rejection of Ethical Appeals to Nature.....	139

IV.	The Construction of Familial Love and Care	145
V.	Politicizing the Family	151
Chapter 4 – Children’s Human Rights and the Meaning of the Family		166
I.	The Rise of Agency in the Era of Children’s Rights	167
II.	The UN’s Enduring Position on the Family	181
III.	A Foundation for Family and Flourishing in the UDHR	186
IV.	The Fundamentality of the Family amidst the Shifting Mores of Modernity	195
V.	The Significance of the Family to Children’s Human Rights	202
Chapter 5 – Engaging an Integrative Model of Children’s Rights		222
I.	Browning and an Integrative View of Children’s Rights	224
II.	Surveying the Intellectual Tradition of the Integrative Model	235
III.	Kin Altruism and Browning’s Aristotelian-Thomistic Perspective	241
IV.	Aristotle’s <i>Zōon Politikon</i> , the Family, and the State	251
V.	Nussbaum’s Divorce from the Aristotelian Family	258
Chapter 6: Fragility as Goodness		271
I.	The Passive Aspect of Truly Human Living	273
II.	Is Childhood a Problem to be Overcome?	282
III.	Vulnerability, Loneliness, and Belonging	292
IV.	Conclusion: Balancing Agency and Vulnerability in a More Human Way	303
Appendix: The Central Human Capabilities		314
Bibliography		316

Abstract

Contemporary discourse on children's rights is shaped by attempts to account for their full humanity. A core issue centers on the question of whether children's rights should take the cultivation of agency or the experience of vulnerability as their starting point. Martha Nussbaum employs her influential capabilities approach to argue that the cultivation of agency should be prioritized in children's rights if respect for their full humanity is to be demonstrated. This yields two key outcomes. First, Nussbaum's theory is shaped by an anthropology in which one's capacity to strive for self-determining agency in the face of worldly contingencies is a vital sign of his or her humanity. Second, Nussbaum's theory poses a challenge to the emphasis that the international human rights movement has consistently placed on the family since the adoption of the Universal Declaration of Human Rights in 1948. This dissertation argues that prioritizing agency over vulnerability in the manner Nussbaum's capabilities approach advocates will complicate the task of demonstrating respect for children's full humanity. The rights discourse that has unfolded over the last seven decades suggests that human flourishing at childhood is not easily disentangled from the relationship that exists between children and their parents (and biogenetic kin relations). Furthermore, Nussbaum has not critically engaged alternative models of children's rights, like Don Browning's integrationist theory, that take seriously the impact of familial connections in the early and important stages of development. Finally, Nussbaum's theory of social justice fails to satisfactorily account for either the fragility of human agency or the goodness of human vulnerability. Demonstrating respect for the full humanity of children means placing their concrete and particular experience of vulnerability at the center of discourse on their rights.

Résumé

Le discours moderne en matière de droits des enfants repose sur les tentatives de reconnaître la totalité de l'humanité qui les habite. Une question fondamentale consiste à définir si les droits de l'enfant devraient prendre racine dans le développement du soi et de ses potentialités d'action ou dans l'expérience de sa vulnérabilité. Martha Nussbaum se sert de son influente approche des capacités pour argumenter que l'épanouissement des capacités devrait être prioritaire au niveau des droits des enfants si le respect pour leur humanité entière doit être démontré. Cela comporte mène à deux principales issues. Premièrement, la théorie de Nussbaum prend racine dans l'anthropologie selon laquelle une personne qui est motivée par de l'autodétermination lorsqu'elle est confrontée à des imprévus de la vie courante constitue un signe immuable de son humanité. Deuxièmement, la théorie de Nussbaum représente un défi quand vient le temps de soutenir que le mouvement international en matière de droit de la personne repose constamment sur la famille, et ce, depuis l'adoption de la *Déclaration universelle des droits de l'homme* en 1948. Cette dissertation infirme que la priorisation de ressources intermédiaires aux dépens de la vulnérabilité comme le défend l'approche des capacités de Nussbaum compliquera une démonstration du respect de l'entière humanité des enfants. Le texte de droits qui a été élaboré au cours des sept dernières décennies porte à croire que l'épanouissement humain au moment de l'enfance se dissocie difficilement de la relation qui existe entre l'enfant et ses parents (y compris les relations parentales biogénétiques). De plus, Nussbaum n'a pas entrepris de démarche critique visant l'élaboration de modèles subsidiaires en matière de droits de l'enfant, comme la théorie intégrationniste de Don Browning, qui prend au sérieux l'impact des liens familiaux au cours des premiers stades du développement qui sont si importants. Enfin, la théorie de Nussbaum portant sur la justice sociale échoue au moment de reconnaître la fragilité des

ressources humaines ou les bienfaits de la vulnérabilité humaine. Démontrer du respect envers l'entière humanité des enfants signifie de placer une expérimentation concrète et particulière de la vulnérabilité au centre du discours portant sur leurs droits.

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reunions are always richly enjoyed and never long enough. The memory of my little sister, Melanie Waind, is always with me. My parents-in-law, Victor and Lucy Martinow, have been extremely generous to our family throughout this endeavor. The kindness, sacrifice and unwavering support of my family has been a constant and vital inspiration.

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Abbreviations

Frequently referenced organizations and documents related to the United Nations

HRC	Human Rights Commission
ICCPR	International Covenant on Civil and Political Rights (1966)
ICESCR	International Covenant on Economic, Social, and Cultural Rights (1966)
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children’s Fund
UDHR	Universal Declaration of Human Rights (1948)
DRC	Declaration of the Rights of the Child (1959)
CRC	Convention on the Rights of the Child (1989)

Frequently referenced works by Martha C. Nussbaum (abbreviated only in footnotes)

FG	<i>The Fragility of Goodness</i>
SSJ	<i>Sex and Social Justice</i>
WHD	<i>Women and Human Development</i>
UT	<i>Upheavals of Thought</i>
HH	<i>Hiding from Humanity</i>
FJ	<i>Frontiers of Justice</i>
PE	<i>Political Emotions</i>
CC	<i>Creating Capabilities</i>
CRCA	“Children’s Rights and a Capabilities Approach”

However much human beings resemble lower forms of life, we are unlike, we want to insist, in one crucial respect. We have reason. We are able to deliberate and choose, to make a plan in which ends are ranked, to decide actively what is to have value and how much. All this must count for something. If it is true that a lot about us is messy, needy, uncontrolled, rooted in the dirt and standing helplessly in the rain, it is also true that there is something about us that is pure and purely active, something that we could think of as ‘divine, immortal, unitary, indissoluble, ever self-consistent and invariable.’ It seems possible that this rational element in us can rule and guide the rest, thereby saving the whole person from living at the mercy of luck.

~ Martha Nussbaum, *The Fragility of Goodness*, 2

The reason that humanity is the proper concern of justice and the service of God, is that it includes the whole principle of life in community. For God, in denying them wisdom, equipped other animals with better natural defences against attack and danger; human beings he created naked and vulnerable that he might teach them wisdom instead; and gave them, beside all else, this deep sense of obligation to protect, love, and cherish one another, to proffer and accept assistance against every danger. The chief tie, then, binding human beings to each other is humanity; to violate it is to be held outcast and parricide.

~ Lactantius, *Divine Institutes*, VI.10

Introduction: Searching for Humanity on the Frontier of Children's Rights

I. Agency, Vulnerability, and Children's Human Rights

This dissertation is a study of Martha Nussbaum's capabilities approach and its philosophical foundations. As such, it seeks to answer the following question: How central should concern for the cultivation of agency be to ethical reflection on children's human rights? The core idea underlying Nussbaum's model of social justice and human development is, in her own words, "that of the human being as a dignified free being who shapes his or her own life in cooperation and reciprocity with others, rather than being passively shaped or pushed around by the world in the manner of a 'flock' or 'herd' animal."¹ Her aim is to counter traditional theories of justice that narrow the political subject to an autonomous rational agent thought to be roughly equal to other members of society in the free exercise of their moral powers.² Such theories, she argues, marginalize those who, like children, experience "unusual vulnerability and powerlessness" as a central feature of daily existence.³ In contrast, Nussbaum's capabilities model holds agency to be a vital feature of any life that is human and maintains that the point of justice is to secure opportunities for its flourishing in each and every individual.⁴ As a result, her method for including children as political subjects begins no differently than it would for any other person.

¹ Martha C. Nussbaum, *Women and Human Development* (New York: Cambridge University Press, 2000), 72 (subsequent references to this work are cited as WHD). Cf. Martha C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap, 2006), 74 (subsequent references to this work are cited as FJ) and Martha C. Nussbaum, "Capabilities as Fundamental Entitlements: Sen and Social Justice," *Feminist Economics* 9, no. 2-3 (2003): 40, available at: <http://www.tandfonline.com/doi/abs/10.1080/1354570022000077926#.VP5hCOER8gU> [accessed 11 March 2015].

² FJ, 14, 222-223, 414-415.

³ Rosalind Dixon and Martha C. Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority," *Cornell Law Review* 97, (2012): 593, University of Chicago, Public Law Working Paper No. 384, available at: <http://ssrn.com/abstract=2060614> [accessed 10 March 2015] (subsequent references to this work are cited as CRCA).

⁴ See FJ, 350.

She simply asks the universal moral question that drives her theory: “What are people really able to do and to be?”⁵

Nussbaum’s capabilities approach is not, however, an idealist theory. She is well aware that the development and exercise of one’s agency is not a guaranteed aspect of life lived under the precarious circumstances of this world. Human beings are undeniably vulnerable and their existence is made fragile by both social and material contingencies. She pursues this theme at various points of her broad and constantly expanding contribution to moral thought through a number of similarly-themed vignettes on the human condition at childhood. The following is one that makes the shared point of those fragments with clarity:

When a human being is born, a sentient creature emerges from the womb of secure narcissism, where all its needs are automatically met, into a world of objects, a world it has not made and does not control. A child cast adrift in that world is soon aware of being an unusually weak and helpless being. Bodily pain is nothing by contrast to the terrifying awareness of helplessness, close to unendurable without the shelter of a womblike sleep. When we wake up, we have to figure out how to live in that world of objects.⁶

Nussbaum's description of vulnerability involves more than the potential for pain and suffering typically associated with the condition. It also entails the helplessness that one encounters upon immediate exposure to worldly contingencies and risks at birth. Still, as Nussbaum conveys, there is dignity and beauty to be found in that condition nonetheless.⁷

⁵ CRCA, 557.

⁶ Martha C. Nussbaum, “Précis of *Upheavals of Thought*,” *Philosophy and Phenomenological Research* 68, no. 2 (2004): 449, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1933-1592.2004.tb00356.x/pdf> [accessed 10 March 2015]. See also, e.g., Martha C. Nussbaum, *The Fragility of Goodness* (New York: Cambridge University Press, 1986), 289 (subsequent references to this work are cited as FG); Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (New York: Cambridge University Press, 2001), 181 (subsequent references to this work are cited as UT); Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, NJ: Princeton University Press, 2004), 177 (subsequent references to this work are cited as HH); Martha C. Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, MA: Belknap Press, 2013), 168-169 (subsequent references to this work are cited as PE); Martha C. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (Princeton, NJ: Princeton University Press, 2010), 39-40.

⁷ FG, 340; WHD, 20.

The beauty and dignity she finds in vulnerability is irretrievably bound up with the manifestation of agency in the individual human person. As the passage from *The Fragility of Goodness* (1986) quoted in the epigraph to this dissertation demonstrates, Nussbaum perceives human existence simultaneously to involve the condition of vulnerability and the capacity for agency. She explains this by remarking that the ability to “deliberate and choose... must count for something” despite the fact that aspects of our human condition are comparable to the fragility of a plant, “messy, needy, uncontrolled, rooted in the dirt and standing helplessly in the rain.”⁸ Each person, while significantly interested in the cultivation of his or her own agency, is weak and powerless all the same. Put simply, this results in a tension between one’s capacity to affect and shape the world of his or her existence (the exercise of agency) and one’s susceptibility to being affected and shaped by the world (the experience of vulnerability). And, as Nussbaum recognizes, this is particularly the case at childhood.⁹

The tension between agency and vulnerability highlights just how difficult it can be to get justice right when it comes to children. Moreover, such a difficulty is intensified in the era of international human rights that, in the words of the United Nations (UN) Convention on the Rights of the Child (CRC), explicitly recognizes “the inherent dignity and... the equal and inalienable rights” of children as “members of the human family.”¹⁰ Important questions are

⁸ FG, 2.

⁹ It is worth noting that Nussbaum is a bit ambivalent about vulnerability at childhood, even in her essay with Dixon. In that essay she explicitly speaks of the “unusual” vulnerability of childhood, yet she is also arguing that there is, in many ways, nothing so special about it. CRCA, 563, 567.

¹⁰ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, Preamble (p.1), available at: <http://www.refworld.org/docid/3ae6b38f0.html> [accessed 17 November 2014] (subsequent references to this document are cited as CRC). The United Nations is a complex organizational system. See UN Department of Public Information, *The United Nations System* (July 2015) DPI/2470 rev.4, available at: http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf [accessed 22 September 2015]. It should be noted that when this dissertation uses the term United Nations or UN the author is not making a distinction between documents created by UN member states and those created by the main UN organizations or their subsidiary organs. Accordingly, some of the documents under review are binding in international law and others are non-binding.

raised by this challenge: Is it possible to maintain a fruitful tension between agency and vulnerability in discourse on children's rights that is respectful of their full humanity? Would such a tension require that equal moral weight be given to both agency and vulnerability, or is one of these core features of the human condition more basic than the other? Furthermore, major UN human rights regimes, like the 1989 CRC and the 1948 Universal Declaration of Human Rights (UDHR) before it, make it virtually impossible to discuss children's rights in separation from the institution of the family, so how does that institution factor into this discussion? What, in particular, does the institution of the family mean for human flourishing at childhood? And what role should the state play in this domain of children's rights and welfare?

Nussbaum's capabilities approach is a valuable resource for reflecting on these questions. She addresses the issue of children's rights in a 2012 essay titled "Children's Rights and a Capabilities Approach" written in collaboration with Rosalind Dixon, her one-time colleague at the University of Chicago's Law School. In that essay they summarize the problem of getting justice right for children by referring to children's rights as a "frontier of justice."¹¹ Such an assessment is informed by the claim that existing political philosophies are poorly equipped to take a document like the CRC and "theorize entitlements" that account for the power differentials that exist between children and adults.¹² The impact of these power differentials on children and the way their rights are articulated remains an unsettled question, Nussbaum and Dixon allege, in a document like the CRC.

This problem is characterized by two related difficulties. First, Nussbaum and Dixon find in the CRC a tendency to inflate the meaning of vulnerability at childhood. The Convention does this in its Preamble by emphasizing how the UDHR proclaimed that "childhood is entitled

¹¹ CRCA, 593.

¹² CRCA, 593, cf. 552-553.

to special care and assistance.”¹³ Article 3, sometimes called the “welfare-article,” also stresses vulnerability by implicitly acknowledging “the fact of young people’s dependency and vulnerability” and explicitly meeting it with protective measures that might be required to secure children’s “best interests.”¹⁴ Although Nussbaum and Dixon describe children as “unusually vulnerable and powerless,” they also insist that prioritizing their welfare rights over those of others in order to address their relative helplessness is “a clear failure of justice” and should, at the very least, be viewed as a “tragic” trade-off rather than an entrenched norm.¹⁵ Second, but related, Nussbaum and Dixon find the meaning of agency at childhood to be obscured in the CRC.¹⁶ This is largely due to the priority that it places on the family as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”¹⁷ From Nussbaum’s perspective, the family is an institution to which children belong without, in most cases, any choice whatsoever.¹⁸ The capabilities approach also finds it problematic that agency is not more directly linked to the “best interests of the child” principle in the CRC, as both vulnerability and the family evidently are.¹⁹ Missing, therefore, is a well-defined and essential emphasis on agency. And it is missing, in large part, because the

¹³ CRC, Preamble; cf. UN General Assembly, *Universal Declaration of Human Rights* 10 December 1948, 217 A (III), Art. 25.2, available at: <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 11 November 2014] (subsequent references to this document are cited as UDHR).

¹⁴ Zoë Clark and Holger Ziegler, “The UN Children’s Rights Convention and the Capabilities Approach – Family Duties and Children’s Rights in Tension” in *Children’s Rights and the Capabilities Approach: Challenges and Prospects*, ed. by Daniel Stoecklin and Jean-Michel Bonvin (New York: Springer, 2014), 219.

¹⁵ CRCA, 553-554, 567-568, 575, 593; cf. Martha C. Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: Belknap Press, 2011), 36-39 (subsequent references to this work are cited as CC). See also Jennifer Caseldine-Bracht, “Pragmatism, Capabilities, and Children’s Rights in Development Ethics” in *Child Rights: The Movement, International Law, and Opposition*, ed. by Clark W. Butler (West Lafayette, IN: Purdue University Press, 2012), 230, Project MUSE, <http://muse.jhu.edu> [accessed 25 September 2014]. Commenting on Nussbaum’s theory, Clark and Ziegler emphasize that under capabilities theory “vulnerability and interdependency are not characteristics that are unique to children, but are general human features.” Clark and Ziegler, 223.

¹⁶ CRCA, 552-553.

¹⁷ CRC, Preamble.

¹⁸ WHD, 274, Martha C. Nussbaum, “Rawls and Feminism” in *The Cambridge Companion to Rawls*, ed. by Samuel Freeman (New York: Cambridge University Press, 2003), 504.

¹⁹ Clark and Ziegler, 219-222, 227-228. See Chapter 2, section V of this dissertation for a fuller discussion.

CRC, and the rights discourse stemming from it, leaves the tension between agency and vulnerability as an unsettled and open issue.

This dissertation questions the centrality of agency to ethical reflection on children's rights that Nussbaum's capabilities approach champions. It argues that the cultivation of agency is a critical but overemphasized aspect of discourse on children's rights when it unseats the condition of vulnerability as a more primary focus. This means that by emphasizing agency over vulnerability Nussbaum's capabilities approach offers an incomplete theory of doing justice to children because it fails to adequately account for the way that agency is inescapably situated within the fragile human condition. One could no more pull a plant up by its roots and demand it to bloom than require human beings to flourish as agents without recognizing the full magnitude of their vulnerability. Nussbaum therefore appears to recognize the importance of vulnerability to human flourishing and the doing of justice, but it is less obvious that she understands its vital centrality. She indeed "insist[s] that need and capacity, rationality and animality, are thoroughly interwoven, and that the dignity of the human being is the dignity of a needy enmattered being."²⁰ Yet the capabilities approach is, nevertheless, a theory driven by the question of what substantive choices and actions are available to people as self-determining agents. This dissertation responds by contending that however free human beings might be, our choices and actions are always responsive to the initial and unchosen circumstances of life that can only be *received* and never *conceived* for oneself. This critique furthermore accents the important role that the family plays in the concept of children's rights. The point is not to valorize one form of this institution over all others or to insist that all families function homogenously. It is simply to acknowledge that being the child of a particular pair of biological parents, whether or not one is

²⁰ FJ, 278.

even raised by them, carries moral weight and has implications for how one fashions a life in this world. Human agency is inescapably a response to the initial situation that Nussbaum so poignantly describes as “a world [the child] has not made and does not control.” Getting justice right for children means recognizing how pervasively their existence as moral agents stems from and is, in fact, entangled with that situation and the inherent fragility of it. Put in more positive terms, and perhaps the most basic ones available, this dissertation argues that “being born” is of momentous significance and should be treated as such in discourse on children’s rights. Nussbaum’s attempt to promote the centrality of agency does not give due regard to how the fragility of human life at birth and closely following thereafter shapes one’s existence.

II. Children, Rights and Vulnerability in Nussbaum’s Thought

The basis for claiming that agency is problematically overemphasized in children’s rights discourse today is drawn from an in-depth exploration of the themes of children, rights, and vulnerability in Nussbaum’s work. Although the foundational question pursued in this study is significantly guided by her version of the capabilities approach, it is that theory *and* the moral thought underlying it that are under investigation. The aim, then, is not only to determine how Nussbaum’s capabilities approach impacts ethical reflection on children’s rights. Rather, it is to critically reflect on her theory while considering whether its emphasis on agency is justifiable by the very criterion that Nussbaum herself has set for it: namely, that children’s rights, like all human rights, should be imagined in a way that exhibits respect for their full humanity.²¹

Exploring the theme of children in Nussbaum’s various contributions to moral thought will be vital to the pursuit of this aim. A careful reading of her work shows Nussbaum to understand children as emerging agents for whom present and future powers of self-

²¹ CRCA, 552-553.

determination are largely dependent on how their basic helplessness is both understood and addressed.²² Three trajectories of her academic work establish this point. First, it surfaces in *The Fragility of Goodness*, her reflection on classical Greek philosophy and related themes that emerge in tragic plays like Sophocles' *Antigone* and Euripides' *Hecuba*. In the case of these two plays, Nussbaum leans on fictional accounts of children's tragic experiences to aid and advance her philosophical discussion on living well despite the frailty of human existence. She explains this toward the end of that work:

What [the *Hecuba*] has shown us, however, as it explores the possibilities of an ideal similar to Aristotle's – what Aristotle himself has shown us, and the *Antigone*, and Protagoras's speech, and Plato's *Symposium* and *Phaedrus* – is that there is in fact a loss in value whenever the risks involved in specifically human virtue are closed off [...].²³

Second, children feature prominently in her exploration of human emotions in *Upheavals of Thought* (2001), *Hiding from Humanity* (2004), and *Political Emotions* (2013). *Upheavals of Thought*, Nussbaum's foundational work on the topic, argues that emotions, “as forms of evaluative thought,” have a history that can be traced back from their expression at adulthood to a grounding point in childhood.²⁴ Finally, the problem of agency and children's rights also emerges in her attempts to articulate the capabilities approach. Children factor into her exploration of what it means to not only flourish as a human being, but to secure the entitlements that such flourishing requires. This is a general theme found in *Sex and Social Justice* (1999), *Women and Human Development* (2000), *Frontiers of Justice* (2006), *Not for Profit* (2010), and *Creating Capabilities* (2011).

²² This is largely derived from her work on emotions and infancy in UT. See UT, 174-237.

²³ FG, 420.

²⁴ UT, 11, 175. Summarizing her own work, Nussbaum explains: “I have argued that the childhood history of emotions shapes adult emotional life: that the emotions of adult life originate in infancy, and that this infantile history shapes their adult structure in powerful ways.” UT, 230, cf. 236.

That being said, it is extremely rare for children in their strict capacity as children to be the focal point of Nussbaum's writing. Children are cited as foundational examples of human vulnerability in *The Fragility of Goodness*. It is as human beings striving for agency in light of their own evolving personal histories that she addresses infancy and early childhood in *Upheavals of Thought*. It is primarily as females (in *Sex and Social Justice*), as involuntary members of the family (in *Women and Human Development*), and as people with disabilities (in *Frontiers of Justice*) that Nussbaum incorporates children into her explanations of the capabilities approach. Even when discussing education, a central capabilities concern relating to human development, Nussbaum includes children mainly as they are incidental to the topic and not as the primary subject of it.²⁵

Nussbaum's engagement with the question of childhood speaks to the basic anthropology underlying her theory. Children certainly differ from adults with regard to the scope of their actual capabilities.²⁶ That is, there are limits to what children are actually free to do and to be, choices that in some cases are not yet possible due to their emerging moral faculties and in other cases are denied while those faculties develop.²⁷ Nevertheless, children, like all human beings, *strive* for opportunities to exercise choice and to have the potential for its exercise developed in themselves. Each one is confronted by the same basic question of what he or she is actually able to do and to be.²⁸ By viewing children in this way, the capabilities approach brings development

²⁵ This is especially true of *Cultivating Humanity* which primarily focusses on university education and, therefore, mostly on young adults or older. See Martha C. Nussbaum, *Cultivating Humanity: A Classical Defense of Reform in Liberal Education* (Cambridge, MA: Harvard University Press, 1997). *Not for Profit*, meanwhile, offers a more focused discussion of children and childhood. Nussbaum, *Not for Profit*, 30-40, 96-99. However, it is not a book about children and childhood *per se*. It is a brief argument that education "prepares people" for "citizenship," "employment," and, "meaningful lives." Nussbaum, *Not for Profit*, 9.

²⁶ CRCA, 575.

²⁷ See FJ, 172; CC, 26.

²⁸ A problem this universalizing perspective faces, as will be noted, is that the ideal of human flourishing is understood, for Nussbaum, in terms of maturity and adulthood. This, as Wall argues, means that both human rights and human development are interpreted from an adult-centred rather than a child-centred point of view. John Wall,

and social justice together. It emphasizes not only the need to cultivate agency in all people, but that the entitlements necessary for doing so should be secured to each and every one as a matter of basic justice. In that sense, getting justice right for anyone, let alone for children, is about safeguarding the circumstances to flourish in their full humanity which, as will be demonstrated, is impossible from Nussbaum's point of view without the development and exercise of agency.

The theme of family is intimately linked to that of children and figures prominently into both the development and social justice components of Nussbaum's capabilities approach, as well as the broader ethic supporting it. This means, on one hand, that while Nussbaum claims a sufficiently "facilitating environment" to be an essential aspect of children's development (as will be discussed in Chapter 2 of this dissertation), she does not in any way mean to underscore the significance of the family if it is taken to be an organic unit (as will be discussed in Chapter 3). Families are closely connected to the flourishing of one's humanity and important bases for that flourishing are established during infancy and childhood. But flourishing does not require *the* family in any strict formational or functional sense. Families are too clouded by inconsistency for Nussbaum. While they might stand for love and care, they too frequently function as institutions of oppression and violence. Children do require close intimate bonds with a number of adults in order to develop sufficiently, as Nussbaum argues in *Upheavals of Thought*.²⁹ But the necessity of such an environment does not make essential one's belonging to a nuclear form of the family that is either naturally or legally bound together as a group. The loosely defined family *qua* facilitating environment is indispensable, therefore, to children's

Ethics in Light of Childhood (Washington, DC: Georgetown University Press, 2010), 119. This way of thinking, as Wall states elsewhere, dehumanizes children "as not yet *full* social citizens." John Wall, "Human Rights In Light Of Childhood," *The International Journal of Children's Rights* 16, no. 4 (2008): 527, available at: <http://booksandjournals.brillonline.com/content/journals/10.1163/157181808x312122> [accessed 10 March 2015].

²⁹ See UT, 185-186, 225-227.

development, but doing justice to them as emerging agents means refusing to attribute moral force to it as any kind of closed or foundational unit.³⁰

A second major thematic element in Nussbaum's work is that of rights. The language of rights is closely allied with the capabilities approach, although the two are not one and the same thing. Rights, today, are typically understood as the formal entitlements of individual human beings that are justified on the basis of bare humanity and imply duties on the part of some responsible other or others.³¹ Capabilities, on the other hand, are substantive opportunities for freedom (particularly the exercise of deliberative choice and the realization of that choice in ensuing action) that, likewise, imply responsibility. Most basically, Nussbaum proposes that rights be thought of in terms of capabilities. Securing any given right, therefore, means securing the possibility for actual functioning in the specified area (e.g., the right to religious free exercise means actually being able to worship as one chooses).³² This leads to two particular emphases in the relationship between children's rights and capabilities. First, children's rights are a social reality while the capabilities approach is a "paradigmatic perspective" for ethical reflection.³³ Therefore, while one can speak of children's rights in a concrete sense by referring to a document like the CRC, capabilities are intentionally abstract.³⁴ Nussbaum seems to challenge how abstract capabilities are by listing her ten central human capabilities. However, as she is

³⁰ See WHD, 251, 275.

³¹ See Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 2013), 7, available online: ProQuest ebrary [accessed 3 November 2014]. Donnelly asserts: "In the narrower sense of entitlement we typically speak of someone having a right. To have a right to x is to be entitled to x. It is owed to you, belongs to you in particular. And if x is threatened or denied, right-holders are authorized to make special claims that ordinarily trump utility, social policy, and other moral or political grounds for action." Donnelly, *Universal Human Rights* (2013), 7. Nussbaum argues that the idea of human rights is not a clear one. WHD, 97; Nussbaum, "Capabilities as Fundamental Entitlements," 37.

³² Nussbaum, "Capabilities as Fundamental Entitlements," 37.

³³ Jean-Michel Bonvin and Daniel Stoecklin, "Introduction" in *Children's Rights and the Capabilities Approach: Challenges and Prospects*, ed. by Daniel Stoecklin and Jean-Michel Bonvin (New York: Springer, 2014), 1, 10.

³⁴ The first sentence of *Frontiers of Justice* affirms this distinction: "Theories of social justice should be abstract." FJ, 1. The last three sentences do as well, with Nussbaum calling for "imaginative courage" in the addressing of unsettled questions of justice. FJ, 415.

careful to note, the list is open and ready for negotiation.³⁵ Second, capabilities scholars think of their approach as a way to “operationalize” the entitlements outlined in a formal agreement like the CRC.³⁶ Nussbaum hopes to infuse moral discourse with “imaginative courage” in order to settle, or at least better settle, frontiers of justice like children’s rights.³⁷

Critical to the question of children’s rights is the rather robust place for the state in Nussbaum’s theory. The state, in fact, inflects Nussbaum’s understanding of children significantly. Children are, from her perspective, “future citizens,”³⁸ a view that identifies their moral powers for deliberate choice as emerging and the state as responsible to ensure its development and exercise. State responsibility extends even into the family under the capabilities approach. There is no such institution as “the family,” Nussbaum remarks, without the state saying so.³⁹ For these reasons, as well as the basic political and legal nature of rights, reflection on the state’s role in getting justice right for children is important to the ensuing discussion. However, it is also one that likely demands a more direct exploration than this dissertation has space to provide.

The most significant thematic element to this dissertation is that of vulnerability. At its most basic, this term refers to human susceptibility to wounding or harm.⁴⁰ However, vulnerability is conceptualized in a variety of ways by scholars today. Often it is viewed more negatively as a problem reasonably similar to a curse of some kind that must be opposed and,

³⁵ Martha C. Nussbaum, *Sex and Social Justice* (New York: Oxford University Press, 1999), 42 (subsequent references to this work are cited as SSJ); WHD, 77; FJ, 76.

³⁶ Bonvin and Stoecklin, “Introduction,” 1.

³⁷ FJ, 415.

³⁸ WHD, 230-232, 280.

³⁹ WHD, 262.

⁴⁰ Wall, *Ethics*, 39; Bryan S. Turner, *Vulnerability and Human Rights* (University Park, PA: The Pennsylvania State University Press, 2006), 28; Robert E. Goodin, *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities* (Chicago, IL: The University of Chicago Press, 1985), 110.

hopefully, overcome.⁴¹ Others infuse the concept with the idea of choice so that, whether opposing or embracing human frailty and weakness, it becomes construed as a decision.⁴² Still others emphasize the idea of change, noting that vulnerability makes life a dynamic and transformational experience.⁴³ Without wholly discounting any of these positions, Nussbaum helps bring to the surface the idea that vulnerability is a basic human condition, an inescapable fact of our existence. And, as will be demonstrated in Chapter 2, she does so in a way that largely refuses the negativity of viewing it as a curse or the relativity of viewing it as a choice. Her conception of vulnerability is closer to the notion of transformation given the priority she places on activity and the importance with which she views the project of shaping one's own life. In fact, she shares with anthropologist Arnold Gehlen – a proponent of the transformational model – the idea that vulnerability essentially means “world-openness.”⁴⁴ In a passage that could easily fit into Nussbaum's moral anthropology, Gehlen offers his definition of humanity (left in non-inclusive language for ease of communication):

Man is an acting being. In a narrower sense, he is also “undetermined” – he presents a challenge to himself. One might say that he is a being who must form attitudes. Actions are the expression of man's need to develop an attitude toward the outside world. To the extent that he presents a problem to himself, he must also develop an attitude toward

⁴¹ Goodin, 206; Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues* (Chicago: Open Court Publishing, 1999), 1, 155; Turner, 43, 126-127, 140.

⁴² The choice to oppose vulnerability is inherent to positions that view it as a curse. See n41 above. Brené Brown, for one, has more popularly built upon the idea that “embracing imperfection and vulnerability” is part of living a flourishing – or to use her term, “wholehearted” – human life. Brené Brown, *The Gifts of Imperfection: Let Go of Who You Think You're Supposed to Be and Embrace Who You Are* (Center City, MN: Hazelden, 2010), x, xi, 13, cf. 36, 73.

⁴³ Anthropologist Arnold Gehlen captures the notion of change by referring to vulnerability in terms of the “undetermined” and “unfinished” quality of human being. As a result, human beings must “make up” for their “organic primitiveness and lack of natural means” or suitability to the environment by “actively transforming the world to suit [their] own ends.” Arnold Gehlen, *Man: His Nature and Place in the World*, translated by Clare McMillan and Karl Pillemer (New York: Columbia University Press), 24, 29; cf. 4, 10, 35, 52. Theologian Kristine Culp links the negative side of vulnerability to a positive one: we are vulnerable, she suggests, “to transformation as well as devastation.” Culp goes on to add that vulnerability “encompasses not only the capacity to suffer harm and to be damaged, but also capacities implied by contrast: to be kept safe and whole, to have integrity and dignity, and to be healed and lifted.” Kristine A. Culp, *Vulnerability and Glory: A Theological Account* (Louisville, KY: Westminster John Knox Press, 2010), 3.

⁴⁴ See FG, 340 and Gehlen, 24-31. Although Nussbaum does not reference the earlier work of Gehlen, Aristotle provides some common ground. See Gehlen, 17, 169, 299, 363.

himself and make something of himself. This process is not a luxury which man could forego; rather his “unfinishedness” is a basic part of his physical condition, of his very nature.⁴⁵

Nussbaum speaks of human existence in terms of an “incompleteness” that likewise requires activity, especially if one’s life is to be considered a flourishing one.⁴⁶ By leaning on the concept of world-openness, she allows for the possibility of a more balanced and positive interpretation of vulnerability. This is, perhaps, one of the most significant yet under-explored contributions of her varied philosophical writings. Ever-present in her work and foundational to understanding her ethics is the idea that human beings flourish only and always in relation to the social and material contingencies that mark their worldly existence.

Yet, as mentioned above, concern for the development of and respect for each one’s full humanity makes the cultivation of agency a central feature of her ethics and, particularly, of her capabilities approach. In fact, the basic moral anthropology underlying her theory is that of the human being as a striving agent, as stated in the first paragraph of this chapter.⁴⁷ Moreover, that anthropology is evident in Nussbaum’s moral thought from nearly the beginning of her scholarly career and well before she had articulated her capabilities theory.⁴⁸ It is also important to comprehend that she does not divide cleanly between vulnerability and agency.⁴⁹ Vulnerability is a beautiful feature of human being, even if it entails much risk and uncertainty. Yet its beauty is inseparable from the precarious striving that is the heart and soul, for Nussbaum and for her capabilities approach, of what it means to be human.

⁴⁵ Gehlen, 24.

⁴⁶ FG, 289, 324, 340.

⁴⁷ See WHD, 72.

⁴⁸ The idea of the human being as a striving agent is central to FG. See, at minimum, FG, 2, 20, 289, 421.

⁴⁹ FG, 80.

III. Critical Reflection on Nussbaum's Theory as a Model of Children's Rights

The first three chapters of this dissertation lay out Nussbaum's position on children and how it fits into her capabilities approach and the broader moral thought that sustains it. The major and minor themes outlined in the previous section will, therefore, be introduced in those chapters.

The final three take a more critical turn. Together those chapters form an analysis of Nussbaum's theory which attempts to demonstrate that ethical reflection on children's rights is inadequate if the cultivation of agency overshadows the condition of vulnerability. Two primary critiques are applied to the capabilities approach and its supporting arguments in order to bear out this claim.

First, it is argued that Nussbaum's theory of justice is a problematic hermeneutical tool to employ in the field of children's rights. This conclusion is primarily based on her use of the capabilities approach to effectively read the family out of rights discourse in the abstract while the institution figures prominently into concrete rights documents. The family, in fact, is a key factor in the way agency and vulnerability are balanced in UN human rights instruments (see Chapter 4). Yet Nussbaum, in both her capabilities theory and broader moral thought, provides insufficient argumentation to support the hostile position she takes on the family *qua* organic and elemental group. In particular, she lacks satisfactory engagement with Aristotle's naturalistic view of the family that arguably serves as the basis for the institution's inclusion in UN instruments like the UDHR and the CRC. Nussbaum might reasonably contend that the idea of the family as an organic unit and basic element of society is irreconcilable with her well-informed moral outlook. However, it is equally reasonable to insist on a higher standard of critical engagement with that idea from a moral theory that takes Aristotle as a key starting point.

Second, and perhaps most surprisingly, Nussbaum's conceptualization of vulnerability is itself insufficient for supporting the emphasis she places on agency. As the final chapter to this

dissertation maintains, vulnerability is the more stable of these two core features of human existence. Whatever it means to be a distinct moral agent, the individual's agency is situated within the condition of vulnerability as he or she experiences it. In other words, agency is impacted in significant ways by the fact that everyone's initial circumstances of life are made up of things unchosen and their prospects for living a good life are highly dependent on others. Two key elements, therefore, are missing from Nussbaum's moral anthropology. First, her emphasis on agency does not suitably account for the fact that much of one's life is a response to things that are simply beyond the scope of deliberate choice. Second, her conception of vulnerability itself is missing a third dimension (in addition to harm and helplessness), namely, aloneness. These two key aspects of moral anthropology may then be brought together to underscore another. By overemphasizing choice and inadequately acknowledging aloneness, Nussbaum's interpretation of children's rights lacks a positive account of that which cannot be chosen but is essential to flourishing: interdependent belonging that starts with and is defined by one's biological mother and father and the web of biogenetic relations that they represent. The point, again, is not to valorize one type of family. But it is to insist that however one's flourishing progresses, it will do so in direct response to the initial situation of one's conception and birth that is tied, for better or worse, to one's biological parentage. The point, in short, is that Nussbaum overlooks the situated nature of one's agency by conceptualizing vulnerability in a way that does not account for our lack of choice and our need to belong. In so doing, she promotes a theory of children's rights that only thinly addresses these aspects of human vulnerability. As a result, Nussbaum is forced to rely on an unnecessarily complicated theory of social justice in order to sustain the emphasis she places on agency.

IV. Literature Review

This examination of the intersection between the capabilities approach and children's rights primarily contributes to a small but emerging field of study. The two principle proponents of this theory, Nussbaum and Amartya Sen, have each only once discussed it in direct relation to children's rights.⁵⁰ Nussbaum's collaboration with Dixon offers a substantive discussion of capabilities and children's rights to go along with the frequent references she makes to children elsewhere. Sen's short essay, however, predominantly discusses the nature and function of human rights and then briefly, over the course of a few short paragraphs, argues that insofar as freedom means one should "make his or her own choice," it is "not particularly relevant to children, except in some rather minimal ways."⁵¹ On the whole, Sen rarely devotes his full attention to either children or childhood as a principal subject of analysis.⁵²

A second generation of theorists has begun to critically and constructively appropriate the capabilities approach as a model of children's rights. Thus far, this has primarily occurred through the publication of articles on the topic. Jennifer Caseldine-Bracht views the capabilities approach, "coupled with a pragmatic methodology" that takes seriously the differences in educational needs across the globe, as "the most promising path towards actualizing more children's rights."⁵³ Jérôme Ballet, Flavio Comim and Mario Biggeri have similarly argued that the capabilities approach "allows us to see children as diverse human beings experiencing a diversity of childhoods across different contexts and expressing different values in which they

⁵⁰ See CRCA and Amartya Sen, "Children and Human Rights" in *Indian Journal of Human Development* 1, no. 2 (2007): 1-11, available at: <http://www.ihdindia.org/ihdjournal/pdf.aspx?cid=34> [accessed 6 March 2015].

⁵¹ Sen, "Children and Human Rights," 9-10, cf. 2. He offers, as an example, the child's "freedom – and perhaps right – to get attention when it decides to scream the house down." Sen, "Children and Human Rights," 10.

⁵² Flavio Comim, Jérôme Ballet, Mario Biggeri, and Vittorio Iervese, "Introduction: Theoretical Foundations and the Book's Roadmap" in *Children and the Capability Approach*, ed. by Mario Biggeri, Jérôme Ballet, and Flavio Comim (New York: Palgrave MacMillan, 2011), 6, available at: <http://www.palgraveconnect.com/pc/doifinder/10.1057/9780230308374.0001> [accessed 10 March 2015].

⁵³ Caseldine-Bracht, 227, cf. 234.

define their different ways as autonomous agents.”⁵⁴ Their brief comment on capabilities and children’s rights is stated from within a larger collection of articles that envision children as having “an active role to play in promoting human development.”⁵⁵ In addition, Noam Peleg critically employs the capabilities approach. He reasons that it allows for children to be understood as “active agents in shaping their own life” who “value different functions and have different capabilities from adults.”⁵⁶ Distinguishing his reconceptualization of this theory from the one’s associated with Nussbaum and Sen, Peleg stresses that through it children can be perceived as “entitled to grow” and not only “in need of growing.”⁵⁷ At least some among this second generation of theorists appear anxious to distance themselves from the idea that childhood is any kind of an obstacle to really human living.

Central to the literature on children’s rights and capabilities – and, indeed, to an entire volume devoted more generally to children and capabilities edited by Ballet, Comim, and Biggeri – are two entwined thematic emphases: first, concern for the exercise of individual agency and, second, for education that supports development toward that end. A foundational thesis to Ballet, Comim, and Biggeri’s text, *Children and the Capabilities Approach* (2011), is that “[c]onceptualizing children as active agents and co-producers of their capabilities enables fresh insights into how capabilities can initially be built and subsequently assessed.”⁵⁸ Another

⁵⁴ Jérôme Ballet, Flavio Comim, and Mario Biggeri, “Children’s Agency and the Capability Approach” in *Children and the Capability Approach*, ed. by Mario Biggeri, Jérôme Ballet, and Flavio Comim (New York: Palgrave MacMillan, 2011), 38, available at: <http://www.palgraveconnect.com/pc/doi/10.1057/9780230308374.0001> [accessed 10 March 2015].

⁵⁵ Comim, Ballet, Biggeri, and Iervese, “Introduction,” 5.

⁵⁶ Noam Peleg, “Reconceptualising the Child’s Right to Development: Children and the Capability Approach,” *The International Journal of Children’s Rights* 21, no. 3 (2013): 540-541, available at: <http://booksandjournals.brillonline.com/content/journals/10.1163/15718182-02103003> [accessed 10 March 2015].

⁵⁷ Peleg, 541. He therefore counters both Nussbaum and Sen who each support some variation of limiting the right of children to choose in certain aspects of development despite tying agency to meaningful human existence and development. See Peleg, 530. Cf., CC, 26 and Sen, “Children and Human Rights,” 9-10.

⁵⁸ Comim, Ballet, Biggeri, and Iervese, “Introduction,” 5.

collection of articles, *Agency and Participation in Childhood and Youth: International Applications of the Capabilities Approach in Schools and Beyond* (2014), ostensibly rests on the same thematic entanglement. In her introduction to that volume, Caroline Hart explains that it examines “the ways that the capability approach may inform how we live our lives and the strategies that societies may choose to develop in order to enhance the quality of the lives of their children and young people.”⁵⁹ Fundamental to that investigation and bound up with its aims is the relationship between agency and its development through education.⁶⁰

Included in the volume of essay’s Hart edits is a chapter devoted entirely to the question of children’s rights. In that chapter Daniel Stoecklin and Jean-Michel Bonvin contend that while the CRC recognizes children as subjects of rights, it fails to acknowledge them as social actors. The CRC is therefore said to lack a mechanism for converting the formal liberties it outlines “into real freedom and enhanced capabilities for children.”⁶¹ They counter that through the capabilities approach “the subject is recognized as having the capacity to act as a social actor, and therefore is entitled to develop this capacity to the fullest extent.”⁶² Stoecklin and Bonvin make the gap they identify between rights (i.e., children’s formal liberties) and capabilities (i.e., children’s actual freedom) the focus of their own edited volume on children’s rights and the capabilities approach.⁶³ The primary purpose of their collection of essays is to reflect on that which either facilitates or obstructs the conversion of rights into capabilities.⁶⁴ They argue that a

⁵⁹ Caroline Sarojini Hart, “Introduction” in *Agency and Participation in Childhood and Youth: International Applications of the Capability Approach in Schools and Beyond*, ed. by Caroline Sarojini Hart (New York: Bloomsbury Academic, 2014), 2.

⁶⁰ See Hart, 8.

⁶¹ Daniel Stoecklin and Jean-Michel Bonvin, “The Capability Approach and Children’s Rights” in *Agency and Participation in Childhood and Youth: International Applications of the Capability Approach in Schools and Beyond*, ed. by Caroline Sarojini Hart (New York: Bloomsbury Academic, 2014), 63, cf. 78.

⁶² Stoecklin and Bonvin, “Capability Approach,” 79.

⁶³ Bonvin and Stoecklin, “Introduction,” 1.

⁶⁴ Bonvin and Stoecklin, “Introduction,” 2, 11-12.

child's ability to actually exercise agency is dependent on "a kind of mutual interdependency between individual agency and social environment." The "commonsense conclusion" the book draws is that "children do not develop independently of the social context, and they are not determined by this context."⁶⁵ This very Nussbaumian assessment will receive further attention over the course of the first three chapters of this dissertation.

Most disconcerting about Stoecklin and Bonvin's volume, from the perspective of this research project, is how minimally the institution of the family factors into a discussion of children's rights that claims to take seriously the interdependency of individual agency and social environment. Only Zoë Clark and Holger Ziegler's chapter on tensions between family duties and children's rights actually engages the question of the family. Even as the topic of that chapter, however, familial relations are effectively dismissed from the outset. Children's rights are only taken seriously, Clark and Ziegler claim, "if children are not understood as objects of altruism and charity."⁶⁶ To put their argument succinctly, the family as it is incorporated into the text of the CRC represents a hindrance to social justice.⁶⁷ It is perceived to be a problem to society for the ways the institution can perpetuate social inequalities, and it is a problem to the individual for the ways it can frustrate the provision of state support.⁶⁸ It is not reflected upon, however, as an initial and foundational site of children's agency.

As will become evident over the course of this dissertation, the literature on children's rights and the capabilities approach is quite reflective of Nussbaum's own version of the theory and the philosophical underpinnings with which she supports it. First, agency and its

⁶⁵ Daniel Stoecklin and Jean-Michel Bonvin, "Conclusion" in *Children's Rights and the Capabilities Approach: Challenges and Prospects*, ed. by Daniel Stoecklin and Jean-Michel Bonvin (New York: Springer, 2014), 277-278.

⁶⁶ Clark and Ziegler, 213.

⁶⁷ See Clark and Ziegler, 228

⁶⁸ Clark and Ziegler, 226, 228.

development is a central concern of theorists applying the capabilities approach to children. Also, there is a similarly Nussbaumian effort to stress the cultivation of individual agency while insisting that its development and exercise remain highly social endeavors. Finally, that sociality does not include any idea of the family that affirms the institution as a natural and/or elemental group unit of society. Briefly put, the inclusion of the family in the CRC presents capabilities theorists with a problem, not a resource.

The emerging literature on capabilities and children's rights departs most clearly from Nussbaum by how careful theorists are to quell any notion that childhood is a problematic stage of life or a mere prelude to the more human living of exercising mature agency. In doing so, the idea of a capabilities model of children's rights fits almost seamlessly into the burgeoning field of "childhood studies" as a whole. Childhood studies is a multidisciplinary approach which seeks to take seriously the basic fact "that all people start as children and that all peoples begin in their nurseries."⁶⁹ Perhaps most significantly, theorists in this field generally champion the concept of agency as "one of the defining characteristics of children's full humanity."⁷⁰ However, they are not merely invested in an observational study of children's agency. Rather, the aim of childhood studies is to discover the unique and active contributions of children and to hear, above all, their voices.⁷¹

⁶⁹ See Erik H. Erikson, *Childhood and Society: Second Edition* (New York: W.W. Norton & Company, 1963), 16. Cf. Wall, *Ethics*, 1-4; Marcia J. Bunge, "Introduction" in *Children Adults, and Shared Responsibilities: Jewish, Christian, and Muslim Perspectives*, ed. by Marcia J. Bunge (New York: Cambridge University Press, 2012), 1.

⁷⁰ Wall, *Ethics*, 37; cf. David Oswell, *The Agency of Children: From Family to Global Human Rights* (West Nyack, NY: Cambridge University Press, 2012), 3, available online: ProQuest ebrary [accessed 9 March 2015].

⁷¹ Allison James, "Understanding Childhood from an Interdisciplinary Perspective: Problems and Potentials" in *Rethinking Childhood*, ed. by Peter B. Pufall and Richard P. Unsworth (New Brunswick, NJ: Rutgers University Press, 2004), 26, available online: ProQuest ebrary [accessed 9 March 2015]. Cf. Peter B. Pufall and Richard P. Unsworth, "Introduction: The Imperative and the Process for Rethinking Childhood" in *Rethinking Childhood*, ed. by Peter B. Pufall and Richard P. Unsworth (New Brunswick, NJ: Rutgers University Press, 2004), 8-9, available online: ProQuest ebrary [accessed 9 March 2015]; Wall, *Ethics*, 37. While Nussbaum's emphasis on agency coheres well with this academic study, there are key aspects of her theory that draw criticism from this perspective. E.g., see Chapter 6, section II.

Therein lays the problem and the promise of Nussbaum's theory as a model of children's rights. Her own version of the capabilities approach might be discounted in childhood studies for downplaying the actual agency of children as undeveloped and their voices as ones with public salience for the future only. However, there has not yet been a thick and critical intellectual engagement with her broader philosophical thought as it pertains to children and their rights in either the study of capabilities *or* childhood. Moreover, the unexplored distance between children's agency in Nussbaum and the way it is perceived in childhood studies is likely one of shades rather than stark differentiation. Children are emerging agents for Nussbaum, but they are already agents for a childhood theorist like John Wall.⁷² Childhood studies therefore provides the basis for an important critique of Nussbaum by inferring that a capabilities theory of children's rights represents a potentially impoverished notion of children's agency. However, by viewing children as emerging agents Nussbaum pushes theorists in childhood studies, as well as those applying her work to children's rights, to incorporate actual power differentials between children and adults into their arguments. The absence of meaningful engagement with Nussbaum's theory in the field of childhood studies means that important tensions like this one are insufficiently reflected upon. The following chapters seek to enrich academic dialogue on children's rights by addressing that need.

This dissertation contributes to the embryonic dialogue on the capabilities approach and children's rights in a variety of ways. It is first and foremost a deep and critical engagement with the intersection of Nussbaum's version of that theory and international children's rights discourse. As such, it provides an earnest effort to understand the impact of Nussbaum's family theory, her particular form of Aristotelianism, and the tension she perceives to exist between

⁷² See Wall, *Ethics*, 36, 43, 57.

agency and vulnerability in discussions on children's rights. Second, but closely related, it takes Nussbaum's capabilities approach seriously as a moral theory. Consequently, it engages in an assessment of her ethical question that appears, for the most part, to be uncritically adopted by the second generation of capabilities theorists previously discussed.⁷³ Third, this dissertation offers a profound analysis of the seemingly uncritical abrogation of the family from discourse on children's rights that marks capabilities approaches. Other than Nussbaum's own work, Clark and Ziegler's article is a prime example of this move.⁷⁴ Fourth, this project acknowledges the diversity of children's ages as a relevant factor to discourse on their rights. Capabilities theorists are, of course, well aware that childhood encapsulates a broad range of human ages and developmental stages.⁷⁵ But the chapters following this introduction represent an attempt to attach moral weight to the common human experience of being born. How, that is, does natality impact the question of what it means to get justice right for children? Finally, this dissertation freely draws on theological and religious sources to test Nussbaum's theory as a model of children's rights. This is done most directly by putting the capabilities approach in conversation with Don Browning's practical theology in Chapter 5. However, a range of theological and religious perspectives are engaged throughout which support the idea that children's vulnerability has not been addressed in a fully human way unless their parents and family are an integral parts of the dialogue.

⁷³ Colin Macleod's critique of Nussbaum stands out among those writing on the capabilities approach and children's rights. Colin M. Macleod, "Primary Goods, Capabilities, and Children" in *Measuring Justice: Primary Goods and Capabilities*, ed. by Harry Brighouse and Ingrid Robeyns (New York: Cambridge University Press, 2010), 174-177, 183-191. He is not suggesting that the capabilities approach be appropriated as a model of children's rights, so his work has been left out of this review. His perspective is reflected upon in Chapter 6, section II.

⁷⁴ They, like Nussbaum, treat the family as essentially alien to the more fundamental relationship that the capabilities approach construes between the state and the individual, including the individual child. See Clark and Ziegler, 213-214, 220, 225-226, 228-229.

⁷⁵ See Caseldine-Bracht, 228; Peleg, 540; and Ballet, Comim, and Biggeri, "Children's Agency," 33.

V. Chapter Overview

The first chapter of this dissertation outlines the basic ideas and structural components of the capabilities approach as Nussbaum presents it. It also explores the connection she makes between her own theory and the idea of human rights. Perhaps most important, this initial chapter discusses what human flourishing means to Nussbaum and then considers it in light of children and childhood. The main assertion is that the application of Nussbaum's capabilities approach to children's rights results in a model of social justice for children that considerably prioritizes the cultivation of agency in them.

The second chapter explores the way Nussbaum entwines the condition of vulnerability with the exercise of agency. It is argued that she refuses to conceptualize vulnerability as only the potential for harm. She begins, rather, with infantile helplessness in order to signify that this condition speaks also to one's lack of control. Nussbaum also draws on the image of the plant to show how living well involves a necessary tension between the exercise of agency and the experience of vulnerability that comes with encountering the social and material elements of the world. Ultimately, this chapter demonstrates that she holds a theory of human flourishing which balances the keen interest human beings have in developing and exercising their own agency against the condition of vulnerability that threatens to undermine it.

The third chapter factors the institution of the family into this dialogue. Nussbaum acknowledges a clear link between family and flourishing, but rejects the moral weight of any traditional or nuclear definition of the institution. Her concern is that familial love and care be understood in light of capabilities. She is therefore revealed to reject the idea of the family as an institution that derives from nature. Nussbaum contends instead that familial love and care are social constructs. This chapter argues that she politicizes the family to ensure that no individual

agent is obscured by group belonging. The family, if it is perceived to be an organic and/or rudimentary group unit, is effectively denied any positive place in Nussbaum's moral thought.

The fourth chapter acknowledges the rise of agency in international discourse on children's rights. However, it argues that the family is too prominently and intricately included in human rights instruments like the UDHR and CRC to be easily read out of the discourse. While social mores in many Western nations have come to challenge the idea that the family is a natural and basic group of society, the UN has persistently affirmed it as such. The final section of this chapter emphasizes that biogenetic links between parents and their offspring continue to register as important factors in questions about social justice for children.

The fifth chapter introduces Browning's integrative model of children's rights. That model is relied upon to demonstrate that the UN position on the family is buoyed by a rich intellectual history, one that undergirds the CRC as well. In particular, this chapter demonstrates that a robust inclusion of the family in children's rights can rely on Aristotelian moral thought for support. As the chapter turns more fully toward a critique of Nussbaum, it is asserted that she essentially divorces her capabilities approach from Aristotelian family theory without providing sufficient argumentation for doing so.

The final chapter argues that there are three main problems with prioritizing agency in the manner that Nussbaum advocates for children's rights. First, such a priority does not account for the way human lives are primarily situated in circumstances that can only be received. Second, it insinuates that childhood is a problem to be overcome rather than a stage of life that is inherently good and important in itself. And, third, Nussbaum's emphasis on agency overshadows a more robust notion of vulnerability that is important if respect for the full humanity of children is to be demonstrated. This chapter ultimately asserts that Nussbaum's prioritizing of agency threatens

to upset the delicate ecology of children's rights and the way they can be drawn upon to foster human flourishing. The task of getting justice right when it comes to children requires that a greater emphasis be placed on the condition of vulnerability which, in turn, implies a more prominent place for the family.

Chapter 1 – Capabilities, Rights, and Children

A [capabilities approach]... provides a clear account for why children's rights should be recognized as human rights, because every human being, under this approach, is entitled to respect for her full human dignity. Like other emerging theories based on the idea of human dignity, a [capabilities approach] also helps explain, in this context, why it makes sense for both [the United Nations Convention on the Rights of the Child] and various national constitutions to recognize a range of rights for children with sensitivity both to children's welfare needs and to children's agency.

~ Martha Nussbaum and Rosalind Dixon, "Children's Rights and A Capabilities Approach," 552-553.

This chapter introduces Martha Nussbaum's version of the capabilities approach and lays a foundation for discussing how centrally the cultivation of agency should factor into ethical reflection on children's rights. The first section outlines key aspects of her theory, including its conceptual background, key underlying principle, and primary political aim. The next section briefly introduces the list of central human capabilities and describes its function in Nussbaum's thought. The third section discusses the critical yet intersecting relationship that she perceives to exist between her theory and human rights. The fourth then investigates the meaning of human flourishing in relation to the capabilities approach and argues that agency is, for Nussbaum, a chief human interest. The final section briefly considers what this interest in agency means for human flourishing at childhood. The main argument of this chapter is that Nussbaum perceives children to share with all human beings a foundational interest in the protection and promotion of agency. Her capabilities approach is designed to support and ensure that interest for all.

I. Nussbaum and the Capabilities Approach

The capabilities approach is an innovative paradigm for thinking about social justice and human development today that is now prominently employed as a "metric of justice" by the UN and

various local and national governments.¹ Generally speaking, varieties of the capabilities approach contain both evaluative and ethical components. They advance a theory of basic social justice examining the actual circumstances in any given society and assess quality of life through comparative analysis.² The two best-known proponents of this model are Martha Nussbaum and her occasional collaborator, Amartya Sen.³ Although similarities exist between their versions, a notable distinction is found in the emphasis that Sen places on the comparative element through his primarily economic employment of capabilities.⁴ Nussbaum, on the other hand, emphasizes the ethical aspect of the theory. Contrasting her version to Sen's, she claims to draw on this approach as "the philosophical underpinning for an account of core human entitlements that should be respected and implemented by governments of all nations, as a bare minimum of what

¹ Ingrid Robeyns and Harry Brighouse, "Introduction" in *Measuring Justice: Primary Goods and Capabilities*, ed. by Harry Brighouse and Ingrid Robeyns (New York: Cambridge University Press, 2010), 2; cf. Caseldine-Bracht, 229 and Gunter Graf, "Realizing the Life Chances of Children – an Application of the Capability Approach" in *The Capability Approach on Social Order: Proceedings of Unseld Lecture 2010*, ed. by Niels Weidtmann, Yanti Martina Hölzchen and Bilal Hawa (Zurich: Lit, 2012), 188. By "metric of justice," Robeyns and Brighouse mean that which answers the question: "what should we look at, when evaluating whether one state of affairs is more or less just than another?" Robeyns and Brighouse, 1.

² WHD, 11-12; CC, 18. This balance is also visible in Sen's CA from the outset. See Amartya Sen, "Equality of What?" in *Tanner Lectures on Human Values, Volume I*, ed. by Sterling M. McMurrin (Salt Lake City, UT: University of Utah Press, 1980), 219-220. Nussbaum, however, perceives Sen to be emphasizing the comparative element of capabilities assessment while she prioritizes the ethical. WHD, 12, 70.

³ Their specific collaboration began with work at the World Institute for Development Economics Research in 1986. WHD, 11. For more information see World Institute for Development Economics Research, *United Nations University: World Institute for Development Economics Research: UNU-WIDER*, 1995-2014, available at: <http://www.wider.unu.edu/> [accessed 13 February 2014]. John Alexander remarks that "Sen and Nussbaum's collaborative work on the capability approach has come to play a major role in normative economics, social ethics and political philosophy." John M. Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Burlington, VT: Ashgate, 2008), 1. Sen is frequently credited with pioneering this approach, although Nussbaum receives top-billing with him on most occasions. Robeyns and Brighouse, 2; Hart, 1. Nussbaum herself refers to Sen as "pioneering" this approach in development economics, noting that her own unique version of it derives from her period of collaboration with him at WIDER. WHD, 11, 70. However, she also emphasizes her own distinct pioneering work on the topic before their individual projects "became fused." Martha C. Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66, no. 2 (1997): 275-276, available at: <http://ir.lawnet.fordham.edu/flr/vol66/iss2/2> [accessed 10 March 2015].

⁴ WHD, xiii, 11, 70. With his 1979 Tanner Lecture, Sen took the idea of "capability measurement" as an alternative to influential moral theories of human development that assessed quality of life on the basis of either people's equal satisfaction (utilitarian welfarism), or the equal distribution of goods among them (Rawlsian egalitarianism). WHD, 12. See Sen, "Equality of What?," 197-220.

respect for human dignity requires.”⁵ Concern for a “bare minimum” connects Nussbaum’s version of this theory with an evaluative notion of what a *truly* human life entails. A truly human life is one actively shaped by the individual agent acting “in cooperation and reciprocity with others” rather than being “passively shaped and pushed around by the world.”⁶ Thus, truly human living – what one might call a flourishing human life – involves the development and exercise of individual agency.⁷ That describes the aim of the capabilities approach. Human living at its most basic, as will become clear over the course of this chapter and the next, involves “reaching out” or “striving” for opportunities to make something of one’s worldly existence.⁸ Agency is vital to Nussbaum’s definition of human existence and flourishing.

Capabilities approaches were first innovated as alternatives to human development models that somehow missed that which Nussbaum and Sen deemed to be critical in the assessment of any given society, namely, how well things are going for individual members as they strive for a decent quality of life.⁹ Rather than basing such assessments on standard evaluative markers like economic growth (e.g., Gross Domestic Product per capita), overall satisfaction (e.g., utilitarian welfarism), or resource allocation (e.g., John Rawls’s theory of distributive justice),¹⁰ Nussbaum and Sen came to rely on capabilities as a way to more concretely measure the actual circumstances of individuals.¹¹ Standard approaches offer distinct contributions to development

⁵ FJ, 70; cf. 155, 182; WHD, 5, 12, 70-74; CC, 1, 16, 19, 29-33.

⁶ WHD, 72; cf. Nussbaum, “Capabilities as Fundamental Entitlements,” 40.

⁷ WHD, 72-73.

⁸ FG, 289, CC, 31.

⁹ CC, 46-48. See a variety of models in CC, Ch. 3. See also WHD, 59-69. Sen adds that his way of thinking focuses not just on “resources or income,” but on “the way human life goes (perhaps even the choices one has).” Amartya Sen, *Development as Freedom* (New York: Knopf, 1999), 24.

¹⁰ Nussbaum lists these approaches as those of a Gross National/Domestic Product (GNP/GDP) approach, utilitarian welfarism, and distributive justice in the vein of John Rawls’s “justice as fairness.” WHD, 59-70; see also CC, 46-58 and FJ, 71-75.

¹¹ Insofar as Nussbaum approaches questions about the quality of life – how well people are doing – she does so as an Aristotelian, immersing herself “at every stage... in the concrete circumstances of history and culture.” Martha C. Nussbaum, “Non-Relative Virtues: An Aristotelian Approach” in *The Quality of Life*, ed. by Martha C. Nussbaum and Amartya Sen (New York: Oxford University Press, 1993), 259.

theory that have been influential for nations either planning to improve their quality of life or attempting to justify the claim that they have already done so.¹² According to Nussbaum, however, the three standard approaches cited above fail in at least this one key aspect. Each lacks attentiveness to concrete realities confronting each and every member of any given society.¹³ Put another way, Nussbaum is concerned, particularly as a feminist, that the individual not be obscured by group belonging, whether that group is the family, the state or some other corporate body.¹⁴ Basic respect for human dignity requires that each one be recognized as a “primary subject of political justice” and treated as an end in his or her own right.¹⁵

The standard of concrete human dignity refers to what Nussbaum calls “the principle of [treating] each person as [an] end.” Although she mentions it often as a justification for her theory,¹⁶ this principle is most thoroughly conceptualized in *Women and Human Development* (2000). In that work, Nussbaum claims it as a feature that distinguishes her capabilities approach from the standard GDP, utilitarian and resource-based models:

Programs aimed at raising general or average well-being do not improve the situation of the least well-off, unless they go to work directly to improve the quality of those people’s lives. If we combine this observation with the thought... that each person is valuable and worthy of respect as an end, we must conclude that we should look not just to the total or the average, but to the functioning of each and every person.¹⁷

¹² CC, 46.

¹³ WHD, 60, 65, 68. Cf. HH, 333 and CC, 47-58.

¹⁴ WHD, 74, 188-189; FJ, 216. Similar concerns are raised by a number of other feminist theorists who note both that the institution of the family can obscure dependents like children and the women who care for them as subjects of justice within itself, and that this has grave implications for society as a whole. See Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), 1-9, 22, 94-95, 180; Eva Feder Kittay, *Love’s Labor* (New York: Routledge, 1999), 4, 76-77; Martha Albertson Fineman, *The Autonomy Myth* (New York: The New Press, 2004), 38, 57-59, 109, 163-164, 176-177, 298-300; Martha Albertson Fineman, “Taking Children’s Interests Seriously” in *What is Right for Children*, ed. by Martha Albertson Fineman and Karen Worthington (Burlington, VT: Ashgate, 2009), 230, available online: ProQuest ebrary, [accessed 9 March 2015]; and, Ayelet Shachar, *Multicultural Jurisdictions* (New York: Cambridge University Press, 2001), 65, 69-71, 75-76, 78.

¹⁵ FJ, 216.

¹⁶ WHD, 56-59, 73-74. A concise definition is provided in FJ, 216. See also PE, 118-119.

¹⁷ WHD, 56.

The significance of human individuality to Nussbaum's framework is, therefore, duly noted under this principle. Even so, it should be carefully observed that treating each person as an end does more than underline Nussbaum's insistence on the value of each person taken singularly and unobscured by some collective.¹⁸ More significantly, it shapes her theory as "an approach that [unlike the standard ones] is respectful of each person's struggle for flourishing, that treats each person as an end and *as a source of agency and worth in her own right*" (emphasis added).¹⁹ It is, therefore, not merely the value and worth of the individual taken singularly as an end to which this principle speaks. Rather, it addresses more fully the value and worth of the *agency of that singular individual*. It is the aim of the capabilities approach to protect and promote the capacity of each individual to choose and act in certain basic ways that contribute to the shaping of his or her life. Nussbaum underscores this aim as follows:

If we agree that citizens are all worthy of concern and respect, and grant that they live separate lives... then we ought to conclude that politics should not treat people as agents or supporters of other people, whose mission in the world is to execute someone else's plan of life. It should treat each of them as ends, as sources of agency and worth in their own right, with their own plans to make and their own lives to live, therefore deserving of all necessary support for their equal opportunity to be such agents.²⁰

Viewing human beings in this fashion has strong implications for children and the family that will be taken up in Chapter 3. However, for the present it is enough to acknowledge that Nussbaum identifies the agency of the individual to act for his or her separate interests to be a chief concern. Her approach "commits itself to respect for people's powers of self-definition."²¹

¹⁸ WHD, 56-59, 73-74.

¹⁹ WHD, 69.

²⁰ WHD, 58; cf. FJ, 70. Nussbaum makes this point also when speaking of the circumstances of Vasanti, a destitute woman who serves as a key example that she draws upon when speaking of the cultivation of capabilities for women. In her exploration of the role that SEWA (the Self-Employed Women's Association) had in Vasanti's life, Nussbaum observes that the focus of that organization is on "the ability of women to control and plan their own lives." CC, 10; cf. WHD, 15-24, 53, 67, 107, 268-269.

²¹ Rosalind Dixon and Martha C. Nussbaum, "Abortion, Dignity and a Capabilities Approach (March 30, 2011)" in *Feminist Constitutionalism*, ed. by Beverly Baines, Daphne Barak-Erez, Tsvi Kahana (Cambridge, UK: Cambridge

That commitment speaks directly to the political aim of Nussbaum's theory, namely, the promotion of capabilities for each and every person as a matter of what their dignity as a human being requires.²² Understanding the significance of this commitment requires a discussion of how the concept of "capabilities" is being utilized. Following Sen, Nussbaum defines capabilities as both "substantial freedoms" and "opportunities to choose and to act."²³ Putting these ideas together, she emphasizes the significance of agency to her theory by explaining that "capability means opportunity to select" and therefore entails the idea of free individual choice.²⁴ As mentioned above, Sen generally ties the question of what people are able to do and to be to economic assessments made between different societies.²⁵ Nussbaum, however, attempts to amplify the employment of capabilities beyond a "weaker" comparative use that only takes stock of how well people are doing. Instead, she wants to ask higher order and applied normative questions.²⁶ As a result, she takes the foundational capabilities questions of "What are people actually able to do and to be? What real opportunities [for activity and choice] are available to

University Press, 2011), 4, University of Chicago Public Law Working Paper No. 345, available at: <http://ssrn.com/abstract=1799190> [Accessed 10 March 2015].

²² WHD, 74; cf. FJ, 216 and PE, 118-119.

²³ CC, 20-21. Nussbaum's use of the term "capabilities" to mean "substantial freedoms" refers, more particularly, to the idea of "combined capabilities." These are "freedoms or opportunities created by a combination of personal abilities and the political, social, and economic environment." CC, 20-21. Technically, combined capabilities exist where "internal capabilities" have been *combined* with suitable external conditions for the exercise of function" (author's emphasis). WHD, 84-85. "Internal capabilities" are a part of "combined capabilities" that speaks to "trained or developed traits and abilities, developed, in most cases, in interaction with the social, economic, familial, and political environment." A third type are "basic capabilities" or "innate powers that are either nurtured or not nurtured." CC, 20-24; cf. WHD, 84-85. Throughout this chapter, references to capabilities should generally be understood in terms of what are technically *combined* capabilities. Sen defines capabilities as "a kind of freedom: the substantive freedom to achieve alternative functioning combinations (or, less formally put, the freedom to achieve various lifestyles)." See Sen, *Development as Freedom*, 75 and Amartya Sen, "Human Rights and Capabilities," *Journal of Human Development* 6, no. 2 (2005): 153, available at: <http://www.tandfonline.com/doi/abs/10.1080/14649880500120491#.VP569-ER8gU> [accessed March 10, 2015].

153.

²⁴ CC, 25.

²⁵ E.g., Sen provides comparative assessments of unemployment and capability deprivation in Europe and America, health care and mortality between America and Europe, poverty and deprivation between India and Sub-Saharan Africa, and gender inequality and missing women between a number of geopolitical locales. Sen, *Development as Freedom*, 99-107.

²⁶ WHD, 12, 70.

them?” in a philosophical direction that is concerned with justice for individuals, rather than Sen’s utilization of them for purposes of economic comparison.²⁷ Since capabilities are seen to be answers to both the normative and comparative inquiries formulated by these questions, Nussbaum’s point is not to malign the significance of comparative questions *per se*. Quite the opposite, she acknowledges how comparative questions have been used successfully by Sen to indicate a space within which quality of life assessments can be made on the basis of individual agency rather than overall satisfaction or resource distribution.²⁸ Her aim is to utilize capabilities as answers to these normative questions that offer direction for addressing the issues uncovered through the asking of comparative ones.²⁹ The political salience of her work, then, is that it promotes capabilities as answers to the question of what people are able to do and to be in a way that accounts for their power of self-definition within the actual circumstances of life.³⁰

Using her account of capabilities in this way leads Nussbaum to set a “decent social minimum” or “threshold level” to establish that which is deemed necessary to living a *really* human life, one marked throughout by the agency that her capabilities approach is meant to secure for all on a global scale.³¹ As shall be more fully explored in the next section, she enumerates a list of ten “central human capabilities” that represents this threshold. The “basic intuitive idea,” according to Nussbaum, is “that we begin with a conception of the dignity of the human being, and of a life worthy of that dignity – a life that has available in it ‘truly human

²⁷ CC, 59; cf. x, 14; WHD, 12, 70-71; FJ, 70, 164-168; CRCA, 557. Nussbaum underscores that this question is to be asked not only at the level of the broader society, but also more narrowly to determine what people embedded within a particular group are able to do and be. SSJ, 34. It is equally clear that comparative questions are subordinate for her to normative ones. WHD, 5-6.

²⁸ WHD, 6, 12, 70. Nussbaum finds Sen to be somewhat ambiguous on the meaning of the term “agency” as he uses it, and how it relates to well-being. See CC, 197-201.

²⁹ WHD, 6, 70-71.

³⁰ Dixon and Nussbaum, “Abortion,” 4.

³¹ WHD, 72, 75, 86; FJ, 70, 71, 75, 84, 279, 310.

functioning' [...]."³² Taken negatively, the threshold level she has in mind sets a line beneath which functioning that is "really" human cannot be thought to exist.³³ A life bereft of a central capability is a life unworthy of human dignity.³⁴ Someone in a permanent vegetative state is, therefore, thought to be no longer vitally linked to the human community and unable to flourish as a human being. Such a life, Nussbaum claims, "just is not a human life at all, in any meaningful way, because possibilities of thought, perception, attachment, and so on are irrevocably [and entirely] cut off."³⁵ Neither, therefore, does an anencephalic child count as human. Mental deprivations under these two conditions are so acute that Nussbaum finds it reasonable to say "that the life there is simply not a human life at all." In fact, she claims, it to be "[o]nly sentiment" that leads us to call the person marked by these conditions a human at all.³⁶ Careful not to exclude in her theory people with mental impairments and cognitive disabilities, Nussbaum maintains that the bar of what counts as "truly human functioning" is not rigorously set, even if it is precise: "The one limitation is that the person has to be a child of human parents and capable of at least some sort of [agency]."³⁷ What matters to Nussbaum is not a so-called "normal range" of capabilities within which individuals must fall. Instead, her concern is for the

³² FJ, 74.

³³ WHD, 75; FJ, 71, 181.

³⁴ FJ, 70-71, 78.

³⁵ FJ, 181.

³⁶ FJ, 187; cf. Dixon and Nussbaum, "Abortion," 5n19. An unborn child or fetus, on the contrary, appears under Nussbaum's capabilities approach to have a stronger claim to human dignity than either of these two cases. That claim, however, is more marked by potentiality than actuality prior to birth: "And indeed the [capabilities approach] does recognize that the fetus possesses a type of human dignity – although its dependent and merely potential status means that its type of dignity is distinctive, and not directly commensurable with that of independent human beings." As such, Nussbaum's account of capabilities "both grants the fetus a type of (potential) human dignity and (in its focus on agency and striving) explains why that status is distinct from that of post-birth human beings." Dixon and Nussbaum, "Abortion," 6.

³⁷ Martha C. Nussbaum, "The Capabilities of People with Cognitive Disabilities." *Metaphilosophy* 40, nos. 3-4 (2009): 332, 335, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9973.2009.01606.x/epdf> [accessed 10 March 2015]. CC, 24. Although Nussbaum speaks of "some sort of active striving" here, I have replaced "active striving" with "agency" for the sake of clarity. That these terms are interchangeable in Nussbaum's lexicon seems apparent. See FJ, 73, 283.

presence of some form of exercisable or potential agency recognizable as capability. For instance, Nussbaum claims that some of the most important capabilities are present in people with cognitive disabilities.³⁸ Their “ability to love and relate to others,” to perceive things, to “delight in movement and play” are examples of what links them to the human community and places a responsibility on that community to support and foster their agency to its fullest extent.³⁹

However, Nussbaum intends her list to be taken more positively.⁴⁰ Therefore, the political goal should be understood as that of moving citizens above the capability threshold. She wants to secure more than the possibility for each individual to lead a basically human life. The capabilities approach is meant to secure the potential for each human being to lead a good or flourishing life.⁴¹ A good or flourishing life is one marked by richer forms of agency so that the individual can access as many opportunities for choice and activity as possible.⁴² What Nussbaum’s account promotes as the appropriate political goal is capabilities and not merely functionings.⁴³ If capabilities are opportunities to choose and act, then the corresponding idea of functionings should be understood as “active realization[s] of one or more capabilities.”⁴⁴ To distinguish functionings from capabilities Nussbaum follows Sen in contrasting one person who is starving against another who is fasting.⁴⁵ Both individuals have the same type of basic functioning with regard to nutrition. To be precise, they both lack it. However, since the one who fasts can choose not to do so, he or she cannot be said to have the same capability as the one

³⁸ FJ, 181, 187-188; CC, 24.

³⁹ FJ, 168, 187-188, 194, 196-197, 199, 218, 375; CC, 31. Cf. Dixon and Nussbaum, “Abortion,” 6.

⁴⁰ Nussbaum claims to be “less interested in the boundary (important though it is for medical ethics) than in a higher threshold, the level at which a person’s capability becomes what Marx called ‘truly human,’ that is, *worthy* of human being” (author’s emphasis). WHD, 73.

⁴¹ FJ, 71, 181.

⁴² WHD, 88.

⁴³ WHD, 87; FJ, 171-172.

⁴⁴ CC, 25.

⁴⁵ Sen, *Development as Freedom*, 75, 76.

who starves and cannot choose to do otherwise.⁴⁶ Sen points to the example of Gandhi: “when Mahatma Gandhi fasted to make a political point against the Raj, he was not merely starving, he was rejecting the option of eating (for that is what fasting is).”⁴⁷ The sign of a flourishing or a good life, as this example suggests, is not necessarily that one’s belly is full, but that one has agency over his or her state of nutrition. To set a list of enumerated functionings that must be respected would, therefore, violate one’s human dignity from Nussbaum’s perspective by precluding choices that citizens might wish to make in accordance with their own ideas of what a good life entails.⁴⁸ Taking capabilities as the appropriate goal places the notion of respect for human dignity at the center of Nussbaum’s theory by insisting that the aim of politics is to respect individuals as agents in their own right, as social actors “with their own plans to make and their own lives to live.”⁴⁹ The goal of political society, she asserts, “is to enable citizens to search for the good life (both in and outside of the political sphere) in their own way.”⁵⁰

The centrality of choice to the pursuit of a good life might, therefore, appear obvious when considering such things as political participation, religious activity, and play. To force functionings of these sorts on all citizens would be both dictatorial and illiberal.⁵¹ However, even in the ostensibly essential component that the capability of health represents to human flourishing, a capabilities framework favors choice. In doing so, the capabilities approach stipulates that making unhealthy activities like “boxing, unsafe sex, football and smoking” illegal would infringe too far on the agency and corresponding dignity of citizens. The lone exception,

⁴⁶ CC, 25, 198. Similarly, Amish citizens have the capability to participate in political choice by voting, but due to religious convictions choose not to exercise the function of voting. FJ, 182-183, cf. 77.

⁴⁷ Sen, *Development as Freedom*, 292.

⁴⁸ WHD, 87.

⁴⁹ WHD, 58.

⁵⁰ UT, 404. Paraphrasing Rawls, she claims that “politics is not just for the sake of politics, but for the sake of the good life.” UT, 404n2, cf. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 201.

⁵¹ FJ, 171.

though, is dignity itself. “We want political principles that offer respect to all citizens,” Nussbaum asserts, “and, in this one instance, the principles should give them no choice in the matter.”⁵² Children further complicate the issue. For them, compulsory functioning in the areas of education, health care, and age of consent for sexual intercourse are justified on the combined basis of their present immaturity and future potential for exercising choice.⁵³

What all of this would appear to mean is that the exercise of agency is viewed by Nussbaum to be such a vital human interest that the only limitations justifiably placed on it are those that ultimately serve it. The capabilities approach supports human agency by seeking to get people above the capability threshold as a matter of principle.⁵⁴ To get above that threshold, however, at least two functionings appear to be necessarily legislated in some way. First, each and every human being should not only obtain the social bases of self-respect but, as Sen asserts, actual self-respect itself.⁵⁵ And, second, all children should have access to a standard of healthcare, education, and bodily integrity that sufficiently supports, and in no way undermines, the potential of their adult capabilities.⁵⁶

⁵² FJ, 171-172.

⁵³ FJ, 172; CC, 26. Michael Freeman makes a similar point, albeit without Nussbaum or the capabilities approach in mind: “We cannot treat persons as equals without also respecting their capacity to take risks and make mistakes. We would not be taking rights seriously if we only respected autonomy when we considered the agent was doing the right thing. But we also would be failing to recognize a child’s integrity if we allowed him to choose an action, such as using heroin or choosing not to attend school, which could seriously and systematically impair the attainment of full personality and development subsequently.” Michael Freeman, *The Moral Status of Children: Essays on the Rights of the Child* (The Hague, NL: Martinus Nijhoff Publishers, 1997), 38. Note, however, that later Nussbaum appears to move somewhat on the issue of sexual consent, or perhaps just articulates her position more fully. The softer position is that she and Dixon take no definitive position on *what* the age of consent ought to be beyond opposition to “granting young children rights of sexual consent, given their vulnerability to manipulation and abuse.” CRCA, 591-592.

⁵⁴ WHD, 72-73.

⁵⁵ Rawls lists the social bases of self-respect as among the primary goods that “citizens need as free and equal persons.” Rawls, *Political Liberalism*, 180-181. He furthermore notes its fundamental significance: “Without self-respect nothing may seem worth doing, and if some things have value for us, we lack the will to pursue them.” Rawls, *Political Liberalism*, 318. Sen criticizes Rawls for being “fetishistic” about the primary goods, noting that by focussing on “goods” rather than “what goods do to human beings,” Rawls’s ends up viewing “the social bases of self-respect” as valuable to persons instead of self-respect itself. Sen, “Equality of What?”, 218-219; cf. FJ, 172.

⁵⁶ FJ, 172.

Hence, Nussbaum's capabilities approach takes as its core concern the cultivation of agency in the form of opportunities for choice and action that ought to be extended to each and every individual on a global scale.⁵⁷ The guiding principle underlying this project is the idea that such opportunities should be extended to each and every individual as a matter of what respect for their basic humanity requires. In other words, the principle of treating each person as an end. The political aim of Nussbaum's approach, the promotion of capabilities for all, follows directly from it. Consequently, Nussbaum's theory seems to promote an idea of basic social justice that closely links notions of human flourishing and dignity (i.e., living a really human life or one worthy of being called human) with the exercise of agency. As stated, the only limits to one's exercise of agency should be those that ultimately result in more of it.

II. The Central Human Capabilities

Nussbaum sets a threshold level or social minimum of ten "central human capabilities" that signal the level of agency required for one's life to not only be considered human, but to have available to it the ability to flourish as such (i.e., a good human life). Enumerating capabilities in this way is a sign of the marked difference between her approach and that of Sen. Although Sen categorizes capabilities like health, education, political participation and non-discrimination as being more important than others,⁵⁸ his comparative focus on economics does not lead to the search for anything like Nussbaum's list.⁵⁹ He finds the generality of his own theory to be, in

⁵⁷ FJ, 70-71; cf. WHD, 74-75.

⁵⁸ CC, 70; cf. Sen, *Development as Freedom*, 5, 36.

⁵⁹ WHD, 13, 70; CC, 20. Sen, in fact, rejects the idea of listing capabilities because he finds such lists to be highly dependent on context and too invasive into the "domain of public reasoning." Sen, "Human Rights and Capabilities," 157. It is interesting that some of his main concerns (i.e., reifying capabilities, marginalizing public reason) do not necessarily challenge the veracity of Nussbaum's own list as it is stated (i.e., tentatively and open to change). See Sen, "Human Rights and Capabilities," 157-169; FJ, 76; WHD, 78n82.

part, its strength. According to Sen, the listing of capabilities suggests a view of human nature that “may be tremendously over-specified.”⁶⁰

Nussbaum, on the other hand, is concerned that a threshold level able to underwrite constitutional guarantees should be established as a matter of global justice. This leads her to articulate a list of central human capabilities.⁶¹ She proceeds to do so in a self-professed tentative manner, although the following is a rather stable representation of how the list has been specified over the years:

1. Life
2. Bodily health
3. Bodily integrity
4. Senses, imagination, and thought
5. Emotions
6. Practical Reason
7. Affiliation
8. Other species
9. Play
10. Control over one's political and material environment.⁶²

This list sets an “ample (specified) threshold of capability” that, taken as an integrated whole, provides an account of what respect for human dignity requires.⁶³ Consequently, it is important to recognize that this list is emphatically one of distinct components (i.e., life, health, affiliation, etc.), but that these components are related to each other in complex ways.⁶⁴ As separate components, Nussbaum remarks that simply giving someone more of one capability is not

⁶⁰ Amartya Sen, “Capability and Well-Being” in *The Quality of Life*, ed. by Martha C. Nussbaum and Amartya Sen (New York: Cambridge University Press, 1993), 47.

⁶¹ The designation of “human” is important here as Nussbaum also applies her capabilities approach to “other species.” See FJ, 325-407.

⁶² See the Appendix to this dissertation for her full list and accompanying descriptions. The only substantial difference to be found in her articulation of the basic capabilities is in one of its first enunciations as an Aristotelian-influenced list identifying “certain features of our common humanity.” This early list was stated by Nussbaum as follows: 1) Mortality; 2) The body; 3) Pleasure and pain; 4) Cognitive capability; 5) Practical reason; 6) Early infant development; 7) Affiliation; and 8) Humour. Nussbaum, “Non-Relative Virtues,” 263-265. These central capabilities belong “first and foremost” to individuals and then only derivatively to groups. CC, 35.

⁶³ CC, 36.

⁶⁴ WHD, 81.

enough to make up for what is lacked in another. For example, an ample quantity of the central capability of life counted in numbers of years would not, from her perspective, balance against or make better many years lived in chronic pain (i.e., bodily health). Nor would it presumably make up for years of being deprived of the sensual capacities required for experiencing to a requisite degree all that the natural world presents (i.e., senses, imagination and, and thought). “All [of the enumerated capabilities] are of central importance,” Nussbaum proclaims, “and all are distinct in quality.”⁶⁵

At the same time, a complex relationship exists between the particular capabilities listed. For example, one of the best ways to promote control over one's environment (political or material) is to also promote literacy for society's more vulnerable members. The ability to read and gain an education might then open opportunities for employment or protect against the potential of being exploited.⁶⁶ This underscores the plurality and nonreducibility of the capabilities listed.⁶⁷ While each one is crucial to human flourishing in its own right, taken together they are sufficiently integrative so that one cannot be promoted at the expense of another without damaging the integrity of the list as a whole.⁶⁸ The central capabilities, taken separately or as a whole, are thus “implicit in the idea of a life worthy of human dignity.”⁶⁹ Failure to secure these “fundamental entitlements of all citizens” is therefore regarded by Nussbaum as a “grave violation of basic justice.”⁷⁰

⁶⁵ WHD, 81; cf. 78.

⁶⁶ See WHD, 81. Nussbaum utilizes the specific example of women here, but the point holds true for any group whose members' vulnerability is at risk of being exploited. See also Nussbaum, *Cultivating Humanity*, 218. Speaking more generally, she claims that “[l]iteracy, including cultural literacy, confers both strength and independence, if viewed as a kind of essential training and nourishment, not as itself the goal.” Nussbaum, *Cultivating Humanity*, 35, cf. 30.

⁶⁷ CC, 18.

⁶⁸ “If people are below the threshold on any one of the capabilities, that is a failure of basic justice, no matter how high up they are on all the others.” FJ, 167.

⁶⁹ FJ, 70, 155.

⁷⁰ FJ, 155.

Although Nussbaum commits to a list of distinct yet interrelated components, two stand out as especially significant: *practical reason* and *affiliation*. These two capabilities are crucial for their roles in organizing and pervading all the others and consequently making the pursuit of them a truly human act.⁷¹ The ability to use the other capabilities in a way “infused by the characteristically human use of thought and planning” is, she maintains, essential to truly human functioning. Similarly crucial is the ability to “plan one's own life” in a way that incorporates “complex forms of discourse, concern, and reciprocity with other human beings.”⁷² Attempts to exercise the central capabilities in a way that did not involve practical reason and affiliation would therefore be to exercise them in an “incompletely human manner.”⁷³

To be clear, Nussbaum does not intend that the list of central human capabilities be reduced to these two components. Rather, she means that all of the capabilities listed should be available in a form that involves practical reason and affiliation.⁷⁴ Affiliation is important as a way of respecting the dignity of the individual as a social being. The significance of practical reason is perhaps even more obvious for its organizational function, especially given the deep interest in choice entailed by Nussbaum's theory. As she clarifies in *Creating Capabilities*: “the opportunity to plan one's own life is an opportunity to choose and order the functionings corresponding to the various other capabilities.”⁷⁵ Furthermore, such planning is inescapably social due to the respect for the equal dignity of others that it inherently entails. As a result, Nussbaum claims that “part of a life with human dignity is a common life with others organized

⁷¹ WHD, 82; CC, 39.

⁷² WHD, 82.

⁷³ WHD, 82.

⁷⁴ WHD, 82-83.

⁷⁵ CC, 39. This, claims Nussbaum, is just another way of indicating the “centrality of choice in the whole notion of capability as freedom.” CC, 39.

so as to respect that equal dignity.”⁷⁶ She is channelling Aristotle in this regard by noting as he does in Book IX of *Nicomachean Ethics*, that a flourishing human life is one lived in community and not solitude, “for the human being is a social creature [*zōon politikon*] and naturally disposed to live with others.”⁷⁷

Nussbaum advances her capabilities approach as a partial rather than a complete theory of justice.⁷⁸ The list of central human capabilities is introduced, she says, “for political purposes only, and without any grounding in political ideas of the sort that divide people along lines of culture and religion.”⁷⁹ Her aim is not the establishment of a complete political philosophy that outlines for itself a comprehensive notion of what a good human life involves.⁸⁰ Instead, she claims to be proposing a partial account of basic social justice that establishes a “decent social minimum in a variety of areas.”⁸¹ By doing so, Nussbaum draws upon John Rawls’s idea of an “overlapping consensus.” In *Political Liberalism* (1996), Rawls defines an overlapping consensus as a freestanding political conception of justice endorsed by citizens with different comprehensive conceptions of the good life.⁸² For Rawls, the political principles and values

⁷⁶ FJ, 274. Nussbaum’s marriage of affiliation to practical reason and her stress on the significance of this union can be found in her interpretation of Aristotle’s treatise on animal motion where she states: “We are not, when we deliberate about our good, solitary beings concerned only with our own satisfaction and our own responses. We are social creatures who require the company and the approval of others for a fulfilling life. We therefore deliberate with a view to justification: a good life must be one that we can justify as good to our fellow human creatures. The possibility of winning approval and reaching agreement is fundamental to our life and projects, since self-respect in a community of men is, for us, a basic good. We therefore must ask ourselves not simply, ‘What’s a good life for me?’ but ‘What’s a good *human* life’ – i.e., what life can I hope to commend as good to my fellow citizens? Deliberation takes place not in a vacuum, but in the *polis*” (author’s emphasis). Martha C. Nussbaum, *Aristotle’s De Motu Animalium: Text with Translation, Commentary, and Interpretive Essays* (Princeton, NJ: Princeton University Press, 1978), 103.

⁷⁷ See FJ, xvii; cf. Aristotle, *Aristotle: Nicomachean Ethics*, Second ed., ed. and trans. by Terence Irwin (Indianapolis, IN: Hackett Publishing, 1999), IX.9, 1196b17-23 (subsequent references to this work abbreviate *Nicomachean Ethics* as EN). The idea of the human being as a “social creature” or “political animal” is taken up more directly in Chapter 5, section IV.

⁷⁸ WHD, 6, 12, 74-75, 96; FJ, 71, 79, 155, 163, 274, 297, 341.

⁷⁹ FJ, 79, 163.

⁸⁰ WHD, 74-75.

⁸¹ WHD, 75; FJ, 274.

⁸² Rawls, *Political Liberalism*, 134.

arising from his own model – “justice as fairness” – are intended to become the object of such a consensus.⁸³ The point is not that all citizens would “affirm the political conception of justice... for all the same reasons, all the way down.” Instead, because people have “conflicting religious, philosophical, and moral views... they affirm the political conception from within different and opposing comprehensive doctrines, and so, in part at least, for different reasons.”⁸⁴ According to Charles Taylor, the affirmation of common regimes of human rights can be anchored on a similar form of overlapping consensus:

There does seem to be some basis for hoping that we can achieve at least some agreement on [certain norms of conduct construed as human rights]. One can presumably find in all cultures condemnations of genocides, murder, torture, and slavery, as well as of, say, “disappearances” and the shooting of innocent demonstrators. The deep underlying values supporting these conclusions will, in the nature of the case, belong to the alternative, mutually incompatible justifications.⁸⁵

Decades prior to this Rawlsian employment of the idea of an overlapping consensus, Jacques Maritain foreshadowed the concept when he famously said about the norms articulated in the UDHR: “Yes... we agree on these rights, *providing we are not asked why*. With the ‘why’, the dispute begins” (author’s emphasis).⁸⁶

⁸³ Rawls, *Political Liberalism*, 149.

⁸⁴ John Rawls, *Justice as Fairness: A Restatement* ed. by Erin Kelly (Cambridge, MA: Belknap, 2001), 32.

⁸⁵ Charles Taylor, “Conditions of an Unforced Consensus on Human Rights” in *The East Asian Challenge for Human Rights*, ed. by Oanne R. Bauer and Daniel A. Bell (New York: Cambridge University Press, 1999), 124-125. Donnelly directly claims that a Rawlsian-like overlapping consensus “has come to develop on the rights of the [UDHR].” Donnelly, *Universal Human Rights* (2013), 57-58. David Miller also describes how human rights are alleged to form the object of an overlapping consensus: “The idea here is that we can find multiple foundations for human rights by going in turn to each of the major world religions, or to significant non-religious world views, and showing that each of these supports a common list of human rights... human rights would have philosophical foundations, but the foundations would be different for different people, depending on their underlying values.” David Miller, *National Responsibility and Global Justice* (New York: Oxford University Press, 2007), 168. Miller, however, is sceptical that the idea of an overlapping consensus does more than encourage “a selective interpretation of the culture” in which one is looking for human rights. Challenging Taylor specifically, Miller argues that “being able to tell a plausible story that leads from the selected idea to a list of human rights is not the same as showing that, taking the cultures as a whole, we can generate an overlapping consensus on human rights from within.” Miller, 175, cf. 172-178.

⁸⁶ Jacques Maritain, *Man and the State* (Chicago, IL: The University of Chicago Press, 1951), 77.

Nussbaum seems intent on establishing a similarly freestanding theory of social justice by drawing on the idea of an overlapping consensus and identifying the list of central capabilities as the object of agreement.⁸⁷ Likening her list to the UDHR, Nussbaum proposes that an overlapping consensus should indeed be “fully available internationally across lines of tradition and religion” because the central capabilities can be justified by people holding differing comprehensive ideas of “the good life.”⁸⁸ As a result, one’s comprehensive idea of what a good life involves should neither restrict agreement on something like Nussbaum’s list of specified universal norms, nor engender any significant disagreements about *why* they stand as norms. The idea of an overlapping consensus, while representing normative agreement, leaves us “undisturbed by the differences of profound underlying belief” that one depends on for justification.⁸⁹ By constraining her philosophical claims Nussbaum hopes to promote her list of the central capabilities as being open to a wide and enduring consensus.⁹⁰

III. Capabilities and Human Rights

Nussbaum’s articulation of the central human capabilities points to an important connection between her approach and the idea of human rights. Human rights discourse is a virtually inescapable component of any serious attempt to articulate social justice today, including (and perhaps especially) attempts to articulate it with children in mind. The global impact of human rights instruments, most prominently the penetration of the UDHR and CRC into the political and legal culture of nearly every nation on earth,⁹¹ has resulted in the language of rights forming

⁸⁷ SSJ, 40; WHD, 76; FJ, 70.

⁸⁸ FJ, 163.

⁸⁹ Taylor, “Unforced Consensus,” 124.

⁹⁰ FJ, 163.

⁹¹ Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, NY: Cornell University Press, 1989), 22, 149-150.

what Barbara Woodhouse has called “the ozone layer” of the international legal environment.⁹²

By this, she means that resisting the ratification of a rights instrument like the CRC does not keep a nation from being both morally and legally influenced by that agreement, it just limits that nation’s influence over “the evolution of children’s rights” both domestically and abroad.⁹³

Rights discourse, whether embraced or not, has become a common global dialect of justice.⁹⁴ As a result, any effort to get justice right with regard to children is likely to fail unless included in that effort is a meaningful engagement with human rights,⁹⁵ particularly with the CRC.

⁹² Barbara Bennett Woodhouse, *Hidden in Plain Sight: The Tragedy of Children’s Rights from Ben Franklin to Lionel Tate* (Princeton, NJ: Princeton University Press, 2008), 32-33, 313. Alice Hearst, writing on the topic of transnational adoption, makes a similar comment about the catalytic impact of the CRC on “the international environment.” See Alice Hearst, *The Politics of Cultural Belonging* (New York: Cambridge University Press, 2012), 179; cf. 167-179.

⁹³ For instance, while the government of the United States has not ratified the CRC, Woodhouse observes that its legal stance on children is indubitably shaped by that document in two ways. First, its stance is shaped by internal pressure to “extend current constitutional doctrines to cover [children as the] new generation of rights-holders” that the world community perceives them, at least formally, to be. Woodhouse, *Hidden*, 33. Woodhouse believes that national constitutions, whether in the process of being created or already established, should be open-textured to allow for the exploration of the concepts of liberty, equality, and dignity” as “value[s] in search of perfection, not as [static definitions] of existing rights.” Barbara Bennett Woodhouse, “The Constitutionalization of Children’s Rights: Incorporating Emerging Human Rights into Constitutional Doctrine,” *Journal of Constitutional Law* 2, no. 1 (1999): 51-52, available at: <http://scholarship.law.upenn.edu/jcl/vol2/iss1/1> [accessed 10 March 2015]. Second, the US legal stance on children is shaped by external pressure from “the universal norms of international law that demand respect” regardless of the internal legal culture. Children’s rights become enforceable in US courts by way of *jus cogens*, or, “customary international law.” Woodhouse, *Hidden*, 33.

⁹⁴ Witte refers to human rights as the *ius gentium* of our time: “the common law of nations, which a variety of Hebrew, Greek, Roman, Christian, and Enlightenment movements have historically nurtured in the West and well beyond.” It forms “a set of principles and customs common to several communities and often the basis for treaties and other diplomatic conventions” and represents “the middle axioms of our discourse.” John Witte, Jr. and M. Christian Green, “Introduction” in *Religion and Human Rights: An Introduction* (New York: Oxford University Press, 2012), 18-19. Cf. John Witte, Jr., *God’s Joust, God’s Justice: Law and Religion in the Western Tradition* (Grand Rapids, MI: Eerdmans, 2006), 111. David Miller observes that human rights are “often now thought of as components of international law.” He, in particular, aims to use rights as a way of specifying “a global minimum that people everywhere are entitled to as a matter of justice.” Miller, 165, 166.

⁹⁵ Engagement with human rights discourse may, of course, be critical. See WHD, 96-101; FJ, 284-291; Witte, *God’s Joust, God’s Justice*, 111; O’Donovan, “The Language of Rights and Conceptual History,” 194-196; Wall, *Ethics*, 113ff. Also, positive engagement with human rights discourse need not be definitively liberal in character. See John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 79 and Robert W. Hefner, “Human Rights and Democracy in Islam” in *Religion and the Global Politics of Human Rights* ed. by Thomas Banchoff and Robert Wuthnow (New York: Oxford University Press, 2011), 53-59.

While undoubtedly aware of its influence, Nussbaum nevertheless finds the meaning of human rights to be far from “crystal-clear.”⁹⁶ Starting with the concept of *rights* alone, a basic definition is simple enough to state. Johannes Morsink defines a “right” as “a justified claim that can activate the duties of others.”⁹⁷ Nussbaum observes, however, that there are numerous distinctions to the meaning of rights that are not immediately evident. For instance, people differ on whether rights are natural (i.e., pre-political) or artificial (i.e., legal constructs).⁹⁸ To that could be added a range of qualifications that include, at minimum, distinctions between rights that are negative and positive,⁹⁹ individual and collective,¹⁰⁰ and domestic (i.e., civil) and

⁹⁶ Nussbaum’s point is that the apparent flexibility of the idea allows for broad consensus while at the same time obscuring “difficult theoretical questions.” This, she claims, gives the “illusion of agreement where there is [in fact] deep philosophical disagreement.” FJ, 285.

⁹⁷ Johannes Morsink, *International Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia, PA: University of Philadelphia Press, 2009), 172.

⁹⁸ FJ, 285. Brian Tierney explains that the idea of natural rights refers not “to rights that people can actually exercise in any given society but to rights that ought to be recognized in all societies because they are necessary for the fulfillment of some basic human needs and purposes.” Brian. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Atlanta, GA: Scholars Press, 1997), 5. There is some discrepancy in this matter. Some distinguish between natural and human rights, taking natural rights to be those that human beings hold “simply in virtue of their being human” and human rights being those of “persons in society.” Rex Martin, “Are Human Rights Universal” in *Human Rights: The Hard Questions*, ed. by Cindy Holder (New York: Cambridge University Press, 2013), 59. See also, Nicholas P. Wolterstorff, “Christianity and Human Rights” in *Religion and Human Rights: An Introduction*, ed. by John Witte, Jr. and M. Christian Green (New York: Oxford University Press, 2012), 43-46. Such an interpretation seems contrary to Donnelly’s definition of human rights being, simply, the rights that “appear to have humanity or human nature as their source.” Donnelly, *Universal Human Rights* (1989), 13, cf. 10-14.

⁹⁹ Donnelly explains that rights are called “negative” which require “only forbearance on the part of the state,” while “positive rights” are those which “require others to provide goods, services, and opportunities.” In addition, the line between positive and negative rights is often a blurry one (i.e., he views positive and negative state action as a part of all human rights) and is historically contingent (i.e., what required positive state action today might be a negative right in the future or was so in the past). Donnelly, *Universal Human Rights* (2013), 42-43. See also Wall on negative and positive rights in relation to children’s rights. Wall, *Ethics*, 121-122.

¹⁰⁰ Donnelly denies that *human* rights can extend to groups. At best, what are considered collective rights, from his perspective, are “rights of individuals acting as members of social groups.” To support this point, he draws on the example of the right to self-determination that the International Covenants recognize for peoples. Donnelly, *Universal Human Rights* (1989), 25, 221-222. The idea of securing rights to groups is a major problem from Nussbaum’s perspective. She discusses the issue of state recognition of religious group rights as the basis for a “liberal dilemma” at length in SSJ, 81ff., WHD, 168ff. Alvin Esau offers a positive take on collective rights with regard to religious freedom in a liberal democracy. He argues for “outside law” (the law of the state) to recognize the legitimacy of “inside law” (e.g., comprehensive norms generated by a religious group and binding on the religious community), and vice versa. His main point is that democratic society should allow space for religious communities to be internally illiberal. Those communities must in turn must be externally liberal and give reciprocal respect to other groups and the wider state. Alvin Esau, “Living By a Different Law: Legal Pluralism, Freedom of

international.¹⁰¹ There are heated debates over the basic conceptual differences between objective right and subjective rights¹⁰² and whether an emphasis should be placed on duties or entitlements.¹⁰³ Furthermore, there are disagreements over the historical evolution of rights discourse¹⁰⁴ and disputes about how the wide range of human rights topics have been instrumentalized.¹⁰⁵ To all of this, Nussbaum adds the issue of species by “addressing issues of

Religion, and Illiberal Religious Groups” in *Law and Religious Pluralism in Canada*, ed. by Richard Moon (Vancouver, BC: University of British Columbia Press, 2008), 132-133.

¹⁰¹ International human rights norms and law operate at both global and domestic levels. Donnelly observes that “extensive and significant international action is a regular part of the politics of human rights,” while the international human rights movement itself “creates a system of national implementation” of human rights norms. Donnelly, *Universal Human Rights* (2013), 161. Thomas Banchoff explains the tension between the national and international as follows: “At the dawn of the twenty-first century, state sovereignty remains the foundation of the international system and the politics of human rights still plays out mainly on a national stage. But more than at any previous point in history, that politics and its religious dimension are now framed by international norms and rules – a common, if contested, frame of reference.” Thomas Banchoff, “The International Human Rights Regime” in *Religion and the Global Politics of Human Rights* ed. by Thomas Banchoff and Robert Wuthnow (New York: Oxford University Press, 2011), 24, cf. 34.

¹⁰² Donnelly explains that rights are sometimes referred to as “subjective rights” because “they focus on the subject (who holds them) rather than an ‘objective’ standard to be followed or a state of affairs to be realized.” Donnelly, *Universal Human Rights* (2013), 8. Oliver O’Donovan emphasizes that subjective rights are derived from some more objective notion of justice and, more specifically, is sceptical of a discourse on justice marked by the inverse (i.e., justice derived from rights). He finds deriving justice from rights to be marred by a political problem (the “subversion of working orders of law and justice”), a conceptual problem (the perpetuation of a conflict between the language of subjective rights and language of objective right), and a historical problem (there is no use of the plural form of “right” in the ancient world). Oliver O’Donovan, “The Language of Rights and Conceptual History,” *Journal of Religious Ethics* 37, no. 2 (2009): 194-196, 201, available at:

<http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9795.2009.00382.x/abstract> [accessed 10 March 2015]; cf. Oliver O’Donovan, *The Desire of the Nations: Rediscovering the Roots of Political Theology* (New York: Cambridge University Press, 1996), 247-248 and Joan Lockwood O’Donovan, “Rights, Law, and Political Community: A Theological and Historical Perspective,” *Transformation: An International Journal of Holistic Mission Studies* 20, no. 1 (2003): 37, available at: <http://trn.sagepub.com/content/20/1/30.full.pdf+html> [accessed 10 March 2015].

¹⁰³ This distinction is especially noticeable in religious engagement with the concept of human rights. See David Novak, “A Jewish Theory of Human Rights” in *Religion and Human Rights: An Introduction*, ed. by John Witte, Jr. and M. Christian Green (New York: Oxford University Press, 2012), 28-30; Frederick Mathewson Denny, “Muslim Ethical Trajectories in the Contemporary Period” in *The Blackwell Companion to Religious Ethics* (Malden, MA: Blackwell Publishing, 2005), 270-271; Harold Coward, “Are there Human Rights in Hinduism?” in *Human Rights and the World’s Major Religions: Volume 4, The Hindu Tradition* (Westport, CT: Praeger, 2005), 25-30; Robert Florida, “Are there Human Rights in Buddhism?” in *Human Rights and the Major World’s Religions: Volume 5, The Buddhist Tradition* (Westport, CT: Praeger, 2004), 10, 26.

¹⁰⁴ The so-called “three generations” of rights refer to “successive generations of civil and political rights, economic, social and cultural rights, and solidarity or people’s rights.” Donnelly, *Universal Human Rights* (2013), 235.

¹⁰⁵ Donnelly presents a variety of “single-issue” human rights regimes, some of which predate the UN, in roughly chronological order as follows: minority rights, the slave trade and slavery, worker’s rights, genocide and crimes against humanity, racial discrimination, torture, women’s rights, children’s rights, rights of people with disabilities and rights of indigenous peoples. Donnelly, *Universal Human Rights* (2013), 179-190.

justice involving nonhuman animals.”¹⁰⁶ Nonhuman animals “also have capabilities and entitlements to develop them,” but those rights are not human and, therefore, are not covered in human rights discourse or by human rights instruments.¹⁰⁷

Also obscured are important distinctions that relate to the specifically *human* aspect of rights discourse.¹⁰⁸ Nussbaum argues that people differ on what is the basis of a human rights claim, pointing out that “rationality, sentience, or mere life have all had their defenders.” From her own perspective, the basis of a rights claim is “a person’s existence as a human being... the very birth of a person into the human community.”¹⁰⁹ The meaning of this proposed basis hinges significantly, however, on certain key factors.¹¹⁰ Nussbaum’s capabilities approach includes both a minimum threshold for what counts as *actual* human living (the central human capabilities) and a political aim that prioritizes the cultivation of *really* human living (developing and exercising the capabilities in order to actively shape one’s own existence as much as possible). One critical requirement for counting as human, then, is registering above the minimum threshold set by the central human capabilities and another is actively striving to shape one’s life through their development and exercise. To these can be added another two factors which are underscored in Nussbaum’s account of the implications of “the very birth of a person into the human community.” First, although Nussbaum distinguishes between fetal life and the two cases where “only sentiment” can cause one to be counted as a human being (i.e., being in a persistent vegetative state or being born anencephalic), she does not refuse “all moral status to

¹⁰⁶ FJ, 21-22, 325-407.

¹⁰⁷ Morsink, *International Human Rights*, 172.

¹⁰⁸ Johannes Morsink lauds Nussbaum’s capabilities approach for providing “us a clear way of saying something more about the adjective ‘human’ in the clause ‘human rights’.” She is thereby thought to address the problem that most books on human rights “tell us a great deal about what a *right* is... but they frequently fail to tell us about the import of the adjective *human* in the juxtaposition of these two words.” Morsink, *International Human Rights*, 172.

¹⁰⁹ FJ, 285.

¹¹⁰ See Section I of the present chapter.

the fetus” but recognizes it as “possessing a type of human dignity.” That dignity is, however, “dependent and merely potential” and therefore “not directly commensurable with that of independent [post-birth] human beings.”¹¹¹ Second, it is through birth into the human community that one begins to function in a truly human way as a social creature “who finds fulfillment in relation to others.”¹¹² Bringing these four factors together, an aspect of the anthropology at work in Nussbaum’s capabilities theory is summed up well with her paraphrase of Aristotle’s account of human being in *Nicomachean Ethics*: “Human beings want to live together, and they want to live together well, which they understand to include living in accordance with justice.”¹¹³ For Nussbaum, possessing basic capabilities and striving to develop and exercise them is characteristic of human beings living together independently in society. Outside of birth into the human community understood in such terms (i.e., the birth of a social creature striving to live well), even the most basic rights claim – the claim to life itself – is unjustifiable under the capabilities approach.¹¹⁴

Nicholas Wolterstorff has recently offered a moral anthropology grounded in a passive reception of dignity that contrasts with Nussbaum’s focus on active striving as the foundation for human flourishing. Wolterstorff points to the theological notion of *imago dei* (bearing the image of God) as the basis of a theistic grounding for human rights.¹¹⁵ The relevance of this concept to

¹¹¹ Dixon and Nussbaum, “Abortion,” 6. Nussbaum and Dixon add: “Prior to the viability of the fetus *ex utero*, the continued existence of the fetus as a being entitled to human dignity is entirely contingent on the provision of affirmative support by a woman.” Dixon and Nussbaum, “Abortion,” 7.

¹¹² FJ, 85.

¹¹³ FJ, 86, cf. Aristotle, EN, IX.9, 1169b17-23.

¹¹⁴ Nussbaum and Dixon argue that “a fetus cannot be said to have a ‘right to life’ unless, from a normative perspective, a woman is also under a corresponding duty to provide [...] affirmative support. In a liberal society which prizes individual autonomy, there will also be few circumstances in which it is legitimate – from the standpoint of notions of equal justice – to impose such a duty.” Dixon and Nussbaum, “Abortion,” 7.

¹¹⁵ Wolterstorff defines the *imago dei* in terms of a theology of human nature. To bear the image of God is, for him, to possess a nature “such that the mature and properly formed possessors of that nature resemble God with respect to their capacities for exercising dominion” in this world. Wolterstorff, *Justice*, 350. There is a theological debate over this issue which Wolterstorff himself only points to in a minimal way. See Nicholas Wolterstorff, *Justice: Rights*

Abrahamic religious traditions rests on its scriptural grounding in Genesis 1:26 (“Then God said, ‘Let us make human kind in our image, according to our likeness; and let them have dominion over... the earth’”) and Psalm 8:5-8 (“Yet you have made them a little lower than God, and crowned them with glory and honor”).¹¹⁶ Significantly, appeal to this basis is found in John Locke who, in *The Second Treatise of Government*, explains:

The state of nature has a law of nature to govern it... [that] teaches all mankind who will consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. For men being all the workmanship of one omnipotent and infinitely wise maker, all the servants of one sovereign master, sent into the world by his order and about his business, they are his property whose workmanship they are, made to last during his, not one another’s, pleasure. And being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us that may authorize us to destroy one another, as if we were made for one another’s uses, as the inferior ranks of creatures are for ours.¹¹⁷

Adding to this argument for grounding rights in the *imago dei*, Locke adds: “Everyone... ought he, as much as he can, to preserve the rest of mankind, and may not, unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, liberty, health, limb or good of another.”¹¹⁸ Interestingly, Locke’s own *imago dei* argument has at least some tentative resonance with Nussbaum’s capabilities approach. While critical of the hierarchical, chauvinistic, and self-interested aspects of his political thought, Nussbaum nevertheless finds a grain of common ground with Locke on the idea that human society is composed of those “seeking a life commensurate with human dignity.”¹¹⁹

and Wrongs (Princeton, NJ: Princeton University Press, 2008), 342-347. That debate is well beyond the scope of this project.

¹¹⁶ Wolterstorff also points to Genesis 9:6. Wolterstorff, *Justice*, 342.

¹¹⁷ John Locke, *The Second Treatise of Government*” in *John Locke: Political Writings*, ed. by David Wootton (Indianapolis, IN: Hackett Publishing, 2003), II.6 (p.264).

¹¹⁸ Locke, *Second Treatise*,” II.6 (p.264).

¹¹⁹ FJ, 44, cf. 41-45.

Wolterstorff, however, rejects such an interpretation of the *imago dei* as a basis for human rights and he does so for the somewhat Nussbaumian reason that “a good many human beings do not have the capacity necessary for exercising dominion.” He explains further:

Those who are severely impaired mentally from birth never had [those capacities]; Alzheimer’s patients no longer possess them. Such human beings neither resemble God with respect to possessing those capacities nor can they implement the divine mandate or blessing by employing those capacities. They possess neither the dignity of bearing the image of God... nor the dignity of being recipients of the divine mandate.¹²⁰

Without abandoning the idea, Wolterstorff argues that being made in the image and likeness of God is not, in itself, a strong enough basis. This leads him to a very non-Nussbaumian conclusion: “What we need,” he claims, “for a theistic grounding of natural human rights, is some worth-imparting relation of human beings to God that does not in any way involve a reference to human capacities.” He argues that such a relation is found in the condition of being loved by God: “being loved by God gives a human being great worth. And if God loves equally and permanently each and every creature who bears the *imago dei*, then the relational property of being loved by God is what we have been looking for.”¹²¹ Furthermore, “if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights are grounded in that love; they inhere in the bestowed worth that supervenes on being thus loved.”¹²² He summarizes the point as follows:

My own answer to [the question of why one has a right to certain ways of being treated that would be a good in one’s life] is that rights are grounded in the worth, the excellence, the estimability, of the rights-bearer. To wrong a person is to treat her in a way that does not befit her worth—in a way that would only befit someone who did not have that worth. We could put it like this: rights are what respect for worth requires.¹²³

¹²⁰ Wolterstorff, *Justice*, 349. See also Wolterstorff, “Christianity and Human Rights,” 50.

¹²¹ Wolterstorff, *Justice*, 352-353.

¹²² Wolterstorff, *Justice*, 360.

¹²³ Wolterstorff, “Christianity and Human Rights,” 44-45.

In brief, Wolterstorff argues for a theistic grounding of rights to be based in the *relationship* of human beings to God as those who bear his image, not in “*resembling* God with respect to the capacities presupposed by this relationship” (emphasis added).¹²⁴ Thus, although Nussbaum and Wolterstorff end up in a similar place (i.e., interpretations of human dignity), their grounding of human rights – she in agency and he in bestowed worth – lay on entirely different paths to it.

While other perspectives could be considered,¹²⁵ the examples of Nussbaum and Wolterstorff suffice to make the point that the *human* side of the idea of human rights is obfuscated, at minimum, by differing ideas of why one counts as a human being (i.e., rationality, sentience, presence of mere life, the *imago dei*, etc.) and differing ways of characterizing one’s dignity and worth as a being human (i.e., agency, bestowed love or relationality, etc.). In light of these distinctions within the concept of rights and the basic differences in the types of anthropology that may be at work in any given approach, one begins to understand why Nussbaum believes the idea of human rights to lack in clarity.

The validity of that criticism is further revealed when one considers Jack Donnelly’s description of human rights as “literally, the rights that one has simply because one is a human being.”¹²⁶ On one hand, the brilliance of this tautology is that it locates human beings as subjects of justice even if or when they are not, technically speaking, political subjects (i.e., citizens) with recourse of some kind provided by their own political community (e.g., the state). In short, it acknowledges the right of the human being to have rights even when all else has failed them.¹²⁷ On the other hand, Donnelly’s tautological description raises a serious practical question about

¹²⁴ Wolterstorff, *Justice*, 347.

¹²⁵ Even if Wolterstorff is taken as a theological counter to Nussbaum, Oliver O’Donovan’s counter to Wolterstorff demonstrates that the theological debate over rights is itself not closed. See O’Donovan, “Language,” 193-207.

¹²⁶ Donnelly, *Universal Human Rights* (1989), 10; cf. 7. A variation on this description is found in Martin’s emphasis on *natural* human rights. Martin, 59.

¹²⁷ Michael Ignatieff, *The Rights Revolution* (Toronto, ON: Anansi Press, 2000), 36.

the inviolability of human rights as such. Hannah Arendt, writing at the time the UDHR was being drafted and while the traumatic memory of atrocities committed during two world wars was fresh, offers a rather pessimistic take on human rights. In *The Origins of Totalitarianism* (1951), Arendt claims that those people made “stateless” by the Great War and its reverberations became convinced that “loss of national rights was identical to loss of human rights, that the former inevitably entailed the latter.”¹²⁸ She then comments:

The conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships – except that they were still human. The world found nothing sacred in the abstract nakedness of being human.¹²⁹

A human being, lacking in all but his or her naked humanity, should be the ideal bearer of human rights if such rights are truly “inborn and inalienable.”¹³⁰ Yet, as Arendt explains, the opposite proved to be true: “It seems that a [human being] who is nothing but a [human being] has lost the very qualities which make it possible for other people to treat him as a fellow-[human being].”¹³¹ So, the idea of human rights seems to be one that flashes with brilliance even while generating intractable dilemmas, further clouding imprecision with incongruity.

However, despite critiquing human rights for a lack of clarity, Nussbaum maintains that there is a strong correlation between her list of central human capabilities and international discourse on it today.¹³² In fact, she considers her framework of capabilities to be a “species of

¹²⁸ Hannah Arendt, *The Origins of Totalitarianism* (New York: Harcourt, 1966), 292, cf. 267. Moreover, as the establishing of the State of Israel demonstrated, the restoration of human rights requires the “restoration or establishment of national rights.” Arendt, *Totalitarianism*, 299.

¹²⁹ Arendt, *Totalitarianism*, 299.

¹³⁰ Ian Linden refers to the dilemma Arendt uncovers as “the paradox of the ‘ideal bearer of human rights’, the human being with only his/her ‘bare life’, as pre-eminently the non-citizens without rights.” Ian Linden, “Border Crossings: Secular Versus Religious Arguments in the Public Domain” in *New Media and Communication Across Religions and Cultures*, ed. by Rukhsana Ahmed and Isaac Nahon-Serfaty (Hershey, PA: IGI Global, 2014), 24-25.

¹³¹ Arendt, *Totalitarianism*, 300.

¹³² Nussbaum, “Capabilities and Human Rights,” 276-277; Nussbaum, “Capabilities as Fundamental Entitlements,” 36-37; WHD, 97; FJ, 243, 284; CC, 62.

the human rights approach”¹³³ for at least three reasons. First, for the universality and broad cross-cultural agreement it can gain as the object of an overlapping consensus.¹³⁴ In this way, Nussbaum’s theory, like international human rights paradigms, emphasizes not only the global acceptability of the norms it articulates, but also a built-in respect for the norm of pluralism.¹³⁵ Second, there exist definite correlates between the concept of capabilities and the first generation rights of political and civil liberties, and the second generation rights of economic and social entitlements.¹³⁶ Capabilities, Nussbaum contends, “cover the terrain” of such rights. This is apparent from similarities between her list and the UN’s 1966 International Covenant on Civil and Political Rights (ICCPR) and its International Covenant on Economic, Social and Cultural Rights (ICESCR).¹³⁷ For instance, the UN Covenants stipulate rights to such things as minority group entitlements (ICCPR, Art. 27), specific provisions for religious freedom (ICCPR, Art. 18), and the promotion of rights to work, fair wages, union membership and an adequate standard of living (ICESCR, Articles 6, 7, 8, and 11). These entitlements overlap rather neatly with the capabilities of “Affiliation,” “Senses, Imagination and Thought,” and “Control over One’s [political and material] Environment” that Nussbaum includes in her list (central capabilities 4,

¹³³ FJ, 284. Referring to it as a “species” aligns capabilities with human rights while maintaining that the two are “not the exact same thing.” Morsink, *International Human Rights*, 172.

¹³⁴ FJ, 78; CC, 62.

¹³⁵ This is especially evident in capability 10.a on Nussbaum’s list. It protects control over one’s political environment. See FJ, 77. Nussbaum outlines six components of the respect for pluralism that is evident in the capabilities approach: 1) its open-ended nature; 2) its generality; 3) its standing as a partial and morally freestanding theory; 4) its focus on capabilities and not functioning; 5) its emphasis on liberties that protect pluralism; and 6) the strong separation between justifying a capabilities approach and taking up its implementation in a way that disrespects state sovereignty. FJ, 78-80.

¹³⁶ FJ, 284.

¹³⁷ FJ, 76-78. For the text of the Covenants, see UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966), United Nations, Treaty Series, vol. 999, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 11 November 2014] (subsequent references to this document are cited as ICCPR) and UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966), United Nations, Treaty Series, vol. 993, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 22 May 2014] (subsequent references to this document are cited as ICESCR).

7, and 10, respectively).¹³⁸ A third correlation made between her list and international human rights is perhaps the most obvious. Nussbaum perceives her list of ten central human capabilities to be a species of human rights because of the role it plays as an account of fundamental entitlements germane to global discourse on justice.¹³⁹ In apparent agreement, Morsink contends that “we can and should read the [UDHR] as saying that all human beings have equal rights to develop the... ten ‘central human capabilities’ mentioned by Nussbaum.”¹⁴⁰ Her foray into children’s rights is an example of her capabilities theory functioning similarly.¹⁴¹

That said, Nussbaum does not view her theory as a mere duplication of any standard human rights model. Instead, the capabilities approach is thought to supplement human rights discourse through the precision it has to offer.¹⁴² That precision becomes perceptible, Nussbaum submits, in the way her approach would ground rights claims in “bare human birth and minimal agency.” Doing so, she maintains, would allow for human rights to be more broadly applied to each and every individual across society.¹⁴³ Furthermore, in places where the language of rights is ambiguous or imprecise, Nussbaum’s capabilities model stands as both a beacon and a benchmark in the doing of justice. “The account of central capabilities,” she explains, “has the advantage... of taking clear positions on [...] disputed issues, while stating clearly what the motivating concerns are and what the goal is.”¹⁴⁴ The disputes Nussbaum has in mind relate to

¹³⁸ For a dialogue on the articles listed from the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, see Banchoff, 27. Banchoff’s comments about the two UN Covenants are unrelated to Nussbaum’s capabilities approach. See the Appendix to this dissertation for the capabilities in question. Ballet, Comim, and Biggeri agree, claiming it to be true “that many basic capabilities, as they appear in Nussbaum’s list, overlap with core human rights, such as those concerning political liberties and free choice of occupation (among others).” Ballet, Comim, and Biggeri, “Children’s Agency,” 39.

¹³⁹ FJ, 284.

¹⁴⁰ Morsink, *International Human Rights*, 169, cf. 169-174.

¹⁴¹ CRCA, 552-553.

¹⁴² FJ, 284; CC, 63.

¹⁴³ CC, 63.

¹⁴⁴ WHD, 97.

such matters as the basis for making rights claims, the nature of human rights themselves, and the relationship between entitlements and duties.

Most salient to the trajectory of this dissertation, however, is the question of whether human rights belong to individuals only or whether they can also belong to groups.¹⁴⁵ Although the UDHR is well known to recognize and protect individual human rights, especially through Articles 3-11,¹⁴⁶ Donnelly argues that such rights are a “social practice” and are “characteristically exercised, and can only be enjoyed, through collective action.”¹⁴⁷ This collective action is protected by reference to civil and political rights (Articles 12-17) and economic, social and cultural rights (Articles 18-21) in the UDHR,¹⁴⁸ the two generations then instrumentalized as legal forms in the two 1966 Covenants. Donnelly’s claim is not meant to affirm *group* rights as *human* rights.¹⁴⁹ It simply grants that the UDHR “envision[s] individuals deeply enmeshed in ‘natural’ and voluntary groups ranging from families through the state.”¹⁵⁰

Then again, the UDHR could be perceived to both embody and resist Donnelly’s interpretation by recognizing the family as “the natural and fundamental group unit of society” that is entitled as such to “protection by society and the State” (Art. 16.3). This assertion certainly addresses the enmeshing Donnelly mentions, but it also indicates that family rights are distinct from the “workers” and “minority” rights with which he associates them, and also that the family is an exception to his general rule that group rights are not human rights.¹⁵¹ It is, after

¹⁴⁵ WHD, 97.

¹⁴⁶ Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001), 179-180; Donnelly, *Universal Human Rights* (2013), 29-31.

¹⁴⁷ Donnelly, *Universal Human Rights* (2013), 31.

¹⁴⁸ See Glendon, *World*, 181-184.

¹⁴⁹ Donnelly is generally against the idea that group rights could be considered *human* rights in any strict sense (the interesting potential exception being indigenous peoples). See Donnelly, *Universal Human Rights* (2013), 30, 45-54.

¹⁵⁰ Donnelly, *Universal Human Rights* (2013), 31.

¹⁵¹ Donnelly, *Universal Human Rights* (2013), 29-31.

all, precisely *as a group unit* that the family is singled out for protection in the UDHR.¹⁵² Also, Article 16.3 undeniably recognizes the entitlement of the family to protection as a group in a way that is perfectly tailored to Morsink's definition of a right as "a justified claim that can activate the duties of others."¹⁵³ Furthermore, the CRC lends weight to this interpretation when, in Article 18, it unflinchingly brings the individual child together with the family, wedding her "best interests" (initially stated in Article 3) explicitly to the family and leaving no suggestion of incongruity between the social group and the individual child. The article states: "Parents, or as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern."

The claim being pursued here is a modest one. This is not an argument that all group rights are human rights, nor a more particular argument that only certain restrictive forms of the family are entitled to state protection and provision. It is merely argued at this point that no obvious or presumed conflict exists between recognition of the family as a group unit entitled to protection and the way children's rights and interests are addressed in international human rights instruments stemming from the UDHR, and perhaps most notably in the CRC. The question of how to reconcile the family group and the individual child in those instruments remains, at the very least, an open one (although Chapter's 4 and 5 of this dissertation will argue that the family holds more significant and definite meaning for children's human rights).

Nussbaum's capabilities approach is entirely uncomfortable with the idea of recognizing rights related to the family as a group unit. Putting things in perhaps the best light possible from a capabilities perspective, Zoë Clark and Holger Ziegler claim that "the status of children as holders of rights for which they can make a claim within the public domain is still ambiguous in

¹⁵² The CRC adds "assistance" to protection, but does so in its Preamble as more of a moral presupposition.

¹⁵³ Morsink, *International Human Rights*, 172.

the [CRC].”¹⁵⁴ Put in Nussbaum and Dixon’s terms, children’s rights are perceived to be another “frontier of justice” in which children’s agency is under-theorized and, as a result, their “special vulnerability” is left largely unaddressed.¹⁵⁵ That special vulnerability, as their essay underlines, is characterized by children’s unique economic and decision-making dependency on their parents.¹⁵⁶ As part of their own comment on CRC Article 18, Nussbaum and Dixon counter the family-centric interpretation proposed in the preceding paragraph to emphasize the state’s responsibility to insure children “against the risk that their parents (or legal guardian) will turn out to be unable, or unwilling, to take reasonable steps to protect their capabilities.” Although “the usual case” is one in which parents are “entrusted with primary responsibility for protecting and developing the capabilities of their children,” Nussbaum’s theory “does not say that children have to live with parental choices that in fact compromise their development in health, education, and other areas.”¹⁵⁷ That argument is primarily an adaptation of Nussbaum’s chapter on the family in *Women and Human Development*. There she refers to children as “captives” to the family.¹⁵⁸ However, Nussbaum’s collaborative article with Dixon makes no mention of the family and emphasizes instead the existence of a power differential between children and their parents and the premium that the capabilities approach places on agency.

Chapter 3 will take up Nussbaum’s view of the family in greater detail, but what has been stated in brief above supports the observation that her capabilities approach takes a decisive stance on the issue of groups. Groups are a problem for at least three reasons: first, capabilities adhere to individuals and specifically not to groups;¹⁵⁹ second, the principle of treating each

¹⁵⁴ Clark and Ziegler, 213-214.

¹⁵⁵ CRCA, 552-553, 559-560, 593.

¹⁵⁶ CRCA, 575-578, 593.

¹⁵⁷ CRCA, 576.

¹⁵⁸ WHD, 274.

¹⁵⁹ WHD, 188.

person as an end entails that the good of the group is unacceptable if it does not do good for each individual singularly;¹⁶⁰ and, third, group purposes are irrelevant to the political goal of promoting capability development and exercise in the individual.¹⁶¹ Applied to human rights agreements like the UDHR and the CRC, Nussbaum's capabilities framework insists that the individual and his or her agency is central, at childhood no less than any other life stage.¹⁶² Highlighting the problem of the family, Clark and Ziegler add that children will only be taken seriously as subjects with rights if they are "not understood as objects of altruism and charity."¹⁶³ Under the capabilities approach, therefore, it is the individual's pursuit of opportunities to choose and act in the shaping of his or her life that is perceived as vital to a life worthy of being called human. Group belonging – even, and perhaps especially, familial belonging – cannot be allowed to obscure any human being's interest in flourishing.

In sum, the connection Nussbaum makes between capabilities and human rights is virtually inescapable given the ubiquitous character of human rights discourse. Being ever-present does not, in Nussbaum's view, ensure clarity. For that reason, her capabilities approach is advanced as a foundational paradigm for critical reflection on both the concept of rights *and* on whatever anthropology will inform it. Furthermore, she offers her theory as a framework for human rights discourse that holds the potential to make up for a serious lack in precision and decisiveness. Nussbaum intends by the capabilities approach to provide definite answers to questions that many human rights approaches allegedly leave unsettled, like the relationship between the individual and the family unit in both the UDHR and CRC. She wants those kinds of questions answered in a way that favors individual human flourishing. According to

¹⁶⁰ WHD, 188.

¹⁶¹ WHD, 188-189.

¹⁶² CRCA, 559-560.

¹⁶³ Clark and Ziegler, 213.

Nussbaum, “an important contribution of the [capabilities approach] is that it emphasizes that rights are not fully secured unless the related capabilities are actually present: otherwise rights are mere words on paper.”¹⁶⁴ From a capabilities approach perspective, the idea of human rights would lose its moral meaning if it did not result in the development and exercise of agency.

IV. Capabilities and Human Flourishing

Capabilities and human rights approaches share the conviction that if people are being treated justly, then actual human flourishing will be the result. Donnelly draws a connection between rights and flourishing by claiming that the UDHR, “like any list of human rights, specifies minimum conditions for a dignified life, a life worthy of a human being.”¹⁶⁵ While reflecting on the UDHR a decade after its adoption, Charles Malik, a Lebanese diplomat and scholar who served as rapporteur of the Human Rights Commission during its drafting,¹⁶⁶ referred to that document in similar terms, namely as “the answer to the question, How [*sic*] does the world conceive of man’s essential worth and dignity at the middle of the twentieth century?”¹⁶⁷ Malik, like Nussbaum, is deeply concerned with the freedom of individuals to choose and act.¹⁶⁸ Neither one would understand the dignity component of human rights to be fulfilled without the exercise of choice being robustly promoted and carefully protected. The central aim of Nussbaum’s theory is, after all, located in the securing of conditions necessary to the leading of a life

¹⁶⁴ CRCA, 561. Bonvin and Stoecklin refer to this as concern for “the individual and social conversion (or conversely, obstruction) factors facilitating or impeding the transformation of rights into capabilities.” Bonvin and Stoecklin, “Introduction,” 2. Elsewhere they argue that “children’s rights can be seen as formal resources or entitlements that need to be transformed into real rights or capabilities.” Stoecklin and Bonvin, “Capability Approach,” 66. See also Ballet, Comim, and Biggeri, “Children’s Agency,” 38.

¹⁶⁵ Donnelly, *Universal Human Rights* (1989), 13.

¹⁶⁶ The rapporteur summarized and prepared official reports on the committee’s work. Glendon, *World*, 33.

¹⁶⁷ Charles H. Malik, *The Challenge of Human Rights: Charles Malik and the Universal Declaration*, ed. by Habib C. Malik (Oxford, UK: Charles Malik Foundation, 2000), 132.

¹⁶⁸ Malik, 28-29.

characterized by self-determining agency, what she frequently refers to as a life worthy of being called human.¹⁶⁹

Focus on “a life worthy of human being” signals much more than the Hobbesian hope of avoiding a conflict-filled existence that is “solitary, nasty, brutish, and short” by trusting the power of the state to ensure life and whatever economic, social and cultural goods (among others) might be enjoyed with its effective protection.¹⁷⁰ The UDHR itself opens in its Preamble with the words: “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹⁷¹ The UN Declaration was, of course, composed in no small part as a response to the horrors of two World Wars and the attempted genocide of the Jewish people.¹⁷² Morsink maintains that following the Holocaust, “Article 1 of the Declaration sounds like a trumpet call of victory after battle” by announcing that “all human beings are born free and equal in dignity and rights.”¹⁷³ However, countering the dehumanizing actions of the National Socialists in Germany required more than the mere protection of dignity. It also entailed outlining provisions for that dignity to be freely and equally enjoyed by all. Morsink remarks on how the UDHR served this end beyond Article 1:

If we are all born with equal dignity and rights and if no one is by nature, birth, or divine appointment to rule over another, that can only lead to the equal participation in government of Article 21’s paragraph 1 – which must include the rights to freedom of

¹⁶⁹ WHD, 5, 72.

¹⁷⁰ Thomas Hobbes, *Hobbes: Leviathan*, ed. by Edwin Curley (Indianapolis, IN: Hackett Publishing, 1994), XIII.8, 9; cf. A. Belden Fields, *Rethinking Human Rights for the New Millennium* (New York: Palgrave Macmillan, 2003), 12-13.

¹⁷¹ See UDHR.

¹⁷² Donnelly writes: “The 1945 defeat of Nazi Germany ushered in the global human rights regime. Revulsion at the array of human rights abuses that came to be summarized in the term ‘Nazi’, combined with general postwar optimism, made it *relatively* easy to reach general agreement on a set of international principles against gross and persistent systematic violations of basic rights...” (author’s emphasis). Donnelly, *Universal Human Rights* (2013), 170.

¹⁷³ Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia, PA: University of Pennsylvania Press, 1999), 38.

thought, expression, and association (Articles 18, 19, 20) – to offices that are open to all of 21’s paragraph 2 and to [the democratic voting rights] of 21’s paragraph 3. Anything less would be an erosion of the fundamental equality laid down in the first two articles of the Declaration.¹⁷⁴

John Witte adds that both the International Covenants follow the UDHR by taking as their “starting point ‘the inherent dignity’ and ‘the equal and inalienable rights of all members of the human family’, and the belief that all such ‘rights derive from the inherent dignity of the human person’.”¹⁷⁵ To this he adds that the concept of dignity plainly entails more than protection against oppression and persecution. It also speaks positively to what resources might be secured to human beings seeking to lead what they consider to be a good life.¹⁷⁶ Securing the capacity for living a life worthy of being called human demands much by way of interpretation, but the foundational reference to dignity sets a positive concern for human flourishing as basic to the idea of human rights.

Nussbaum’s capabilities approach is similarly concerned to secure something more than negative protections against misery. While articulating the heart of her theory in *Women and Human Development*, she details just how central the human person is to the capabilities approach and how grounded it is in an Aristotelian viewpoint:

For we see a human being as having worth as an end, a kind of awe-inspiring something that makes it horrible to see this person beaten down by the currents of chance – and wonderful, at the same time, to witness the way in which chance has not completely eclipsed the humanity of the person. As Aristotle puts it, “the noble shines through.” Such responses provide us with strong incentives for protecting that in persons that fills us with awe.¹⁷⁷

¹⁷⁴ Morsink, *Universal Declaration*, 69.

¹⁷⁵ Witte, *God’s Joust, God’s Justice*, 44-45. See ICESCR and ICCPR.

¹⁷⁶ Witte, *God’s Joust, God’s Justice*, 47-48. Summarizing his point, Witte states: “Fairness commands as broad a definition of human dignity as possible, so that no legitimate human good is excluded and no legitimate human rights claim is foreclosed. But prudence counsels a narrower definition of human dignity, so that not every good becomes part of human dignity, and not every aspiration becomes subject to human rights vindication.” Witte, *God’s Joust, God’s Justice*, 48.

¹⁷⁷ WHD, 73.

A straight line can be drawn from the final sentence quoted above to the moral anthropology developed in *The Fragility of Goodness*. The phrase “that in persons that fills us with awe” is easily connected to the active component of the human being that could be thought of, according to Nussbaum, “as ‘divine, immortal, unitary, indissoluble, ever self-consistent and invariable.’”¹⁷⁸ John Alexander remarks that “the concept of capabilities and its moral and political implications remain only in the background” to that earlier work. Even so, it is perhaps more important to recognize that while Nussbaum’s thought has undergone “refinement and changes” since the publication of *The Fragility of Goodness*, developments that are evident in *Women and Human Development* and *Frontiers of Justice*,¹⁷⁹ her fundamental interest in human flourishing has remained constant. Nussbaum has, right from her earliest publications, been deeply concerned with the individual’s active and animalistic pursuit of opportunities to shape his or her own life through the development and exercise of deliberative choice.¹⁸⁰

It is not surprising that Nussbaum turns to Aristotle to provide the classical conceptual basis for the notion of human flourishing that informs her theory. She finds the foundational meaning of this term in the ancient Greek concept of *eudaimonia*. As Nussbaum employs this concept, she means by it more than the common but allegedly misleading English translation of “happiness” that has connected the word to various forms of Utilitarian thought.¹⁸¹ Instead, she uses the term to refer to living well as a human being, particularly living in a way that is worthy of one’s humanity. Nussbaum explains the concept with more precision in an early footnote in *The Fragility of Goodness*:

¹⁷⁸ FG, 2.

¹⁷⁹ Alexander, 63.

¹⁸⁰ See Nussbaum, *Aristotle’s De Motu Animalium*, xvii, 269, 380 and FG, 282-289.

¹⁸¹ UT, 32. Nussbaum claims that the English use of the word, spelled out as “eudaimonistic,” has come to be associated with the idea that “the supreme good is happiness or pleasure.” She wants to avoid this definition and, therefore, stays with a more direct translation of the ancient Greek, *eudaimonia*, in order to infer the idea of pluralism which maintains that there are a variety of ways to conceptualize a good human life. UT, 31n23.

To the Greeks, *eudaimonia* means something like ‘living a good life for a human being’; or... ‘human flourishing’. Aristotle tells us that it is equivalent, in ordinary discourse, to ‘living well and doing well’. Most Greeks would understand *eudaimonia* to be something essentially active, of which praiseworthy activities are not just productive means, but actual constituent parts... A very common position would be Aristotle’s, that *eudaimonia* consists in activity according to excellence(s).¹⁸²

The basic notion, Nussbaum explains, speaks to living in a way that not only presumes activity, but presumes excellent or valued activity.¹⁸³ “[M]ost people virtually agree... that living well and doing well are the same as being [*eudaimōn*].”¹⁸⁴ Sen’s reading of Aristotle yields the same interpretation.¹⁸⁵ Alexander, in his comment on the capabilities approach, similarly observes that *eudaimonia* entails for Aristotle (according to his interpretation of the way it is sketched out in Book I of *Nicomachean Ethics*) the pursuit of “worthwhile *activities* of excellence and character rather than [the] pleasurable amusements” of a Utilitarian interpretation.¹⁸⁶ The key point is a simple one. Just as “[t]hat which we call a rose, by any other word would smell as sweet,”¹⁸⁷ so *eudaimonia*, however it is translated – flourishing, happiness, living-well, or with reference to the worth or dignity of human being, etc. – is linked by Nussbaum to a life of excellent activity.¹⁸⁸

That is the more objective part of human flourishing under the capabilities approach. The modern concept of *eudaimonia* is, however, understood to have a highly subjective dimension. As Taylor explains, “Every person, and every society, lives with or by some conception(s) of what human flourishing is: what constitutes a fulfilled life? what makes life really worth

¹⁸² FG, 6n†.

¹⁸³ Nussbaum claims that *eudaimonia* “consists in activity according to excellence.” FG, 329, 334 cf. 6n† and 20.

¹⁸⁴ Aristotle, EN, I.4, 1095a17-20. “Happiness, *eudaimonia*” in Terence Irwin, ed., *Aristotle: Nicomachean Ethics*, Second ed. (Indianapolis, IN: Hackett Publishing, 1999), 333.

¹⁸⁵ I.e., as “valued activities.” Sen, “Capability and Well-Being” 47-48.

¹⁸⁶ Alexander, 1.

¹⁸⁷ William Shakespeare, *Romeo and Juliet* ed. by René Weis (London, UK: Arden Shakespeare, 2012), II.2.40-45.

¹⁸⁸ The concept of *eudaimonia* should be understood as the hermeneutical framework whenever Nussbaum makes reference to “flourishing.” See UT, 31.

living?”¹⁸⁹ By speaking of human flourishing as *eudaimonia*, Nussbaum is similarly referring to a person’s own conception of what a complete or full human life entails. She explains in

Upheavals of Thought:

In a eudaimonistic ethical theory, the central question asked by a person is, “How should a human being live?” The answer to that question is the person’s conception of *eudaimonia*, or human flourishing, a complete human life. A conception of *eudaimonia* is taken to be inclusive of all to which the agent ascribes intrinsic value [...].¹⁹⁰

The answer to the question of how a human being should live is, therefore, as subjective as the concept itself. It requires that an evaluation of human flourishing be made “from the agents own personal viewpoint” which, especially at childhood, should be understood as an evolving conception of a worthwhile life.¹⁹¹

As a result, Nussbaum follows her Aristotelian interpretation of ancient Greek notions of flourishing (i.e., *eudaimonia*) to support the pluralist idea that there are as many distinct conceptions of what a good life entails as one cares to propose.¹⁹² Even so, human activity represents a common element shared between these conceptions. The result is that Nussbaum’s capabilities approach reflects Aristotle’s assertion that everyone desires a flourishing human life (*eudaimonia*) and that such a life is an active one.¹⁹³ Otherwise, both agree that there is little agreement on what flourishing actually means.

¹⁸⁹ Charles Taylor, *A Secular Age* (Cambridge, MA: Belknap, 2007), 16.

¹⁹⁰ UT, 31-32.

¹⁹¹ PE, 11, 219, 399; cf. UT, Ch.1. The emphasis on childhood here is mine. It is supportable, though, by Nussbaum’s work on emotions at infancy. See UT, Ch.4. The subjectivity of Nussbaum’s eudaimonistic approach to human flourishing is especially evident in her work on emotions. HH, 51. That work will be taken up more directly in Chapter 2.

¹⁹² UT, 31n23.

¹⁹³ “As far as its name goes, most people virtually agree; for both the many and the cultivated call it happiness, and they suppose that living well and doing well are the same as being happy. But they disagree about what happiness is, and the many do not give the same answer as the wise.” Aristotle, EN, I.4, 1095a17-22.

It is this pluralist aspect that identifies Nussbaum's theory so strongly with political liberalism. Rawls remains the contemporary champion of that theory,¹⁹⁴ and his version is built upon the foundation of the social contract tradition traceable to Hobbes, Kant and Rousseau.¹⁹⁵ Rawls was interested in questions about the possibility for political stability in a pluralist society of "free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines."¹⁹⁶ Put another way, he theorized for a society in which a variety of conflicting notions about human flourishing could successfully and peacefully be employed by citizens and the distinct groups to which they belong. Consequently, the Rawlsian version of political liberalism refers to a freestanding conception of justice that might become the object of agreement between a plurality of free and equal citizens who cooperate with one another for political purposes despite their differing and potentially irreconcilable ideas of what a good life entails.¹⁹⁷

Nussbaum, while admiring Rawls and drawing upon his work, nevertheless maintains that he tells a defective story of social cooperation by excluding from his narrative some of societies more vulnerable sectors,¹⁹⁸ significant among them being children and persons with

¹⁹⁴ This project begins in earnest for Rawls with *A Theory of Justice*. See John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap, 1971), 11.

¹⁹⁵ Rawls explains social contract doctrine as follows: "[T]he guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement [i.e., the social contract]. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established." Rawls, *Theory*, 11.

¹⁹⁶ Rawls, *Political Liberalism*, xxvii, 4, 47; cf. xxxix, xl; John Rawls, "The Idea of Public Reason Revisited" in *John Rawls: Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 588-589.

¹⁹⁷ Rawls, *Political Liberalism*, xxvi, xl, 36, 44. See also John Rawls, "The Idea of an Overlapping Consensus" in *John Rawls: Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 424-425, 446-447 and Rawls, "Public Reason," 573-574. For similar paraphrases of political liberalism see FJ, 6, 70, 153; and Samuel Freeman, *Rawls* (New York: Routledge, 2007), 477-478. A conception of a good life, for Rawls, is building upon ideas of "the meaning, value, and purpose of human life." Rawls, "Overlapping Consensus," 424-425.

¹⁹⁸ FJ, 222-223.

cognitive disabilities of all ages.¹⁹⁹ She aims through her capabilities approach to tell a new story of social cooperation, one in which justice is extended “to all those in the world who ought to be treated justly” and not only those who count for Rawls as both free and equal.²⁰⁰

According to Nussbaum, the purpose of social cooperation is not merely to gain an advantage of some kind for oneself, but to “foster the dignity and well-being of each and every citizen.”²⁰¹ In other words, she wishes for society to be filled with as much flourishing as possible for each and every one of its members. Imagined through the Aristotelian lens of her capabilities approach, Nussbaum’s brand of political liberalism views each member of society to be a separate and non-reducible individual flourishing in his or her own distinctly pursued ways while foundationally remaining a political animal for whom cooperative social life is itself a part of that flourishing. Reimagining political liberalism, therefore, means that Nussbaum attempts to bring the Rawlsian aspect of her political thought under the more dominant Aristotelian influence.²⁰²

All of this leads to a particular interpretation of human flourishing that has already received brief mention. Being human entails, at base, actively striving for opportunities to shape one’s life through the exercise of deliberative choice in a way that, at the very least, does not interfere with similar quests by all others. Recall from the first section of this chapter that the only requirement for the status of human being is “to be the child of human parents and capable of at least some form of active striving.”²⁰³ However, actual human flourishing, living well and enjoying a good human life, is found in the actual shaping of that life. That is the goal for which

¹⁹⁹ Nussbaum takes up the cause of people with disabilities in *Frontiers of Justice* and a subsequent article, “The Capabilities of People with Cognitive Disabilities.” It is worth noting that the examples she draws upon in FJ include children. She takes up childhood as a distinct frontier of justice in CRCA.

²⁰⁰ FJ, 6, 92, 100-101, 414. Cf. CRCA, 593.

²⁰¹ FJ, 202.

²⁰² A convergence between Rawls and Aristotle in Nussbaum’s thought is evident, in part, by the fact that Aristotle’s famous assertion about human beings in *EN* Book XI is quoted as the epigraph to a book dedicated to John Rawls. See FJ, v, xvii.

²⁰³ CC, 24.

the capabilities approach aims. Recall also that really human living is, according to Nussbaum, “shaped throughout by these human powers of practical reason and sociability” to the end of actively shaping one’s own life rather than passively being “pushed around by the world.”²⁰⁴ Again, Nussbaum claims to be “less interested in [the lower] boundary [for what counts as actual human living] (important as it is for medical ethics) than in a higher threshold, the level at which a person’s capability becomes... “truly human,” that is, *worthy* of a human being” (author’s emphasis).²⁰⁵ The key point is that to be human *just is* to resolutely strive for opportunities to actively shape one’s own life through the development of agency and its actual exercise.

However, as will be elaborated more fully in Chapter 2, actually being able to shape one’s life as one deems fit is not guaranteed due to the precarious and contingent nature of worldly existence. We strive for desired objects in the world, objects we deem necessary to a good life, but striving is not the same as acquiring. It is, therefore, as agents striving for opportunities to develop and exercise choice amidst worldly uncertainties that, for Nussbaum, “the noble shines through.” A basic notion of flourishing is, in this way, arguably coterminous with the bare pursuit of agency because living well is rooted in the capacity to struggle for opportunities to act on one’s own deliberate choices.²⁰⁶ Although striving itself does not fill out the full meaning of this concept, it is the base component to leading a good human life from Nussbaum’s perspective.

²⁰⁴ WHD, 72.

²⁰⁵ WHD, 73.

²⁰⁶ FG, 340. WHD, 72-74, 87.

V. Agency and Flourishing at Childhood

What, then, does Nussbaum's account of human flourishing mean for children? It arguably should mean precisely the same thing as it does for anyone else if her ethical question is intended to be universally applied. Nussbaum and Dixon make this very assertion:

The [capabilities approach] begins, then, from a very simple question: What are people really able to do and to be? 'Capabilities' are the answer to that question: people's real opportunities for functioning and choice... Proponents of [this approach] hold that each and every person matters: this is what Nussbaum has called the '*principle of each person as end*.' In other words, it is not enough to secure capabilities to a region, or a group, or even a family. The approach asks how each and every person is doing, and its goal is the empowerment of each. *Children are no exception*: all human beings possess equal and inalienable human dignity, whatever their attainments, talents, or potential, and all are equally entitled to all the capabilities on the list (emphasis added).²⁰⁷

Children, it bears repeating, are "no exception" in Nussbaum's theory. The universality of the ethical question speaks to this. That question is further supported by her theory's basic principle (i.e., treating each person as an end), its political aim (i.e., the promotion of each one's capabilities) and the minimum threshold that the central human capabilities represent. All of this has been the focus of sections I and II in this chapter, and Nussbaum's message is difficult to miss: the capabilities approach is intended to do justice on a global scale to each and every one who has human parents and strives for agency. The relation of the capabilities approach to human rights and to human flourishing, the topics of sections III and IV, articulate a no less universalistic message. In fact, if the capabilities approach as Nussbaum outlines it is designed to accomplish anything, it seems bent on making justice a more universal reality for human beings – indeed for all animal life – than she finds in even the most successful political philosophies (e.g., Rawlsian political liberalism) and the most accepted of ethical paradigms (i.e., international human rights rooted in the UDHR). In fact, it even reaches beyond the human to

²⁰⁷ CRCA, 557.

embrace all sentient beings capable of meaningful striving and agency. In *Frontiers of Justice* Nussbaum boldly asserts the global aspirations of her theory: “The capabilities approach, which begins from an ethically attuned wonder before each form of animal life, offers a model that does justice to the complexity of animal lives and their strivings for flourishing.”²⁰⁸

While allegedly being “no exceptions,” children do complicate this theory and, in particular, Nussbaum’s claim to its universality.²⁰⁹ Children are simply not seen to be equal in agency with their adult counterparts. For adults, it is capabilities and not functionings that form the appropriate political goal because a governmental focus on the former leaves room for the exercise of freedom that a governmental focus on the latter does not.²¹⁰ Children, however, are different in that “requiring certain forms of functioning of them (as in compulsory education [along with health care and age of sexual consent]) is defensible as a necessary prelude to adult capability.”²¹¹ Childhood, furthermore, is understood as a station of life in which one’s interest in obtaining the agency necessary to actively shape a good life at adulthood must be developed in a way that it accounts for that same interest as it is pursued by all others, including one’s parents and other primary caregivers.²¹² Who could argue against the requirement that children be educated, that they receive adequate healthcare, or that they be protected from the possibility of sexual exploitation as part of flourishing in their capacity as social agents striving, as all others, for the development and exercise of their own agentive powers? Yet, as Wall points out, there is a problem with requiring present functionings in children for the sake of protecting and promoting their interest in the future and mature exercise of capability. It is that the child’s

²⁰⁸ FJ, 406-407.

²⁰⁹ WHD, 34-35, 69-70, 105, 106.

²¹⁰ CC, 25-26.

²¹¹ CC, 26; FJ, 172.

²¹² UT, 174-237; cf. CRCA, 567, 571-573, 585.

interests are generally being interpreted without taking account of his or her perspective. Rather, some mature form of agency is the aim, and it is adults who ascribe it to be so and define it as such.²¹³ Nussbaum recognizes this difficulty when she and Dixon write:

The idea of agency has a central role to play in the [capabilities approach]: the [capabilities approach] sees people as striving agents, and in contrast to approaches that aim only at the satisfaction of preferences, it aims at supporting the growth of agency and practical reason. This emphasis on agency... further means that children should be afforded the maximum scope for decisional, freedom *consistent with their actual – or potential – capacity for rational and reasoned forms of choice, or judgment* (emphasis added).²¹⁴

So, while the capabilities approach advocates for as much agency at childhood as possible, the exercise of that agency is tied to an adult capacity for exercising rational and reasoned choice. That capacity in children is perceived by Nussbaum to be an emerging and evolving one.²¹⁵

However, perceiving that capacity to be an emerging and evolving one does not necessarily mean the lack of respect for children's full humanity that Wall suspects.²¹⁶ For her part, Nussbaum is concerned with political theories like Rawls's that promote an anthropology rooted in the idea of the human person as being a homogenously capable moral agent.²¹⁷ She rejects as unjust a homogenous view of human agency that blocks children and others from the political sphere (e.g., her charge against Rawls's theory) and fails to take the particularity of their

²¹³ Wall, *Ethics*, 119.

²¹⁴ CRCA, 559-560.

²¹⁵ While not agreeing with her assessment, Colin Macleod helpfully sums up Nussbaum's view of agency at childhood: "Children assume significance [from a capabilities perspective] only as potential agents, that is, as members of the human community who have the potential to become mature citizens with developed moral powers. The main task, therefore, is to adequately secure the conditions of the development of mature agency." Macleod, "Primary Goods," 182.

²¹⁶ See Wall, *Ethics*, 119-120 or Wall, "Human Rights," 532-533. Macleod questions the failure of the capabilities approach to directly recognize the intrinsic goods of childhood. See Macleod, "Primary Goods," 182, 197.

²¹⁷ A citizen is understood to have status as a person on the basis of two moral powers: (1) the capacity for a sense of justice; and (2) the capacity for a conception of the good. It is, furthermore, the possession of these powers that makes citizens "free and equal." Free because they possess these powers, and equal because they possess them to a requisite degree that enables them to participate in social cooperation throughout the course of their life. Rawls, *Political Liberalism*, 19. For Nussbaum's criticism, see FJ, 14, 28-34.

vulnerability as social agents seriously.²¹⁸ Children are agents, for Nussbaum, but not in a way that is comparable with the agency generally attributed to adulthood.²¹⁹ The broad spectrum of what “childhood” entails must therefore be taken into account for it is not, in itself, a “unified category.” As Ballet, Comim, and Biggeri explain:

A one-year-old child has limited capability shaped by neurological constraints, in contrast to, for example, an 11-year-old child, who has developed many capacities to understand the world. However, an 18-year-old teenager is much better prepared than both to relate with the world in several dimensions. And yet, all of them should be treated differently from adults who are better able to cope with many more aspects of individual and social life.²²⁰

Childhood should not only be recognized for the developmental diversity encapsulated in a stage of life, but also for recognizing children as “diverse human beings experiencing a diversity of childhoods across different contexts and expressing different values in which they define their different ways [of being] agents.”²²¹ In the broad spectrum of childhood there exists vast differences between actual children, to say nothing of the distinctions that must be made between children and adults. Such distinctions are operative in Nussbaum’s work as she understands adult agency to be significantly shaped by one’s life and experiences, particularly the shaping of one’s emotions, at childhood.²²² For Nussbaum, a basic distinction between children’s agency and that of adults is made out of respect for their humanity.²²³

Does this then mean that the capabilities claim to universality is an unjustified one when it comes to children? Not necessarily, but the obvious differences between the agency of children and adults does complicate things. For Nussbaum, the flashpoint for the universality of

²¹⁸ CRCA, 593.

²¹⁹ Although Wall finds Nussbaum’s theory wanting, he agrees on this basic point. See Wall, *Ethics*, 120.

²²⁰ Ballet, Comim, and Biggeri, “Children’s Agency,” 33. See also Manfred Liebel, *Children’s Rights from Below: Cross Cultural Perspectives* (New York: Palgrave, 2012), 17.

²²¹ Ballet, Comim, and Biggeri, “Children’s Agency,” 38. See also Bonvin and Stoecklin, “Introduction,” 8.

²²² UT, 175, 177-178. See Chapter 2, section II and Chapter 3, section IV of this dissertation.

²²³ See CRCA, 559-560, 593.

agency is located in the quality of striving and not a quantitative assessment of agency itself. When she sets her social minimum, it is based on the pursuit of agency and not their actual exercise of it (although the two are closely related). Respect for children's full humanity is therefore not found in a homogenous notion of actual agency, but in recognizing the common human struggle for agency and the diverse ways that struggle manifests among human beings, not only *at* but *within* childhood. Discourse on children's rights is a frontier of justice, then, not because it fails to address children's agency at all. Rather, it is a frontier of justice for Nussbaum because it does not address the particularity of their agency in light of power differentials that exist between various stations of human life, especially those that exist between children and their parents or other adult caregivers.²²⁴

Recognizing this does not answer all of the concerns that Nussbaum's theory raises with regard to children. The adult-centric notion of agency that Wall identifies remains a problem. Children, under the capabilities approach, are perceived to be in pursuit of adult flourishing. Leading a good life, from this perspective, entails a mature quest for self-determination.²²⁵ Nussbaum also repeatedly refers to children as future citizens,²²⁶ indicating that even if the question of social agency is answered there remains a question of future political subjectivity to be addressed.²²⁷ And, finally, by taking striving as her starting point, Nussbaum leaps over a key aspect of the human condition at infancy: having one's striving necessarily situated in numerous

²²⁴ CRCA, 559-560, 593.

²²⁵ Wall, *Ethics*, 119.

²²⁶ WHD, 230-234, 278-280. The notion of children as future citizens is also implied, albeit more subtly, in Dixon and Nussbaum's discussion of voting rights for children. In particular, the capabilities approach "does not close off the possibility of giving limited voting rights in some areas to adolescents." CRCA, 560n45. Also, "the question of political rights for children is at least on the table in the [capabilities approach], whereas it is not in the social contract tradition," and, "A [capabilities approach] thus merely sanctions the possibility that it could be legitimate for a democracy to delay access to the vote for children." CRCA, 564, 565.

²²⁷ Bonvin and Stoecklin speak to the important distinction between agency and subjectivity. They explain: "the child as a subject of rights, has a right to participation, and as a social actor, this same child has a capability through participation." See Stoecklin and Bonvin, "Capability Approach," 67, cf. 79.

ways that one simply cannot choose for oneself. While Nussbaum is well aware of the shaping impact that childhood has on adult capabilities, she does not pay sufficient attention to how significantly one's agency (or capability) is itself shaped by these unchosen circumstances.²²⁸ She is also inattentive to how those unchosen circumstances might themselves be considered an "intrinsic good" of childhood.²²⁹ Overlooked by her theory is how the highly responsive and situated nature of human agency mitigates the self-determining accent she puts on it. At this point, these concerns are merely being noted. They will be taken up in Chapter 6.

This chapter has explored the foundational significance of agency to Nussbaum's capabilities approach. Moreover, it has considered the ways in which the priority she places on the cultivation of agency shapes her attempt to more fully incorporate children into the evolving discourse of children's rights. Although their agency and its flourishing are somewhat distinct from that of adults, children, like all other human beings, are understood by Nussbaum to be striving for opportunities to develop and exercise deliberate choice as they struggle to make something of their lives in this world.

²²⁸ See Chapter 6, section I.

²²⁹ See Macleod, "Primary Goods," 182. Cf. Stanley Hauerwas, "The Politics of Gentleness" in *Living Gently in a Violent World* by Stanley Hauerwas and Jean Vanier (Downers Grove, IL: InterVarsity Press, 2008), 90. See Chapter 6, section II.

Chapter 2 – Vulnerability and Human Flourishing at Childhood

[The] pretense [of control in a world that one does not really control] is unmasked virtually every day by life itself, as [one] feels hunger, fatigue, longing, often illness or fear... Once again, then, we can see how crucial it is for children not to aspire to control or invulnerability, defining their prospects and possibilities as above the common lot of human life, but, instead, to learn to appreciate vividly the ways in which common human weaknesses are experienced in a wide range of social circumstances, understanding how social and political arrangements of different kinds affect the vulnerabilities that all human beings share.

~ Martha Nussbaum, *Not for Profit*, 39-40.

The aim of this chapter is to explore the concept of vulnerability in light of the prominent place Martha Nussbaum devotes to the cultivation of agency in her capabilities approach. The first section reflects on her basic conceptualization of this condition and considers how difficult it is to resist theorizing vulnerability in primarily negative terms. The second section builds on the first by contemplating how significant the twin ideas of *helplessness* and *lack-of-control* are to the way Nussbaum conceptualizes vulnerability. Of particular significance is her effort to discuss this core feature of human existence in a more positive light. The third section briefly examines Nussbaum's earlier philosophical ethics in order to better grasp how vulnerability and agency are woven together in her moral thought. It is argued that Nussbaum intertwines the two in a calculus of human flourishing that prioritizes agency. The fourth section situates childhood vulnerability within the framework of the capabilities approach by considering whether children constitute a special case when compared against others. The final section of this chapter outlines how Nussbaum's capabilities approach addresses the special priority the CRC places on children through its "best interests of the child" principle.

I. The Condition of Vulnerability: Embodied encountering of the world

As much as Nussbaum is committed through her capabilities approach to the idea that agency is a chief human interest, she is also a realist about its actual exercise and development under the precarious circumstances of life in this world. To actively plan out and attempt to control the shaping of one's life is, by all accounts, a struggle. Furthermore, from the outset of *Creating Capabilities*, Nussbaum is careful to emphasize that struggling for a life "worthy of human dignity" is a global issue, plaguing not only the poorer countries of the world but wealthy societies as well.¹ "All nations," she claims, "are developing nations, in that they contain problems of human development and struggles for a fully adequate quality of life and for minimal justice."² Perhaps nothing better punctuates this claim than the fact that the United States stands among the three UN member nations yet to ratify the 1989 CRC, along with Somalia and South Sudan. Nevertheless, pursuit of an adequate quality of life and minimal sense of justice, whether it takes place in the Horn of Africa or Washington, D.C., is more than a struggle over social or political culture, although it is at least that much.³ It is also a sign that agency in this world is not unfettered even if, humanly speaking, our pursuit of it is undaunted and should be supported as such by social and political institutions. Put another way, the main question that Nussbaum's theory of social justice seeks to answer (i.e., what people are able to do and be) is concerned not only with human agency, but also with various forms of resistance to

¹ CC, 1, 16.

² CC, 16.

³ Noting how central religion is to policy-making in the United States, Martha Fineman argues that Americans should "rethink [their] approach to children with explicitly secular, rather than religious, sensibilities providing the framework and defining state obligations." Martha Albertson Fineman, "Introduction" in *What is Right for Children? The Competing Paradigms of Religion and Human Rights*, ed. by Martha Albertson Fineman and Karen Worthington (Burlington, VT: Ashgate, 2009), 2, 4, available online: ProQuest ebrary [accessed 9 March 2015]. For reflection on the debate over children and family that addresses tensions between religion and secular society, see Don S. Browning, Bonnie J. Miller-McLemore, Pamela D. Couture, K. Brynolf Lyon, and Robert M. Franklin, *From Culture Wars to Common Ground: Religion and the American Family Debate* (Louisville, KY: Westminster John Knox Press, 1997).

its development and exercise. As a result, the actual ability to plan out and control one's own life through the exercise of capabilities should be recognized as a struggle that is rooted in a core feature of human being: the condition of vulnerability.

The word "vulnerability" is derived from the Latin *vulnus* which literally means "wound." It is frequently used in a way that reflects its Latin root, namely, a human openness to harm in various forms.⁴ Nussbaum acknowledges this when she explains in *Sex and Social Justice* that human life is "a vulnerable thing, a thing that can be invaded, wounded, violated by another's act in many ways."⁵ Later, in *Hiding from Humanity*, she again links vulnerability to wounding by observing the human need of law "precisely because we are vulnerable to harm and damage in many ways."⁶ Indeed, Nussbaum's concerns for social justice and human development are connected throughout her writings to various manifestations of vulnerability that entail both greater and lesser degrees of wounding. A list of potentially harmful phenomena drawn from Nussbaum's works include the potential for harm to manifest as social and material misfortune,⁷ negative public opinion about oneself (especially in the area of sexual freedom),⁸ domestic violence and degrading social structures for women,⁹ social inequalities in cases of sexual, religious or ethnic minorities,¹⁰ disease,¹¹ and even the susceptibility of convicted

⁴ Wall, *Ethics*, 24, 39; Turner, 28; Culp, 3. Cf. Goodin, 110; MacIntyre, 1, 4, 155; Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition," *Yale Journal of Law and Feminism* 20, no. 11 (2008): 1-24, available at: <http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/vjfem20&id=3> [accessed 10 March 2015].

⁵ When speaking of vulnerability in this context, however, Nussbaum is referring to it in relation to more "primitive" and retributive notions of justice. SSJ, 157.

⁶ HH, 6.

⁷ See FG, *passim*; Nussbaum, *Cultivating Humanity*, 91,

⁸ See Nussbaum, *Cultivating Humanity*, 223, 253; Martha C. Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (New York: Oxford University Press, 2006), *passim*.

⁹ See SSJ, 90; WHD, 1, 106, 107; CC, 2.

¹⁰ See SSJ, 84, WHD, 1, 230 and Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (New York: Basic Books, 2008), *passim*.

¹¹ See FJ, 336.

criminals to harm in the sentencing process.¹² A key idea underlying *The Fragility of Goodness*, one of Nussbaum's most foundational texts on human vulnerability, is the recognition that life in this world, even of the most excellent kind, is open to very real risks and potential reversals.¹³ She recounts this perspective more recently, noting that her capabilities approach imagines human dignity itself to be "capable of suffering [profound] assaults from the world of nature" while still remaining a profound feature of the individual.¹⁴

The risks, reversals and harms to which human beings are susceptible as a result of their openness to wounding speak to a key aspect of the human condition: our bodily embeddedness in the world. Following (of course) Aristotle, Nussbaum observes that human action and human being "are placed squarely within nature."¹⁵ This implies that any meaningful answer to the questions "What are people able to do and to be? What real opportunities are available to them?" must account for the fact that these opportunities to do and to be take place *in the world*. John Wall maintains that as human beings we are "world-constituted" and, therefore, always experience our ongoing encountering of the world through "particular languages, relations, materialities, and times."¹⁶ "Human being," he sums up, "is 'being-in-the-world.'" It is not separate from but [always and in every way occurs] within the world."¹⁷ Nussbaum appears to concur. In her summation of Aristotle's view of rational action in *The Fragility of Goodness*, she refers to human beings as creatures of "love and desire" existing in the material world and exercising under its conditions a "selective focussing upon objects in the world and an equally selective set of responses to that focussing."¹⁸ Consequently, it is this desire for worldly objects

¹² See HH, 48-56.

¹³ FG, 340.

¹⁴ Dixon and Nussbaum, "Abortion," 5.

¹⁵ FG, 289.

¹⁶ Wall, *Ethics*, 36.

¹⁷ Wall, *Ethics*, 36.

¹⁸ FG, 289.

and their perceived necessity to one's own flourishing that actually causes human action: "Neither inert objects nor perfected gods, neither simply pushed around from without or spontaneously self-moving, we all reach out, being incomplete, for things in the world."¹⁹ In an earlier comment on Aristotle's *De Motu Animalium*, Nussbaum explains that for a creature to be moved to action, "an object must appear to him: he must select, mark it off, organize it, interpret it." The point is that action follows from more than the passive reception of stimuli for human beings.²⁰ It follows from the agent's "awareness of some object or state of affairs, which may well prove to be an object of desire," and then from the agents reasoned determination to make the object one of pursuit or avoidance.²¹ In Nussbaum's opinion, influenced as it is by Aristotle, human action and human being must be understood as inseparable from the world and the desirable objects located within it.

Her position, therefore, initially appears to echo that of Bryan Turner in *Vulnerability and Human Rights* (2007). This short book offers a sociological perspective on the matter of doing justice to the precariousness of human existence, and it leans at least in part on *The Fragility of Goodness* to do so.²² According to Turner,

The idea of vulnerable humanity recognizes the obviously corporeal dimension of existence; it describes the condition of sentient, embodied creatures who are open to the dangers of their environment and are conscious of their precarious circumstances."²³

¹⁹ FG, 289. See also MacIntyre, 68-69. Gehlen also links human vulnerability to incompleteness. He summarizes the concept of vulnerability as follows: "Humans have no natural protection against inclement weather; we have no natural organs for defense and attack but yet neither are our bodies designed for flight. Most animals surpass man as far as acuity of the senses is concerned. [Humankind] has what could even be termed a dangerous lack of true instincts [...]." This leads Gehlen to assert that human being in this world is living under the condition of being "undetermined" or "unfinished." Gehlen, 24, 26.

²⁰ Nussbaum, *Aristotle's De Motu Animalium*, 269.

²¹ Nussbaum, *Aristotle's De Motu Animalium*, 261, 265. Remarking on a distinction between nonhuman animals and human beings, Nussbaum states: "Animals can act only according to the awareness of the moment. Human beings can, however, look to the future and to past experience, deliberating and weighing one 'this' against another [...]." Human beings, thus, becoming aware of several possible courses of action. Nussbaum, *Aristotle's De Motu Animalium*, 263.

²² Turner, 43.

²³ Turner, 28.

He certainly encapsulates the anthropology at work in Nussbaum's thought by finding the condition of vulnerability to mean that human existence is inescapably bound up with and made up of *being-in-the-world*. His position also clearly asserts that vulnerability means people are open to harm in a variety of ways. In fact, Turner understands vulnerability to constitute a "traumatic wounding" that leaves human beings open to "psychological harm, moral damage, or spiritual threat" while existing in bodies marked by an "organic propensity" toward morbidity, mortality, and the likelihood of impairment and disability as aging progresses.²⁴ As such, he views misery and suffering as companions to vulnerability and likens the condition to the "discomfort, pains, and tribulations of everyday life."²⁵ Alasdair MacIntyre, in his own Aristotelian-influenced investigation of vulnerability, likewise appears able only to think of the condition in terms of affliction and disability and largely conceptualizes it as a counter or obstacle to human flourishing.²⁶ The opening sentence to his *Dependent Rational Animals* reads: "We human beings are vulnerable to many kinds of affliction and most of us are at some time afflicted by serious ills."²⁷ Robert Goodin also lends support to Turner's more negative interpretation when he defines vulnerability as "essentially a matter of being under threat of harm."²⁸

²⁴ Turner, 28-29.

²⁵ Turner, 9, 102. While not holding to an overly negative conception of vulnerability himself, Wall provides the outline of the historically negative interpretation of the concept. He recognizes three possible meanings to the term as it has been employed: "[B]eing overwhelmed by one's own disordered animality; having one's inner gifts and talents squashed by a larger corrupted society; or remaining captive to an underdeveloped or uneducated ignorance. To these we may add a further (feminist) possibility: vulnerability as the potential to be excluded from the level of social power." Wall, *Ethics*, 39. See also Fineman, "Vulnerable Subject," 8.

²⁶ MacIntyre, 4.

²⁷ MacIntyre, 1. MacIntyre's seemingly negative view of vulnerability is even communicated through the Index to his book. When looking up "vulnerability" one will be instructed to "*see also* disability." MacIntyre, 172.

²⁸ Goodin, 110. Goodin's notion of vulnerability, informed by both his consequentialist and welfarist perspectives, is twofold: "[v]ulnerability amounts to one person's having the capacity to produce consequences that matter to another" while "[r]esponsibility amounts to his being accountable for those consequences of his actions and choices." Goodin, 114.

However, by construing vulnerability so negatively, Turner, MacIntyre and Goodin move in directions that Nussbaum would appear to find troubling. For example, after claiming vulnerability as a core feature of human being, Turner goes on to suggest that human rights should be employed for the security they offer as a means to either contain or, with some luck, overcome that condition.²⁹ In Turner's view, our efforts to contain vulnerability through the constructing of social institutions – like regimes of human rights – are attempts to “reduce our vulnerability and [provide] security,” however “imperfect, inadequate, and precarious” that security inevitably turns out to be.³⁰ Furthermore, he counts among the most tragic realities of life the fact that even those who are living well “endure the contingencies of history and their own fate,” so that “[o]vercoming precariousness and vulnerability will always be subject to some degree of sheer luck and the fragility of goodness” (emphasis added).³¹ Nevertheless, by suggesting that vulnerability can and should be either contained or (hopefully) even overcome, Turner's position seems tenuous.

First, it would seem that he cannot take either approach to vulnerability and remain consistent with his own position on the condition being an integral aspect of human existence. As he states elsewhere in the same work, vulnerability cannot be eradicated without at the same time forfeiting one's humanity.³² Yet, by this same logic, any project aimed at either containing or overcoming one's vulnerability is a project simultaneously aimed at containing or overcoming one's humanity. It is obvious that Turner is genuinely concerned about human well-being and, due to that concern, leans on the concept of vulnerability to justify human rights as the

²⁹ Turner, 1, 9, 28-29, 30-34, 43, 108-109, 127, 140.

³⁰ Turner, 28; cf. 9, 140. Goodin similarly views vulnerability as a phenomenon that carries with it a corresponding responsibility to ensure that the potential for harm is met by efforts at prevention and protection. Goodin, 206.

³¹ Turner, 43. MacIntyre, likewise, includes in the thesis argued in *Dependent Rational Animals* that the relationship between “our animal condition and our vulnerabilities” will require, in part, that we “confront and respond to vulnerability and disability both in ourselves and in others.” MacIntyre, 5.

³² Turner, 126.

corresponding instrument for “the construction of a [global] commonwealth in which security might be restored” and maintained.³³ But by tying vulnerability to humanity and then construing it so negatively, Turner cannot avoid at the same time interpreting human existence in similarly undesirable terms. A good life, as his anthropology would appear to suggest, is one in which a core and universal feature of one’s being is either contained or overcome for the potential and actual trauma it inflicts. As a result, does he not consequently suggest that one would be better off if he or she were less vulnerable, or even invulnerable? This position is inconsistent with what Nussbaum refers to as the real beauty of human being and her repeated repudiation of various ethics of self-sufficiency that shape, in her view, the thought of Plato and Immanuel Kant.³⁴

It seems apparent, then, that internal consistency is not Turner’s only problem. Since he is drawing somewhat on Nussbaum to support his position,³⁵ it matters whether she finds the goals of containing or overcoming vulnerability to be sustainable projects. In fact, she does not. Rather, as just mentioned, Nussbaum finds that vulnerability contributes to making life a beautiful experience. In *The Fragility of Goodness* she holds that human beings undergo,

...a loss in value whenever the risks involved in specifically human virtue are closed off. There is a beauty in the willingness to love someone in the face of love’s instability and worldliness that is absent from a completely trustworthy love. There is a certain valuable quality in social virtue that is lost when social virtue is removed from the domain of uncontrolled happenings. And in general each salient Aristotelian virtue seems

³³ Turner, 140; cf. 9. Turner is not alone in finding the concept of vulnerability to speak to a universal condition that ought to be central to questions of social justice. Martha Fineman claims vulnerability “for its potential in describing a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.” Fineman, “Vulnerable Subject,” 8-9; cf. 1, 10-11. Nussbaum also recognizes the ubiquity of vulnerability among human beings. See FJ, 132.

³⁴ See FG, 2, 20, cf. 361. See also FJ, 132; cf. Dixon and Nussbaum, “Abortion,” 5.

³⁵ While referring to Nussbaum’s work, Turner says: “We suffer and therefore we need institutions that will protect us. The world is precarious, and therefore we need to attend to institution building and the moral education of our children. Goodness is fragile; honorable people endure the contingencies of history and their own fate. Overcoming precariousness and vulnerability will always be subject to some degree of sheer luck and the fragility of goodness.” Turner, 43; cf. 44. While he appears influenced by Nussbaum’s *The Fragility of Goodness*, Turner also appears to be critical of her capabilities approach for its global aspirations and the seemingly unresolvable tensions it upholds between the rights of children and their parents. See Turner, 62-63 and 80-83.

inseparable from a risk of harm... There are certain risks – including, here, the risk of becoming unable to risk – that we cannot close off without a loss of human value, suspended as we are between beast and god, with a kind of beauty available to neither.³⁶

Facing the risk of harm itself poses no threat to human dignity for Nussbaum. In fact, these risks, whether social or material,³⁷ seems to be essential to what she regards as the dignity of good human living. The picture of human excellence that Nussbaum applauds throughout *The Fragility of Goodness* is one that promotes “a kind of human worth that is inseparable from vulnerability” and is, conversely, distinct from philosophical notions of self-sufficiency.³⁸ Living well, she maintains, must find its “completion or full expression” in activity that “takes the agent to the world in such a way that he or she becomes vulnerable to reversals.”³⁹ Simply put, there is no inherent discrepancy for Nussbaum between being vulnerable and living well. Put another way, the condition of vulnerability is not inconsistent with human flourishing, but contributes to it. This would explain why, in her short treatise on public education quoted at the start of this chapter, Nussbaum remarks on how vital it is that children *not* aspire to “control or invulnerability, defining their prospects and possibilities as above the common lot of life.” Instead, she argues that they should be taught to “appreciate vividly the ways in which common human weaknesses are experienced in a wide range of social circumstances.”⁴⁰

This does not mean Nussbaum is uninterested in mitigating tragedy. She most certainly is!⁴¹ In fact, Nussbaum sees her version of the central human capabilities discussed in the preceding chapter as informing citizens that “certain calamities are grave,” and as such are

³⁶ FG, 420.

³⁷ Vulnerability to the material world is covered in Chapter 11 of FG, and vulnerability to the social world in Chapter 12. See FG, 318-342 and 343-372 respectively.

³⁸ FG, 20; cf. FJ, 132.

³⁹ FG, 340.

⁴⁰ Nussbaum, *Not for Profit*, 39.

⁴¹ UT, 418-419. In fact, Nussbaum views the central human capabilities as informing citizens that “certain calamities are grave,” and are “unjust [and] wrong.” Even more: “No citizen should have to suffer [such calamities] and all have a basic entitlement not to suffer them.” UT, 418.

“unjust [and] wrong.” Even more, she proclaims: “No citizen should have to suffer [such calamities] and all have a basic entitlement not to suffer them.”⁴² A key aspect of her philosophy of education is the task of helping children understand the impact of differing social and political arrangements on the shared human experience of vulnerability.⁴³ However, she just as certainly does not follow Turner in conceptualizing vulnerability as a core feature of human being that should be in some way circumvented because it so negatively impacts one’s life. In fact, all human flourishing (or, alternatively, dignity) is an “animal sort” of flourishing that “could not be possessed by a being who was not mortal and vulnerable, just as the beauty of a cherry tree in bloom could not be possessed by a diamond.”⁴⁴ So, while Nussbaum does engage vulnerability as a constitutive feature of human existence, she avoids addressing it in terms that look anything like Turner’s traumatic wounding. To do so would be de-humanizing and would also deny the complexity of the concept itself, and the human person it is designed to describe.⁴⁵

That being said, the potential challenge that vulnerability poses to human agency is a vital concern for Nussbaum. In *Women and Human Development* she explains that the core idea behind her capabilities approach is that of the human being as “a dignified and free being who shapes his or her own life in cooperation and agency with others, rather than being passively shaped or pushed around by the world in the manner of a ‘flock’ or ‘heard’ animal.”⁴⁶ Speaking

⁴² UT, 418.

⁴³ Nussbaum, *Not for Profit*, 39-40.

⁴⁴ FJ, 132.

⁴⁵ Nussbaum has company in both her refusal to construe vulnerability in strictly negative terms and in her more complex treatment of the concept. See Fineman, “Vulnerable Subject,” 1, 8-10 and Wall, *Ethics*, 39. Theologian Kristine Culp goes further. Unlike Turner and MacIntyre who couple vulnerability with afflictions of some sort, Culp couples it with “glory.” Her point is that vulnerability does not merely mean the possibility of devastation, but also of transformation. She articulates this idea as follows: “Even at the point where humans are most vulnerable to the deadliest organized brutality of fellow creatures, they remain susceptible to restoration and healing... vulnerability is creaturely opening to God’s grace and glory [...]” Culp, 3-4, 120.

⁴⁶ WHD, 72.

to the universal resonance that the notion of human dignity linked closely with the notion of human agency holds, Nussbaum maintains that:

We react to the spectacle of humanity [assailed by misfortune and chance] in a way very different from the way we react to a storm blowing grains of sand in the wind. For we see human beings as having worth as an end, a kind of awe-inspiring something that makes it horrible to see this person beaten down by the currents of chance – and wonderful, at the same time, to witness the way in which chance has not completely eclipsed the humanity of the person... We see the person as having activity, goals, and projects – as somehow awe-inspiringly above the mechanical workings of nature, and yet in need of support for the fulfillment of many central projects.⁴⁷

Each person is not only an end, but an agent as such.⁴⁸ A flourishing human life, then, is not put at risk by the potential for *harm*, but by the potential for *being passively shaped* by worldly contingencies. As Nussbaum explains it, any idea of living well that is actually “rich enough” to be worth pursuing contains not only the potential for one to experience reversals of fortune or diminished circumstances, but also, and necessarily, the possibility for active agency amidst such circumstances.⁴⁹

II. Vulnerability as Helplessness

The preceding section culminates in a key point: Nussbaum’s account of vulnerability does not allow us to conceptualize it in an overly negative way. Rather than regarding one’s bodily encountering of the world for the potential harm that it holds, she primarily describes vulnerability as “helplessness” for the way it speaks to one’s lack of control. Her work on emotions presents helplessness as a universal feature of animal infancy, but one that is more distinct and protracted in human infants.⁵⁰ In *Political Emotions* she makes the point that “[a]ll creatures are born weak and needy, and all seek both sustenance and security.” Yet humans

⁴⁷ WHD, 72-73.

⁴⁸ WHD, 106.

⁴⁹ FG, 340.

⁵⁰ UT, 181-182; HH, 177.

differ from the rest of the animal kingdom due to an “odd type of infancy.” Working the comparison, Nussbaum explains:

With other animals, the skills of survival begin to be present right from birth, as standing, moving around, and actively searching for the sources of nourishment and security begin virtually immediately; cognitive maturity (the ability to articulate the perceptual field, grasping the good and bad in it) and bodily maturity develop in tandem. By the time the creature has a robust sense of its practical goals, it also has sources for attaining them.⁵¹

Human life, she continues, is not like that. The human infant is physically more helpless than other animal species at the same stage of life. This is due in part to the relatively large size of its head when compared with the rest of its body at birth. The human body simply does not develop *in utero* to a degree that is sufficient to support standard and somewhat independent movement at, or shortly after, birth in the way that other animal bodies develop to support their own particular types of movement.⁵² Arnold Gehlen explains the human condition similarly:

Humans have no natural protection against inclement weather; we have no natural organs for defense and attack but yet neither are our bodies designed for flight. Most animals surpass man as far as acuity of the senses is concerned. [Humankind] has what could even be termed a dangerous lack of true instincts and needs an unusually long period of protection and care during his infancy and childhood.⁵³

He later characterizes this unusually long period of protection and care as an “extrauterine year” during which “the process of maturation, as well as the acquisition of an erect posture and of the rudiments of language and movement, first get underway.”⁵⁴ His central point, which affirms Nussbaum’s, is that the human being, right from birth, “exhibits an absence of specialization... a singular lack of biological means” for life in this world compared to that which is evident in other nonhuman animals.⁵⁵ The newborn human is effectively a “normalized, premature infant”

⁵¹ PE, 168.

⁵² PE, 169; cf. Nussbaum, *Not for Profit*, 30-31.

⁵³ Gehlen, 26.

⁵⁴ Processes of maturation were already underway intrauterine, but the extrauterine processes included the experience of external sources of stimulation that importantly contribute to development. Gehlen, 36.

⁵⁵ Gehlen, 26, cf. 52, 80.

due to the additional development it requires if it is to more actively engage with the world on a level similar to other animal newborns in terms of both movement and communication.⁵⁶ Thus, Nussbaum explains, “[h]uman beings have a level of physical helplessness unknown elsewhere in the animal kingdom.”⁵⁷

Insofar as Nussbaum means by “helplessness” the infant’s obvious need of “every life-sustaining [aid]” which, at its base, refers to basic nourishment and care,⁵⁸ vulnerability must still involve the potential for harm. Left to itself, the human infant will certainly face some sort of mortal wounding. Gehlen, upon describing the impoverished character of human beings at birth, notes that “under natural conditions, among dangerous predators, [human beings] would long ago have died out.”⁵⁹ Helplessness, then, does not detach the potential for harm from the condition of vulnerability. Yet, by speaking of vulnerability as helplessness, Nussbaum evidently means more than reference to the potential for harm can communicate. In fact, it means that one lacks the certainty of control over his or her bodily encountering of the world.⁶⁰ Furthermore, this lack of control is an issue right from the moment of birth when a child transitions from the womb, where all of its needs are automatically met, to “the drama of helplessness before a world of objects – a world that contains both threat and promise of good things, the things it wants and needs.”⁶¹ As she observes, virtually every day of life, from the moment of birth, the “pretense of control in a world that one does not really control” is unmasked by our nearly inexhaustible neediness.⁶² The acuity of that neediness in infancy

⁵⁶ Gehlen, 36, cf. 129.

⁵⁷ Nussbaum, *Not for Profit*, 30.

⁵⁸ UT, 183. Nussbaum means, of course, something more than that as she looks to Lucretius’ three-fold view of infant neediness which adds attachment to a caretaker and cognitive stimulation to the basic bodily need for nourishment and care. UT, 183-190.

⁵⁹ Gehlen, 26.

⁶⁰ HH, 6, 177.

⁶¹ HH, 177.

⁶² Nussbaum, *Not for Profit*, 39-40 (see epigraph to this present chapter).

presents a picture of vulnerability that broadens our understanding of the concept. A newborn left to itself is at great risk and would likely perish from wounds inflicted through lack of nourishment, exposure to the elements, or some combination of the two.⁶³ As a result, vulnerability as helplessness must include the potential for wounding. However, it must also be taken more broadly as speaking to the lack of control that marks human encounterings of the world and its objects in a way that is distinct from, and ranked above, the potential for harm.

Therefore, if human dignity means for Nussbaum that we are agents for whom really human living includes striving for objects we desire and need,⁶⁴ then the helplessness of being human highlights a lack of control over such striving. This helplessness is, furthermore, not only evident at infancy, but extends to the maturity of adulthood also. The result is the dilemma of being a helpless agent, a condition that, as Nussbaum explains, is almost too much to overcome:

Human beings are deeply troubled about being human – about being highly intelligent and resourceful, on the one hand, but weak and vulnerable, helpless against death, on the other. We are ashamed of this awkward condition and, in manifold ways, we try to hide it.⁶⁵

Shame at our lack of control develops early. Infants become “increasingly aware of what is happening to them” along with the fact that “they cannot do anything about it.”⁶⁶ Still, despite this condition, Nussbaum maintains that vulnerability should not lead human beings to hide from their humanity for two key reasons.

First, although there are limited ways in which shame can be a constructive tool in human society,⁶⁷ the “primitive shame” that would cause one to hide from his or her own humanity is

⁶³ One of the primary and more obvious needs at infancy that Nussbaum lists is “the ‘need of every life-sustaining help,’ the basic bodily need for nourishment and care [...]” UT, 183.

⁶⁴ FG, 289.

⁶⁵ HH, 336.

⁶⁶ Nussbaum, *Not for Profit*, 31.

⁶⁷ Nussbaum explains, “The person who is utterly shame-free is not a good friend, lover, or citizen, and there are instances in which the invitation to feel shame is a good thing [...]” so long as one recognizes “the dangers in any invitation to another person to feel shame.” HH, 211-216.

not among them. Shame, as Nussbaum uses the term, refers to “a painful emotion responding to a sense of failure to attain some ideal state.” It should be distinguished, then, from guilt, which takes a particular act as its object. Shame takes on the whole self to render one wholly inadequate and incomplete. Primitive shame, then, speaks to the “primary narcissism of a typical human infant” that “gives rise to a particular type of shame, as the infant encounters inevitable narcissistic defeats.”⁶⁸ The primary narcissism of early childhood manifests as an “infantile omnipotence” in which the entire world is understood by the infant to revolve around its wants and needs. Hence, Nussbaum’s references to Sigmund Freud’s famous phrase, “his majesty, the baby,” to denote the full egocentrism of this stage of life.⁶⁹ Nussbaum underscores Freud’s point by taking the perspective of the infant herself to proclaim: “I am the monarch, and yet here I am alone, hungry, and wet.”⁷⁰ British novelist Ian McEwan advances the imagery further: “It’s only children, in fact, only infants who feel a wish and its fulfillment as one; perhaps this is what gives tyrants their childish air.”⁷¹ However majestic or tyrannical the young child might actually be, all infantile omnipotence is inextricably coupled with helplessness.⁷² This leads, Nussbaum discloses, to an inevitable crisis:

⁶⁸ HH, 184.

⁶⁹ UT, 192n46; HH, 181. Although it becomes clear that Nussbaum recognizes Freud as placing significant responsibility for the perpetuation of infantile narcissism on the kind of care a child receives from adults, it is perhaps helpful to note the context in which this phrase arises for Freud: “The child shall have a better time than his parents; he shall not be subject to the necessities which they have recognized as paramount in life. Illness, death, renunciation of enjoyment, restrictions on his own will, shall not touch him; the laws of nature and of society shall be abrogated in his favour; he shall once more really be the centre and core of creation – ‘His Majesty the Baby’, as we once fancied ourselves. The child shall fulfil [*sic*] those wishful dreams of the parents which they never carried out – the boy shall become a great man and a hero in his father’s place, and the girl shall marry a prince as a tardy compensation for her mother. At the most touchy point in the narcissist system, the immortality of the ego, which is so hard pressed by reality, security is achieved by taking refuge in the child. Parental love, which is so moving and at bottom so childish, is nothing but the parents’ narcissism born again, which, transformed into object love, unmistakably reveals its former nature.” Sigmund Freud, “On Narcissism” in *Freud’s ‘On Narcissism: An Introduction*, ed. by Joseph Sandler, Ethel Spector Person and Peter Fonagy (New Haven: Yale University Press, 1991), 21.

⁷⁰ PE, 172.

⁷¹ Ian McEwan, *Saturday* (New York: Nan A. Talese/Doubleday, 2005), 39.

⁷² UT, 196; HH, 183.

When an infant realizes that it is dependent on others, we can therefore expect a primitive and rudimentary emotion of shame to ensue. For shame involves the realization that one is weak and inadequate in some way in which one expects oneself to be adequate. Its reflex is to hide from the eyes of those who will see one's deficiency, to cover it. If the infant expects to control the world, as to some extent all infants do, it will have shame, as well as anger, at its own inability to control.⁷³

While shame at one's impotence is likely a "basic and universal feature of the emotional life," it is not one that should be cultivated in society or in the family. Societies "have a good deal of room to shape the experience [of primitive shame] differently." They do this by teaching what constitutes an appropriate occasion for that emotion to arise and by linking it differently to other emotions.⁷⁴ For instance, since primitive shame is linked closely with aggressive expectations toward the failure of caretakers or parents to meet the infant's needs, the behavior of the caretakers toward the child's sense of omnipotence will be crucial. In particular, the parents' or other caretakers' ability to "meet the child's omnipotence with suitably responsive and stable care" results in a growing "framework of trust and interdependence." It is under such conditions, Nussbaum maintains, that the child "will gradually relax its omnipotence, its demand to be attended to constantly, once it understands that others can be relied on and it will not be left in a state of utter helplessness."⁷⁵

Remarkably, the crucial ability that Nussbaum identifies is the child's ability to play alone in the presence of its caretakers.⁷⁶ Play is a unique site for child-like agency. It is essential to the child's "growing ability to think and to act" that it begins to understand the world as a "not-too-hostile" place – both safe and dangerous – so that it can become confident of its own ability to achieve things.⁷⁷ Yet, as Nussbaum strains to convey through her capabilities

⁷³ UT, 196; cf. HH, 183.

⁷⁴ HH, 185-186.

⁷⁵ HH, 187.

⁷⁶ HH, 187.

⁷⁷ UT, 207, 209.

approach, all human beings are in and of themselves *ends* who have plans that they seek to enact in this world.⁷⁸ Internalizing the principle of each person as end is, therefore, essential to the child learning to live and play in “a world of individuals, in which other people too have a right to live and have their own plans.”⁷⁹

That principle is also essentially the *telos* of caring for a child for Nussbaum. It is the aim of caregiving to foster the child toward “mature interdependence” so that she is able to,

...accept the fact that those whom she loves and continues to need are separate from her and not mere instruments of her will. She allows herself to depend upon them in some ways, but she does not insist on omnipotence; and she allows them, in return, to depend in certain ways upon her; she commits herself to being responsible for them in certain ways.⁸⁰

This means, she later affirms, “acknowledging the imperfection of the human body, and its need for material goods” while also “renouncing the wish of envy to monopolize the sources of good.”⁸¹ The impact of this aim, couched as it is in the capabilities principle of treating each person as an end, is radically universal by taking as its object not only children – and, importantly for Nussbaum, not *especially* children – but adult caretakers as well. In essence, the idea of mature interdependence takes the principle of treating each person as an agentive end and applies it to the institution of the family. The result is that caretakers (i.e., “sources of good”) are recognized also for the way that vulnerability and agency are linked together in their particular person, and not only in the person of the infant. Sharpening this point, Nussbaum underscores the radical universality of her position by suggesting that,

... mature [inter]dependence entails the determination to pursue the fulfillment of basic material needs for all citizens, granting that all have rights not only to liberty but also to

⁷⁸ See Chapter 1, Section I of this dissertation.

⁷⁹ HH, 188.

⁸⁰ UT, 224-225. Nussbaum’s mature interdependence does not appear to be entirely unlike John Wall’s ethical circle, at the middle of which stands “a thinking self [whether adult or child] whose ongoing struggle is to enlarge its moral horizons into wider self-narratives and other-responsibilities.” Wall, *Ethics*, 177, 179; cf. 31, 127-132.

⁸¹ UT, 227.

basic welfare. All are allowed to be children, in the sense that all are permitted to be imperfect and needy, and an essential part of regard for the humanity in them is to attend to the ‘holding’ of those needs and the creation of a political ‘facilitating environment’.”⁸²

For Nussbaum, mature interdependence is basically just another term for a love that is increasingly about “interchange and reciprocity” between individuals, each with their own distinct ends, rather than the narcissism of an infantile omnipotence bent on control.⁸³ People have too much shame already and should therefore be provided space to feel both secure and imperfect at the same time.⁸⁴ The political action to be taken as a result is for society to provide a “facilitating environment” through which all are permitted to be helpless, like a child, while at the same time having their capabilities cultivated in order to exercise the “initiative and creativity” that being an agent in the world requires.⁸⁵ This, as will be demonstrated in Chapters 3 and 4, carries significant implications for how the capabilities approach that Nussbaum employs will view the relationship between the family and children’s rights. In addition, this present chapter will later discuss the related implications that this radical equality carries for the “best interests of the child” principle that is foundational to interpreting the CRC.

More could be said about the points of contact between Nussbaum’s facilitating environment and the institution of the family. For the present it is enough to establish her concern that a balance between agency and vulnerability be nurtured in all human beings. Nurturing this balance is the second reason one should not hide from his or her humanity. If the presence of even the most basic capabilities “exerts a claim [for development],” as Nussbaum

⁸² UT, 227.

⁸³ HH, 188.

⁸⁴ UT, 229.

⁸⁵ UT, 227. The shape of facilitating environments are determined not only by parents, but also by “customs, institutions, and laws.” UT, 227. This will be taken up more directly in Chapter 2. The point, for the moment, is to notice the tension that exists for Nussbaum between the state and the institution of the family, in particular the agency of the parents.

maintains,⁸⁶ that claim itself is evidence that one's helpless vulnerable-yet-agentive humanity is nothing of which to be ashamed. It is, rather, the basis for living a truly human life, one worthy of the name. Moreover, helplessness, while meaning a lack of control that could lead to harm, also entails the sort of striving agency that Nussbaum equates with human dignity and flourishing. One does not cease to "reach out" because of helplessness. Instead, being helpless lays at the root of striving for the objects we need to shape our existence. Being helpless, therefore, limits neither one's ability to strive as an agent, nor the full dignity of one's standing as a human being. It is holding to a misguided notion of self-sufficiency that mitigates the urgency of striving while spawning, in turn, a related sense of shame.⁸⁷ Helplessness, by contrast, encourages active striving, and it does so not by hiding or denying vulnerability, but by accepting and engaging in the uncertainty of one's circumstances.

Nussbaum's view of vulnerability, then, cannot be narrowly construed to mean only, or even primarily, susceptibility to harm. Reducing the concept in such a way might lead one toward the erroneous notion that vulnerability is something to be contained or even overcome. Instead, as is suggested by her use of it, this concept must be taken to incorporate the idea of helplessness in a way that speaks to one's lack of control in this world. Rather than causing human beings to hide in shame from their humanity, vulnerability so construed should be understood as an integral sign of that humanity, one which entails the idea of striving that Nussbaum so closely relates to human dignity. The condition of vulnerability, therefore, situates human beings as embodied agents encountering a precarious world. Coupled with the central

⁸⁶ Nussbaum argues that "the 'basic capabilities' of human beings are sources of moral claims wherever we find them: they exert a moral claim that they should be developed and given a life that is flourishing rather than stunted." FJ, 278.

⁸⁷ FG, 275-276.

interest that agency represents to human beings situated as such, vulnerability is infused with dignity due to the accompanying opportunities for choice and activity that it represents.

III. Imagining Vulnerability and Agency: “the fragility, ...the beauty, of a plant”

Reflection on Nussbaum’s moral thought suggests that the concept of vulnerability speaks not only to our helplessness before the world, but to our striving for agency within it nonetheless. By incorporating the idea of helplessness into her view of vulnerability, Nussbaum inflects the concept toward a fuller and more positive interpretation, one arguably more fitted to the notion of human dignity and more compatible with the distinctive approach to agency that she advances. As a result, understanding life to be a struggle becomes an idea that is itself infused with dignity. Being human means striving for opportunities to shape one’s ongoing encounterings of the world even though those encounterings are uncertain at best. But the uncertainty of those encounterings, insofar as they may be considered truly human ones, still speaks to agency as *a*, if not *the*, chief human interest. The result is that Nussbaum speaks of living well in terms that richly infer vulnerability without suggesting that it should somehow be circumvented. This is perhaps nowhere more evident than in her interpretive summary of Aristotle’s position on the leading of a good human life amidst worldly uncertainties:

We require that the good condition [of living well] find its completion or full expression in activity; and this activity takes the agent to the world, in such a way that he or she becomes vulnerable to reversals. Any conception of good living that we will consider rich enough to be worth going for will contain this element of risk. The vulnerability of the good person is not unlimited. For frequently, even in diminished circumstances, the flexible responsiveness of his practical wisdom will show him a way to act well. But the vulnerability is real: and if deprivation and diminution are severe or prolonged enough, this person can be ‘dislodged’ from *eudaimonia* itself.⁸⁸

⁸⁸ FG, 340.

In this way, vulnerability and agency become linked in Nussbaum's thinking. The very best human living is characterized by a "yielding and open posture towards the world" that remains undiminished by the very real risks associated with existing in it.⁸⁹ In fact, as Gehlen observes, human beings often pursue "opportunities for endangering [themselves]" to the point that "consciously creating risks" becomes "one of [humanity's] most salient features" and a key component in the manifestation of culture.⁹⁰ To be vulnerable means more than strictly adhered notions of openness to harm or even helplessness can convey. It means, for Nussbaum, that one is *world open* so that agency and vulnerability are entwined in a balance that does not reduce the full meaning of either.

The idea of being world open is, for Nussbaum, best expressed through "the fragility, as well as the beauty, of a plant."⁹¹ It is this image of vulnerability, therefore, that she draws upon to communicate the flexible stability of living well. Furthermore, through the image of a plant Nussbaum envisions a balance between vulnerability and agency that satisfies her idea of what a life worthy of human dignity requires. She quotes from Book VIII of Pindar's *Nemean* in the epigraph to *The Fragility of Goodness* in order to establish this imagery for that purpose. It reads,

...But human excellence
grows like a vine tree

⁸⁹ FG, 340.

⁹⁰ Gehlen, 52. Gehlen's point can be supported in a number of ways. The securing of food, whether that food is grown, trapped, or hunted, involves a variety of risks that today often go unheralded (e.g., open water and ice fishing, farming with the aid of animals or mechanical equipment, and the raising of livestock). There are inherent risks to everyday modes of transportation such as the use of automobiles, locomotives and airplanes. And those risks pale in comparison to the ones required by the inventive and developmental processes that led to their use. The skyline of any city testifies to the risks entailed by the construction of each building, as do the bridges that span the rivers running through those cities. Athletic competitions (e.g., football, hockey, rugby and all forms of racing), acrobatic circus and gymnastic performances, and engagement with nonhuman species (e.g., observation, training and hunting of wild animals) all make up significant aspects of culture that are viewed to be both entertaining and risky. Finally, to conclude this superficial list of examples, humankind's apparently insatiable need to explore the unknown and the corresponding risks of doing so are evident in the mining industry, deep sea voyages, mountaineering expeditions and missions to outer space.

⁹¹ FG, 340.

fed by the green dew
raised up, among wise men and just
to the liquid sky...⁹²

This, she explains, communicates what ancient Greek thought identified as the common human obstacle to practical reasoning about actually living well; namely:

That I am an agent, but also a plant; that much that I did not make goes toward making me whatever I shall be praised or blamed for being; that I must constantly choose among competing and apparently incommensurable goods and that circumstances may force me to a position in which I cannot help being false to something or doing some wrong; that an event that simply happens to me may, without my consent, alter my life; that it is equally problematic to entrust one's good to friends, lovers, or country and to try to have a good life without them – all these I take to be not just the material of tragedy, but everyday facts of lived practical reason.⁹³

It is for such reasons that the image of the plant is so suited to thinking about human existence.

That image helps one to consider, in Nussbaum's words,

...how far and in what ways does (and should) the world impinge upon us as we attempt to live in a valuable way? How far are we creatures who, like plants, depend passively upon what is outside of us in the world of nature? How far are we purely active intellectual human beings [...]? And what is, for a human being, the best (most praiseworthy) way to be?⁹⁴

In short, the image of the plant itself posits a way to understand the necessary balance between agency and vulnerability that must be maintained for really human living to ensue under the precarious circumstances of life.

This horticultural imagery amounts to what may be called a calculus of human flourishing. Nussbaum not only forges a vital link between vulnerability and agency, but balances them against each other as essential factors in the equation of what it means to live well. A key question in *The Fragility of Goodness* is how much chance one can reasonably endure while still speaking of life as good. It is, for Nussbaum, the question of, "How much

⁹² Pindar, *Nemean* VIII.37-44 quoted in FG, vi.

⁹³ FG, 5.

⁹⁴ FG, 264.

vulnerability or passivity is compatible with worth and goodness?”⁹⁵ Such questions imply that a balance must be struck and maintained. It should be deducible at this point that Nussbaum’s capabilities approach is her preferred way of managing this balance politically.

The philosophical work of balancing agency and vulnerability is done, in large part, by the image of the plant that Nussbaum employs. The flexible beauty of the plant stands as the beginning of an answer to how much worldly contingency one can endure. Despite its beauty, plant-like flexibility means that one is nonetheless susceptible to real and potentially permanent harm from both material and social contingencies. What the picture of invulnerability found in the dazzling gem of Platonic or Kantian ethics simply cannot express for Nussbaum is expressed in the more Aristotelian image of the plant as a picture of human excellence (*aretē*): the image of the plant conveys, that is,

...a kind of human worth that is inseparable from vulnerability, an excellence that is in its nature other-related and social, a rationality whose nature is *not* to attempt to seize, hold, trap and control, in whose values openness, receptivity, and wonder play an important part.⁹⁶

Vulnerability, as already stated, leaves the individual open to the world and the contingencies that result from living in it. When faced with reversals, the imagery Nussbaum utilizes suggests that the agent is left with more prospects than choosing between one or two poor options: either a violent response to being pushed around by the world *or* a passive acceptance of that pushing.⁹⁷ Instead, the flexibility of the plant offers a third way: the “deliberative art” of “appropriately combining activity with passivity, fidelity to [the plant’s] own nature with responsiveness to the world.”⁹⁸ “A plant,” she remarks, “has a definitive nature; it is this and not that, it requires,

⁹⁵ FG, 238.

⁹⁶ FG, 20; cf. 2-6.

⁹⁷ Nussbaum is speaking in light of Creon’s active and controlling rigidity found in Sophocles *Antigone*. FG, 80.

⁹⁸ FG, 80.

‘cares for’, responds to, this and not that. It is vulnerable and needy; but it also has its own appropriate ends and, to put it somewhat metaphorically, its own sense of value.”⁹⁹ The plant stands as the central image that Nussbaum draws upon to think out an appropriate balancing between agency and vulnerability. “For the Aristotelian will argue,” Nussbaum, the Aristotelian, maintains, “that plantlike flexibility, far from being at odds with stability, provides the best sort of stability for a human life.”¹⁰⁰

It seems necessary, for the moment, to step away from the metaphor in order to understand how plant-like flexibility translates into moral terms for Nussbaum. In other words, how, in terms of definite human action, is one to understand the balance between agency and vulnerability to which the image of the plant speaks? How does the calculus of human flourishing actually parcel out?

Nussbaum’s answer is clear. Striving for opportunities to choose and act in meaningful ways despite uncertain social and material circumstances requires that an appropriate balance be struck and maintained between agency and vulnerability. For that balance to be appropriately struck under Nussbaum’s theory, however, requires two equally vital characteristics. First, agency must not be understood as somehow overwhelmed by vulnerability, and, second, vulnerability must not be understood as being somehow diminished by the exercise of agency. Since practical reason, choice and action are all undertaken *in the world*, all are invariably marked by vulnerability. Being marked as such, however, does nothing to reduce the significance of human agency pertaining to the exercise of each. Instead, that significance is accentuated by unavoidable vulnerabilities that set the circumstances for one’s attempts to shape a good life for him- or herself. The question moving forward, therefore, becomes not *whether*

⁹⁹ FG, 80.

¹⁰⁰ FG, 421.

agency and vulnerability are linked, but rather *how* to maintain a balance in their linking so that one's capacity for living well is as richly realized as possible.

The Nussbaumian answer appears to be that agency must be ranked ahead of vulnerability in a way that does not impoverish the meaning or impact of the latter. It is the purpose of Nussbaum's capabilities approach to foster human agency amidst unavoidable worldly contingencies. The basic principle, political aim, and underlying framework of the capabilities approach discussed in the first two sections of Chapter 1 all appear to serve a project of protecting "spheres of human freedom," and specifically not one of closing them off.¹⁰¹ As a result, agency and vulnerability are only appropriately balanced for Nussbaum if agency and its cultivation is taken as the priority of social and political institution building. That, after all, is the purpose of setting a social minimum and basic threshold level through establishing a list of central human capabilities.

The priority Nussbaum places on agency is visible when she addresses the plight of societies' more fragile and marginalized members, like persons with disabilities and children. In both cases, it is her concern that the individual maintain as much agency as is possible given his or her specific requirements for assistance.¹⁰² The horticultural metaphor seems inadequate to fully explaining this point, which is perhaps why Nussbaum supplements it with a maritime metaphor at certain points in *The Fragility of Goodness*. The plant, while obviously fragile and needy, has its own "definite nature" and, as such, "appropriate ends... [and] sense of value." Yet the image of a ship better articulates the balance between the active and passive elements of human living that Nussbaum wishes to emphasize: "The ship, too, is a definite conveyance that takes people somewhere to pursue certain characteristic aims and ends. It does not and cannot

¹⁰¹ WHD, 106.

¹⁰² FJ, 199; CRCA, 559-560.

simply go with every current and every wind that bears upon it; it has its own orderly way and its own course.”¹⁰³ Recalling that practical reason is critical among the capabilities (in concert with affiliation), she refers to it in this earlier writing as a “deliberative art” that “appropriately combines activity with passivity, fidelity to its own nature with responsiveness to the world.”¹⁰⁴ However passively human beings might be required to “[bend] responsively to the shape of the natural world,” they are also to act within it according to their own singular response to the shape of the world.¹⁰⁵ Agency, then, while held in tension with vulnerability, is necessarily prioritized over vulnerability by Nussbaum for what it means to the dignity of being able to order and shape one’s own life.

That point is further clarified when Nussbaum discusses voting rights for those with cognitive disabilities. Although she takes up this issue in *Frontiers of Justice*,¹⁰⁶ a more precise argument is made in a later article in which Nussbaum reflects on a person with cognitive disabilities “so profound that she cannot communicate her wishes about whom to vote for to a guardian,” or, indeed, even form such a view.¹⁰⁷ That person’s interest in voting, however, remains deeply vested in his or her citizenship and therefore ought to be recognized to its fullest potential. Consequently, a spectrum of possibilities for exercising that right are contemplated. Ideally, the individual should vote on her own (i.e., both choosing and acting for oneself). If that is not possible, then the vote should either be cast with assistance from a guardian (i.e., choosing but having the action of voting done by a representative), or entirely by proxy (i.e., with one’s interests represented by a guardian who both chooses and acts on the individual’s behalf).¹⁰⁸ The

¹⁰³ FG, 80.

¹⁰⁴ FG, 80.

¹⁰⁵ FG, 80; cf. 289.

¹⁰⁶ FJ, 199.

¹⁰⁷ Nussbaum, “Cognitive Disabilities,” 347.

¹⁰⁸ Nussbaum, “Cognitive Disabilities,” 344-349.

idea is simply stated, yet profoundly significant: to exclude an individual from a central public process like voting because he or she cannot form a political opinion, much less act on one, is both disrespectful and wrong. The exercise of agency should be protected and promoted as extensively as possible. If democracy truly means the extension of political power to all people without demanding the presence of qualifications for holding that power,¹⁰⁹ then a democratic state has no justification for withholding voting power from people with even acute cognitive disabilities.¹¹⁰ It cannot, in fact, withhold the right to vote without at the same time discounting such individuals as persons *qua* citizens. As a result, the example of voting rights for people with cognitive disabilities indicates that an appropriate balancing between agency and vulnerability is only maintained if it is tipped in favor of agency. Moreover, human striving for agency should be supported as fully as possible in all cases, even the most difficult ones.¹¹¹

Here again, Nussbaum's reliance on the idea of helplessness to conceptualize vulnerability is informative. As noted in the preceding section, one's helplessness does nothing to correspondingly limit her striving for agency. Helplessness, in fact, actually lays at the root of such striving. Lack of control, or simple lack altogether, is why human beings *strive* or *reach out* for desired objects. Therefore, however helpless human beings might actually be before the world, they remain agents all the same, actively striving to construct or shape features within it that are necessary to living well. A key passage from *The Fragility of Goodness* makes this point with clarity. Although it quoted in the epigraph to this dissertation, it bears repeating in full:

¹⁰⁹ Jacques Rancière, "Who is the Subject of the Rights of Man?" *The South Atlantic Quarterly* 103, no. 2 (2004): 304-305, available online: <https://muse.jhu.edu/> [accessed 10 March 2015]. Rancière is drawing this conclusion from Plato's list of qualifications that claim to be sources of legitimate authority. At the end of that list is a qualification for power that Plato refers to "ironically [as] God's choice, meaning by that mere chance: power gained by drawing lots, the name of which is democracy." Rancière summarizes that democracy "is the power of those who have no specific qualification for ruling, except the fact of having no qualification." Rancière, 305.

¹¹⁰ Nussbaum, "Cognitive Disabilities," 348-349.

¹¹¹ FJ, 199.

We are able to deliberate and choose, to make a plan in which ends are ranked, to decide actively what is to have value and how much. All this must count for something. If it is true that a lot about us is messy, needy, uncontrolled, rooted in the dirt and standing helplessly in the rain, it is also true that there is something about us that is pure and purely active [...].¹¹²

Even at infancy, when such cognitive abilities are first developing, human helplessness is coupled with an intelligence that allows the child to distinguish its own mother's milk from that of another and to communicate from an early age with caregivers through the use of sign language.¹¹³ Furthermore, the presence of even severe cognitive disabilities does not, for Nussbaum, negate one's standing as an agent striving for opportunities to choose and act. Therefore, while vulnerability is evident, so too is an accompanying agency that takes even the infant or the person with severe cognitive disabilities to the world, each one striving after necessary things.¹¹⁴

The main purpose of the plant metaphor that Nussbaum employs is to link vulnerability to agency and thereby allow the two concepts to inform and infuse one another when appropriately balanced. That balance is defined by world openness. The striving human agent is not vulnerable merely by existing in a body that is weak and mortal. Focusing only on the weakness of the plant results in too passive a view of the human being. Taking plant-like flexibility and resilience as a metaphor for world openness is meant also to convey that the evolving and unfolding plans of the agent are rooted in the shifting and unpredictable earth of the world in which we live. The image is used to convey the beauty of living in a world that is uncertain and, as such, requires a kind of docility from those existing within it. Yet, given that

¹¹² FG, 2.

¹¹³ PE, 169. Nussbaum remarks in *Not for Profit* that the physical deficiencies of human beings coalesce with "a high level of cognitive sophistication" to form a "strange combination of competence with helplessness; our problematic relationship to helplessness, mortality, and finitude; our persistent desire to transcend conditions that are painful for any intelligent being to accept." Nussbaum, *Not for Profit*, 30-31.

¹¹⁴ See Wall, *Ethics*, 39.

human beings are endowed with both the capacity to choose and the power to act, the world remains in many ways malleable to human agency all the same. Switching metaphors, as Nussbaum appears forced to do, this amounts to a picture of practical reasoning that envisions one navigating the world as would a group of sailors who were “voyaging unsafely,” but voyaging all the same.¹¹⁵ Agency and vulnerability are therefore balanced together. However, in the calculus of human flourishing, represented as it is for Nussbaum by the image of the plant and supplemented by the image of the ship, that balance is tipped importantly toward agency.

IV. The (Not So) Special Case of Childhood Vulnerability

So, what does the foregoing discussion of vulnerability and agency mean vis-à-vis children and their human rights? Nussbaum and Dixon argue that without an appropriate theoretical linking of children’s agency to concern for the maintenance of their own well-being (i.e., accounting for the manifestation of vulnerability at childhood), the CRC and various national constitutions across the globe cannot be relied upon to effectively recognize the full human dignity of children.¹¹⁶ This implies, as the authors highlight elsewhere, that the animal side of human nature (i.e., our embodied worldly encounterings) and the “side that chooses” (i.e., our capacity to deliberate about what is valuable and to alter and criticize our own desires¹¹⁷) are and should be “thoroughly interwoven.”¹¹⁸ Whatever actions one deliberately takes are always deliberated and taken within the uncertain context of one’s social and material encounterings. Therefore, the tension between vulnerability and agency discussed in the preceding section is largely reflected in the application of capabilities to children’s rights.

¹¹⁵ FG, 421.

¹¹⁶ CRCA, 552-553.

¹¹⁷ FG, 285, cf. 2. Nussbaum offers a rich and complex Aristotelian interpretation of this process that is beyond the scope of this project. See FG, 264-289 and Nussbaum, *Aristotle’s De Motu Animalium*, 221-269, cf. xvii-xviii.

¹¹⁸ Dixon and Nussbaum, “Abortion,” 5-6.

Moreover, respect for the human dignity of children also requires that vulnerability and agency be conceptually entwined in a way that prioritizes agency (i.e., the calculus of human flourishing). Nussbaum and Dixon underscore the centrality of choice to a political theory that champions the principle of treating each person as an end: “It is focused on choice or freedom, holding that the crucial thing societies should be promoting for their people is a set of opportunities, or substantial freedoms, which people then may or may not exercise in action: the choice is theirs.”¹¹⁹ Furthermore, they maintain that a life worthy of human dignity requires more than giving someone food or health; it requires “giving choices regarding nutrition... [and] health.”¹²⁰ That is why Nussbaum and Dixon proclaim the capabilities approach to be critical for interpreting and applying the CRC: “[it] sees people as striving agents... [and] aims at supporting the growth of agency and practical reason [in them].”¹²¹ Accordingly, a capabilities perspective will call for a rights instrument like the CRC to be employed in a way that affords children as much space to exercise deliberate choice as their capacity to do so will allow without diminishing their potential to do so in the future.¹²² The capabilities approach seeks to support children, like all others, as self-determining agents.

But a capabilities perspective does not perceive children to be entirely like all others. Nussbaum plainly views them as agents whose faculties for choice and action are emerging and not yet fully mature. The capabilities approach marks an obvious distinction between the primitive nature of childhood agency and that which is more fully developed at adulthood.¹²³ Nevertheless, Nussbaum perceives it to be the human plight, and not only the plight of children,

¹¹⁹ Dixon and Nussbaum, “Abortion,” 4.

¹²⁰ Dixon and Nussbaum, “Abortion,” 5-6.

¹²¹ CRCA, 559.

¹²² CRCA, 559-560.

¹²³ See Chapter 1, section V for this discussion. See CC, 26; FJ, 172.

to live in a world of desirable and needful objects that one does not fully control (see section II above).¹²⁴ As a result, one could counter that she provides little reason to mark a distinction between the full dignity of human beings, taken generally, and the more specific recognition of such dignity in children. Nussbaum herself maintains that the capabilities approach “provides a clear account for why children’s rights should be recognized as human rights, because every human being, under this approach, is entitled to respect for her full human dignity.”¹²⁵ Left unanswered is the question of whether there is anything distinct or special about children that should be accounted for in a dialogue on their rights.

Nussbaum, similar to other theorists concerned with topics like vulnerability and dependency, is well aware of the acute helplessness of human existence at childhood.¹²⁶ “Human beings,” she remarks, “are born into a world that they have not made and do not control.”¹²⁷ Moreover, the inability of many standard theories of justice – the political liberalism of Rawls among them – to adequately incorporate the unusual vulnerability of children and their need for care into a coherent scheme of rights is highly disconcerting to her.¹²⁸ Children, analogous as they are in certain ways to people with cognitive disabilities, represent a barren “frontier of justice” under standard approaches that are “not well equipped to theorize entitlements in areas [like childhood] in which great differences in power exist.”¹²⁹ Even with

¹²⁴ UT, 43.

¹²⁵ CRCA, 552-553.

¹²⁶ See Kittay, 29, 33; Fineman, “Children’s Interests,” 229-230; Turner, 69; MacIntyre, 68, 71, 74, 83-84, 155.

¹²⁷ HH, 177.

¹²⁸ CRCA, 562-563; cf. 593. Nussbaum has both Rawls and her critique of his political liberalism in mind here. See FJ, 21-25, cf. 9-22. Rawls admits that his work needs to be extended to cover people with disabilities and impairments, global justice, and doing justice to animals and nature in *Political Liberalism*. But he did not explicitly include children on that list. His reference to “future generations” implies children, but appears more economically driven and does not explicitly state that the concern is for those generations at the life stage of childhood. Rawls, *Political Liberalism*, 20-21. Also, as will be discussed in Chapter 3, doing justice to children is largely covered by the family. See Rawls, *Restatement*, 162-168, Rawls, “Public Reason,” 595-601; cf. Rawls, *Theory*, 462-469.

¹²⁹ CRCA, 593.

the increasing recognition that their rights have received in recent years, children are vulnerable and dependent upon others in ways that serve to marginalize them in society simply because they are not the “‘free, equal and independent’ agents of the [traditional] social contract model.”¹³⁰ It appears, then, almost axiomatic for Nussbaum to include special considerations for children in her account of social justice.

However, Nussbaum is careful to explain that childhood vulnerability is quite unexceptional in important ways. She detects, for instance, a correlation between the manifestation of vulnerability in both children and adults with severe cognitive disabilities:

For them as well, active state protection is needed for a wide range of capabilities, to a degree that it is not required by adults without such disabilities. This difference (between children and adults with severe cognitive disabilities and other adults) is a matter of degree: all people need state protection for [the central capabilities]. In the case of children and adults with severe cognitive disabilities, however, the state must remain more deeply involved in protecting capabilities, frequently through delegation of some powers to a guardian or surrogate, but also through the supervision and limitation of those powers.¹³¹

As this passage suggests, the case of children is comparable to that of adults with severe cognitive disabilities if it is agreed that “all people need state protection” with regard to capabilities.

Of course, if *all people* stand in need of such protection, then distinguishing children from any of the adult population in general is unjustifiable under Nussbaum’s system. After all, capabilities are to be protected on an equal basis for all human beings. Nussbaum and Dixon declare the “primary claim” of the capabilities approach to be “that each and every person is entitled to a minimum threshold level of ten central capabilities or opportunities, and that the job of securing these is that of the state in which they live [...]”¹³² All individuals *without exception*

¹³⁰ CRCA, 593; cf. 563.

¹³¹ CRCA, 575.

¹³² Dixon and Nussbaum, “Abortion,” 5.

are entitled to claim protections related to substantive opportunities to choose and select in the areas Nussbaum lists.¹³³ Consequently, she rejects the idea of allocating a special priority that pertains to various vulnerabilities perceived to be intrinsic to children, including their presumably distinctive innocence and their allegedly unique needs for healthcare and opportunities to develop autonomy.¹³⁴ Making a special case out of children for any reason, including the apparent exceptionality of their vulnerability, would violate the principle of treating each and every person as an agentive end that is foundational to Nussbaum's thought. Therefore, entitling children to a special priority will "in most cases" be unjustifiable under her theory.¹³⁵

But it will not be so in all cases. Vulnerability at childhood does trigger special considerations in at least one sense: the "more or less unique vulnerability [of children] to the decisions of others – that is, those adults legally and economically responsible for their care."¹³⁶ Children are, generally speaking, dependent on adults economically in order that they might receive an education without having to worry about earning wages. Furthermore, they are legally dependent on parents and guardians who are given broad rights for making decisions with regard to housing, education, and healthcare for their children while also supplying them with political and legal representation.¹³⁷ Such rights are important, especially under Nussbaum's theory of justice, due to the significance that a child's present functioning in areas like education and healthcare holds for his or her future exercise of self-determining agency.¹³⁸ Accordingly, Nussbaum seems to violate her own position by requiring functioning rather than capabilities in

¹³³ CRCA, 572-573.

¹³⁴ CRCA, 567-571.

¹³⁵ CRCA, 573.

¹³⁶ CRCA, 575.

¹³⁷ CRCA, 575.

¹³⁸ FJ, 171-172; CC, 26.

these key areas when it comes to children. She justifies doing so, however, on the basis that children “will ultimately attain full adult freedom.”¹³⁹ It therefore does not “denigrate” them to impose conditions on things like education and healthcare for the time being.¹⁴⁰ It just acknowledges the emerging character of their agency.

While parents are generally entrusted with “primary responsibility for protecting and developing the capabilities of their children,” Nussbaum’s theory does not maintain that children “have to live with parental choices that in fact compromise their development” in areas of high importance, like health and education.¹⁴¹ A “total lack of control over certain decisions” prompts her account of capabilities to call on state action to insure children “against the risk that their parents (or legal guardian) will turn out to be unable, or unwilling, to take reasonable steps to protect their [actual and maturing agency].”¹⁴² This, among other reasons, causes her to question the United States Supreme Court decision in *Wisconsin v. Yoder*.¹⁴³ Nussbaum contends that it was based on the weaker concern that Amish children grow up to be self-supporting members in their community and not on the robust capabilities concern for how withdrawal from school might affect the wider range of opportunities available to them.¹⁴⁴

Consequently, Nussbaum appears to call for children’s rights to account for the *actual* particularity of children’s vulnerability and powerlessness.¹⁴⁵ Rather than viewing children as unique according to flawed notions about the distinctiveness of their helpless state, Nussbaum

¹³⁹ Wall finds this to be a troubling aspect of Nussbaum’s moral thought as human dignity becomes based on adult expressions of agency. Wall, *Ethics*, 119; cf. Macleod, “Primary Goods,” 174, 187-189, cf. 182. See Chapter 6, section II of this dissertation.

¹⁴⁰ CRCA, 576.

¹⁴¹ CRCA, 576.

¹⁴² CRCA, 576-577.

¹⁴³ *Wisconsin v. Yoder* deals with laws on compulsory public education for children and the right of parents to be exempt from conformity to them. WHD, 199, 232-234.

¹⁴⁴ CRCA, 571; cf. WHD, 233. Concern over sex-equality causes Nussbaum to be uncertain about the outcome of the case. WHD, 233-234.

¹⁴⁵ CRCA, 593.

focuses on the particular ways their present and future agency can be infringed upon. While basic vulnerabilities facing children might be common to the broader spectrum of humanity, being susceptible in significant ways to the decisions of others – particularly those made by parents or legal guardians – is, more or less, unique. In the interest of affording them “decisional freedom” commensurate with their actual and potential capacities, the capabilities approach therefore takes children to be a special case in this specifically limited way.

V. Capabilities and the CRC’s Best Interests of the Child Principle

As a result of this narrow and strictly defined “special priority” for children, it should be apparent that the capabilities approach holds significant implications for the “best interests of the child” principle that is so crucial to interpreting the CRC.¹⁴⁶ That principle, located in Article 3.1, reads: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” According to UNICEF, this principle “underpins the legal protection and evidence-based care of children.”¹⁴⁷ While it is said to “float in meaning” for its lack of precision,¹⁴⁸ the significance of the best interests principle to the CRC

¹⁴⁶ The “best interest of the child” principle (Art. 3) is one of four core principles that guide interpretation of the CRC. The remaining three are non-discrimination (Art. 2), the right to life, survival and development (Art. 6), and respect for the views of the child (Art. 12). Thoko Kaime, *The Convention on the Rights of the Child: A Cultural Legitimacy Critique* (Groningen, NL: Europa Law Publishing, 2011), 93-129. Note that provisions related to these principles are not restricted to the articles cited above, but only that these are the grounding points for the principles as endorsed by the UN. See UNICEF, *The State of the World’s Children: Special Edition* (New York: United Nations Children’s Fund, 2009), 2, 6-9, available at: http://www.unicef.org/publications/files/SOWC_Spec_Ed_CRC_Main_Report_EN_090409.pdf [accessed 10 March 2015] and UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child* (May 2008), 14, available at: <http://www.refworld.org/docid/48480c342.html> [accessed 15 November 2014].

¹⁴⁷ UNICEF, *State of the World’s Children*, 8.

¹⁴⁸ Don S. Browning, “Legal Parenthood, Natural and Legal Rights” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 107; Philip Alston, “The Best Interests Principle: Toward a Reconciliation of Culture and Human Rights,” *International Journal of Law and the Family* 8, no. 1 (1994): 4, 17-18, available at: <http://lawfam.oxfordjournals.org/content/8/1/1> [accessed 10 March 2015]; Kaime, 104-109; Liebel, 46; Rana Lehr-Lehnardt and T. Jeremy Gunn, “What’s Love Got to Do with It? (Part II): The Best Interests of the Child in International and Comparative Law” in *The Best Love*

is undeniable all the same. Manfred Liebel explains that since the CRC is a treaty amongst states, inclusion of this principle means that ratifying parties are committing themselves to “act in the best interests of the children.”¹⁴⁹ Philip Alston further observes how its placement early in the Convention lends the principle “importance and prominence” as an “umbrella provision.”¹⁵⁰ The phrase “best interests of the child” is, in fact, repeated several times in the CRC with regard to the separation of the child from the family context (Art. 9), parental responsibility in the upbringing and development of the child (Art. 18), adoption and comparable practices (Arts. 20 and 21), and the child’s engagement with the police and the judicial system (Arts. 39 and 40).¹⁵¹ Accordingly, Rana Lehr-Lehnardt and Jeremy Gunn claim the best interests principle to be a “basic premise” upon which the CRC is built. As such, they find that its repetitions therein are intended to inform “relationships of parents and children, children and the state, foster care, juvenile delinquency, and punishment.”¹⁵²

While undeniably important, the best interests principle is, as mentioned, lacking in exact definition. The CRC is said to be purposefully vague with regard to this principle because, at least according to guidelines for applying it outlined in 2008 by the UN High Commissioner for Refugees, “a conclusive definition” of what is in a child’s best interests depends on “a variety of individual circumstances” like age, level of maturity, parental involvement, and the child’s environment and experiences.¹⁵³ The principle is therefore understood in broad terms to pertain to the well-being of the child and to carry with it the expectation that interpretation and

of the Child: Being Loved and Being Taught to Love as the First Human Right, ed. by Timothy P. Jackson (Grand Rapids, MI: Eerdmans, 2011), 305-306.

¹⁴⁹ Liebel, 125. Michael Freeman finds the best interests principle to be stated too lightly. He would prefer that children’s interests “determine” the course of action to be followed on their behalf. Freeman, *Moral Status*, 107.

¹⁵⁰ Alston, “Best Interests Principle,” 15.

¹⁵¹ Alston, “Best Interests Principle,” 3.

¹⁵² Lehr-Lehnardt and Gunn, 304.

¹⁵³ UNHCR, *Guidelines*, 14-15.

application will occur in light of “all the rights of the child” outlined in the CRC and in conjunction with “other relevant legal bases, both at the international and national level, that may affect [decisions related to the child’s best interests].”¹⁵⁴

Also critical is the matter of social and cultural variation.¹⁵⁵ That issue, namely the social and cultural breadth of ideas about the nature of the child and what may or may not be in her best interests, has at times been understood to pose a problem for the application of this standard. Like “arbitrary and inconsistent applications” of the best interests principle at the domestic level, its success in international law is called into question due to the inherent indeterminacy with which it is characterized.¹⁵⁶ Without diminishing the problems that this poses to the interpretation of children’s rights norms, Alston nevertheless notes the important flexibility that is built into the principle through its imprecision:

Indeed it is one of the paradoxes of international human rights law that, on the one hand, the norms must be sufficiently clear, comprehensive and inflexible to provide the international community with some basis on which it might seek to constrain a government which undermines or circumvents minimum standards of decent behavior. On the other, any enterprise which is avowedly universalist in its aspirations and aims to address a very wide range of issues involving, *inter alia*, the relationship between the state, the family and the child, must be characterized by a significant degree of flexibility and adaptability.¹⁵⁷

Alice Hearst concurs and remarks that “[i]mbuing the best-interests principle with content [would prove] difficult in specific circumstances, as there is no consensus about what that standard means in varying contexts; distinct communities and cultural groups may legitimately emphasize different child-rearing values.”¹⁵⁸

¹⁵⁴ UNHCR, *Guidelines*, 15, cf. CRC, Art. 41.

¹⁵⁵ See Alston, “Best Interests Principle,” 5-9, 16-23.

¹⁵⁶ Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (The Hague, NL: Martinus Nijhoff Publishers, 2002), 17.

¹⁵⁷ Alston, “Best Interests Principle,” 17-18.

¹⁵⁸ Hearst, 16, cf. 28, 141-142.

In addition to recognizing the disparities that exist between actual children and the cultural dependence of “best interests” as a concept, the principle’s lack of definition also importantly accounts for family autonomy. While addressing the issue of government control over freedom of expression in America, Barbara Woodhouse affirms the tradition of giving “wide latitude” to parental decision making based, in part, on the “presumption that parents act in their children’s best interest.”¹⁵⁹ Article 18, an important best interests statement in the CRC, implies a similar conjecture when it asserts the primacy of parental responsibility in the “upbringing and development of the child” according to the best interests standard. Philip Veerman comments that this emphasis on parental responsibility “implies that the State should stay in the background.”¹⁶⁰ Acknowledging the autonomy involved in the work of child-rearing appears to be one way that the CRC acknowledges the fragile goodness of family life and the open-ended nature of the best interests principle. It articulates the hope that parents will act in the best interests of their children even if, in reality, it cannot legislate a particular way of doing so.¹⁶¹ In fact, filling out the principle with content would seem counterintuitive to the respect it is meant to demonstrate for the uniqueness of children, the diverse cultures to which they identify, and families into which they are born. Filling out the content of the principle would have increased the degree of difficulty for gaining the broad consensus on children’s rights that

¹⁵⁹ To be clear, Woodhouse is commenting specifically on the issue of parental control over their children’s access to media and various other forms of expression. However, the point she makes has analogies. The two other “strong American traditions” she adds with regard to trusting parents to act in their children’s best interests are, first, “the danger of instilling conformity by standardizing our children,” and, second, “the high value we place on cultural diversity.” Woodhouse, *Hidden*, 130-131.

¹⁶⁰ Philip Veerman, *The Rights of the Child and the Changing Image of Childhood* (Norwell, MA: Kluwer Academic Publishers, 1992), 196.

¹⁶¹ Lehr-Lehnardt and Gunn register as crucial the fact that the CRC proclaims that “the best interests of the child *will* be their basic concern” rather than the commonly used imperative “shall.” The use of “will,” they argue, denotes future tense and associates the best interests principle with “some amount of hope” rather than legislative command. Lehr-Lehnardt and Gunn, 305.

the CRC represents. It would also appear counterproductive to Nussbaum's own basic concern that human beings have space to shape their distinct lives in cooperation with others.

Being flexible does not, however, make the best interests principle broadly appealing to capabilities theorists. Zoë Clark and Holger Ziegler test the limits of its flexibility in their attempt to link agency more stringently to the best interests standard. Contrary to Veerman, they argue that Article 3, the so-called "welfare-article" of the Convention, is at risk of diminishing both welfare provisions related to vulnerability and participation rights related to agency. They maintain that it "implicitly acknowledges the fact of young people's dependency and vulnerability and thus explicitly stresses the (potential) need of protective measures in order to secure 'children's best interests'."¹⁶² The problem, therefore, is with the second paragraph of this article and its alleged inference that the state should stay in the background in order to account for "the rights and duties of [the child's] parents, legal guardians, or other individuals legally responsible for him or her." Buoyed by Article 18's explicit reference to the primacy of parental responsibility for the child, Article 3 can be perceived as emphasizing the role of the parent or legal guardian to provide adequate care while offering little mention of direct public responsibility for safeguarding welfare needs.¹⁶³

The problem this interpretation poses according to Clark and Ziegler, and presumably to others enthused about the potential for capabilities to inform the idea of children's human rights, is that the action of relegating the state to the background simultaneously distances children from their rights. By emphasizing parental care in a way that appears to diminish (direct) state responsibility, the CRC is perceived to "celebrate children as active agents without taking the complex social conditions of agency into account." Although Clark and Ziegler address this

¹⁶² Clark and Ziegler, 219.

¹⁶³ Clark and Ziegler, 220.

issue in somewhat ambiguous terms for the most part, reference to the complexity of children's social conditions appears to mean for them the "highly unequal and often unjust power-relations" that can characterize family life.¹⁶⁴ The following makes evident this concern:

It is one major characteristic of a right that the entitlement is ensured by state agents within the sphere of the public. Yet, in the [CRC], in many articles, young people are recommitted to the sphere of the private and to their parents (or legal guardians) as providers of access to rights. It is already fixed in the preamble of the children's rights convention that the family is a natural way of growing up and that it is *the* environment for developing well-being [...] (author's emphasis).¹⁶⁵

Clark and Ziegler read the CRC as problematically advocating that children's rights should be primarily mediated to them through their parents rather than recognized as their own publically endorsed entitlements. Since responsibility for the rearing of children is perceived to be first of all a parental obligation and "not (or at least not primarily)" a political one, children "are not equally entitled to social, civil and political rights as adults are, but their provision, participation and protection depend [all the same] on their parents in many ways."¹⁶⁶ Turner makes a similar observation from a more neutral stance: "Children depend on advocacy if they are to realize their rights effectively, and the obvious problem is that children generally cannot exercise their rights without the full backing and assistance of their parents."¹⁶⁷ The idea that children depend on parental advocacy in order to realize their rights speaks to a key capabilities' concern for Nussbaum that will be discussed further in Chapter 3, namely, that children, particularly in their capacity for agency and their status as political subjects, are obscured by familial belonging.

¹⁶⁴ Clark and Ziegler, 221.

¹⁶⁵ Clark and Ziegler, 225.

¹⁶⁶ Clark and Ziegler, 226.

¹⁶⁷ Turner, in this instance, is commenting on the interesting potential for conflict between parental and children's rights when the two fail to coincide. He provides four examples, all of which open a plethora of other contentious debates: sex selection, contraception, abortion, and divorce. Turner, 83.

The difficulty, however, is not just that children's welfare rights are obscured because they are distanced from those rights *qua* political entitlements. It is also that children's participatory (or agency) rights are disconnected and also distanced from the best interests principle itself. Clark and Ziegler view the relationship between Article 3 (the aforementioned "welfare article") and Article 12 (the so-called "participatory article"¹⁶⁸) of the CRC to be a strained one. They maintain that the original draft of the Convention submitted by Poland in 1978 included the right of the child to be heard in conjunction with the best interests principle.¹⁶⁹ Presumably they are referring to the claim that the child "shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to enable him to develop... in a healthy and normal manner and in conditions of freedom and dignity."¹⁷⁰ By articulating the child's right to be heard in a way that is only loosely connected to their best interests, the ratified 1989 version of the CRC is thought to effectively legitimize a patriarchal notion of the family and to seriously restrict children's rights as the rights of human social agents.¹⁷¹ Daniel Stoecklin and Jean-Michel Bonvin are similarly anxious and, although they make no explicit reference to the family, argue for Article 3 and Article 12 to be read in a way that reflects the "interdependent" nature of the CRC. They claim that the best interests of the child must be defined by integrating children's perspectives:

This integration should be sensitive to forms of communication, written (including drawings) and oral, through which children express their opinions. The 'due weight' given to the views of the child according to age and maturity is a limitation. But it should also be understood as the consideration that is due to the child so that he/she can be effectively heard through appropriate procedures and hearing techniques. Therefore, the limited but evolving capacities of the child become a '*de facto*' criterion (to be assessed

¹⁶⁸ Clark and Ziegler, 219.

¹⁶⁹ Clark and Ziegler, 227.

¹⁷⁰ Office of the United Nations High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vol. 1 (New York and Geneva: United Nations, 2007), 335, available at: <http://www.ohchr.org/documents/publications/legislativehistorycrc1en.pdf> [accessed 13 November 2014].

¹⁷¹ Clark and Ziegler, 227-228.

on a case-by-case basis) linked to the ‘*de jure*’ subjective right attached to the child of seeing his/her best interests considered... in any decision affecting him/her.¹⁷²

Clark and Ziegler state their unease in terms that more directly implicate the family: “Such an interpersonal dependency in which children rely on resources, mercy and the knowledge of their parents is in danger of reproducing inter-generational inequalities between children and also blames parents with fewer resources.”¹⁷³

Both Clark and Ziegler’s *and* Stoecklin and Bonvin’s apprehensions about the best interests principle are at least partially derived from Nussbaum and Dixon’s stated uncertainty that parents will be willing and able to insure their children’s capabilities. The simple claim of Nussbaum and Dixon is that children should not have to live with parental decisions that in fact “compromise their development, in health, education, and other areas.”¹⁷⁴ Nussbaum’s interest in agency, however, occupies a more potent place in her analysis than that of Clark and Ziegler (although their account is moving close to it). She and Dixon only briefly mention the best interest standard in their discussion of the CRC,¹⁷⁵ but that reference, when situated in Nussbaum’s broader theory, represents a serious test of the principle’s flexibility that comes in the form of her principle of treating each person as an end. That key capabilities principle makes it difficult, if not impossible, to promote the universality of the central human capabilities *and* the emerging and fragile agency of children if that agency, entwined as it is with their vulnerability, is more directly linked to the best interests principle of Article 3. As argued in the preceding section, childhood vulnerability elicits no special priority under the capabilities approach beyond concern to address their unique economic and decisional dependence on

¹⁷² Stoecklin and Bonvin, “Capability Approach,” 64.

¹⁷³ Clark and Ziegler, 228.

¹⁷⁴ CRCA, 576.

¹⁷⁵ CRCA, 568, 569.

parents (or legal guardians) and other significant adult caregivers.¹⁷⁶ The problem is that children's present capabilities – and especially their future ones – are put at risk of being limited or derailed by parental decisions or those of other significant adult caregivers. It appears logical to answer this problem by placing a greater emphasis on agency in one's interpretation of the CRC, as Nussbaum and Dixon call for.¹⁷⁷ Both Clark and Ziegler *and* Stoecklin and Bonvin certainly bring that emphasis by insisting that Article 12 be factored into the best interests principle to a greater degree. But this approach really glosses over Nussbaum's primary concern with regard to children's rights. The problem that implicitly surfaces from a careful reading of her collaboration with Dixon is not merely that agency factors insignificantly into the best interests principle. It is that the best interests principle effectively undermines the integrity of the principle of treating each person as an end by placing a special priority on children. The CRC as a whole, in fact, is problematic for that very reason.

If a principle is required to emphasize children's particular vulnerability it would therefore have to be framed as an exceptional principle that specifically accounts for children's unique dependency on parents and other adult caregivers. Clark and Ziegler's attempt to link agency more closely to the best interests principle breaks with the logic of Nussbaum's theory, however much their emphasis on agency might appear to converge with it. There really is no space for a best interest principle in a capabilities-informed theory of children's rights, at least not one that is as importantly and prominently placed as Alston claims the best interests principle of the CRC to be.¹⁷⁸ If Nussbaum were to sanction a special priority for children, it could not be one articulated as a central and definitive hermeneutical tool. Furthermore, it would have to

¹⁷⁶ CRCA, 573-578.

¹⁷⁷ CRCA, 552-553, 559-560.

¹⁷⁸ Alston, "Best Interests Principle," 15.

stress the tragic and anomalous nature of doing so. Placing a priority on one type of individual over another – or, more precisely, on the agency of one sector of society over that of another – is a tragic choice for Nussbaum and not a best case scenario. There is nothing like a best interests principle for children, or anyone else, entrenched in her list of central human capabilities. There is only the entitlement of “being treated as a dignified being whose worth is equal to that of others.”¹⁷⁹

In fact, Nussbaum carefully stresses that “the intrinsic value and importance” of each of the central capabilities make the situation produced when any two of them collide a tragic one: “any course we select involves doing wrong to someone.”¹⁸⁰ This tragic situation describes precisely what Nussbaum deems to be the result of giving a special priority to children.

Speaking to that issue, she explains:

The [capabilities approach] provides an account of each person’s fundamental entitlements – entitlements that must be secured to everyone as a necessary condition of minimal social justice. All entitlements are held to be required by the notion of a life worthy of people’s equal human dignity. When, therefore, a given capability cannot be secured to everyone, or when securing one capability means forgoing another, that is a tragic conflict, which deserves to be marked as such. Both [the CRC] and various national constitutions, however, frequently give just this kind of special priority to children’s rights, without explicitly acknowledging the moral difficulty, in some cases amounting to a tragic choice, that this involves.¹⁸¹

Insofar as an emphasis on the best interests of children depends on constraining the interests of their adult caregivers, that principle can be viewed to neither fulfill the aim of mature interdependence nor contribute positively to the formation or functioning of the facilitating environment that should be sought, according to Nussbaum.¹⁸² The capabilities approach under her theory can recognize no special priority for children that would not be, at one and the same

¹⁷⁹ See Appendix, *Affiliation*, 7.B.

¹⁸⁰ CC, 37.

¹⁸¹ CRCA, 567-568.

¹⁸² See Section II of this present chapter.

time, a dreadful decision made at the expense of others. This does not mean that certain situations will not call for such a decision to be made. Nussbaum acknowledges that “[t]ragic situations may require us to consider what to do in the immediate situation.”¹⁸³ More specifically, “parents themselves will often face tragic choices under the [capabilities approach].”¹⁸⁴ But tragic situations and unfortunate choices are not to be enshrined as a capabilities norm. Although Nussbaum herself describes children as “unusually vulnerable and powerless,” she also insists that prioritizing their welfare rights over that of others in order to address their relative helplessness is “a clear failure of justice.” Doing so should, at the very least, be viewed as a deeply regrettable trade-off that occurs under defective circumstances rather than an entrenched and valued norm.¹⁸⁵

The tragic character of prioritizing children’s interests over those of others through the priority placed on them in the CRC speaks to the foundational idea that this chapter has attempted to explicate. Although Nussbaum’s capabilities framework weaves agency and vulnerability together, it emphasizes the cultivation of agency as a basic requirement of what really human living means for everyone. Despite the various ways in which choosing and acting for oneself are threatened by a plethora of uncertainties, Nussbaum’s capabilities approach seeks to protect both the actual and increasing exercise of agency for children to shape their own life through deliberate choice and action. Her calculus of human flourishing factors both agency and vulnerability into its equation. But insofar as flourishing is the intended outcome, then agency must factor more heavily than vulnerability. Even so, this calculus is one of *human* flourishing

¹⁸³ CRCA, 593.

¹⁸⁴ CRCA, 584.

¹⁸⁵ CRCA, 553-554, 567-568, 575, 592-593; cf. CC, 36-39. Commenting on Nussbaum’s theory, Clark and Ziegler affirm that under the capabilities approach “vulnerability and interdependency are not characteristics that are unique to children, but are general human features.” Clark and Ziegler, 223.

and not one particularly adjusted to childhood except for certain unique circumstances, like children's economic and decisional dependence on their parents. As a result, it is difficult for the capabilities approach to support anything like the best interests of the child principle if what it registers is a special priority for children that becomes, in Nussbaum's view, a regrettable and distorting component of children's rights discourse.

The main argument of this dissertation may, after two chapters, be summarized as follows: the idea of human rights is applied to children in a fully human way for Nussbaum only if the application of it highlights the individual child's emerging capacity to deliberately shape his or her own life in cooperation with others and despite the intrinsic uncertainties of life. Any justification for applying human rights to children in this way is incomplete, however, without a fuller exploration of the family.

Chapter 3 – Politicizing Familial Love and Care

Family, then, can mean love; it can also mean neglect, abuse, and degradation. Moreover, the family reproduces what it contains. Just as it is often a school of virtue, so too (and frequently at the same time) it is a school of sex inequality, nourishing attitudes that not only make new families in the image of the old, but also influence the larger social and political world.

~ Martha Nussbaum, *Women and Human Development*, 243-244.

But children are simply hostages to the family in which they grow up, and their participation in its gendered structure is by no means voluntary.

~ Martha Nussbaum, “Rawls and Feminism,” 504.

The purpose of this chapter is to investigate how the family factors into human flourishing under Martha Nussbaum’s theory. Her claim that “family, rightly understood, stands for love and care” will guide this discussion.¹ The first section makes explicit the qualified link between family and flourishing that she perceives to exist. The second then discusses Nussbaum’s claim that the family should be opened up to scrutiny, a position that signifies a sharp critique of John Rawls’s own stance on the matter. The following two sections then outline, in order, the basics of Nussbaum’s Millian argument against the idea that the family exists by nature and her more positively stated social constructionist argument for viewing the family as a dynamic and fluid institution. The final section then argues that Nussbaum’s capabilities approach requires a politicization of the family in which each member is identified as a social agent and a subject of justice in his or her own right. The overall aim is to demonstrate that, from a capabilities perspective, an appropriate estimation of familial love and care consists of state-sanctioned affiliation bonds between the individual child and his or her adult caregiver(s).

¹ WHD, 275.

I. Linking the Family to Human Flourishing

To speak of children at all is, in fact, to either infer the family in some form or to seek a familial-like substitute for it. The influential twentieth-century psychoanalyst Donald Woods Winnicott once proclaimed, “There is no such thing as a baby – meaning that if you set out to describe a baby, you will find you are describing a *baby and someone*. A baby cannot exist alone, but is essentially part of a relationship” (author’s emphasis).² Nussbaum makes a similar point in *Upheavals of Thought*.³ After noting that children arrive in the world in the condition of “needy helplessness” discussed in the preceding chapter, she goes on to remark that,

...the infant is not altogether helpless. From the first there are agencies in the environment that minister to its needs, supplying what it cannot supply for itself. These agencies therefore take on an intense importance in the infant’s inchoate and as yet undemarcated awareness of the world. Its relationship to them focuses, from the first, on its passionate wish to secure what the world of nature does not supply by itself – comfort, nourishment, protection.⁴

Nussbaum becomes more specific about these “agencies,” noting later in the same chapter that it is “mother, father, nurse, or some other caretaker or caretakers who plays or play the primary role” of tending to the infant in its helpless state. She even cites experimental evidence to highlight a newborn’s ability to recognize the scent of his or her own mother’s breastmilk,⁵ thereby reinforcing the idea that infancy implies an intimate relation to a caregiver or separate caregivers. The key point, however, is not that there is a vital connection between child and biological mother and/or father or any particular parental figure. Rather, it is that “human

² Donald Woods Winnicott, *The Child, the Family, and the Outside World* (Reading, MA: Addison-Wesley, 1987), 88, quoted in Andrew Solomon, *Far from the Tree: Parents, Children and the Search for Identity* (New York: Scribner, 2012), 1.

³ Winnicott, it should be noted, figures significantly into Nussbaum’s discussion of infancy and emotions. See UT, 174-236. He also features as a prominent influence in PE, 173-182 and HH, 173-203.

⁴ UT, 182.

⁵ UT, 184, 187. The ability of a one week old infant to differentiate the smell of its mother breast milk from that of another also speaks to the interesting way a high level of physical helplessness combines with a “very high level of cognitive sophistication.” Nussbaum, *Not for Profit*, 30.

infants... need security and stability in their environment, and need, for this purpose, the ability to recognize and enjoy the comfort of one or a small number of reliably caring individuals.”⁶

Alasdair MacIntyre remarks that infants, “from the earliest stages of [human] life after birth... direct themselves towards the immediate satisfaction of felt bodily wants: for milk and the breast, for warmth and security, for freedom from this or that discomfort or pain, for sleep.”⁷ In that way parental love, as Matthew Liao views it, is shown to be “a primarily essential condition for children to have a good life,” even if an organic bond between parent and child is not.⁸

Nussbaum shares a similar outlook. The loving and nurturing attention of an adult is so important to the child’s prospects for flourishing that one cannot speak of infancy or early childhood without axiomatically implying a vital connection between one or more specific caregivers and a particular child. Yet, Nussbaum would agree with theorists who allege that no natural or biological connection is necessary or intrinsic to this adult-child bond.

The conviction that a vital link exists between family and flourishing is evident as early in Nussbaum’s work as *The Fragility of Goodness*. Commenting on Euripides’ play, *Hecuba*, she makes this connection between adult care and human flourishing at childhood:

A young child, [Euripides] suggests (in an image well known to us), is like a green plant: its very growth to maturity and good character depends on the provision of nourishment from without. Put in the mouth of a murdered child [as Euripides does with Hecuba’s son, Polydorus], this image makes us recall that our possibilities for goodness depend on the good faith of others, who are not always faithful. And even when a plant comes to maturity and flourishes, it is still, after all, nothing harder or tougher than a plant. Even healthy plants can be blasted from without by storms, disease, betrayal.⁹

⁶ UT, 188.

⁷ MacIntyre, 68.

⁸ S. Matthew Liao, “The Right of Children to be Loved” in *What is Right for Children? The Competing Paradigms of Religion and Human Rights*, ed. by Martha Albertson Fineman and Karen Worthington (Burlington, VT: Ashgate, 2009), 348n2, 351, available online: ProQuest ebrary [accessed 9 March 2015].

⁹ FG, 397, cf. 103.

At least two general conclusions about childhood can be drawn from this passage. First, there is no figure of a solitary child – one actually separated from the agencies of love and care – that is not, at one and the same time, a tragic figure also. Euripides' *Hecuba* offers a case in point. After the fall of Troy and her own ensuing enslavement, Hecuba entrusted her son, Polydorus, to the care of Polymester, a local Thracian king and close family friend. Away from his mother's loving arms, Polydorus is murdered for his wealth and thrown into the sea by the very one commissioned with keeping him safe during a period of war.¹⁰ Second, the experience of familial love is not guaranteed to children purely on the basis of being enfolded into a family or family-like situation. Hecuba obviously had no inclination that Polymester would betray her and murder her son. Had she suspected as much, Hecuba's deep love for Polydorus would have kept her from ever entrusting him to the duplicitous monarch. Nussbaum addresses this second point in her later work on capabilities where she frequently references actual women and female children who have also faced various forms of violence and oppression at the hands of trusted family or near-family members.¹¹ Being dependent on others (i.e., Winnicott's "someone"), as all children are, especially in the early stages of childhood, is perceived by Nussbaum to be no guarantee that familial love will be imparted, nor is it a guarantee that violence and oppression will be absent from one's life. The abuse of children at the hands of caregivers is a tragic fact of life, true today as it has been throughout history.¹²

¹⁰ FG, 397-399; cf. Euripides, *Hecuba*, translated by Christopher Collard (Warminster, UK: Aris & Phillips Ltd, 1991), 53, 93-95.

¹¹ For a minimal set of examples, see SSJ, 82-83, 89-90, WHD, 15-24; 241-243; CC, 2, 7-8, 9.

¹² Andrew Solomon recounts the story of Pete Nelson who suffered physical abuse and perpetrated sexual abuse, both as a child and within his own family. Pete's tale is a tragic one that is too often repeated today. Unlike many, his story ends in reconciliation. Solomon, 539-543. Reaching back in history, the Hebrew Scriptures testify to family violence and oppression in a number of narratives: Cain's murder of his brother Abel (Genesis 4:1-16); Lot's willingness to offer his daughter's as sexual appeasement to an angry mob (Genesis 19: 1-11); Joseph's brothers selling him into slavery and subsequent lying to their father that he was killed (Genesis 37:15-36); Jephthah's sacrifice of his only child, a daughter (Judges, 11:29-40); and, to cite one last example, King David's daughter

If there is no solitary child that is not also a tragic figure due to his or her dire need for loving and affectionate care, and there is no guarantee that families will impart love and care, what then can be said of the family's role in the promotion of human flourishing at childhood? Nussbaum appears at first glance to be ambivalent on this issue. She writes in *Women and Human Development* that "family, *rightly understood*, stands for care and love" (emphasis added).¹³ Yet in the same chapter she makes the Euripidian observation that families are also a home for violence and oppression. "Love and care do exist in families," she claims, but "so too do domestic violence, marital rape, child sexual abuse, undernutrition of girls, unequal health care, unequal educational opportunities, and countless more intangible violations of dignity and equal personhood."¹⁴ Family, she argues, "can mean love; it can also mean neglect, abuse, and degradation."¹⁵ A deeply ambivalent approach to this institution therefore seems to be justified since the family, she concludes, "both fosters and undermines human capabilities."¹⁶

Nussbaum is not satisfied, however, with ambivalence. That much is apparent in the chapter of *Sex and Social Justice* in which she specifically asks the question of how families factor into the promotion of human flourishing.¹⁷ Her answer is that children "do need intimate and stable care from a small number of adults who are persistently devoted to the child's well-being, know the child's particularity, and provide the child with a materially secure and emotionally stable environment."¹⁸ That position is later echoed and more fully fleshed out in *Upheavals of Thought*. In a chapter titled "Infancy and Emotions," Nussbaum argues against the

Tamar's rape at the hands of her half-brother Amnon and her brother Absalom's subsequent murder of Amnon, two events made possible in part because of the King David's deficiencies as a parent (1 Samuel 13).

¹³ WHD, 275.

¹⁴ WHD, 243.

¹⁵ WHD, 243.

¹⁶ WHD, 270.

¹⁷ SSJ, 272.

¹⁸ SSJ, 272-274.

kind of parenting that demands some subjective standard of “perfect” behavior from the child (perfect, that is, according to the caregiver’s own assessment). Such caregiving only gives rise to an enduring and debilitating shame. The result is that “the real vulnerable self” of the child is hidden, only to be replaced by the façade of a “robotic and inauthentic ‘false self’” that surfaces at childhood and reverberates throughout the individual’s adult life.¹⁹

What flourishing requires, instead, is an environment of parental love that acknowledges human neediness at infancy and works to guide the child away from infantile omnipotence and toward mature interdependence.²⁰ If all goes well, she proclaims, such parenting will result in the child’s emotions “evolv[ing] in relation to an environment that is relatively stable, which provides space for the development of wonder and joy, as well as stable love and gratitude.”²¹ Despite the possibility for family relationships to factor negatively into human flourishing, the institution cannot be ignored due to the central significance that parental love holds for children and their prospects for a good life. Nussbaum is, in *Upheavals of Thought*, making a point that is similarly made by others: parents and family play a decisive role in the formation of personality that begins from the earliest stages of infancy.²²

The international children’s rights movement has long affirmed the central importance of a caring family, restating in the Preamble to the 1989 CRC what was established as the sixth principle of the 1959 UN Declaration of the Rights of the Child (DRC): “that the child, for the full and harmonious development of his or her personality, should grow up in a family

¹⁹ UT, 197-198.

²⁰ UT, 227; cf. 181-229.

²¹ UT, 209.

²² UT, 190-200; cf. Margaret F. Brinig, “A Case for Integrated Parenthood” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 164.

environment, in an atmosphere of happiness, love and understanding.”²³ Wall also maintains that “the ethical purpose of parenting is to love others by enabling others to love.”²⁴ Timothy Jackson, in his introduction to a collection of essays that together assert “the right to be loved” as “the first right of the child,” goes on to emphasize the importance of familial love and care: “Every child, to live a fulfilling life, needs loving care. Secure attachments with empathic parents or other consistent caregivers, the emotional security of an environment where love is given and received – these are crucial for lifelong flourishing.”²⁵ In the concluding essay to that volume, Don Browning adds that “to love a child is to simultaneously respect or honor the emerging personhood of the child and actively work to actualize the basic goods... needed for the child’s flourishing.”²⁶ Liao argues, as was noted earlier in this section, that the condition of being loved is “primarily essential” to a child’s prospects for a good life.²⁷ The capabilities approach, despite identifying the family as an all too frequent place of violence and neglect, ultimately takes a firm ethical stance based on the key nurturing role that parents play in the lives of their children: children require loving and caring familial bonds.

²³ CRC, Preamble. The 1959 DRC states this with slight difference: “The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and in any case, in an atmosphere of affection and of moral and material security...” UN General Assembly, *Declaration of the Rights of the Child* (20 November 1959) A/RES/1386(XIV), Principle 6, available at: <http://www.refworld.org/docid/3ae6b38e3.html> [accessed 10 March 2015] (subsequent references to this document are cited as DRC). It should be noted, however, that there “is no legally binding language associated with love [in the CRC],” according to Lehr-Lehnardt and Gunn, “perhaps because it is an emotion impossible of enforcement.” This is similarly the case with love and affection as stated in the DRC. Lehr-Lehnardt and Gunn, 303. The UN position on the family is a major topic of the following chapter (Chapter 4).

²⁴ Wall, *Ethics*, 147. See also Liao, 348-351.

²⁵ Timothy P. Jackson, “General Introduction” in *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*, ed., by Timothy P. Jackson (Grand Rapids, MI: Eerdmans, 2011), 2, *passim*.

²⁶ Don S. Browning, “The Best Love of the Child: An Integrational View” in *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*, ed., by Timothy P. Jackson (Grand Rapids, MI: Eerdmans, 2011), 350.

²⁷ Liao, 249, cf. 248-251.

II. Opening the Family to Scrutiny

When Nussbaum asks what role families play in the promotion of flourishing at childhood, however, the question, she claims, is posed “holistically, in the context of a larger inquiry into what it is for a human being to flourish.”²⁸ At this point, the nature of her holistic method is unmistakably the capabilities approach with its foundational principle of treating each person as an end along with its core list of ten central human capabilities (see Chapter 1). This theory, Nussbaum maintains, provides the basis for what role families will play in human flourishing at childhood or any other station in life. In *Sex and Social Justice*, Nussbaum asserts,

...it is only when we have a conception, however, vague and general, of what the important activities in a human life are, and what support they need to develop, can we even begin to say what role care of various sorts from other human beings does and does not play in getting young human beings to those goals. Only then can we imagine fruitfully the different ways in which the care we want may be instantiated in a society such as ours, with our resources and our history. Only then, as well, can we even begin to ask what material support is required for the kind of care we want and think good, and to take the necessary measures to make such support available to those capable of giving care.²⁹

In other words, it is only once a conception of human flourishing has been established that one can begin to think about how it might be supported. That, perhaps, explains the structure of Nussbaum’s argument in *Women and Human Development*. In the first chapter of that work, while introducing her readers to the central human capabilities, she proclaims the heart of her theory to be located in the idea of the human being who actively and freely “shapes his or her own life in cooperation and reciprocity with all others” by drawing on the “human powers of practical reason and sociability.”³⁰ It is not until the last chapter that she begins to discuss the family’s role in such a life. By addressing the issue of the family in that way, Nussbaum is

²⁸ SSJ, 273.

²⁹ SSJ, 273.

³⁰ WHD, 71-72. Recall from section II of Chapter 1 that these are the two organizing capabilities in her list.

affirming her conviction that the question of the family's role in human flourishing is itself necessarily subsequent to the establishment of these core political principles. Establishing a conception of political justice, even if "vague and general," is necessarily prior to "fruitfully" thinking about the administration of love and care. For Nussbaum, the family does not exist prior to the establishment of political principles of justice. It is, as will be discussed shortly, an artifact of them.³¹

As a result, the question of family and its role in the promotion of flourishing at childhood is asked more critically than pragmatically.³² Nussbaum is not asking whether families should contribute to the flourishing of their members. She is confident about the answer to that question: "Families are homes for love and care."³³ No child entrusted to an adult caregiver or caregivers should suffer neglect, abuse and degradation from a relationship that is meant to provide love and care and to foster a dignified human life.³⁴ By asking what role families play in human flourishing from a more holistic and critical perspective, Nussbaum does not, however, have only the worst of cases in mind. Beyond securing the necessities of bare human living, she is concerned to ensure that "more fostering and less impeding" of individual agency characterizes the work of the institution going forward.³⁵ Especially in light of what the uncertain circumstances of life can mean to relationships, particularly those between a parent and a child, that are so influential in the fostering of capabilities.³⁶

³¹ See WHD, 261-264.

³² Speaking of the classical liberal tradition that "often conceived of the family as part of a 'private sphere' off-limits to social justice," Nussbaum comments: "Leaving the family uncriticised was leaving a little piece of feudal hierarchy uncriticised, and liberalism is rightly subversive to all hierarchies based on birth or status." CC, 147.

³³ SSJ, 272; cf. WHD, 275.

³⁴ WHD, 243.

³⁵ WHD, 270.

³⁶ Gehlen observes that human beings rely on institutions to set "behavior patterns" in the form of a series of habits. Institutional failure, such as family fracturing or social injustices, result in the manifestation of "confusion and helplessness" in the individual. See Gehlen, 70-71; cf. 4. See also Turner, 31-32. In this senses "environment" for human beings means not only material nature, but the "second nature" of culture. Gehlen, 71.

Nussbaum's capabilities approach is a liberal theory that takes as its moral imperative the political goal of always putting people "into positions of agency and choice."³⁷ The realm of the family is no exception to that objective. When she asks what role families play in human flourishing, she means that the family, like any institution, should face scrutiny for its potential impact on that flourishing.³⁸ It must be asked, from her viewpoint, whether the family actually serves the task of cultivating agency in each one of its members, or whether it impedes that task.³⁹ Taking a stance of sceptical ambivalence toward the family could perhaps be justified if it was based solely on the observation that the institution is often, at one and the same time, a "school of virtue" and an institute of oppression.⁴⁰ However, this stance cannot be justified by appealing to Nussbaum's capabilities approach. By that account, the idea that individual agency should be fostered through the promotion of capabilities in loving and caring adult-child relationships is just what it means for the family to be "rightly understood." The challenge is ensuring that this form of relationship is put into concrete practice.

Nussbaum's affirmation of families as homes for love and care means that the institution serves as a site where the doing of justice for each of its members is a political objective. As she proclaims in *Women and Human Development*, when one looks at the family through the lens of the capabilities approach, one looks at "each person" and focuses on "the individual as the basic

³⁷ SSJ, 11.

³⁸ That much is implied from the context in which she asks the question. See SSJ, 272. Support for the idea of vulnerability-based institutional scrutiny can be found in Fineman, "Vulnerable Subject," 11, 18, 21.

³⁹ WHD, 246-247.

⁴⁰ WHD, 243-244. In *The Subjection of Women*, Mill makes a similar point which Nussbaum presumably has in mind: "If the family in its best form is, as it is often said to be, a school of sympathy, tenderness, and loving forgetfulness of self, it is still oftener, as respects its chief, a school of wilfulness, overbearingness, unbounded self-indulgence, and a double-dyed and idealized selfishness, of which sacrifice itself is only a particular form: the care for the wife and children being only care for them as parts of the man's own interests and belongings, and their individual happiness immolated in every shape to his smallest preferences." John Stuart Mill, *The Subjection of Women* ed. by Susan Moller Okin (Indianapolis, IN: Hackett Publishing Company, 1988), 39.

political subject.”⁴¹ Doing so marks a critical point of departure between Nussbaum’s political liberalism and that of Rawls. For Nussbaum, principles of justice are established *prior* to arrangements for the care of children and, as such, are applied separately to each member *within* the institution of the family. This is not the case for Rawls. Like Nussbaum, he does not view the family as a pre-political institution which owes its basic existence to nature.⁴² However, he is accused of theorizing the family as a private institution.⁴³ Rawls himself never describes the family in such terms,⁴⁴ but he does claim that the principles of justice “do not apply directly to the internal life of families.”⁴⁵ Clarifying his stance, Rawls explains that,

...we distinguish between the point of view of people as citizens and their point of view as members of families and other associations. As citizens we have reasons to impose the constraints specified by the political principles of justice on associations; while as members of associations we have reason for limiting those constraints so that they leave room for a free and flourishing internal life appropriate to the association in question... We wouldn’t want political principles of justice to apply directly to the internal life of the

⁴¹ WHD, 246.

⁴² Samuel Freeman points out that much criticism of Rawls on the family presupposes that he holds a traditional view of the institution. In fact, Freeman claims, Rawls saw the family not as a *natural* grouping but as a *social* institution that could be constructed in a number of different ways. Freeman, *Rawls*, 236-237, 470; cf. Rawls, *Theory*, 462-463, “Public Reason,” 596n60 and *Restatement*, 163. Mary Walsh argues for a more complex view of the matter, claiming that “for Rawls the family is both private and public.” Consequently, “[f]amilies lay both outside and inside the basic structure of society; they are both voluntary and non-voluntary; and they express both individual and public ends.” See Mary Barbara Walsh, “Private and Public Dilemmas: Rawls on the Family,” *Polity* 44, no. 3 (2012): 427, available at: <http://search.proquest.com/docview/1035633661?accountid=12339> [accessed 10 March 2015]. Like Freeman, however, she leaves Rawls’s view of the family as primarily a convention, only a more complex and layered one. Walsh, 444-445. It could be argued, however, that neither scholar tells the full Rawlsian story on the family. Both are undoubtedly correct to read him as perceiving the family to be a conventional social institution of sorts. However, both also fail to mention two points that infer some connection to biological necessity, namely, reproduction of children and importance of natural parental affection to moral development. See section III of this chapter.

⁴³ It is Susan Okin who levels this charge against Rawls. See Okin, *Justice, Gender and the Family*, 22. Nussbaum acknowledges Rawls’s rejection of this label, yet comments that children and, quite frequently, women are “its captives,” perhaps suggesting agreement with Okin. WHD, 274. Nussbaum more explicitly attaches the “private” label to Rawls when asserting that the family should not be treated as a “domain off-limits to political justice.” Neither does she find the explanation of his position compelling. FJ, 321.

⁴⁴ Okin claims that Rawls infers the private family from two essays. Okin, *Justice, Gender and the Family*, 198n3. The most explicit inferences she points to are found in John Rawls, “Justice as Fairness: Political not Metaphysical” in *John Rawls: Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 409n27 and John Rawls, “The Priority of the Right and Ideas of the Good” in *John Rawls: Collected Papers*, ed. by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 460-461.

⁴⁵ Rawls, *Restatement*, 163-164.

family. It is hardly sensible that as parents we be required to treat our children in accordance with political principles. Here those principles are out of place.⁴⁶

He does not mean by this that the family stands somehow outside the realm of political justice.

“If the so-called private sphere is a space alleged to be exempt from justice,” he retorts, “then there is no such thing.”⁴⁷ In advancing this position, Rawls is merely being consistent with his

preferred “pure procedural method” of justice which “obtains when there is no independent criterion for the right result: instead there is a correct or fair procedure such that the outcome is likewise correct or fair, whatever it is, provided that the procedure has been properly

followed.”⁴⁸ In brief, as long as the principles of justice are applied to and consequently order the basic structure of society, then any outcome following from that basic structure is itself just,

“whatever it may be.”⁴⁹ It is the foundational institutions of society, its “basic structure,” that stand together as the primary subject of justice for Rawls.⁵⁰ That is, the principles of justice are applied directly to the basic structure so that “individuals and their actions are just insofar as they conform to the demands of just institutions.”⁵¹ The family, as one element of that structure, is

constrained by those principles so that “the basic rights and liberties and fair opportunities of all of its members” are consequently guaranteed.⁵² No social institution or association is, under

Rawls’s theory, justified in violating the rights of its citizens. In particular, he affirms that the

⁴⁶ Rawls, *Restatement*, 165.

⁴⁷ Rawls, *Restatement*, 166.

⁴⁸ Rawls, *A Theory of Justice*, 86.

⁴⁹ Rawls, *Political Liberalism*, 72-73. Rawls relates pure procedure to gambling in that the outcome of a game of chance is not known, but the game is entered into as fair because the basis upon which it is played is understood to be just. Rawls, *Theory*, 86.

⁵⁰ Rawls, *Theory*, 7. Rawls defines the basic structure of society as “the way in which the main political and social institutions of society fit together in one system of social cooperation, and the way they assign basic rights and duties and regulate the division of advantages that arises from social cooperation over time.” He includes among the institutions belonging to that structure the “political constitution with an independent judiciary,” “legally recognized forms of property,” the economic system, and also “the family in some form.” Rawls, *Restatement*, 10; cf. 4, 8-9.

⁵¹ Samuel Freeman, “Introduction: John Rawls – An Overview” in *The Cambridge Companion to Rawls*, ed. by Samuel Freeman (New York: Cambridge University Press, 2003), 3.

⁵² Rawls, *Restatement*, 164.

“equal rights of women and the claims of their children as future citizens are inalienable and protect them *wherever they are*” (emphasis added).⁵³ Yet, “a free and flourishing internal life appropriate to [the family]” means trusting the adults leading it to sort out gender roles for themselves and to provide ample and appropriate “affection and goodwill” toward their children.⁵⁴ Insofar as the family is justly ordered – and Rawls assumes it to be so if the principles of justice are applied to it as an institution of the basic structure – then, according to his reliance on a pure procedural method of justice, no intervention into the ordinary life and functioning of it is necessary or permissible.

Nussbaum acknowledges that the family is not an entirely private institution for Rawls,⁵⁵ but his treatment of it remains, in her opinion, “complex and torturous.”⁵⁶ According to Nussbaum, if the family is to truly stand for love and care, then principles of justice are precisely *in place* when applied to its internal life. As she explains in *Women and Human Development*, “We must... ask at every point not just whether love is preserved but whether the capability of each person to select appropriate relations of love and care (and the other central functions) is preserved.” Advancing her argument, she adds:

Love that exists at the expense of the emotional freedom of others does not deserve public protection, any more than religious freedom attained by tyrannizing over the

⁵³ Rawls, *Restatement*, 166.

⁵⁴ Rawls, “Public Reason,” 599-600; Rawls, *Restatement*, 164-166. Rawls concedes that a wife’s work in the raising of children should entitle her by law to an equal share of her husband’s earnings during marriage, and an equal share in the increased value of their joint assets should the marriage end in divorce. Rawls, *Restatement*, 167.

⁵⁵ Nussbaum remarks that Rawls’s does not simply import into his theory “the classical but rightly criticized idea of a distinction between ‘public’ and ‘private’.” He equates violence within the family to violence in the public sphere. Martha C. Nussbaum, “Rawls’s *Political Liberalism*. A Reassessment,” *Ratio Juris* 24, no. 1 (2011): 5, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9337.2010.00471.x/epdf> [accessed 10 March 2015].

⁵⁶ FJ, 321. She finds him attempting to maintain a “difficult to apply” tension between the public and the private in WHD when he argues that “traditional gendered division of labor within families” be allowed provided that such divisions are voluntarily and not unjustly determined. WHD, 273-274. While distinguishing between Rawls and the traditional liberal notion of a “private” family realm that is imagined to be “precontractual or natural,” Nussbaum nevertheless associates Rawls closely (but not precisely) with that traditional position. However, she notes that “he repudiates the public/private distinction, at least officially.” See FJ, 105-106, cf. 321-322, 405.

religious freedom of others. Nor should public actions protect an organic unit as such; what it should protect are the emotional and affiliational capabilities of its members.⁵⁷

Nussbaum's strong commitment to liberal individualism is readily apparent in her critique of the Rawlsian view of the family,⁵⁸ and it underscores her disregard for his procedural approach to justice.⁵⁹ The requirements of social justice go unmet, Nussbaum argues, if the basic structure of society is taken as its primary subject and the family, as part of that structure, is merely assumed to be a just institution. Her central point about the significance of each family member having agency in their relations of love and care is made in the shadow of her assertion that children, and frequently women, are involuntarily "captives" of the family.⁶⁰ Rawls, she maintains, "assume[s] too much organic unity and harmony" within the institution.⁶¹ Hence, conceiving of the family as an organic whole and acknowledging it as a subject of justice is unacceptable to her capabilities approach with its central concern to account for the agencies of each and every individual. This concern, moreover, is no less significant when applied to the family than when applied to any other aspect of life in society since family life is taken by Nussbaum to be an aspect of public life.

Consequently, the question of the family marks a significant distinction between the political thought of Nussbaum and that of Rawls. By applying his principles of justice to the basic structure and subsequently protecting the inner life of the family from unwarranted political interference, Rawls accords meaningful moral status to the family. Under the

⁵⁷ WHD, 274-275.

⁵⁸ SSJ, 65.

⁵⁹ The capabilities approach is concerned with outcomes rather than the procedure that flows from an "adequate design of the original situation." Nussbaum explains the difference as follows: "Justice is in the outcome, and the procedure is a good one to the extent that it promotes [a just] outcome." FJ, 81-82.

⁶⁰ WHD, 274. See also Nussbaum, "Rawls and Feminism," 504. Nussbaum compares the child's "belonging" to his or her parents, especially in a more traditional sense, with Marx's view of the workers' lack of true autonomy under capitalism and the "thing-like treatment" of human beings in the institution of slavery. SSJ, 221-223.

⁶¹ SSJ, 65.

capabilities approach, however, it is the separate person who alone must be the primary political subject.⁶² Nussbaum argues this forcefully in *Sex and Social Justice* when outlining what she believes it to mean for liberalism to make the individual the basic unit of political concern:

It means, first of all, that liberalism responds sharply to the basic fact that each person has a course from birth to death that is not precisely the same as that of any other person; that each person is one and not more than one, that each feels pain in his or her own body, that the food given to A does not arrive in the stomach of B. The separateness of persons is a basic fact of human life; in stressing it, liberalism stresses something experientially true and fundamentally important. In stressing this fact, the liberal takes her stand squarely in the camp of this worldly experience and rejects forms of revisionary metaphysics (e.g., forms of Buddhism or Platonism) that would deny the reality of our separateness and our substantial embodied character. [...] It says that the fundamental entity for politics is a living body that goes from here to there, from birth to death, never fused with any other – that we are hungry and joyful and loving and needy one by one, however closely we may embrace one another.⁶³

This brief proclamation on liberal individualism then culminates with an assertion of how the principle of treating each person as an end – that is, as an individual political subject endowed with agency in his or her own right – impacts the family:

In normative terms, this commitment to the recognition of individual separateness means, for the liberal, that the demands of a collectivity or a relation should not as such be made the basic goal of politics: collectives, such as the state and even the family, are composed of individuals, who never do fuse, who always continue to have their separate brains and voices and stomachs, however much they love one another. Each of these is separate, and each of these is an end.⁶⁴

Nussbaum's commitment to do justice by directly addressing each and every individual and his or her separate ends is unwavering. So, too, is her corresponding rejection of conceptions in which the family is viewed as a basic unit of justice for its members.⁶⁵

⁶² WHD, 247, cf. 249, 251.

⁶³ SSJ, 62.

⁶⁴ SSJ, 62.

⁶⁵ Stoecklin and Bonvin make an interesting distinction between “political subject” as the bearer of rights and “social agent” as a unique actor said to be participating through social groups. They argue that “the ‘subject of rights’ and the ‘social actor’ cannot be equated: whereas the subject is entitled to individual rights, the actor acts through families and broader social groups.” Stoecklin and Bonvin, “Capability Approach,” 67; cf. 79.

The implications of Nussbaum's refusal to afford moral status to the family are not insignificant. Insofar as Nussbaum criticizes Rawls for leaving the "private sphere [of the family] unexamined," she is at the same time criticizing the liberal-ity of his justifications for doing so.⁶⁶ Individuals have a right to privacy with regard to their "associative and decisional" liberties. This means that political principles should be shaped to preserve "an appropriate degree of space for personal choice in matters of love and care."⁶⁷ Institutions, conversely, can claim no such right, Nussbaum insists. Threats to the development and exercise of individual agency, in whatever form they might come, are therefore not diminished or excused simply because they originate from within the home.⁶⁸ Rather, such threats must be addressed. The ubiquitous principle of treating each person as an end is, for Nussbaum, relevant in every aspect of human life, and no less when it comes to the family.

However, Nussbaum's counter to Rawls's conception of the family requires more philosophical support than the principle of treating each person as an end can deliver by itself. The family, as even Rawls's theory suggests, receives a significant amount of moral deference.⁶⁹ That deference is nowhere more plainly stated than in the preponderance of international human rights instruments that continue to cite the family as "the natural and basic group unit of society" that the world community claimed it be with the adoption of the UDHR in 1948.⁷⁰ For this reason, Nussbaum's reliance on what she calls the "principle of moral constraint" seems

⁶⁶ This follows from Nussbaum's assertion that sexual desire is socially shaped and, according to Catherine MacKinnon and Andrea Dworkin, that it is shaped by "norms that subordinate women to men." SSJ, 77-78.

⁶⁷ WHD, 245, 274.

⁶⁸ WHD, 245.

⁶⁹ That Rawls believes this to be true is evident from his discussion of the family. See Rawls, *Restatement*, 165. The connection between "moral deference" and the family in Nussbaum is made by analogy from her discussion of religion. See WHD, 190; cf. 275. Nussbaum's whole point about moral constraint is that families are different than religions with respect to being the object of moral deference. As she remarks: "...religions have a life outside the state, as do universities; families do not." WHD, 275.

⁷⁰ See UDHR, Art. 16.3 and CRC, Preamble. This is the topic of Chapter 4.

important, if not necessary, to making her argument. She introduces that principle when discussing how to reconcile religion with her capabilities approach in *Women and Human Development*,⁷¹ but she also applies it to the family later in that same work. The principle consists of two main features: a more formal political one and a less formal social one. Its political feature denies as familial anything that is cruel or unjust. Accordingly, any family member who abuses another puts himself beyond the pale of what may normatively be referred to as the family.⁷² The moral bite of this formal side to the principle is found in Nussbaum's contention that the family only exists by political fiat (to be discussed in section V). The social feature applies internal pressure to the meaning of the family. If "family, rightly understood, stands for love and care," then this informal social aspect requires that the actions of individual family members can justifiably be referred to as loving and caring ones.⁷³ As a result, it is on the basis of actual human actions – the free exercise of the major capabilities, especially those of love, care and affiliation – that Nussbaum assesses the moral value of what may be called a family. Those who are biologically or legally related may fairly be discounted as family members on the basis of their behavior, while those with no organic or lawful connection may fairly be counted in.⁷⁴

Ultimately, the principle of moral constraint brings these two features together in support

⁷¹ See Chapter 3 of WHD, pp. 190-197, 202.

⁷² WHD, 275.

⁷³ WHD, 275.

⁷⁴ Nussbaum would count out the abusive and neglectful husbands of two Indian women she met through her development work, Vasanti and Jayamma. See WHD, 16-22, 112-113. She counts in, however, the relationships women like Vasanti and Jayamma have developed with other women in similar circumstances through an institution like the Self-Employed Women's Association (SEWA). SEWA, an effort to help impoverished women to "improve their working conditions through credit, education, and a labor union," is said to offer these women the maternal nurture of taking them seriously, respecting their privacy, and helping to solve their problems. WHD, 15. Programs like SEWA, Nussbaum concludes, provide women with a choice other than either being alone and without a family, or being treated unfairly within a family: "women who have dignity and self-respect [afforded to them through women's collectives like SEWA] can help to fashion types of community that are no less loving, and often quite a lot more loving, than those they have known before." WHD, 290.

of the key capabilities principle of treating each person as an end to provide the state with a moral imperative regarding the family: “the state should not intervene in the conduct of family members without a compelling interest, but such a compelling interest is always supplied by the protection of the central capabilities – including, of course, the individual capabilities to choose relationships of love and care.”⁷⁵ As Nussbaum underscores in her discussion of *Wisconsin v. Yoder* – a US Supreme Court case that revolves around legitimate parental rights vis-à-vis the religious education of their own children and state concerns for the capabilities of its future citizens – intervention into the family is a complicated matter to be undertaken with care.⁷⁶ Nevertheless, whatever legitimate liberty or self-determination the family might have is only that which is exercised by its individual members.⁷⁷ Although the government’s intervention into it is justified only by a compelling interest, the family has no moral basis for withstanding that intervention where the capabilities of its individual members are concerned.⁷⁸

Canadian legal theorist Benjamin Berger’s discussion of the issue of religion and the education of children captures the essence of Nussbaum’s family ethic understood in light of the interplay between these two principles. He claims that the state cannot stand “inactive when conscious of the need to ensure the continuance of a common social world, and mindful of the interests of children, whose autonomy and identity cannot be neatly folded into that of their

⁷⁵ WHD, 275. Further clarity on the application of this principle can be gained from observing Nussbaum’s use of it in the case of religion. See WHD, 202. It is an example of what Alexander refers to as a departure from the basic liberal tenet of “freedom as non-interference.” He perceives Nussbaum and Sen to understand freedom as “not merely the absence of interference, but also the possession of different capabilities to achieve valuable human functionings.” Therefore, capabilities theorists following their lead will not be “against interferences *per se*.” Instead, as the principle of moral constraint testifies, it is well within the ambit of the capabilities approach to tolerate “certain qualified forms of interferences” for the sake of realizing basic capabilities in all citizens. Alexander, 3-4.

⁷⁶ See WHD, 230-235.

⁷⁷ WHD, 251, 274-275 cf. 188-189.

⁷⁸ Nussbaum states: “The family has no power to stop this intervention on its own, as though it were a mystical unity over and above the lives of its members.” WHD, 277.

parents.”⁷⁹ Berger’s position correlates well with Nussbaum’s principle of moral constraint and its purpose, in collaboration with her principle of treating each person as an end, to ensure that the capabilities of all members of the family are protected and promoted. Each one is to be taken as a separate and distinct individual who is free to develop and exercise his or her own capabilities as a social agent. Furthermore, as the rest of this chapter will argue, this freedom is perceived to be unconstrained by either biological connections or group belonging. Attachment to a small number of caregivers is presumed, but that attachment is political and transitory, not natural or fundamental.

III. A Millian Rejection of Ethical Appeals to Nature

One of the most significant moral bases for resisting state intervention of the kind Nussbaum proposes is found in the idea that the family exists by nature. Article 16.3 of the UDHR (reaffirmed in the Preamble to the CRC) contains this claim and couples it to the charge that the state owes the family protection. The article states: “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.” It infers, according to Browning, not only that society and the state must protect the family, but that the family’s rights are “in some way independent of these social entities,” thus depriving them of “the power to grant the family its basic rights.”⁸⁰ Even Rawls, who perceives the institution to be primarily based in convention and makes no particular form of it normative, still relies on the family to reproduce children “in appropriate numbers to maintain an enduring society” and entrusts much

⁷⁹ Benjamin L. Berger, “Religious Diversity, Education, and the ‘Crisis’ in State Neutrality,” *Canadian Journal of Law and Society* 29, no 1 (2014): 122, available at: http://muse.jhu.edu/journals/canadian_journal_of_law_and_society/v029/29.1.berger.html [accessed 12 March 2015].

⁸⁰ Don S. Browning, *Equality and the Family: A Fundamental, Practical, Theology of Children, Mothers, and Fathers in Modern Societies* (Grand Rapids, MI: Eerdmans, 2007), 329.

of their moral development to the “natural affection and goodwill of parents.”⁸¹ Neither the UN, Browning, nor Rawls are claiming that nature guarantees a loving and nurturing internal family life, but neither do they claim it to be wholly irrelevant to the cultivation of such.

Nussbaum’s capabilities-guided discussion of the family in *Women and Human Development*, on the other hand, does reject any ethical appeal to nature with regard to sex, gender, and the family. To be specific, she rejects the idea that the family exists “by nature” as some kind of pre-political or “private” sphere.⁸² Nussbaum finds such notions of the family particularly problematic for their alleged promotion of the idea that women, given their “natural propensities,” are uniquely positioned to provide love and care to the other members of the institution.⁸³ She closely follows the nineteenth-century feminism of John Stuart Mill on this matter.⁸⁴ Referring to *The Subjection of Women* (1869), Nussbaum affirms Mill’s proclamation that assigning the characteristic of “caregiving” to the “nature of a woman” is “an eminently artificial thing” that results from the “forced repression in some directions, unnatural stimulation in others” that women face in a male-dominated society.⁸⁵ Viewing women in this way, she maintains, results in “a false sense of inevitability that so often surrounds questions of gender and family.”⁸⁶ She cites U.S. Supreme Court Justice Bradley’s 1871 decision that upheld the ban on women practicing law in Illinois as a particularly “notorious example” of this position:

⁸¹ Rawls, *Restatement*, 163-165; cf. Rawls, *Theory*, 463-464.

⁸² No institution is ruled to be “private” or off limits to public scrutiny under the capabilities approach. WHD, 245.

⁸³ WHD, 252.

⁸⁴ Susan Okin applies the term “feminism” to Mill’s work in her introduction to Mill’s, *The Subjection of Women*. She qualifies it by noting that the terms “feminism” and “feminist” did not appear in dictionary form until 1895, so applying them to Mill is done “somewhat anachronistically.” Susan Moller Okin, “Editor’s Introduction” in *The Subjection of Women* ed. by Susan Moller Okin (Indianapolis, IN: Hackett Publishing, 1988), ivn1.

⁸⁵ Mill, *Subjection*, 22. See WHD, 264-265. Nussbaum supports her assertion that “women’s care giving” is an “eminently artificial thing” by arguing that such a view of their nature: 1) results from cultural conditioning in the area of basic beliefs about women; 2) is supported by environmental influences stemming from such beliefs; and, 3) varies depending on which culture is under investigation. WHD, 265-270.

⁸⁶ WHD, 270.

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.⁸⁷

Since Justice Bradley goes on to claim that such is “the law of the Creator,” Nussbaum concludes that he must understand the “natural order in teleological religious terms.”⁸⁸

Nussbaum’s critique of appeals to nature in the discourse on family reveals the profound influence of Mill on her moral and political thought. Mill, in his posthumously published essay “Nature” (1874),⁸⁹ rejects the idea that the natural structures of the world provide human beings with any suitable moral guidance.⁹⁰ Conformity to nature,” he claims, “has no connection whatever with right and wrong.”⁹¹ As such, reference to “nature” can be thought to imply any one of at least two principle meanings:

In one sense, it means all the powers existing in either the outer or the inner world and everything which takes place by means of those powers. In another sense, it means, not everything which happens, but only what takes place without the agency, or within the voluntary and intentional agency, of man.⁹²

However, there is, he argues, no justification for appealing to nature in any ethical sense, as though employment of the term could “not [only] stand for what is, but what ought to be.”⁹³

Nature, in both its material and human forms, is to be amended or transformed, not followed.⁹⁴

The two key premises of his argument are, first, that human engagement with the natural is more

⁸⁷ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873), quoted in WHD, 253.

⁸⁸ WHD, 253.

⁸⁹ His purpose in this essay was to “inquire into the truth of the doctrines which make Nature a test of right and wrong, good and evil, or which in any mode or degree attach merit or approval to following, imitating, or obeying Nature.” John Stuart Mill, “Nature” in *Three Essays on Religion* (New York: Henry Holt and Company, 1874), 13.

⁹⁰ In brief, Mill finds ethical appeals to nature troubling in two ways. First, for their lack of conceptual clarity, and second, as a misplaced intellectual endeavor. Mill, “Nature,” 15, 18-19.

⁹¹ Mill, “Nature,” 62.

⁹² Mill, “Nature,” 8.

⁹³ Mill, “Nature,” 12-13.

⁹⁴ Mill, “Nature,” 41, 54.

adversarial than cooperative,⁹⁵ and, second, that human character left “untutored” away from its basic nature is “decidedly repugnant.”⁹⁶ He even appeals to religion to make this point, observing the theological claim that “the paramount duty of man upon earth” is both to “amend himself... [and] the world, and not solely the human part of it but the material; the order of physical nature.”⁹⁷ There is, for Mill, no good reason to follow nature as though it contains a valid moral law within its structure. Rather, human beings are to amend nature as it presents itself both within their own bodies, and in the material world that stands without.⁹⁸ To follow it would be both irrational in the face of an uncertain material world, and immoral in light of the harm that natural forces frequently visit upon humanity.⁹⁹

Mill’s influence on Nussbaum’s moral thought becomes especially apparent in her own rejection of nature as a basis for ethics in *Women and Human Development*. In a robustly Millian fashion, she explains how an ethical appeal to nature lacks philosophical precision and weight by observing that the claim “relation R exists ‘by nature’” can potentially mean any one of four things:

1. *Biology*: R is based on an innate endowment or tendency.
2. *Tradition*: R is the only way we know; things have always been this way.
3. *Necessity*: R is the only possibly way; things cannot be any other way.

⁹⁵ Mill explains that real human engagement with nature is more aligned with attempts to conquer than obey it. He relies, among other examples, on the construction of bridges or the erecting of lightning rods to support his point. Mill, “Nature,” 20. For his survey of material nature’s largely adversarial stance toward humanity, see 19-34.

⁹⁶ Mill, “Nature,” 46. For Mill’s broader discussion of the frailty of human moral capacities, particularly as he terms them our “active impulses,” see 43-50.

⁹⁷ Mill, “Nature,” 25-26; cf. 41. Mill might have had Romans 8:18-23 in mind: “I consider that the sufferings of this present time are not worth comparing with the glory about to be revealed to us. For the creation waits with eager longing for the revealing of the children of God; for the creation was subjected to futility, not of its own will but by the will of the one who subjected it, in hope that the creation itself will be set free from its bondage to decay and will obtain the freedom of the glory of the children of God. We know that the whole creation has been groaning in labor pains until now; and not only the creation, but we ourselves, who have the first fruits of the Spirit, groan inwardly while we wait for adoption, the redemption of our bodies” (New Revised Standard Version).

⁹⁸ Mill wrote of the argument presented in his essay: “This brief survey is amply sufficient to prove that the duty of man is the same in respect to his own nature as in respect to the nature of all other things, namely not to follow but to amend it.” Mill, “Nature,” 54.

⁹⁹ Mill, “Nature,” 64-65.

4. *Norm*: R is right and proper, the way things should be.¹⁰⁰

Leaning on Mill, Nussbaum concludes that such appeals often slip, without argumentation,

“from one of these claims to another.” “Thus,” she observes,

...from the fact that things have always been a certain way, it is all too quickly inferred that this way is grounded in biology, or that it is the only possible way, or that this way is right and proper. But of course no one of these inferences is legitimate: custom does not reliably track biological foundations, and our failure to conceive of another way may be due to a want of imagination or experience, rather than to the inherent impossibility of alternative ways. Clearly the longevity of custom does not show that it is right.¹⁰¹

Often, then, when people appeal to nature, Nussbaum finds them to simply mean that things have “always” been that way. Consequently, referring to the family as deriving from *nature* is really a misnomer. It is *custom*, from her perspective, which is the more appropriate category of reference for how those making such an appeal actually view the family.

If the influence of Mill’s essay is evident in Nussbaum’s rejection of the idea that the family exists by nature, so too is the feminism he outlines in *The Subjection of Women*. In fact, it is that work, published prior to his essay on “Nature,” which joins his rejection of natural moral foundations together with his feminism. This is demonstrated by the comparison Mill makes between the institution of slavery and the plight of women within marriage and family life.

“There remain no legal slaves,” he famously wrote, “except the mistress of every house.”¹⁰² This

¹⁰⁰ WHD, 253-254.

¹⁰¹ WHD, 254.

¹⁰² Mill, *Subjection*, 86. The wife, he explains, vows lifelong obedience to her husband in marriage; she can “do no act whatever” without his permission; and all of her property becomes his as well. Mill, *Subjection*, 32. In actual fact, Mill argues, her position is worse than that of the slave in at least three ways: the potential for owning property of one’s own, for having time of one’s own, and the legal basis for a female slave to refuse the sexual advances of the slave-owner. Mill, *Subjection*, 32-33. His critique should be situated by two factors. First, he does not mean by it to claim that “wives are in general no better treated than slaves.” Also, while drawing on various historical facts (e.g., *peculium* in Roman slavery), he does mean to challenge the entwining of Christian doctrine with civil marriage laws in nineteenth century England. See Mill, *Subjection*, 31-33.

enslavement is, furthermore, perpetuated through a program of social conditioning meant to ensure not only that women are obedient to men, but that they are so willfully.¹⁰³ Mill explains:

The masters of women wanted more than simple obedience, and they turned the whole force of education to effect their purpose. All women are brought up from the very earliest years in the belief that their ideal of character is the very opposite to that of men; not self-will, and government by self-control, but submission, and yielding to the control of others.¹⁰⁴

The primary institution for this education is identified as the family. Rather than offering “a school of sympathy in equality” where parents exist “living together in love, without power on one side or obedience on the other,” the family is, to Mill, “a school of despotism” in which women’s total subjection to men is fostered.¹⁰⁵

One of Mill’s key claims, however, is that the family need not be a despotic institution. There is no natural necessity that places women in a position of subjection to men or predisposes them to do the work of care within the family.¹⁰⁶ It is custom, rather than nature, that places them in this position: “The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural. But how entirely, even in this case, the feeling is dependent on custom, appears by ample experience.”¹⁰⁷ There is a new custom, however, that Mill wants to take root: that of individual choice.¹⁰⁸ Nussbaum’s capabilities approach is nothing if not a project for advancing this new development. It is promoted every time she raises the ethical question of capabilities (i.e., What are people able to do and be?), and especially at those points where the question of education comes into contact with children and their families

¹⁰³ Mill, *Subjection*, 15.

¹⁰⁴ Mill, *Subjection*, 16.

¹⁰⁵ Mill, *Subjection*, 47.

¹⁰⁶ Mill, *Subjection*, 22.

¹⁰⁷ Mill, *Subjection*, 13, cf. 17.

¹⁰⁸ Mill, *Subjection*, 18. For that “new custom” to take root allegedly requires social learning that repudiates the “natural” subjection of women, and fosters a vision of marriage that is characterized by “the best kind of equality, similarity of powers and capabilities with reciprocal superiority in them.” Mill, *Subjection*, 102-103, cf. 45.

(e.g., *Sex and Social Justice* and *Women and Human Development*). The main point, put briefly, is that families cannot stand for love and care in the way that the capabilities approach envisages if they are understood to simultaneously represent a sphere that is protected on the basis of natural or group-based belonging.

IV. The Construction of Familial Love and Care

Rejecting ethical appeals to nature as the moral grounding of the family raises a question about how the institution is to be understood. Nussbaum's answer to that question is found in her commitment to social construction theory. Social constructionism is a complex intellectual perspective that permeates diverse theories and disciplines.¹⁰⁹ However, a chief tenet of this perspective is arguably that "all claims to knowledge, truth, objectivity or insight are founded within communities of meaning." These communities are consequently said to represent various demonstrations of "the cultural and historical lodgement of the otherwise taken for granted."¹¹⁰ In other words, among the basic suppositions pertinent to social constructionist approaches is the conviction that cultures are neither monolithic nor static. In Nussbaum's words, "They contain many strands; they contain conflict and rebellion; they evolve over time and incorporate new ideas, sometimes from other cultures."¹¹¹

¹⁰⁹ Vivian Burr maintains that there is "no single description" that would be adequate to cover the range of scholars for whom the social constructionist label is fitting. Vivian Burr, *Social Constructionism* (New York: Routledge, 2003), 2. She describes social constructionism in loose terms as "any approach which has as its foundation one or more of the following key assumptions": 1) a critical stance toward taken-for-granted knowledge; 2) a way of understanding the world that is historically and culturally specific (i.e., it is particular to when and where one finds oneself in the world); 3) a recognition that knowledge of the world is fabricated through "daily interactions between people in the course of social life" and not by objective observation; and 4) an acknowledgment that our constructions are bound up with particular power relations that sustain some patterns of social action and exclude others. Burr, 2-5.

¹¹⁰ Kenneth J. Gergen, *Social Construction in Context* (London: SAGE, 2001), 2. Gergen observes that although the origins of social constructionism would appear to be sown in critical theory, we are now seeing the emergence of "possibilities for a 'positive programme' of social constructionist science and scholarship." Gergen, 2.

¹¹¹ Nussbaum, *Cultivating Humanity*, 117.

She builds on this notion by tying social constructionist theory to human emotions and explaining that our experiences of “anger, fear, grief, and love” and the like are “not simply given in our biological makeup (although they may have a biological basis); they embody a good deal of learning.”¹¹² Nussbaum remarks that societies “shape people’s belief and expectations” in many ways that are related to emotions by teaching them “what events are offenses, what offenses are important, and how a reasonable person would behave in response.”¹¹³ She defines them in *Upheavals of Thought* as “forms of evaluative thoughts” about external objects salient to our own well-being.¹¹⁴ Emotions are thoughtful responses to the circumstances of being human.

Those responses are, Nussbaum claims, socially shaped in at least the following areas:

1. *Behavior*: Society teaches people how to manifest or not manifest their anger, their fear, their grief, [their love], and what expressions of these emotions are appropriate or inappropriate. There is great social variation in these teachings [...].
2. a. *Norms about the whole emotion category*. Societies give people different views about how they should view their fear, their anger, their grief, [their love...].
 b. *Norms about evaluations within the category*. Society teaches people what is worth getting angry about and what not, what is worth fearing and what not, [what is worth loving and what not]. These evaluations are likely to contain much similarity and overlap... But there are also many variations that are socially shaped [...].
3. *Categories*. Sometimes social shaping enters into the way in which the whole emotion category is conceived... [with society shaping] not only the tradition, but also the experience of people who grow up in it.
4. *Placement of individuals in categories*. The role that [emotions like] fear, anger, [...] jealousy, [and love] play in the life of a given person is likely to have a complicated etiology. Differences of early experience in the family are likely to play a large role. But here, too, it is plausible to think that social factors are important [...].¹¹⁵

¹¹² Nussbaum, *Cultivating Humanity*, 227.

¹¹³ Nussbaum, *Cultivating Humanity*, 227.

¹¹⁴ UT, 11, 19.

¹¹⁵ Nussbaum, *Cultivating Humanity*, 227-229.

Since the family *rightly understood* stands for love and care from Nussbaum's perspective, and the emotions of love and care – especially when considered in light of the central capability of affiliation – appear to define the family for her, the social construction of these emotions would also appear to hold significant implications for the institution of the family. As a result, it should be understood that Nussbaum not only implicitly rejects the family as the natural group unit of society because she finds appealing to nature to be philosophically problematic, she also rejects it because she views the family as a social construct rather than a bio-genetic reality.

If this latter position is evident enough through her emphasis on the social construction of emotions, it is amplified by her conviction that human sexuality is socially constructed as well. As with emotions, a constructionist approach to sexuality means, Nussbaum explains, that the same areas of social learning also hold in the domain of sexual behavior and desire. She underlines this point by outlining the relation of those areas to sexuality as follows:

1. *Behavior.* Societies shape norms of proper sexual behavior in varying ways, fostering norms of what sexual behavior is appropriate for parties at different ages and in different social relationships and settings, what sexual acts are appropriate or inappropriate for parties engaged in sexual relationship.
2.
 - a. *Norms about sexuality itself, as a whole,* vary greatly as well, in ways that affect experience. Some societies teach that sex is a basically good thing in need of control, rather like the appetite for food and drink; others, that it is a basically evil thing to be tolerated for the sake of procreation. Most societies today contain complex mixtures of these views [...].
 - b. *Norms about other evaluations within the category.* We are familiar with many other norms in the area of sexuality: norms, for example, of what is desirable in a sexual partner [...].
3. *Categories.* More controversially, the social constructionist claims that the basic sexual categories themselves undergo social shaping. Sexual actors may be categorized in a number of ways, for example by whether they are active or passive or by whether they choose partners of the same or opposite gender [...].

4. *Placement of individuals within the categories.* The social constructionist can plausibly argue that fulfilling society's norms of proper male or female behavior is something to which individuals are strongly pushed by social pressures sanctions.¹¹⁶

These areas of social conditioning make it apparent that Nussbaum's negative Millian argument for rejecting ethical appeals to nature with regard to the family is joined to a positively stated constructionist account. Families, she contends, are shaped in substantial ways by "our conceptions of sex roles, sexual desirability, and the aims of sexual activity," none of which comes to us from nature as some kind of biological inevitability but, instead, are learned through social or cultural conditioning.¹¹⁷ It is a failure at parenting well, then, when a caregiver assumes a natural inevitability of masculinity or femininity that is based solely on a child's external genitalia at birth, "forcing a binary choice when the genitalia themselves do not clearly announce their affiliation."¹¹⁸ "Genital organs," she explains, "...do not interpret themselves; they do not announce to their bearers what they are and what is salient about them." Instead, "they figure in human experience only as mediated through many representations, and these representations interact in many ways with other representations of gender."¹¹⁹

It obviously conflicts with a social constructionist position (as held by Nussbaum) to define the family as a natural institution. The meaning of sex and family is thoroughly socially constructed in her opinion. She delineates this position in a key (and ambitious) thesis statement in *Sex and Social Justice*:

[I]n many central respects, the sexual domain of human life, and its close relative, the domain of the family, are domains of symbolic cultural interpretation, shaped by historical and institutional forces, though within constraints imposed by biology; that cultural formations affect not just the theoretical exaltation of desire but the very experience of desire, and of oneself as a desiring agent; that such considerable overlap as one does encounter among cultures in these areas can best be explained by the

¹¹⁶ Nussbaum, *Cultivating Humanity*, 230-232.

¹¹⁷ SSJ, 272.

¹¹⁸ SSJ, 270.

¹¹⁹ SSJ, 270, cf. 269.

considerable overlap in the problems with which different human societies must grapple as they try to get on in the world; that the feeling most human beings have that certain ways of doing things sexually are “natural” and necessary is often best explained not by biology but by the depth of social conditioning in the life of every human being, in giving a sense of what is possible and impossible, what is an available role, and what is not.¹²⁰

Speaking more directly to the question of the family in *Cultivating Humanity* (1997), Nussbaum remarks:

We all have biological parents, and many of us grew up with one or two parents, whether biological or adoptive. We all have assumptions about what a parent is and what a child is. We rarely recognize *the extent to which these assumptions are shaped by a specifically Western tradition*, in which the idea of the two-parent nuclear family living in its own house has a prominence probably unequaled elsewhere in the world (emphasis added).¹²¹

Consequently, for Nussbaum what is culturally meaningful vis-à-vis sex and family at one time and/or in one place has no necessary moral resonance for the meaning of sex and family at other times and/or in other places.

One should be aware, however, that Nussbaum does not find *all* manner of biological influence to be undone by social construction. Although she offers no examples in support, Nussbaum maintains that it is “very likely that biological factors play a significant role in influencing behavioral tendencies” beyond mere parental recognition of external genitalia. Yet to rely too heavily on biology would serve to lessen the real impact of social conditioning.¹²² Furthermore, even while acknowledging that biology may play some role in human expressions

¹²⁰ SSJ, 256.

¹²¹ Nussbaum, *Cultivating Humanity*, 122. Social construction theory does not, at least for Nussbaum, mean biology plays no role whatsoever. It simply means that biology’s role is uncertain. On one hand, parental recognition of external genitalia at birth typically leads from the very beginning to difference in experience for the child that “end up producing a ‘man’ and a ‘woman’ due to the nearly inseparable link between biology and sexual identity forged by culture, even if in principle a distinction can be made between the two spheres.” SSJ, 271.

¹²² Nussbaum supports her social constructionist position in part by relying on Anne Fausto-Sterling’s work to show how infants labelled male and those labelled female are treated differently even if, in fact, those labels are inaccurately placed. Fausto-Sterling remarks that boys labeled as girls are treated as girls, and the same is true of the opposite, thus supporting the argument that sex roles are highly socially conditioned. Nussbaum, *Cultivating Humanity*, 187.

of maleness and femaleness, she maintains that “we cannot say what that role is, or how sharply it is divided between the sexes.”¹²³ Biology, or nature, can be factored into the equation of what family means, and subsequently its role in human flourishing, but the uncertainty of that role makes a view of the family as natural less philosophically precise and practically coherent for Nussbaum than a social constructionist approach. This perception of the ambiguous role of biology leads her to assert that:

Given the role of culture in constructing what it is to be male; what it is to be female; what it is to love, grieve, and fear; what it is to desire; and even what it is to have a body, it could not fail to follow that what we naively refer to as ‘*the family*’ is a highly various group of social constructs (author’s emphasis).¹²⁴

Furthermore, children, Nussbaum maintains, are cared for through a vast array of social arrangements, showing that what it is to be a parent and what it is to be a child vary greatly depending on how a given society at a given time values care and infuses it with social meaning.¹²⁵ Nussbaum, therefore, seems bound to find the constitution of the family to be as flexible as the arguments made from various disciplines in the social sciences suggest.¹²⁶

From her point of view, what appears for some to be the universal norm of a natural family unit is unsupported by evidence from either the history of sexuality or the study of human behavior, and appeals to such paradigms are themselves bound up with cultural shaping.¹²⁷ The social constructionist position, by contrast, offers a more complete picture, providing “knowledge of ourselves” that represents “a valuable contribution to our development as a

¹²³ SSJ, 271.

¹²⁴ SSJ, 272.

¹²⁵ SSJ, 272.

¹²⁶ E.g., Nussbaum draws on a comparison between ancient Greece and modern America to make a historical point. Nussbaum, *Cultivating Humanity*, 233-238. See also the anthropological case for family diversity between cultures argued by Judith Stacey, “Uncoupling Marriage and Parenting” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 65-84.

¹²⁷ Nussbaum, *Cultivating Humanity*, 236-237.

society.”¹²⁸ In the light of Nussbaum’s social constructionism, the UN idea of the family as a natural and fundamental group unit appears to be at risk of distorting the nature of social reality rather than serving as its solid foundation. According to Nussbaum, understanding the family as natural rather than socially constructed renders one ignorant to sexual “behavioral patterns, norms, and experiences” and the complexity with which they are interwoven into our own culture,¹²⁹ let alone all others. It attempts to universalize that which cultural observation demonstrates to be based on a great deal of social conditioning and its various instantiations throughout history and around the world.

V. Politicizing the Family

A social constructionist perspective is essential to understanding Nussbaum’s view of human flourishing at childhood and its relation to the family, but it is an incomplete perspective in and of itself. The family is not merely the spontaneous result of accidental social conditioning. It is, she argues, an institution deliberately fabricated by law. In *Women and Human Development* she supplements her constructionist perspective by claiming that “the shape of the family structure and the privileges and rights of family members are in many respects artifacts of state action,”¹³⁰ and that they are so in a very direct sense. “There is,” Nussbaum provocatively asserts, “really no entity, ‘the family’, into which the state either does or does not intervene.”¹³¹ Furthermore:

People associate in many different ways, live together, love each other, have children. Which of these is given the name “family” is a legal and political matter, never one to be decided simply by the parties themselves. The state constitutes the family structure through its laws, defining which groups of people can count as families, defining the privileges and rights of family members, defining what marriage and divorce are, what legitimacy and parental responsibility are, and so forth. This difference makes a difference: the state is present in the family from the start, in a way that is less clearly the

¹²⁸ Nussbaum, *Cultivating Humanity*, 238.

¹²⁹ Nussbaum, *Cultivating Humanity*, 238.

¹³⁰ WHD, 261; cf. UT, 423.

¹³¹ WHD, 262.

case with [other voluntary institutions like] the religious body or the university; it is the state that says what this thing *is* and controls how one becomes a member of it.¹³²

To this she adds that “all human associations” are shaped by law and institutions, but the family is shaped by law in “a deeper and more thoroughgoing way, in the sense that its very definition is legal and political; individuals may call themselves ‘a family’ if they wish, but they only get to be one, in the sense that is socially recognized, if they satisfy legal tests.”¹³³ Contributing to a volume on sexual agency and the family edited by Nussbaum, Martha Minow expresses her strong agreement with this account: “Certainly it is a legal rule, not a natural fact, that creates the presumption that a child born to a woman who is married is the child of the woman’s husband.”¹³⁴ Nussbaum pursues this matter in a more recent work, *From Disgust to Humanity* (2010), by remarking on the role of the state in solemnizing marriage. Marriage, she explains, “is no single thing.” It is, instead, “plural in content and meaning.” This indicates that when people think of marriage Nussbaum believes them to think of it as a structure of support for a “cluster of things,” such as “sexual relations, friendship and companionship, love, conversation, procreation, child rearing, mutual responsibility,” and the like.

The idea that marriage has more than one meaning, however, is really not so novel. St. Augustine of Hippo, some sixteen centuries ago, explained the goods of marriage to be located in the procreation of children (*prolos*), the loyalty of the spouses to each other (*fides*), and the indissoluble bond between them (*sacramentum*).¹³⁵ His position on the institution, rooted in the

¹³² WHD, 262-263.

¹³³ WHD, 263-264.

¹³⁴ Martha Minow, “All in the Family and In All Families,” in *Sex, Preference, and Family: Essays on Law and Nature* ed. by David M. Estlund and Martha C. Nussbaum (Cary, NC: Oxford University Press, 1998), 250, available at: ProQuest ebrary [accessed 10 March 2015].

¹³⁵ Augustine, *The Good of Marriage*, para. 32 in *Treatises on Marriage and Other Subjects (The Fathers of the Church, Volume 27)*, ed. by Charles T. Wilcox, M.M., Charles T. Huegelmeier, M.M., John McQuade, S.M., Sister Marie Liguori, I.H.M., and Robert P. Russell, O.S.A. (Washington, DC: The Catholic University of America Press, 2010), 47-48; Project MUSE, <http://muse.jhu.edu/> [accessed 11 March 2015]. See John M. Rist, *Augustine: Ancient Thought Baptized* (New York: Cambridge University Press, 1994), 246; cf. 246-252 and John Witte, Jr., *From*

theological perspective that *really* human living has as its telos the felicitous hope of being in God's actual presence at the culmination of this world (i.e., the *eschaton*),¹³⁶ has been affirmed, reaffirmed and reformed in ecclesiastical circles and has served as a foundation to the Western tradition of law.¹³⁷

However, Nussbaum employs the idea that marriage is plural in meaning to signal her belief that it has civil, expressive, and religious aspects to it.¹³⁸ Its civil aspect speaks to the rights and benefits that marriage confers to the individuals being wed; its expressive aspect speaks to their witnessed statements of love and commitment; and its religious aspect speaks to the significance that many people find in marrying according to the rules of their religion. As a legal construct, however, government is woven into all three of these elements: it confers and administers benefits, it recognizes the human dignity of voicing commitments, and it entitles clergy to perform legally binding marriages.¹³⁹ If marriage is considered to be *a* beginning to the family (and from a social constructionist outlook it could only be considered a single example of how a family might be created at any given time or in any given culture), it is as such a shining example for Nussbaum of how family exists as an artifact of the state.

Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition (Louisville, KY: Westminster John Knox Press, 2012), 67-69, cf. 65-75, 330.

¹³⁶ Human flourishing in the terms Augustine outlines in *The City of God* entails participation in the life of God. Any other "happiness" is only a pretence and an empty shell. "It is by participation in [God] that all are happy who are happy in truth and not in emptiness." Augustine, *The City of God Against the Pagans*, ed. and trans. by R.W. Dyson (New York: Cambridge University Press, 1998), V.11 (p.206), cf. XXII.29 (p.1177) and XXII.30 (p.1178).

¹³⁷ Note that while the Protestant Reformers held to procreation and spousal loyalty as goods of marriage, they had "no place for the good of *sacramentum*." Witte, *Sacrament*, 130, cf. 122-123. Witte describes as "the grand movement of Western marriage law in the course of the last millennium" its shift "from sacrament to contract," that is, "from a sacramental model that prioritizes canonical norms and ecclesiastical structures to a contractarian model that prioritizes private choice and contractual strictures. It is a movement fueled, in part, by the reciprocating shifts in the dominant theological models and legal structures of marriage." Witte, *Sacrament*, 12. Augustine's three goods are a foundation piece of that movement.

¹³⁸ Augustine has secular/civil and religious aspects to his view of marriage as well. Rist, 250.

¹³⁹ Nussbaum, *Disgust*, 128-129.

The view that the family exists by state action brings to the fore two key aspects of Nussbaum's ethic: her insistence that the family is a public institution and its correlate that, as such, each individual member is the appropriate subject of political justice. Dealing first with the family as a public institution, it is clear that Nussbaum wants to erase the line she finds the historical liberal tradition to have inappropriately drawn between "private" family and "public" society. That line is, however, thickly etched. For instance, Johannes Althusius, whose *Theory of Justice* (1617) is noted for the attention it paid to "the rights and liberties of private persons and the various private and public associations that they formed,"¹⁴⁰ referred to the family in his *Politics* (1603) as a "private and natural symbiotic association... in which married persons, blood relatives, and in-laws, in response to a natural affection and necessity, agree to a definite communication among themselves."¹⁴¹ Importantly, the private and natural association of the family is (along with other similarly simple and private civil associations)¹⁴² contrasted against "public associations" – e.g., the city (i.e., *civitas* or "unity of citizens")¹⁴³ – which "exists when many private associations are linked together for the purpose of establishing an inclusive political order."¹⁴⁴ John Locke, who Browning refers to as the "author of liberal family theory,"¹⁴⁵ differentiated in *The Second Treatise of Government* (1681) between "conjugal society" and "political society." He claims that the former "came short" of the latter due to "the

¹⁴⁰ John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (New York: Cambridge University Press, 2007), 152-153.

¹⁴¹ Johannes Althusius, *The Politics of Johannes Althusius*, trans. by Frederick S. Carney (Boston, MA: Beacon Press, 1964), II-III (p.23).

¹⁴² Althusius, *Politics*, II-III (p.23), IV (p.28ff.).

¹⁴³ Note that the city is one form of political association among others, even if it is the primary form.

¹⁴⁴ Althusius, *Politics*, V-VI (p.34, 37). Althusius explains the distinction between public and private: "The members of a community [i.e., public political order] are private and diverse associations of families [natural society] and collegia [i.e., civil society], not the individual members of private associations." Althusius, *Politics*, V-VI (p.35).

¹⁴⁵ Browning, *Equality*, 306.

different ends, ties, and bounds” that characterize each.¹⁴⁶ Explaining the private ordering of the family further, Locke states:

Conjugal society is made by a voluntary compact between man and woman; and though it consist chiefly in such a communion and right in one another’s bodies as is necessary to its chief end, procreation, yet it draws with it mutual support and assistance, and a communion of interest too, as necessary not only to unite their care and affection, but also necessary to their common offspring, who have a right to be nourished and maintained by them till they are able to provide for themselves.¹⁴⁷

The distinction Locke made between conjugal society and political society is further developed in his argument that paternal power and political power “are so perfectly distinct and separate, are built upon so different foundations, and given to so different ends.”¹⁴⁸ Jean-Jacques Rousseau also made a public/private distinction in his *Discourse on Political Economy* (1758). In that work he asserts that even if one assumed a relation between the state and the family, “it would still not follow that the rules of conduct appropriate to one of these two societies are suited to the other: they differ too much in size to admit of being administered in the same way, and there will always be a very great difference between domestic government... and civil government.”¹⁴⁹

¹⁴⁶ Locke, *Second Treatise*, VII.77 (p.300).

¹⁴⁷ Locke, *Second Treatise*, VII.78 (p.300).

¹⁴⁸ Locke, *Second Treatise*, VI.71, VII.77-78 (p.300). The chief end of conjugal society, according to Locke, is procreation. Locke, *Second Treatise*, VII.78 (p.300).

¹⁴⁹ Jean-Jacques Rousseau, “Discourse on Political Economy” in *Rousseau: The Social Contract and Other Later Political Writings* ed. by Victor Gourevitch (New York: Cambridge University Press, 1997), para.2 (p.3). Rousseau is careful to assert that none of his comments about the economy of the family “obtains in political society.” Rousseau, “Discourse,” para. 5 (p.4). The family, while “the only natural society,” is nevertheless “the first model of political societies.” Jean-Jacques Rousseau, “Of the Social Contract” in *Rousseau: The Social Contract and Other Later Political Writings* ed. by Victor Gourevitch (New York: Cambridge University Press, 1997), II.1-3 (p.42). Although some common ground can be found between Rousseau’s view of the family and Locke’s, Rousseau is critical of Locke’s reliance on moral proofs derived from nature in *The Second Treatise*, VII.79, 80 (pp.300-301). Rousseau, on this matter, appears to agree with the Millian position discussed earlier in this chapter (section III). Rousseau explains: “To begin with I shall observe that moral proofs do not have great force in matters of Physics and that they serve rather to justify existing facts than to verify the real existence of these facts.” Jean-Jacques Rousseau, “The Naturalness of the Family” in *Rousseau on Women, Love, and the Family* ed. by Christopher Kelly and Eve Grace (Hanover, NH: Dartmouth College Press, 2009), 237; cf. 235-240.

More recently, a form of the public/private distinction has been attributed to Rawls (as was discussed in section II of this chapter). Revisiting Rawls's position, it is important to recall that he finds political justice to be necessary as a means for protecting children from abuse and neglect. Even so, Rawls maintains that "at some point society has to rely on the natural affection and goodwill of the mature family members" to treat children in a just manner. Moreover, he charges the family with such fundamental tasks as "raising and caring for children" by ensuring their "moral development and education into the wider [democratic] culture" and doing so "in inappropriate numbers to maintain an enduring society."¹⁵⁰ Although Rawls plainly understands the family to be a social convention, he just as plainly allows for at least some appeal to nature by including these references to the necessary reproduction of children and the natural affection of caregivers. By doing so, Rawls invites Nussbaum's critique of his position on two scores: first, she rejects the privacy that protection of group belonging is thought to afford and, second, she denies the legitimacy that is assumed to accompany an appeal to nature (even if that appeal is only minimally stated by Rawls).

However, acknowledging family as something akin to the UDHR's "natural and fundamental group unit of society" is not the same thing as claiming it to be somehow "private" and thereby exempt from justice. The family, as part of the basic structure of society (which, recall, is the "primary subject of political justice" for Rawls),¹⁵¹ cannot violate the basic rights of the equal citizens who comprise it. "Since wives are equally citizens with their husbands," Rawls explains, "they have all the same basic rights, liberties, and opportunities as their husbands; and this, together with the correct application of the other principles of justice, suffices

¹⁵⁰ Rawls, "Public Reason," 596-598; Rawls, *Restatement*, 163-165.

¹⁵¹ Rawls, "Public Reason," 596.

to secure their equality and independence.”¹⁵² Rawls does not take the internal life of the family to be devoid of justice. Yet, neither does he open the family up for scrutiny beyond the application of justice to it as an institution of the basic structure. Rather, it is his basic position that such principles are ill-equipped to inform parents on the matter of raising their children.¹⁵³

Rawls’s view of the family therefore includes a form of the basic distinction between the familial and the political that Nussbaum associates with the historical liberal tradition (as found in the likes of Althusius, Locke, and Rousseau). Rawls’s political liberalism, in his own words, “distinguishes between the point of view of people as citizens and their point of view as members of families and of other associations.”¹⁵⁴ According to this position, it is reasonable for the state to place constraints on *citizens* as members of society who must comply with political principles of justice. It is, however, also reasonable for the state to limit those constraints when it comes to the family (and other associations) in order to “leave room for a free and flourishing internal life appropriate to [that association].”¹⁵⁵ Consequently, the Rawlsian family appears to be, as Mary Walsh puts it, “both public and private.” It is a domain in which he “wishes to protect the individual from intrusive political intervention” to ensure adequate space for one’s own “personal self-realization,” while at the same time acknowledging that human decisions and the exercise of power can often be found to exploit “coercive space within families.”¹⁵⁶ Exploitation of that kind is, however, recognized as unjust according to his theory.

¹⁵² Rawls, “Public Reason,” 597.

¹⁵³ Rawls, “Public Reason,” 598.

¹⁵⁴ Rawls, “Public Reason,” 597. On the distinction between private family and public society, see FJ, 105.

¹⁵⁵ Rawls, “Public Reason,” 597; Rawls, *Restatement*, 164-165.

¹⁵⁶ Walsh, 427. Walsh states her interpretation of Rawls more fully as follows: “Families lie both outside and inside the basic structure of society; they are both voluntary and non-voluntary; and they express both individual and public ends.” As such, the private and public dimensions of families pose a dilemma that does not go unnoticed by Rawls’s political liberalism, even if some accuse him of ignoring matters of justice within the family. Walsh, 427.

Nussbaum is troubled by precisely how free and flourishing the internal life of the family actually proves to be under the Rawlsian perspective.¹⁵⁷ It has already been established that the family *rightly understood* stands for love and care under her theory. And also that families can be places of violence and oppression. Yet the foundational difficulty with the family is not that it is sometimes, or even frequently, a place of violence and oppression. It is that the family is *misunderstood* if it is taken to be a protected space wherein lesser and greater injustices are sanctioned to occur. Such sanctioning occurs, at the most basic level, when the family is thought to exist independent of and protected from political intervention, as Nussbaum finds the case to be with both Rawls and traditional human rights talk.¹⁵⁸ In short, whether children belong to a family that is truly loving and caring *or* one that is abusive and neglectful, they are nevertheless “its captives in all matters of basic survival and well-being for many years” without having chosen to join the institution or being enabled to act within it in a way could be described as “fully voluntary.”¹⁵⁹ The family – whether taken to be the traditional liberal “private” institution or the “natural and fundamental group unit of society” described in UN human rights instruments – obscures human agency, and it does so while occupying moral high ground and availing itself of the legal protection that such a position merits.

Family, then, is not misunderstood only when love and care – conceived of as social goods or vital interests – are absent or are replaced by abuse and neglect. It is misunderstood also and, for Nussbaum, primarily when love and care are not recognized as *capabilities* that

¹⁵⁷ She is not alone in her friendly criticism of Rawls on this issue. See Okin, *Justice, Gender and the Family*, 9, 21-22, 89-109; Kittay, 75-113; Fineman, *Autonomy Myth*, 4-5, 215-217. Iris Young specifically criticizes Okin for focusing too much on the distributive aspect of Rawls’s theory as the point of concern. Interestingly, she wants to supplement it with a somewhat Nussbaumian concern for power-differentials around decision-making that “are not reducible to distribution.” Iris Marion Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (Princeton, NJ: Princeton University Press, 1997), 97-101.

¹⁵⁸ See FJ, 14, 105, 290.

¹⁵⁹ Nussbaum claims the same dilemma to be issuing from the private family for women, albeit to a lesser degree. WHD, 274; cf. Nussbaum, “Rawls and Feminism,” 504.

translate directly into political entitlements. Love and care, like all other capabilities, are opportunities for individual agency that ought to be protected as such.¹⁶⁰ But these capabilities are not appropriately valued if family is taken to be a natural and/or private sphere that is in any way exempt from state intervention aimed at their protection. The principle of treating each person as an end and the principle of moral constraint both trigger what, under the capabilities approach, amounts to justifiable and appropriate state intervention in cases where capabilities are demonstrated to be at risk. By deferring to its “internal life,” Rawls is therefore affording more privacy to the family than is morally justifiable for Nussbaum. The UN’s recognition of the family as the basic element of society that is entitled to state protection and support should be understood as likewise disconcerting to her.

The problems posed by the basic level of privatization that Nussbaum attributes to Rawls are compounded for her when religion is factored into the equation. Broadly speaking, religions are perceived by her to provide little by way of support to the development and exercise of individual human agency, and may in fact be found to blatantly deny other liberties that democratic citizens find valuable.¹⁶¹ Nevertheless, addressing this issue is a delicate matter. For the state to interfere with people’s free religious expression is to strike against citizens in an area of “intimate self-definition and basic liberty.” However, not to interfere permits encroachments on individual agency that amount to the same.¹⁶² This concern is echoed in Nussbaum’s family ethic.¹⁶³ Her apprehension in this matter is not simply that love itself be preserved in familial relations, but that each person as an individual has the *capability* to “select appropriate relations

¹⁶⁰ This means that love and care should be viewed as opportunities for choice and action and, furthermore, ought to be protected as such by a rights regime that is justly ordered (from a capabilities perspective).

¹⁶¹ WHD, 168.

¹⁶² This is what Nussbaum refers to as “the liberal dilemma.” WHD, 168ff., cf. SSJ, 81-87, 92-93, 102-103. A variation of this dilemma is found in Shachar, *Multicultural Jurisdictions*, 17ff.

¹⁶³ Nussbaum observes, in fact, that religion and the family are “frequently bound up” with one another. WHD, 274.

of love and care (and the other central functions).”¹⁶⁴ Family, especially when fueled by religion, holds significant potential to obscure and constrain that agency.

The principle of moral constraint discussed earlier in this chapter must therefore factor in again.¹⁶⁵ Nussbaum carefully explains how in the case of religion the state and its agents may impose a “substantial burden” on a person’s free exercise “only when it can show a compelling interest” for doing so. “But,” she quickly adds, “protection of the central human capabilities should always be understood to ground a compelling state interest.”¹⁶⁶ It should be noted here that Nussbaum is speaking about individual rights clashing with individual rights, and not the rights of a collective clashing against those of an individual. Her concern is about one’s individual agency as it relates to religious freedom and not the sanctity of a particular religious group *per se*. The same goes for the family. In both cases, the capabilities approach “begins by focussing on the capabilities and liberties of *each person*, and does not assume that *any one affiliative grouping* is prior or central in promoting those capabilities” (emphasis added).¹⁶⁷ True to her social construction commitment, Nussbaum approaches the family with concern for how to best promote the claims of human capabilities “given [the particular] history and circumstances” that are being addressed.¹⁶⁸ But, as she explains:

The only thing that stops state intervention is the person and the various liberties and rights of the person, including associative liberties, the right to be free from unwarranted search and seizure, and so forth. The family has no power to stop this intervention on its own, as though it were a mystical unity over and above the lives of its members.¹⁶⁹

¹⁶⁴ WHD, 274.

¹⁶⁵ See section II.

¹⁶⁶ WHD, 202.

¹⁶⁷ WHD, 276.

¹⁶⁸ The central human capabilities are defended by Nussbaum as “universal values” which represent “opportunities for functioning, such that it is always rational to want them whatever else one wants.” WHD, 88. The list itself might be susceptible to social conditioning and cultural variation as far as its content, but pursuit of opportunities to shape one’s life through the exercise of self-determining choice is, for Nussbaum, central to what it means to be human. WHD, 72-73, 77.

¹⁶⁹ WHD, 277.

Neither the “private” family of historical liberal theory that finds a modern form in Rawls, nor its close correlate – the UN’s “natural and fundamental group unit of society” – has any moral or political standing under the capabilities approach. Only individuals do.

This all adds up to a second key issue. Insofar as the family is considered a protected group, it represents for Nussbaum the sanctioned concealment of individual human beings and a legitimized hindrance to the development and exercise of their self-determining agency. Consequently, if erasing the line that Rawls allegedly draws between the internal life of the family and public society is a key concern for Nussbaum, it is coupled with a parallel concern to ensure that each member of the family is recognized as a separate and distinct subject of political justice. Taking the family as the natural and fundamental group unit of society, as some kind of “private domain,” would make it extremely difficult to do justice to its individual members – especially children – in an area of key interest like the cultivation of agency. Therefore, the difference between a Rawlsian or UN emphasis on the family as a presumably protected sphere and a capabilities priority on affiliational and emotional agency is, for Nussbaum, stark. It is the difference between viewing children as passive hostages locked away in an allegedly private domain and viewing them as emerging agents actively determining the shared social and political spaces of public life, or at least being prepared to do so at adulthood. Rather than being the state’s direct concern as political subjects in a way comparable to adult citizens, Rawls considers children to be subject to parents who themselves “follow some conception of justice (or fairness) and due respect with regard to their children.”¹⁷⁰ The UN position is similarly perceived to separate children from their rights by abandoning them primarily to the domestic sphere. But, as Nussbaum laments, such a view does not afford children volitional agency in an area that matters

¹⁷⁰ Rawls, “Public Reason,” 598.

greatly: the capabilities of love and care necessary to leading a good human life.¹⁷¹ For this reason, she identifies the family as a political institution that exists by state action and subsequently seeks to promote and protect the capabilities of all its participants. In short, politicizing the family appears to address the twin problems of agency and subjectivity specified at the end of Chapter 2. It addresses the potential for childhood vulnerability to be exploited because children are distanced from their welfare rights *qua* political entitlements. It also attends to the potential for children's agency to be impeded because their participation rights are disconnected from the best interests principle.¹⁷² From Nussbaum's point of view, family *rightly understood* therefore means that children should neither be obscured as (future) political subjects nor encumbered as (emerging) social agents.

It is significant to recognize that this scrutiny of the family is not an attempt to diminish the importance of sociality to children or anyone else. Sociality (or affiliation) is, after all, a central human capability.¹⁷³ Additionally, Nussbaum specifically references children's need for "intimate and stable" relationships with adult caregivers as essential to their development.¹⁷⁴ In *Political Emotions* she leans on Winnicott to more pointedly affirm the kind of ordinary affiliations she understands them to require in order for their capabilities to adequately develop. Based on her reading of his essay "The Capacity for Concern," she remarks that "the infant develops confidence that it can make good contributions" to its relationship with a parent who is "being loveable as well as just being there."¹⁷⁵ Furthermore, Stoecklin and Bonvin emphasize the collective dimension of agency that the capabilities theory identifies: "the concept of agency

¹⁷¹ WHD, 275. See also Appendix.

¹⁷² See section V of Chapter 2.

¹⁷³ See Appendix.

¹⁷⁴ SSJ, 273-274.

¹⁷⁵ PE, 175.

does not only indicate an individual competence, but also the social relationships in which individuals are involved.”¹⁷⁶ Clark and Ziegler declare that the capabilities approach actually “demands a relational perspective” in which can be combined “a focus on the socially structured space in which the life conditions of individuals and the conditions of their capabilities for action are situated” in order to assess the possibilities and limitations on self-determination.¹⁷⁷ And Ballet, Comim and Biggeri begin their own capabilities-informed investigation of children’s agency by asserting the supposition that children are “engaged in the social world even from before birth, advancing throughout development in their skill in independently carrying out and organizing activities of their culture.”¹⁷⁸

Even so, and this is a key idea to be drawn from this chapter, the family itself, when understood as an organically or legally formed group, has no positive ethical significance under the capabilities approach. It is effectively “read out” of moral discourse by Nussbaum. More particularly, it is entirely absent from her engagement with the idea of children’s human rights. Noting how groups add complexity to the matter of doing justice, Nussbaum reminds that the primary subject of justice is nothing other than the individual person: “It is as persons that we flourish or fail to flourish, that we love each other or separate from one another, join a sustaining group or flee from a domineering group.”¹⁷⁹ As a result, justice should be done for each and every member of the family as an individual political subject in his or her own right. This is why the term “family” can be found nowhere on Nussbaum’s list of central human capabilities.

¹⁷⁶ Stoecklin and Bonvin, “Conclusion,” 274; cf. Bonvin and Stoecklin, “Introduction,” 9.

¹⁷⁷ Clark and Ziegler, 217.

¹⁷⁸ Barbara Rogoff, *Apprenticeship in Thinking: Cognitive Development in Social Context* (New York: Oxford University Press, 1990), 22 quoted in Ballet, Comim, and Biggeri, “Children’s Agency,” 23.

¹⁷⁹ Martha C. Nussbaum, “The Complexity of Groups: A Comment on Jorge Valadez,” *Philosophy & Social Criticism* 29, no. 1 (2003): 67, available at: <http://psc.sagepub.com/content/29/1/57.full.pdf+html> [accessed 11 March 2015].

Instead, she refers to love and affiliation as opportunities for self-determining choice.¹⁸⁰ Moreover, nowhere does she address the UN position on the family in human rights instruments.¹⁸¹ Why? Presumably because the family as it is described in those instruments is unintelligible to the framework of a capabilities approach. Or, put otherwise, it registers no moral weight under the metric of Nussbaum's theory. That is unmistakably the case in the secondary literature wherein the family is almost entirely absent as a category of concern vis-à-vis children's rights, or is alternatively presented in an entirely negative light related to them.¹⁸² The family is simply irrelevant to answering to Nussbaum's basic capabilities question of what people are able to do and to be. The only legitimate answers to that question are the opportunities to choose and act that are either emerging or are being exercised by individual human beings in cooperation with one another.

In conclusion, family *rightly understood* means love and care manifest as individual capabilities being exercised, or developed toward that end. It is therefore politicized under the capabilities approach for the sake of cultivating agency in all without diminishing the agentive prospects of any. Stoecklin and Bonvin summarize the tension this represents well when they assert that "children do not develop independently of the social context." Yet neither, they insist, are children "determined" by such a context. There is "a kind of mutual interdependency between individual agency and social environment."¹⁸³ Stated so, Stoecklin and Bonvin put a

¹⁸⁰ See Appendix.

¹⁸¹ There appear to be two exceptions. In SSJ she mentions the UN's struggles to define the family in relation to the 1994 International Year of the Family. See SSJ, 272. Also, she does refer to parental decision making power in CRCA. However, no mention is made of the UN's description of the family as the natural and fundamental group unit of society (UDHR, Art. 16.3). This represents a key factor to interpreting the CRC given its prominence in the Preamble and concerns for protecting the parent-child relationship that surface throughout its 54 articles. This discussion continues in Chapter 4.

¹⁸² Clark and Ziegler are a rare case of capabilities theorists addressing the issue of the family in any meaningful way. Their assessment of the family in the CRC is a negative one. See Clark and Ziegler, 225-226, 229.

¹⁸³ Stoecklin and Bonvin, "Conclusion," 277-278.

more positive spin on Berger's concern that children's interests are not easily enfolded into those of their parents and family. In either case, the point is the same: the family only factors positively into human flourishing at childhood for Nussbaum if it is a domain in which they count as individual political subjects and social agents, regardless of what qualifications their dependent status might require. Otherwise, children are simply the family's captives, denied the dignity of choice altogether.

Chapter 4 – Children’s Human Rights and the Meaning of the Family

We speak of fundamental freedoms and of human rights; but I ask you, where and when are we really free and human? Is it in the street? Is it in our direct relations to the state? Do we not rather enjoy our deepest and truest freedom and humanity in our family, in the Church, in our intimate circle of friends, when we are immersed in the joyful ways of life of our own people, when we seek, find, see and acknowledge the truth? These intermediate institutions between the state and the individual are the real sources of our freedom and our rights. The tragedy of the modern world is that these real grounds of freedom are in danger and decay.

~ Charles Malik, *The Challenge of Human Rights*, 95.

This chapter questions how easily the family might actually be “read out” of a rights instrument like the CRC. The first section briefly traces the rise of agency in children’s rights instruments to demonstrate that the capabilities conviction that children are active “doers” is present in the CRC and articulated in similar terms. The next section reveals that this increasing focus on children’s agency has not formally displaced the family in its capacity as the “natural and fundamental group unit of society” that the UDHR and subsequent rights instruments articulate. The third section explains how the connection between family and flourishing implicit to the UDHR lays an important foundation for the more explicit connection found in the CRC. The next section considers the UN’s continued commitment to the family despite major disruptions the institution has endured in contemporary Western society. Finally, the fifth section draws on a particular aspect of Argentina’s “Dirty War” to argue that the family, understood in the ideal terms persistently articulated by the UN, is so present in the text of the CRC that it could not be displaced without significant alterations to the agreement. The basic case being made over the following pages is that the UN continues to identify the organic unit of the family as vital to flourishing at childhood precisely because it symbolizes the kind of nourishing and symbiotic connections between a child and his or her parents that human development requires.

I. The Rise of Agency in the Era of Children's Rights

The emphasis that Nussbaum places on agency through her capabilities approach appears, at first glance, to coincide well with its prominence in international discourse on children's rights today. The defining moment of that discourse came on November 20, 1989, when the UN General Assembly adopted the CRC, an international agreement comprised of 54 articles that is arguably surpassed in global significance today only by the 1948 UDHR. Eleanor Roosevelt proposed that the UDHR might become "the international Magna Carta of all [humankind] everywhere."¹ Her hope in that document seems to have been well-placed given Jack Donnelly's observation that the UDHR has been affirmed "regularly and repeatedly, by virtually all states."² Yet, the CRC is the human rights instrument in the UN's arsenal of declarations, conventions and protocols that has most quickly entered into force and is most broadly endorsed.³ It is well known to have "achieved near universal acceptance" having been ratified by 194 member countries to date.⁴ Despite not ratifying the Convention, however, even as powerful a nation as

¹ Eleanor Roosevelt, "Statement by Mrs. Franklin D. Roosevelt U.S. Representative to the General Assembly" in *The Eleanor Roosevelt Papers: The Human Rights Years, 1945-1948 (Vol. 1)*, ed. by Allida Black (Detroit, MI: Charles Scribner's Sons, 2007), 973. See also Glendon, *World*, 173.

² Jack Donnelly, *Universal Human Rights* (1989), 22.

³ Having been adopted by the UN General Assembly on November 20, 1989, "...the Convention was ratified in record time by the required minimum number of State parties (20) and entered into force in September 1990." With 194 States parties the CRC is also the most broadly ratified human rights instrument in history. UNICEF, *State of the World's Children*, 1-2, 6. See also Cynthia Price Cohen, "United Nations Convention on the Rights of the Child: Developing International Norms to Create a New world for Children" in *Children as Equals: Exploring the Rights of the Child*, ed. by Kathleen Alaimo and Brian Klug (Lanham, MD: University Press of America, 2002), 53.

⁴ UNICEF, *State of the World's Children*, 2. As noted earlier in section I of Chapter 2 (see p.76), the three current outliers to the CRC are Somalia, South Sudan and the United States. While both Somalia and the United States have signed the CRC (Somalia on May 9, 2002 and the United States on Feb. 16, 1995), which the UN takes as partial support, neither has ratified it. See UN Treaty Collection, *Chapter IV: Human Rights, Convention on the Rights of the Child*, available at: https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en [accessed 11 March 2015]. The Republic of South Sudan joined these two outlying states when it declared its independence from Sudan on July 9, 2011. Aloys Habimana, "Africa's Newest State Should Sustain the Dream," *Human Rights Watch* (9 July 2011), available at: <http://www.hrw.org/news/2011/07/09/africa-s-newest-state-should-sustain-dream> [accessed 11 March 2015]. However, both Somalia and South Sudan took steps toward ratifying the CRC on the November 20, 2013, the 24th anniversary of the convention. On that date South Sudan's parliament voted to ratify the convention and Somalia's president pledged that his country would "ratify it soon." Jo Becker, "Dispatches: Will the US be the Last to Endorse Child Rights Convention?" *Human Rights Watch* (26 November 2013), available at: <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention> [accessed 10 February 2014]. The State of Palestine became the 194th State to ratify the CRC on 2 April 2014. See

the United States is nevertheless shaped by its moral impact,⁵ to say nothing of the international political pressure the CRC places on struggling states like Somalia and South Sudan.

Building up to the extensive list of entitlements outlined in the CRC was a decades-long project. Until 1989, the two most significant international agreements that specifically addressed children were the 1924 League of Nations' Geneva Declaration of the Rights of the Child (said to be the "first global rights agreement [of any kind] enacted in all of history") and the 1959 UN Declaration of the Rights of the Child (DRC).⁶ These documents each outline global aspirations for child wellbeing by securing through international agreement children's entitlements to both provisions (i.e., the positive rights of the Geneva Declaration) and protections (i.e., the addition of negative rights in the DRC).⁷

Although the DRC was building on the foundation of the earlier Geneva Declaration, the basic thrust of each was to address the special vulnerability of children to the precarious circumstances of worldly existence.⁸ The Geneva Declaration addresses vulnerability by singling children out as those to whom "mankind owes... the best that it has to give." That debt is then articulated in the form of five provision rights that include: the means to material, moral and spiritual development; nourishment and care; relief from distress; freedom from exploitation; and being reared for social responsibility.⁹ The DRC, drafted in the aftermath of World War II,

UN Treaty Collection, *Chapter IV* and UN, "State Parties to Child Rights Convention Elect Nine Candidates as Members of Monitoring Committee," *Meetings Coverage and Press Releases* (25 June 2014), HR/5200, available at: <http://www.un.org/News/Press/docs/2014/hr5200.doc.htm> [accessed 11 March 2014].

⁵ See Chapter 1, section III.

⁶ Wall, *Ethics*, 121.

⁷ Positive rights speak to one's entitlements to the active aid and support of society and the state; negative rights speak to one's entitlements against being done violence or harm. Wall, *Ethics*, 121-122. See p.46n99 of this dissertation.

⁸ Wall, *Ethics*, 121-122.

⁹ League of Nations, *Geneva Declaration on the Rights of the Child* (Geneva, CH: UN Documents, 26 September 1924), available at: <http://www.un-documents.net/gdrc1924.htm> [accessed 11 February 2014]. See also UNICEF, *State of the World's Children*, 4.

attempted to account both for children's vulnerability to harm from others as well as the family's evident inability to fully protect them.¹⁰ This central concern for vulnerability is featured in its Preamble, which states: "Whereas the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."¹¹ It is furthermore representative of the UN's approach to children located in its major human rights agreements. Article 25.3 of the UDHR explicitly addresses the vulnerability of children by referring to the "special care and assistance" to which childhood, like motherhood, is entitled. A similar conviction is then repeated in the two 1966 International Covenants.¹²

The CRC, as a descendent of these earlier agreements, also makes certain its continued and fundamental interest in the condition of vulnerability that manifests at childhood by underlining in its Preamble "the need to extend particular care to the child."¹³ Article 3, furthermore, directly links the "best interests of the child principle" (discussed in the last section of Chapter 2) with the condition of vulnerability. Although the best interests principle is notoriously imprecise, its articulation in Article 3 may be taken as a tangible statement of concern for the welfare of children. Such a conclusion appears justified by the presence of the

¹⁰ Wall, *Ethics*, 122.

¹¹ DRC, Preamble. This very statement is repeated in the Preamble to the CRC. Alston argues that there is some ambiguity to its inclusion. It cannot be read, he explains, "as mandating the recognition of the right to life of the unborn child." Instead, he views as its significance the endorsing of "already very widespread practices of taking whatever measures the state considers 'appropriate' with a view to protecting the fetus." The point, according to Alston, is that there exists "neither an explicit nor an implicit assumption that such protection will or should include an absolute right to life." The metric of appropriateness is left to each state to determine for itself. Philip Alston, "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child," *Human Rights Quarterly* 12, no. 1 (1990): 172, available at: <http://www.jstor.org/stable/762174> [accessed 10 March 2015]. Proposals to explicitly recognize the absolute right to life of the unborn child were consistently rejected, and the preambular paragraph calling for "special safeguards and care" that include the unborn child "cannot be interpreted as an indirect reversal of that explicit rejection." Alston, "Unborn Child," 173.

¹² The relevant articles pertaining to the special vulnerability of children are: ICCPR, articles 23.4 and 24; and ICESCR, article 10.1, 3.

¹³ The CRC makes note of its heritage by repeating in its Preamble specific references to childhood vulnerability found in the 1929 Geneva Declaration, the 1948 UDHR, and the 1959 DRC. It also strengthens its concern for vulnerability by adding to those reference "the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children." See CRC, Preamble.

best interests principle in the first draft of the CRC, a proposal made by Poland in 1978 to simply adapt the provisions of the non-binding DRC into a binding treaty.¹⁴ The best interests provision that stands as Principle 2 of the DRC was restated in full in the Polish proposal:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.¹⁵

The working group drafting the CRC tempered this principle so that it is expressed therein as “a primary consideration” rather than “*the* paramount” one. As Philip Alston explains, use of the indefinite article is meant “to ensure sufficient flexibility” so that interests other than that of the child might prevail in “certain extreme cases.”¹⁶ The principle remains, however, largely inflected toward children’s welfare given that paragraphs 2 and 3 of CRC Article 3 both impose an affirmative duty on the state to play its particular “legislative and administrative” role in ensuring the care and protection necessary for the child’s well-being.¹⁷

However, without neglecting vulnerability concerns articulated as provisions and protections in the earlier Geneva and UN declarations of children’s rights, a novel contribution of the CRC is its addition of participation entitlements aimed at cultivating children’s agency.¹⁸ That is, the recognition of each child’s right to act and be heard in society on his or her own terms.¹⁹ “In all its varieties,” Pufall and Unsworth add, “agency means that children’s actions

¹⁴ Alston, “Best Interests Principle,” 10.

¹⁵ DRC, Principle 2 quoted in Alston, “Best Interests Principle,” 10.

¹⁶ That said, Alston maintains that as adopted the statement made by the article imposes “a burden of proof on those seeking to achieve such non-child-centred results” to show that other feasible alternatives do not, under the given circumstances. Alston, “Best Interests Principle,” 13.

¹⁷ CRC, Article 3.2-3. See Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (The Hague, NL: Martinus Nijhoff Publishers, 1999), 93-95.

¹⁸ Wall, *Ethics*, 123.

¹⁹ Wall, *Ethics*, 123, cf. 37.

affect their worlds and especially their social worlds.”²⁰ This right is more complex than baldly stating it can communicate. Daniel Stoecklin and Jean-Michel Bonvin speak of it in capabilities terms as recognition that the child is “not only a passive recipient, but also a doer.” However, they maintain that the child is not *only* a doer, but an individual who needs “adequate support from the State and other external actors.”²¹ The framers of the CRC articulated this form of recognition through the following seven entitlements: the freedom to shape one’s own views and to have them heard (Art. 12); the freedom to express oneself (Art. 13); the freedom of thought, conscience and religion (Art. 14); the freedom of association and peaceful assembly (Art. 15); the freedom to personal and familial privacy (Art. 16); the freedom to access information and material through mass media (Art. 17); and, the freedom to participate in cultural life and the arts (Art. 31).²² By including these rights, the CRC became the first international rights instrument to explicitly acknowledge the agency of children by viewing them as “social actors and active holders of their own rights.”²³ Stoecklin and Bonvin remark on the “revolutionary” character of Article 12 for introducing into the text of the CRC the idea “that children are not just protected, they are not just guaranteed provisions, but there is also an *obligation* made to States parties to guarantee that they are listened to” (author’s emphasis).²⁴ Michael Freeman adds that Article 12

²⁰ In addition, they claim that “children are much more self-determining actors than we generally think.” Pufall and Unsworth, “Introduction,” 9. UNICEF speaks of Article 12 as “pivotal” among a “wide range of provisions” (included among the articles listed above) related to the matter of children having “their views heard and respected in matters concern them – according to their age and maturity.” UNICEF, *State of the World’s Children*, 9.

²¹ Stoecklin and Bonvin, “Conclusion,” 274. That Stoecklin and Bonvin speak of only the state and “other external actors” further supports the claim that capabilities proponents read the family out of children’s rights. See Chapter 3, section V.

²² Wall, *Ethics*, 123. Stoecklin and Bonvin repeat the same list of articles as Wall, but add Article 31. See Stoecklin and Bonvin, “Capability Approach,” 63-64.

²³ UNICEF, *State of the World’s Children*, 2.

²⁴ Stoecklin and Bonvin, “Capability Approach,” 64. In fact, Article 12 does not merely state an entitlement, but stands as one of four foundational principles undergirding the CRC. UNICEF, *State of the World’s Children*, 6. See Chapter 2, section V of this dissertation.

is significant for its recognition of the child “as a full human being, with integrity and personality, and with the ability to participate fully in society.”²⁵

The inclusion of this particular obligation coincides with David Oswell’s identification of a shift in the sociological study of childhood. He claims that in the late 1980s children came to be more broadly understood as people,

...valued in their own right, not as adjuncts to adults, family or school, and not measured according to normative adult views and structures. The focus is, in the first instance, on children in the positive sense of their action and being in the world. Children are conceptualised as active in their own construction.²⁶

Wall maintains that it is the budding field of childhood studies that has most recently championed the concept of children’s agency: “The sociologists, anthropologists, historians, and others who first developed this field fixed upon agency as one of the defining characteristics of children’s full humanity.”²⁷ Its chief focus is on “asserting children’s equal agency and voice, the ways in which children participate in society as much as adults.”²⁸ Allison James finds this focus to entail shifting away from a concentration on children’s biological development that “traditionally underplayed and undertheorized” their “active social engagement with the world.”²⁹ The new paradigm is more interested in the social construction of childhood and, in particular, “argues for acknowledgment of the agency of children in shaping the form that ‘childhood’ takes as a structural element within society.”³⁰ Bonnie Miller-McLemore and Don Browning together concur that contemporary childhood studies moves children from the

²⁵ See Freeman, *Moral Status*, 56.

²⁶ Oswell, 41.

²⁷ Wall, *Ethics*, 37. Pufall and Unsworth argue that the breadth of academic “languages” involved in childhood studies is important “because children’s lives cannot be fully captured inside any one of them.” Pufall and Unsworth, 6.

²⁸ Wall, *Ethics*, 38. Voice is said to be an “expression of agency” that “puts the focus on children’s commitment to make known their ability to act on their own behalf.” Pufall and Unsworth, “Introduction,” 9.

²⁹ James, 26-27.

³⁰ James, 28-29.

periphery to the center in a shift of research attention “sparked by a commitment to their fuller participation in society and political advocacy [undertaken] on their behalf” as social agents.³¹

Although the study of childhood and children’s rights are distinct from one another, it would be difficult to contest the influence of the CRC in effecting the paradigmatic shift that childhood studies represents. The CRC’s perspective on children has arguably grown to become the dominant global influence on policies directed toward them, “both on governmental and civil society levels.”³² UNICEF claims that the Convention has been instrumental to the way children are “viewed and treated throughout the world,” having exerted a “pervasive and profound influence on national and international legislation, policy and programmes, public and private institutions, families, communities and individuals.”³³ It has spawned other rights instruments, either directly or indirectly, in the years since it was adopted, for example: the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption (1993),³⁴ the European Convention on the Exercise of Children’s Rights (1996),³⁵ the African Charter on the Rights and Welfare of the Child (1999),³⁶ and three Optional Protocols to the

³¹ Bonnie J. Miller-McLemore and Don S. Browning, “Introduction: Children and Childhood in American Religions” in *Children and Childhood in American Religions*, ed. by Don S. Browning and Bonnie J. Miller-McLemore (New Brunswick, NJ: Rutgers University Press, 2009), 7-8.

³² Anna Holzscheiter, *Children’s Rights in International Politics: The Transformative Power of Discourse* (New York: Palgrave MacMillan, 2010), 86-87.

³³ UNICEF, *State of the World’s Children*, 1.

³⁴ See Preamble to Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption* (29 May 1993), 33, available at: <http://www.refworld.org/docid/3ddcb1794.html> [accessed 12 March 2015].

³⁵ The Preamble to the European Convention states its link to the CRC: “Having regard to the United Nations Convention on the rights of the child and in particular Article 4 which requires States Parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the said Convention.” Council of Europe, *European Convention on the Exercise of Children’s Rights* (25 January 1996), ETS 160, available at: <http://www.refworld.org/docid/3de78d964.html> [accessed 23 October 2014].

³⁶ The Preamble to the African Charter specifically states that it is reaffirming “the principles of the rights and welfare of the child” contained in the CRC. Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child* (11 July 1990), CAB/LEG/24.9/49, available at: <http://www.refworld.org/docid/3ae6b38c18.html> [accessed 23 October 2014]. Michael Freeman refers to this instrument as being of symbolic importance, but otherwise “toothless.” Especially when compared to the European Convention on Human Rights and to the CRC. Freeman, *Moral Status*, 59.

Convention on the Rights of the Child – one on the Involvement of Children in Armed Conflict (2000),³⁷ another on the Sale of Children, Child Prostitution and Child Pornography (2001),³⁸ and the most recent on a Communications Procedure (2011).³⁹ While these instruments vary in the emphasis that is placed on children’s participation in society, the 2011 protocol demonstrates the UN’s commitment to the cultivation of children’s agency through the CRC. UNICEF explains that the Optional Protocol on a Communications Procedure “allows the Committee on the Rights of the Child to hear complaints that a child’s rights have been violated... [directly] from children, groups of children or their representatives [and] against any State that has ratified the Protocol.”⁴⁰ This appears to confirm Wall’s assessment of that the Convention “institutes, among other things, new means for children’s social freedom, voice, and participation, on the assumption that children should bring their own full moral capabilities into society.”⁴¹ With twenty-five years now behind it, the CRC has not “transformed the Earth into a child-friendly planet.” Yet, as Woodhouse discerns, “it has begun to shift the international macrosystem of power and ideologies to make a place for children as priorities and as participants.”⁴² With the CRC and its lasting impact on rights discourse, children have come to be recognized more fully as legitimate social agents and political subjects, not just as objects for whom agency is anticipated and justice should be done. Since it came into force, formal recognition of children’s

³⁷ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict* (25 May 2000), available at: <http://www.refworld.org/docid/47fd180.html> [accessed 22 November 2014].

³⁸ UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography* (16 March 2001), A/RES/54/263, available at: <http://www.refworld.org/docid/3ae6b38bc.html> [accessed 23 October 2014].

³⁹ UN Human Rights Council, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council* (14 July 2011), A/HRC/RES/17/18, available at: <http://www.refworld.org/docid/4e72fbb12.html> [accessed 22 November 2014].

⁴⁰ UNICEF, “Advancing the CRC,” *UNICEF: Convention on the Rights of the Child* (19 May 2014) http://www.unicef.org/crc/index_protocols.html [accessed 10 March 2015].

⁴¹ Wall, *Ethics*, 23.

⁴² Woodhouse, *Hidden*, 313.

rights has come to mean, at least in principle, that their voices and actions bear moral weight in the present, not just moral potential for the future.

The CRC, then, represents an important watershed in the international discourse on children's rights and perhaps the most visible sign that the twentieth century has ushered in what Oswell claims to be "the age of children's agency."⁴³ The participation rights secured for them by it indicate a global intention to exist in an era of human society in which each and every child is thought of as an agent who, along with all others, actively participates in the fashioning of his or her own life.⁴⁴ Oswell claims that children today are no longer simply seen to *be*, but are "seen, heard and felt to *do*" (emphasis added).⁴⁵ The perception of children as *doers* underscores a key point that generally characterizes the shift toward agency attributed to the CRC: that the recognition of children as agents means something different than viewing them as the objects of an "emotional, social, cultural, technological and economic" investment, however great that investment might be. It means instead viewing them as a "class or group or collective of people [who] have become more vocal, more visible and more demonstrable in ways that resonate across our contemporary world."⁴⁶ The CRC serves the entrenchment of such a perspective through the interdependent character of the rights it articulates.⁴⁷ This means that participation

⁴³ Oswell, 3. This point, however, should be carefully understood in light of the contextual flavoring of the CRC's impact. As Oswell observes, the articles of the CRC "only have effect in the context of social practice and infrastructure; national state and governmental agencies clearly shape their take-up, interpretation and the subsequent actions taken. Different national governments have taken on the [CRC] in different ways." Oswell, 249-250. In as much as the CRC is a global sign that we live in an age of children's agency, it must also be understood to find expression as such in ways that might impinge more or less on the actual expression of that agency.

⁴⁴ Wall, *Ethics*, 123; cf. 37, 57. Oswell, 41. For similar ideas about the dignity of human agency more generally, ones that are not directly linked to rights, see WHD, 72; CC, 10.

⁴⁵ Oswell, 3.

⁴⁶ Oswell, 3; cf. Cohen, 51, 52.

⁴⁷ UNICEF's guidelines for implementing the rights outlined in the CRC repeatedly proclaims its 54 articles to be "indivisible" and "interdependent." Rachel Hodgkin and Peter Newell. *Implementation Handbook for the Convention on the Rights of the Child*. Third ed. (Geneva, CH: UNICEF, 2007), xix, 15, cf. *passim*; available at: http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf [accessed 10 March 2015]. Wall declares in more general terms that the rights articulated in the CRC should be understood "in a more fully interdependent way." Wall, *Ethics*, 125.

(i.e., agency) entitlements should be paid “particular regard,” either directly or indirectly, when appeal is made to any of the other rights stated therein.⁴⁸ In fact, agency plays a basic hermeneutical role in the CRC given that Article 12 is one of the four basic principles meant to guide its interpretation. Rachel Hodgkin and Peter Newell, in their UN handbook on implementing the CRC, state that “article 12 is [one of four] general principle[s] of fundamental importance, relevant to all aspects of implementation of the [CRC] and to the interpretation of all other articles.”⁴⁹ However, as Nussbaum and other capabilities theorists contend, it is arguable that the idea of children’s agency should bear even more significantly on interpretations of the CRC for its integral relation to the safeguarding of their own best interests.⁵⁰

On one hand, this focus on agency indicates that children are to be viewed similar to all others, namely, as those carving out their own distinct life in an uncertain world. There are some gradients to how this should be understood. For instance, Nussbaum emphasizes agency in an almost absolute way (as is apparent from her family ethic discussed in Chapter 3), yet still speaks of children as *emerging* agents and *future* citizens. Other capabilities theorists take a similar stance, but explain the issue further. Ballet, Comim, and Biggeri, for instance, mention an important distinction that is inherent to Nussbaum’s position: the difference between “[the] capacity to make choices and [the] capacity to evaluate and revise choices.”⁵¹ They claim that the problem is “not so much that children are unable to make choices, but that they might be

⁴⁸ Recall that Article 12 (“respect for the child’s views” and “opportunity to be heard” is one of the four general principles of the CRC. See Hodgkin and Newell, 82, 95.

⁴⁹ Hodgkin and Newell, 149, cf. xix.

⁵⁰ This idea is more implicit in Dixon and Nussbaum (for the reason discussed in Chapter 2, section V) who call more generally for greater sensitivity to both agency (particularly decisional freedom) and welfare needs in the CRC. CRCA, 559-560, cf. 552-553. It is more explicit with Clark and Ziegler, 227-228 and Stoecklin and Bonvin, “Capability Approach,” 64.

⁵¹ Ballet, Comim, and Biggeri, “Children’s Agency,” 27; cf. WHD, 78. This refers to “practical reason” (i.e., capability 6) on Nussbaum’s list of central human capabilities. See Appendix.

unable to evaluate and revise the choices they make, i.e. act as capable agent[s].”⁵² Stoecklin and Bonvin build a rather complicated system around the notion of children’s budding or impending agency (or, more negatively put, the varying *incapability* to fully exercise practical reason at childhood). They point out that it is challenging to refer to children’s rights as *agency* rights given the distinction that must be made between their “potential agency and real agency.”⁵³ After considering various ways to address this issue,⁵⁴ they tentatively propose that children’s agency rights be thought of as “potentially agentic rights.” Stoecklin and Bonvin decipher their idea as follows:

The potential level of agency and the real level of agency depend on factors (rights, contexts, people) that are interdependent, and none of which is decisive by itself. It is not sufficient for agency to develop to have either a right, or a social context in which rights can be experienced, nor is it sufficient to have people able to give meaning to rights in relation to social contexts. It looks like agency only occurs after the three elements (rights, contexts, people) are sufficiently bound together. With children, this can be observed from the moment that any right contained in the [CRC] is directly exercised. In other words, the challenge is to help children transform the formal rights contained in the [CRC] into real freedoms that can be experienced to the maximum extent... All children’s rights are potentially agentic, but the levels of agentivity will always depend on the possible understanding of rights, in social contexts, and in individual children’s minds.⁵⁵

In a way, this dense explanation does the work of justifying Nussbaum’s reference to children as emerging agents by qualifying use of the term “agency” itself. However, Clark and Ziegler can be relied upon to suggest that this also amounts to an over-qualification of agency that essentially pulls the capabilities approach back into the traditional contractarian position that Nussbaum

⁵² Ballet, Comim, and Biggeri, “Children’s Agency,” 27.

⁵³ Stoecklin and Bonvin, “Conclusion,” 281.

⁵⁴ Stoecklin and Bonvin refer to three options for addressing the question of whether children’s rights should be thought of as substantive *agency* entitlements or adjectival *agentic* entitlements. The first is to equate participation rights with “agentic rights” in order to indicate that respect for them “confers higher levels of agency to children.” The second is to consider that every rights is an agency right “in the sense that the active exercise of any right gives some more agency to the actor.” The third option is to call for the invention of “new” rights to guarantee children’s access to agency. Stoecklin and Bonvin, “Conclusion,” 283.

⁵⁵ Stoecklin and Bonvin, “Conclusion,” 284.

criticizes. “Instead of a political contractualism between roughly equals in their ability and will to participate,” they maintain, “she argues in favor of an ethical contractualism between each and every human being as an end, independently of their abilities or their willingness to participate.”⁵⁶ That children are agents unlike their adult counterparts is not a problem for Nussbaum. Remember, the “special” vulnerability that she attributes to childhood (i.e., their lack of agency in light of parental decision making), actually “means that they are not the ‘free, equal, and independent’ agents of the social contract model.”⁵⁷ A central point of her critique of Rawls and classical liberalism is, in that sense, lost if children are not treated as active agents who are nevertheless specifically unequal to adults in their capabilities.⁵⁸

Wall, however, still finds fault with the capabilities framework. He insists on the recognition of children not only as emerging agents or as future citizens, but as present agents in their own right. “Children are dehumanized,” he argues, “...when they are seen as merely passive recipients of adult socialization or adults-in-the-making.”⁵⁹ Nussbaum is perceived to be at least partially guilty on this front for imagining her central human capabilities in terms that represent “rights to things that are usually possessed by adults to higher degrees.”⁶⁰ It seems reasonable to claim that both Wall and Nussbaum, at least in ideal terms, recognize children as actors in the world and shapers of it and not just as those who passively endure and are moulded by its social and material contingencies. The key difference is that while agency might evolve and change over time for Wall, it has no adult-centered telos that requires children to be understood as emerging agents or future citizens. He, like other childhood theorists, “focuses on

⁵⁶ Clark and Ziegler, 223.

⁵⁷ CRCA, 593.

⁵⁸ See Clark and Ziegler, 223.

⁵⁹ Wall, *Ethics*, 37.

⁶⁰ Wall, *Ethics*, 119.

asserting children's equal agency and voice, the ways in which children participate in society as much as adults."⁶¹ Woodhouse appears sensitive to the tension Wall wishes to maintain:

"Children of all ages have equal claims to agency. But developmental theory tells us that children's agency, while it is present at birth, grows and changes and is asserted in different ways as children begin to interact with and understand the social and political worlds around them."⁶²

Nussbaum, however much she draws on children as positive examples and however fully she views them to be agents, still views children as "different" in that regard and as existing in a "necessary prelude to adult capability."⁶³

The implementation of agency entitlements is, therefore, more complex than simply stating an entitlement and asserting a responsibility on the state. Participatory "agency rights" involve the individual as a "co-author in the implementation" process of their own rights.⁶⁴ As childhood theorists are constantly reminding, the individual child is not merely a passive recipient of care and socialization, but also an active doer who engages society as such.⁶⁵ That is, the child is not seen to rely *only* on some external action on the part of the state, other intermediate social institutions, or the family, but to participate him- or herself in the realization of the rights in question.⁶⁶ This point of view is perhaps nowhere better exemplified than in the message "A World Fit for US" that was produced by the Children's Forum at the UN Special Session on Children in 2002. Through that message, the delegates to the Children's forum (all under 18 years of age) pledged,

...an equal partnership in this fight for children's rights. And while we promise to support the actions you take on behalf of children, we also ask for your commitment and

⁶¹ Wall, *Ethics*, 38.

⁶² Woodhouse, *Hidden*, 111.

⁶³ CC, 26.

⁶⁴ Stoecklin and Bonvin, "Conclusion," 274.

⁶⁵ Wall, *Ethics*, 1, 37; Oswell, 3.

⁶⁶ Stoecklin and Bonvin, "Conclusion," 274.

support in the actions we are taking – because the children of the world are misunderstood.

We are not the sources of problems; we are the resources that are needed to solve them. We are not expenses; we are investments. We are not just young people; we are people and citizens of this world. Until others accept their responsibility to us, we will fight for our rights... You call us the future, but we are also the present.⁶⁷

Although there is a discrepancy between the capabilities approach viewing children as “future citizens” and the claim of the Children’s Forum (which could draw support from the field of childhood studies) to be “present,” this statement does reflect Nussbaum’s concern that children (like people with disabilities) “participate as much as possible in decisionmaking and choice.”⁶⁸

It is worth noting, however, that the CRC itself is not a robust example of children’s participation rights at work. Actual children played virtually no role in either its drafting or adoption. It has only been following the adoption of the CRC that they have taken part in summits, forums, and meetings at the UN related to their own rights.⁶⁹ That fact speaks well to Stoecklin and Bonvin’s assertion that the child is not an isolated “doer,” but requires “adequate support from the State and other external actors.”⁷⁰ Children’s agency, in this sense, is said to be inseparable from his or her context. However, Stoecklin and Bonvin, commenting on the CRC from a capabilities standpoint at least partially informed by Nussbaum, regard sociality and the context of the child in a way that does not presume the family as the organic and basic unit of society that the CRC claims it to be. The family, in fact, registers as one among a number of unspecified “external actors” from whom the child needs adequate support.⁷¹

⁶⁷ UNICEF, “A World Fit for Us: Children’s Forum Message,” *Meeting of Under-18 Delegates to the United Nations Special Session on Children* (New York: UNICEF, 5-7 May 2002), available at: <http://www.unicef.org/specialsession/documentation/documents/childrens-statement.pdf> [accessed 16 March 2015].

⁶⁸ FJ, 199; cf. CRCA, 559-560.

⁶⁹ Liebel, 125.

⁷⁰ Stoecklin and Bonvin, “Conclusion,” 274.

⁷¹ At one point, Stoecklin and Bonvin refer to external actors as “the State, third sector institutions, and the family in the case of children.” Later on that same page, they simply refer to the child’s need for adequate support from “the State and other external actors.” Stoecklin and Bonvin, “Conclusion,” 274.

While the issue of agency is unquestionably important to children's rights discourse, including entitlements to participation does not somehow reduce that discourse to the issue of agency alone, as though the social dimension is lost. Nussbaum's capabilities approach is decisive on that matter. Neither did previous emphases on provisions and protections in the Geneva Declaration and the DRC constrain the evolving discourse on rights to the matter of their welfare.⁷² Nevertheless, counting participation rights among the entitlements recognized in the CRC signalled an important shift in focus toward agency. And the virtually universal ratification of the CRC bears witness to a related transformation in the way children and childhood are conceptualized around the globe.⁷³ It remains imperative, however, to consider how agency and vulnerability are balanced in children's rights discourse, especially in light of that shift. It is particularly important to consider how an emphasis like that which Nussbaum places on the cultivation of agency might impact the place of the family in human rights instruments, and especially the CRC.

II. The UN's Enduring Position on the Family

The near universal ratification of the CRC suggests that along with an obvious and growing emphasis on agency there remains a rich consensus that families are somehow integral to the question of getting justice right for children. The idea that children's interests are difficult to enfold into those of their parents and family is, therefore, not one that is easily supported by an appeal to UN human rights instruments. They do not obviously reflect the open sociality that capabilities theorists propose or the outright rejection of the family as a basic and organic element of society that theory appears to entail (see Chapter 3).

⁷² Wall, *Ethics*, 125; cf. 121-125.

⁷³ UNICEF, *State of the World's Children*, 1.

From a UN perspective, the centrality of the family to the promotion of human flourishing at childhood is beyond doubt. The organization's plainly stated and enduring position on the institution is first laid out in Article 16.3 of the UDHR: "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."⁷⁴ This statement has been consistently repeated in substance, and at times in exact wording, in UN rights instruments ever since it was first pronounced in 1948. It is included in both the 1966 ICCPR and the ICESCR which, together with the UDHR, are sometimes referred to as the International Bill of Human Rights.⁷⁵ It appears again in the 1969 Declaration on Social Progress and Development.⁷⁶ It exerts tangible influence on the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief in which can be found a deference to parents in the matter of children's religious education.⁷⁷

⁷⁴ Article 12 also speaks to the basic right of the family to protection against interference or attack. UDHR. The family is mentioned three other times in the text of the Declaration. In addition to Article 16.3, Johannes Morsink observes its explicit reference to the family in Article 23.3 and 25.1 which, respectively, entitle the individual to remuneration that ensures "an existence worthy of human dignity" for one's family and a standard of living "adequate to the health and well-being of himself and his family." Morsink, *Universal Declaration*, 252. A fourth reference to the family is implied in Article 25.2 which states that "motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." Morsink, *Universal Declaration*, 252.

⁷⁵ The International Covenants put in legal form that which the UDHR stated in moral and aspirational terms. For repetitions of UDHR Article 16.3 in the International Covenants, see Article 10.1 of ICESCR and Article 23.1 ICCPR. On the UDHR, ICCPR and ICESCR as the International Bill of Human Rights, see Donnelly, *Universal Human Rights* (2013), 26-27.

⁷⁶ Article 4 of this declaration states the idea in a slightly different form, but with the same basic thrust: "The family as a basic unit of society and the natural environment for the growth and well-being of all its members, particularly children and youth, should be assisted and protected so that it may fully assume its responsibilities within the community." UN General Assembly, *Declaration on Social Progress and Development*, 11 December 1969, A/RES/2542(XXIV), available at: <http://www.refworld.org/docid/528c97704.html> [accessed 21 May 2014].

⁷⁷ See Article 5.1,2 of UN General Assembly, *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, 25 November 1981, A/RES/36/55, available at: <http://www.refworld.org/docid/3b00f02e40.html> [accessed 15 August 2014]. Browning and Witte claim that the UDHR position on the family is repeated in this declaration. Don S. Browning and John Witte, Jr., "Christianity's Mixed Contribution to Children's Rights" in *Children, Adults and Shared Responsibilities* ed. by Marcia J. Bunge (New York: Cambridge University Press, 2012), 280. While it is not restated verbatim, the substance of UDHR Article 16.3 is evident when the 1981 declaration recognizes, first, the parents' right "to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up" and, second, that all children have a right to be educated "in the matter of religion or belief in accordance with the wishes of his parents or, as the case may be, legal guardians" as fits the principle of the best interests of the child." See Article 5.1 and 5.3 respectively.

Furthermore, the global community's affirmation of Article 16.3 is manifested in regional rights agreements in the Americas and in Africa that stress the very same point.⁷⁸

Forty-one years after the adoption of the UDHR, the UN reaffirmed its position on the family by substantively restating both Article 16.3 and Article 25.2 (recognition of special entitlements to care and assistance for motherhood and childhood) in the Preamble to the CRC.

That restatement adds what is only implied in the UDHR, namely, an explicit connection between the family and flourishing. The relevant section of the CRC reads:

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding [...].⁷⁹

⁷⁸ Office of the United Nations High Commissioner for Human Rights and the Department for Economic and Social Affairs, *The Family in International and Regional Human Rights Instruments* (New York: United Nations Publications, 1999), 5. See Article VI of Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, Article VI (2 May 1948), available at: <http://www.refworld.org/docid/3ae6b3710.html> [accessed 21 May 2014]; Article 17.1 of Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose", Costa Rica*, 22 November 1969, available at: <http://www.refworld.org/docid/3ae6b36510.html> [accessed 21 May 2014] and Article 18.1 of Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: <http://www.refworld.org/docid/3ae6b3630.html> [accessed 21 May 2014]. The 1948 American Declaration on the Rights and Duties of Man and the 1969 American Convention on Human Rights are international agreements referring to the Americas and not just to the United States. Both fall under the purview of the Organization of American States, a regional agency within the UN. See Chapter I, Article 1 and Chapter III, Article 4 of the Organization of American States (OAS), *Charter of the Organisation of American States*, 30 April 1948, available at: <http://www.refworld.org/docid/3ae6b3624.html> [accessed 21 May 2014]. Interestingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms makes no reference to the family as a basic element of society, although Article 8 does protect the privacy of the family, notably from undue state interference. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> [accessed 21 May 2014].

⁷⁹ CRC, Preamble. This same explicit connection was also made a decade earlier in the UN General Assembly resolution reflecting on the International Year of the Child in 1979. That resolution asserted the UN's recognition of "the importance of assisting and protecting the family as a basic unit of society and the natural environment for the development and welfare of all its members, especially the children." UN General Assembly, *International Year of*

The near universal ratification of the Convention signals, then, a vibrant recognition of the nexus between family and human flourishing at childhood.

Further endorsement of the UN stance would continue after 1989. Immediately on the heels of the CRC's adoption, 1994 was declared by the UN General Assembly to be the International Year of the Family.⁸⁰ This was done with the explicit purpose of further advancing the conviction that the family is the "natural and fundamental unit of society."⁸¹ Before that event could take place, the UN again repeated its basic position at the 1990 World Summit for Children which produced the World Declaration on the Survival, Protection and Development of Children. Article 14 of that declaration states that families are important to a child's prospects for "find[ing] their identity and realiz[ing] their worth."⁸² A 1999 UN manual on how the family is addressed in various human rights instruments sums up the organizations lasting position well: "The family, a universal institution, is unquestionably the cornerstone of all life in society."⁸³ That same manual then goes on to claim "that the family is an economic unit, the context in which children are born and educated, and that it is there for the well-being of its members and

the Child (18 October 1979), A/RES/34/4, available at: <http://www.refworld.org/docid/3b00f1b462.html> [accessed 3 June 2014].

⁸⁰ The CRC was adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 on 20 November 1989. See CRC. The International Year of the Family was declared by UN General Assembly, *International Year of the Family: 78th Plenary Meeting* (8 December 1989) A/RES/44/82, available at: <http://www.un.org/documents/ga/res/44/a44r082.htm> [accessed 11 March 2015].

⁸¹ With regard to the inaugural observance of the International Year of the Family, the UN General Assembly proclaimed that it: "Affirms that the major activities for the observance of the Year should be concentrated at the local and national levels and assisted by the United Nations and its system of organizations, with a view to creating among Governments, policy-makers and the public a greater awareness of the family as the natural and fundamental unit of society [...]" UN General Assembly, *International Year of the Family: resolution / adopted by the General Assembly* (14 December 1990), A/RES/45/133, available at: <http://www.refworld.org/docid/3b00efe918.html> [accessed 22 May 2014].

⁸² Wall, *Ethics*, 143; cf. Article 15 of World Summit for Children, *World Declaration on the Survival, Protection and Development of Children* (30 September 1990), available at: <http://www.un-documents.net/wsc-dec.htm> [accessed 11 March 2015].

⁸³ Office of the United Nations High Commissioner for Human Rights, *Human Rights Instruments*, 1, cf. iii.

the support of the most vulnerable ones.”⁸⁴ This same point of view is again repeated in the UN General Assembly Resolution “A World Fit for Children” that resulted from the Special Session on Children in 2002. In that resolution the family is recognized as the basic unit of society and noted for bearing “primary responsibility for the protection, upbringing and development of children.”⁸⁵

Even today, as the twentieth anniversary of the International Year of the Family has been marked in 2014, the UN continues its formal recognition of the family in the very terms adopted over six decades ago and it continues to maintain the explicit link between the family and human flourishing that was established with the CRC.⁸⁶ The first sentence on the UN webpage dedicated to global issues facing families proclaims that the organization “recognizes the family as the basic unit of society.”⁸⁷ The UN also recognizes the family as an institution that either directly or indirectly touches nearly all activities within its organizational system.⁸⁸ Since the

⁸⁴ Office of the United Nations High Commissioner for Human Rights, *Human Rights Instruments*, 5.

⁸⁵ UN General Assembly, *A world fit for children: resolution / adopted by the General Assembly* (11 October 2002), 4, available at: <http://www.refworld.org/docid/5290a8624.html> [accessed 3 June 2014].

⁸⁶ The resolution states: “Recognizing that the family, as the natural and fundamental group unit of society, has the primary responsibility for the nurturing and protection of children and that children, for the full and harmonious development of their personality, should grow up in a family environment and in an atmosphere of happiness, love and understanding.” UN Economic and Social Council, Commission for Social Development, *Observance of the twentieth anniversary of the International Year of the Family and beyond* (19 February 2014) E/CN.5/2014/L.5, available at:

<http://undesadspd.org/Family/InternationalObservances/TwentiethAnniversaryofIYF2014/ResolutionsandReports.aspx> [accessed 11 March 2015].

⁸⁷ United Nations, *Global Issues: Family*, available at: <http://www.un.org/en/globalissues/family/> [accessed 11 March 2015]. The General Assembly resolution calling for preparations to celebrate 2004 as the 10th anniversary of the International Year of the Family did not repeat the conviction of UDHR, Article 16.3. The significance of the family to human development is, however, everywhere present in the document. See UN General Assembly, *Preparations for and observance of the tenth anniversary of the International Year of the Family: Resolution adopted by the General Assembly* (16 January 2003) A/RES/57/164, available at: <http://www.refworld.org/docid/3f422a7f4.html> [accessed 10 March 2015].

⁸⁸ UN, *Global Issues: Family*, available at: <http://www.un.org/en/globalissues/family/> [accessed 11 March 2015]. On the Global Issues “Family” webpage, UN bodies with a “direct and obvious” connection to the family include The United Nations Population Fund (UNFPA) and the United Nations Children’s Fund (UNICEF). Other UN bodies that indirectly support the family include the Food and Agriculture Organization of the United Nations (FAO), the United Nations Development Programme (UNDP), the World Health Organization (WHO), the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the United Nations Permanent Forum for Indigenous Issues (UNFPII), UN Women, and others. UN, *Global Issues: Family*.

UDHR was adopted, the UN has scarcely missed an opportunity to remind its constituents of its position on the family. The CRC arguably provides an exclamation mark to the UN conviction.

III. A Foundation for Family and Flourishing in the UDHR

Although the explicit link between family and flourishing located in the CRC traces its lineage back to Article 16.3 of the UDHR, that initial statement lacks the categorical precision of the later one. Browning maintains that the article “hangs in midair as a bald statement of natural law devoid of the actual arguments, history, and narrative that motivated its original origin.”⁸⁹ The term “family” may, of course, be thought to imply nurturing relationships between parents and children as well as broader kin relations. But taken alone that is all Article 16.3 can be thought to do: imply a general and unclear link between family and flourishing.

The articles of the UDHR, however, were never intended to be read in isolation from one another. Mary Ann Glendon – Harvard legal scholar, former American ambassador to the Holy See, and expert on the Declaration’s drafting process – explains that the UDHR was meant to be read “as an integrated document that rests on a concept of the dignity of the human person within the human family. In its substance, as well as in form, it is a declaration of interdependence – interdependence of people, nations, and rights.”⁹⁰

Interpreting the UDHR in this way holds at least two implications for the unique move of recognizing the family group as the collective bearer of a human right.⁹¹ First, it indicates that Article 16.3 could be accused of declaring too much. Such an accusation would be more difficult to level against the statement on marriage and family rights articulated by John Peters

⁸⁹ Browning, “Legal Parenthood,” 109.

⁹⁰ Glendon, *World*, 174. The same basic idea applies also to the CRC. See Detrick, 22.

⁹¹ Protection for the family stated in Article 16.3 represents the one right in the document that adheres to a group rather than an individual. Glenn Mitoma, “Charles H. Malik and Human Rights: Notes on a Biography,” *Biography* 33, no. 1 (2010): 226, available online: <https://muse.jhu.edu/> [accessed 10 March 2015].

Humphrey in his initial draft of the Declaration. Humphrey, a Canadian law professor from McGill University who served as secretary of the Human Rights Commission (HRC) during the drafting process, offered a very brief statement on marriage and family rights: “Everyone has the right to contract a marriage in accordance with the laws of the state.”⁹² Although it underwent significant alteration, Daniel Cere remarks that this “stripped-down conception of marriage rights” maintains “considerable appeal in contemporary Western jurisprudence.” Making particular note of Nussbaum’s view that the family is “the artifact of state action,” Cere goes on to claim that such a view of “family relations” accentuates their fragility “as legal constructs with little or no protection from other rights claims.”⁹³

A similar concern led Charles Malik to push for a thicker recognition of the family’s rights in the Declaration.⁹⁴ He originally proposed that Article 16 be informed by natural law to read: “The family *deriving from marriage* is the natural and fundamental group unit of society. It is *endowed by the Creator* with inalienable rights antecedent to all positive law and as such shall be protected by the State and Society” (emphasis added).⁹⁵ Cere observes that the wording of Malik’s proposal echoes Catholic social teaching and has as a direct source a memorandum circulated at the time of the UDHR’s drafting by the International Federation of Christian Trade Unions (IFCTU), a Catholic trade union movement.⁹⁶ The memorandum – written by P.J.S.

⁹² The Humphrey draft of the UHDR is included as appendix 1 of Glendon’s *World*, 271-274. Daniel Cere remarks that Article 41 of that draft provided added reference to the family by stating that “everyone has the right to such public help as may be necessary to make it possible for him to support his family.” Daniel Cere, “Human Rights and the Family,” *Academic Questions* 22, no. 1 (2009): 70n15, available at: <http://link.springer.com/article/10.1007/s12129-008-9098-y/fulltext.html> [accessed 10 March 2015].

⁹³ Cere, “Human Rights,” 70; cf. WHD, 261. Glendon, writing shortly after the CRC was adopted, makes a similar point in her discussion of the family and sociality. See Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press, 2001), 111, 123, 137-138.

⁹⁴ Mitoma, 226.

⁹⁵ Morsink, *Universal Declaration*, 254-256; cf. Browning, *Equality*, 328-329, 338-339. At the time it was, technically speaking, Article 13. See UN Economic and Social Council, Human Rights Commission, *Summary Record of the Thirty-eighth Meeting* (26 May 1948) E/CN.4/AC.1/SR.38, available online: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/SR.38 [accessed 11 March 2015].

⁹⁶ Cere, “Human Rights,” 73.

Serrarens, then General Secretary of the IFCTU – stated:

The family is the natural, primary and fundamental unit of society; it is older than society itself and has unalienable rights antecedent and superior to positive law.

The family must therefore be protected by society and have its free development and its security of life ensured.⁹⁷

The influence of Serrarens's memorandum on Malik's thought appears obvious when one considers that the idea of the family as "that natural and fundamental group unit of society" became for him the most important part of his proposal.⁹⁸

Despite being forced away from his initial and more robust statement on the family, Malik was able to retain two key components from it in the version of Article 16 that was ultimately adopted. First, he moved his statement away from Humphrey's statist grounding (i.e., the right to contract marriage "in accordance with the laws of the state"). Malik, as one of his biographer's informs, sought to infuse the UDHR with a cautious perspective toward the state.⁹⁹ In his own words, the increasing dominance of the state's claims on its citizens represented "the deepest danger of the age, namely, the extinction of the human person as such in his own individuality and ultimate unviability, and, therefore, the disappearance of real freedom of

⁹⁷ P.J.S. Serrarens, *Memorandum on Human Rights presented for the International Federation of Christian Trade Unions, Human Rights Commission* (3 December 1947), E/CN.4/45, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/45 [accessed 23 November 2014]. Morsink remarks that Malik had been appealing to the 1948 Bogota Declaration (also called the American Declaration of the Rights and Duties of Man) that had been adopted by twenty-one American states (both northern and southern continents) a month earlier to support his case. Article VI on the family states: "Every person has the right to establish a family, the basic element of society, and to receive protection therefor [*sic*]." UN Economic and Social Council, Commission on Human Rights, *American Declaration of the Rights and Duties of Man* (10 June 1948) E/CN.4/122, 3, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/122 [accessed 12 March 2015]. The Bogota Declaration contained none of Malik's controversial terminology, specifically "natural" and Creator." Morsink, *Universal Declaration*, 256.

⁹⁸ Morsink, *Universal Declaration*, 256.

⁹⁹ As Glendon reports, Cassin had already worked to temper Humphrey's more statist position on marriage and family. He proposed adding "and society" to the idea of family protection by the state in order "to make clear... that the principle could and should also be implemented by institutions of civil society, such as the churches. Glendon, *World*, 93, cf. 272.

choice.”¹⁰⁰ In an interesting contrast to Nussbaum’s view of the family as a hostile group, Malik used his quest for its moral recognition to further a concern that the Human Rights Commission was too willing to subordinate “individual rights” to “those of the national community” and thereby constrain the exercise of choice.¹⁰¹ The claims of the state, he argues,

...have a tendency to dictate to people what they ought to think, what they ought to do, what even they ought to believe and hope for, concerning themselves and the nature of things. The political state is becoming increasingly determinant of the very being of the person, and it does it by its laws, by psychological pressure, by economic pressure, by every possible means of propaganda and social pressure.¹⁰²

The family, as Malik would later assert, is among the first spheres of human freedom and should be acknowledged as such for the sake of the individual exercise of that freedom.¹⁰³

Malik’s commitment to the doctrine of natural law is also significantly reflected in his fuller statement on the family. Just over a decade after the UDHR was adopted, he described how dependent on nature are all of the rights articulated therein:

If these rights are the mere products of positive law, namely of law as it happens to be at a particular stage in evolution, then clearly, since positive law changes, my rights, and therewith my very human nature, will change with it. But if, on the other hand, these rights express my nature as a human being, then there is a certain compulsion about them. They are metaphysically prior to any positive law, and any such law must either conform to them or else be *by nature* null and void. Either man has an external essence that can be grasped and expressed by reason, or he dissolves without any remainder into the general flux (author’s emphasis).¹⁰⁴

One can “read in the doctrine of the declaration,” Malik goes on to claim, “a partial and implicit return to the law of nature.” Putting this claim in stronger terms, he asserts that Article 1 of the

¹⁰⁰ Malik, 28.

¹⁰¹ Mitoma, 226.

¹⁰² “Commission on Human Rights Verbatim Record Fourteenth Meeting [Excerpt]” in *The Eleanor Roosevelt Papers: The Human Rights Years, 1945-1948, Vol. 1* ed. by Allida Black (Detroit, MI: Charles Scribner’s Sons, 2007), 507. This source was used instead of Malik’s *The Challenge of Human Rights* because typographical errors in the third sentence in that work rendered the quotation illogical. In Malik’s book, the third sentence reads: “The political state is increasingly being determined by the very being of the person...” Malik, 28.

¹⁰³ Malik, 95.

¹⁰⁴ Malik, 169-170.

UDHR “heavily smack[s] of the doctrine of the law of nature” for its use of the words “‘recognition’, ‘inherent’, ‘inalienable’, ‘born’, and ‘endowed.’”¹⁰⁵ Article 16.3 ultimately excluded overt reference to “the Creator” that would have provided the fuller natural-law basis Malik preferred.¹⁰⁶ However, by retaining the words “natural,” “fundamental,” and “group unit,” the UDHR articulated the rights of the family the same way it articulated all human rights: as inalienable and, therefore, prior to all positive law and beyond the mere impulse of either State or public opinion.¹⁰⁷ Malik’s natural law inclinations are, therefore, evident in the continued UN position on the family, even if only partially and implicitly so.

The reception of Malik’s family statement suggests it overreached and required curbing in at least three ways. First, it was incumbent on Malik and his fellow drafters to ensure that ethical appeals to nature were indeed only partial and implied. Even Jacques Maritain, a key figure in the drafting process who shared Malik’s conviction that the foundation for human rights is located in natural law,¹⁰⁸ would have found an explicit appeal to Thomistic natural law theory counterproductive to the UN project and out of place in a truly universal declaration.¹⁰⁹

Maritain’s work with UNESCO to establish a theoretical basis for human rights made it apparent

¹⁰⁵ Malik, 170. Article 1 reads: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood.” UDHR.

¹⁰⁶ Browning, *Equality*, 328-329; cf. Morsink, *Universal Declaration*, 255.

¹⁰⁷ UN Economic and Social Council, Human Rights Commission, *Summary Record of the Thirty-seventh Meeting* (13 December 1947) E/CN.4/SR.37, 11-12, available online: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.37 [accessed 11 March 2015]. See also Browning, *Equality*, 328-329 and Morsink, *Universal Declaration*, 254-255. For the connection between the inalienability of individual human rights and the right of the family to protection, see the Preamble to the UDHR which reads “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world.” UDHR, Preamble. In defending this position Malik noted the phrase “endowed by nature” in Article 1 as a precedent for the wording he proposed. Although he was fine with allowing the term “Creator” to be open to interpretation so that it did not have to mean “God” in a rigidly monotheistic sense, he wanted to ensure the Declaration recognized the “fundamental and inalienable importance of the family.” Mitoma, 226; cf. Human Rights Commission, *Thirty-eighth Meeting*, E/CN.4/AC.1/SR.38, 8.

¹⁰⁸ Maritain was a French Thomist philosopher and an active member of the UNESCO Committee on the Theoretical Bases of Human Rights. Glendon, *World*, 51. He proclaimed, “The philosophical foundation of the Rights of man is Natural Law. Sorry that we cannot find another word!” Maritain, *Man and the State*, 80.

¹⁰⁹ Maritain, *Man and the State*, 76-77; cf. Glendon, *World*, 77-78, 147, 230.

to him that any agreement on universal norms would include at least two camps of people: “those who to a greater or lesser extent explicitly accept, and those who to a greater or lesser extent explicitly reject ‘natural law’ as the basis of those rights.”¹¹⁰ The solution, he maintained, would be to “adopt a practical viewpoint and concern ourselves no longer with seeking the basis and philosophic significance of Human Rights but only their statement and enumeration.”¹¹¹ This would be no less the case in dealing with Article 16.3 than any other aspect of the UDHR. In fact, Malik’s repeated attempts to include specific reference to “the Creator” in the formulation of the article nearly cost that which he believed to be “the most essential part” – recognition of the family as “the natural and fundamental group unit of society.”¹¹² With Malik pushing too hard for his treasured terminology, his fellow delegates whittled down the marriage and family article to a thin call for the protection of marriage and the family by the state and society. Only at Malik’s pleading during the following session did the Commission reinstate his key phrase.¹¹³

Second, defining the family as “deriving from marriage” was seen by some to pose a problem for the rights of children born outside the institution. Article 25.2 declares: “Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” The fear was that connecting the family directly to marriage in one article would stigmatize children for whom special protections were articulated in another. The result would be two articles in this supposedly interdependent document standing at apparent cross-purposes with one another.¹¹⁴ As Cere puts

¹¹⁰ Jacques Maritain, “Introduction” in *Human Rights: Comments and Interpretations; A Symposium*, ed. by UNESCO (Paris: UNESCO, 25 July 1948), 5, available at: <http://unesdoc.unesco.org/images/001550/001550155042eb.pdf> [accessed 10 March 2015].

¹¹¹ Maritain, “Introduction,” 6.

¹¹² Morsink, *Universal Declaration*, 255-256.

¹¹³ Morsink, *Universal Declaration*, 255-256.

¹¹⁴ Browning, *Equality*, 345. Morsink comments that it was “clear that the Third Committee did not want to tie the rights of children to any kind of narrow definition of the family, in which they might get entrapped, or which might leave some children unprotected. Morsink, *Universal Declaration*, 256, 258.

it, Malik's initial formulation was perceived to be "too unequivocal." A "softer version of the link between marriage and the family" was therefore affirmed for the final draft which read "the right to marry and to found a family" (Article 16.1).¹¹⁵

In the third place, even in 1948 it had to be admitted that defining "the family" and gaining a global consensus on the term would be a difficult (if not impossible) task in both theory and practice. Soviet delegate Alex Bogomolov made this point when he rejected Malik's proposed definition and its corresponding natural law justification. He argued that Malik's characterization of the family did not account for varied forms of the institution which were the result of diverse economic circumstances and religious perspectives.¹¹⁶ Jamil Baroodi, delegate from Saudi Arabia, made a similar claim. He observed that the articles in the draft declaration dealing with marriage and religious freedom were "based largely on 'Western' concepts, which were frequently at variance with patterns of culture in other parts of the world."¹¹⁷ This, at the very least, held the potential for conflict with Article 18's protection of religious freedom.¹¹⁸ Notions around the idea of "equal rights in marriage" were difficult for representatives from predominantly Muslim populations to accept given their own laws had already stood for centuries.¹¹⁹ Even today, the issue of polygamous marriage has drawn legal attention in Canada and the United States as the current practice of it in a fundamentalist Mormon sect clashes with established marriage laws and concerns that the vulnerability of women and children will be

¹¹⁵ Cere, "Human Rights," 74.

¹¹⁶ See Morsink, *Universal Declaration*, 254-257.

¹¹⁷ Glendon, *World*, 141, 153-154; cf. UN Economic and Social Council, Human Rights Commission, *Ninety-First Meeting: Draft International Declaration of Human Rights (E/800)*. 2 October 1948, A/C.3/SR.91, 49, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.91 [accessed 11 March 2014].

¹¹⁸ "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." UDHR, Art. 18.

¹¹⁹ Glendon, *World*, 153.

exploited.¹²⁰

Ultimately, as the final version of the UDHR bears out, the drafters found it sufficient to proclaim the family as the “natural and fundamental group unit of society” that, as such, is owed “protection by society and the State.”¹²¹ Consequently, the answer to what counts as family had to be open-ended enough so that it could encompass a wide array of ethical perspectives *and* avoid conflict with both Article 18 (which protects religious freedom) and Article 25.2 (which protects children born out of wedlock). In this sense, Article 16.3, in its final form, was crafted to reflect the purposefully “open texture” of the Declaration that allowed for broad political agreement and an enduring application “through changing times.”¹²²

However, if Article 16.3 potentially said too much about the family, it could also be accused of saying too little about flourishing. Deriving a connection between family and flourishing from Article 16.3 means accepting little to no specificity from the article itself on what that connection means. Yet, if the articles of the UDHR should not be understood as negatively impinging on one another (as noted above with the impact of Articles 18 and 25 on Article 16), they also should be read as positively informing each other. From that perspective, Article 29.1 can be read as strengthening a connection between the family and flourishing in the UDHR. The article reads: “Everyone has duties to the community *in which alone the free and*

¹²⁰ See *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, paragraphs 228-233, 836, 879-885, 1350, available at: <http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1588/2011bcsc1588.html> [accessed 11 March 2015].

¹²¹ Morsink, *Universal Declaration*, 256; Browning, *Equality*, 345. To read the UN reports on the various stages of debate over what became Article 16.3, see the following documents: Human Rights Commission, *Thirty-seventh Meeting*, E/CN.4/SR.37, 11-12; Human Rights Commission, *Thirty-eighth Meeting*, E/CN.4/AC.1/SR.38, 7-15; UN Economic and Social Council, Human Rights Commission, *Summary Record of the Fifty-eighth Meeting* (16 June 1948) E/CN.4/SR.58, 9-18, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.58 [accessed 11 March 2015]; UN Economic and Social Council, Human Rights Commission, *Summary Record of the Sixty-second Meeting* (11 June 1948) E/CN.4/SR.62, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.62 [accessed 11 March 2015].

¹²² Glendon, *World*, 191.

full development of his personality is possible” (emphasis added). While this article could be addressed to any number of communities that contribute to a person’s flourishing, Johannes Morsink observes that “under normal circumstances the family, however defined, is a person’s primary community of growth and development.”¹²³ So convinced was he of the connection, in fact, that Morsink prominently featured Article 16 in his exposition of Article 29.¹²⁴ Building on a similar conviction, Browning suggests an even stronger link by proclaiming the institution to be a welfare system like no other: “The family as a group unit has been and remains today an intergenerational reality that spreads mutual care outward into society and forward into the future cycle of the generations.”¹²⁵

It seems obvious, at least to the likes of Malik, Morsink and Browning, that there is a direct and vital link between family and human flourishing which the UDHR acknowledges, even if Article 16.3 could have been designed to more explicitly state that connection. Furthermore, that link was made more explicit by the UN well before the adoption of the CRC. Article 10.1 of the 1966 ICESCR binds States Parties to recognize that: “The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.” In short, although some contemporary theorists find it difficult to enfold children’s interests into those of their parents and family (as the basic thrust of Nussbaum’s capabilities argument goes), the stated conviction of the UN from the time the UDHR was drafted to the present is that children’s interests are not easily disentangled from familial belonging. Furthermore, time has not diluted the connection the UN identifies between

¹²³ Morsink, *Universal Declaration*, 252.

¹²⁴ Morsink, *Universal Declaration*, 252-258.

¹²⁵ Browning, *Equality*, 342.

family and flourishing. It has only allowed the organization time to more explicitly communicate that connection.

IV. The Fundamentality of the Family amidst the Shifting Mores of Modernity

While the UN has retained and strengthened its conviction about the family over the decades since 1948, views about sex and the family have at the same time radically changed. Cultural and legal developments in sexual freedom have provoked ethical disputes over the family to evolve beyond the basic concerns for children born out of wedlock, women's position in the family, or polygamous marriage that drove debate during the drafting of the UDHR.¹²⁶ Michael Ignatieff, Canadian philosopher and one-time candidate for Prime Minister, remarks that it is amazing how "rights talk has transformed [the way] we think about ourselves as citizens, as men and women, and as parents."¹²⁷ He suggest that these new ways of thinking have been the result of a rights revolution that continues to evolve. Notably, it moved toward a sexual revolution that has now taken root as a moral revolution.¹²⁸ This plays out significantly in the family, which for Ignatieff, is "a community where each member receives and displays lifelong moral concern for the well-being of everyone else," a standard that "can be met by a wide variety of persons and a wide variety of possible family forms."¹²⁹

Ignatieff's observation appears confirmed by a recent Pew Research Center survey done in the United States. The results show the national "family album" in that country to now include ensembles other than the nuclear model of "mom, pop, and the kids" formed either

¹²⁶ Morsink, *Universal Declaration*, 255, 257.

¹²⁷ Ignatieff, 1. In Ignatieff's words, "the rights revolution has penetrated the most intimate spheres of private life." Moreover, he states that "the rights revolution has become a sexual revolution, and in the process, it has transformed all our most important social relationships: between men and women, between parents and children, and between heterosexuals and homosexuals." Ignatieff, 85, cf. 1, 89.

¹²⁸ Ignatieff, 89.

¹²⁹ Ignatieff, 102.

biologically or through adoption.¹³⁰ Linda McClain adds to this observation that what counts as family in America today includes,

...families formed by a single parent (whether due to divorce or the absence of marriage), families formed by two unmarried biological parents, by lesbian and gay parents, and by foster parents, blended families formed when divorced parents remarry or cohabit with new partners, and extended families (where a grandparent or other relative serves as caretaker, with or without the biological parents present in the household).¹³¹

Many of the examples just listed, while certainly diverging from the nuclear model, are not entirely new. Others, like the idea that a publicly recognized family may consist of a same-sex couple and their children, seem to better represent what family has come to look like under the conditions of modernization.¹³²

That said, attempting to reify the “modern family” is a self-defeating project. Even McClain’s recent assessment seems to put current social realities in banal terms. Legally protected and promoted sexual freedom, at least in Western liberal democracies, is combined today with major advancements in assisted reproductive technologies so that families existing under the conditions of modernization now includes a range of unconventional co-parenting initiatives,¹³³ attempts to blend motherhood and fatherhood through the experimental

¹³⁰ Pew Research Center, *The Decline of Marriage and the Rise of New Families: A Social and Demographic Trends Report* (18 November 2010), available online: <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [accessed 11 March 2015]. See also Linda C. McClain, “A Diversity Approach to Parenthood” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 48.

¹³¹ McClain, “Diversity Approach,” 48.

¹³² McClain, “Diversity Approach,” 48.

¹³³ The tamer version of this would be Matthew Liao’s “multi-family adoption scheme” which serves to contrast with traditional single-family adoption. Under Liao’s scheme a number of non-biologically related individuals from different families join together to adopt a child. Child-care responsibilities for providing food, shelter, clothing, health-care insurance, education etc., are spread out between primary and secondary co-adopters so that the pressures related to providing parental love are somewhat relieved by being spread out among associate duty-bearers. Liao, 361-362, cf. 357. A more radical version, at least for the time being, is the Modamily approach whereby aspiring parents looking to birth and raise children without marriage or romantic attachment seek likeminded partners through an online service. See “The Modamily Mission,” *Modamily*, available at: <http://modamily.com/contact-us/> [accessed 11 March 2015]. The basic idea is that of “helping people fulfill their dream of becoming a parent on their own terms.” “First Fridays: Ivan Fatovic, Founder and CEO of Modamily,” *Cassandra Daily* (1 June 2012), available at: <http://www.cassandradaily.com/life/first-fridays-ivan-fatovic-founder-and-ceo-of-modamily/> [accessed 11 March 2015]. Another example of the same idea is Co-ParentMatch.com. The

impregnation of post-operative transsexuals,¹³⁴ and the reality of parenting to assist young children through their own self-determining exploration of gender.¹³⁵ Browning, who was long concerned with the disruptive impact of modernizing forces on the family,¹³⁶ has often argued that changes to the institution result, at least in part, from a variety of separations that those forces have introduced into the field of human sexuality and the modern domestic sphere. These include “separations between marriage and sexual intercourse, marriage and childbirth, marriage and child rearing, childbirth and parenting, and (with the advent of assisted reproductive technologies) childbirth from sexual intercourse and biological filiation.”¹³⁷ Separated as well are the seemingly mutually dependent ideas of parenthood and family.¹³⁸ Regardless, then, of

mission statement for this online co-parenting site is “To enable loving alternative families to be created by matching like-minded individuals in their pursuit to become a parent.” The basic idea is “to provide a networking site where you can choose a sperm donor, sperm recipient or co-parent via a selection process using the member’s profiles.” “Co-ParentMatch: Find Your Perfect Parenting Partner,” *Co-ParentMatch.com*, available at: <http://www.co-parentmatch.com/about.aspx> [accessed 11 March 2015].

¹³⁴ Thomas Beatie, a self-described “transgender, legally male, and legally married” man, became pregnant through assisted reproductive technology in 2008. Born female as Tracy Lagondino, Beatie altered his body to transition to male but kept his female reproductive organs, thus making pregnant fatherhood a possibility. Guy Trebay, “He’s Pregnant. You’re Speechless,” *The New York Times* (21 June 2008), available at: http://www.nytimes.com/2008/06/22/fashion/22pregnant.html?_r=2& [accessed 11 March 2015].

¹³⁵ See Fiona Joy Green and May Friedman, eds., *Chasing Rainbows: Exploring Gender Fluid Parenting Practices* (Bradford, ON: Demeter Press, 2013), 4. For Kathy Witterick, one half of a Canadian couple who both advocate and practice this approach and have received international recognition for doing so, the guiding question has been: “how can I parent in ways that protect my child’s right to a safe, creative and healthy future?” Kathy Witterick, “Dancing in the Eye of the Storm” in *Chasing Rainbows: Exploring Gender Fluid Parenting Practices*, ed. by Fiona Joy Green and May Friedman (Bradford, ON: Demeter Press, 2013), 22, 24. The answer, in short, is to honor children’s agency through “gender engaged parenting.” This form of parenting “facilitates a child’s conscious interchange with their world, for the purpose of growing *the child’s* capacity to make their own healthy choices” (author’s emphasis). Witterick, 32, 35. Gender non-conformity is viewed from this perspective as an important challenge to the “binary gender” status quo, a challenge steeped in the recognition that “[a]gency and freedom of expression are *that* important to being human, and gender non-conforming children are sticking up for everyone’s right to both” through their self-determining actions. Witterick, 30.

¹³⁶ In one of his early works, *Generative Man* (1973), Browning remarks how “uncontrolled economic and technological expansion” must be curtailed in order to avoid weakening “the very fabric of social existence.” Don S. Browning, *Generative Man: Psychoanalytic Perspectives* (Philadelphia, PA: The Westminster Press, 1973), 9.

¹³⁷ Don S. Browning, “Christianity and the Rights of Children” in *Christianity and Human Rights: An Introduction*, ed. by John Witte, Jr. and Frank S. Alexander (New York: Cambridge University Press, 2010), 284; cf. Browning, “Legal Parenthood,” 106-107. Browning borrows the idea of separations from Brent Waters. See Browning, *Equality*, 359; cf. Brent Waters, *Reproductive Technology: Toward a Theology of Procreative Stewardship* (Cleveland, OH: Pilgrim Press, 2001), 15-17. The likely source behind Waters’ discussion is his doctoral supervisor Oliver O’Donovan. See Oliver O’Donovan, *Begotten or Made?* (New York: Oxford University Press, 1984), 17-20.

¹³⁸ As Waters puts it: “A single woman forswearing marriage may provide surrogacy services for an infertile couple, while a fertile couple may donate gametes to infertile individuals while forswearing any child-rearing

the consensus that Article 16.3 of the UDHR has proclaimed and the Preamble to the CRC has affirmed, that which has been thought to constitute the family in the past is now perceived by many to be a borderland ripe for exploration.¹³⁹ Moreover, exploration of it seems to be limited only by the “expanding horizon of technological ingenuity and the shrinking horizon of the public purse.”¹⁴⁰ In other words, the evolving forms and functions of the family are likely to be pushed as far as imagination and resources will allow.

It should be noted, however, that historical and global perspectives on the family demonstrate that pluralist accounts of the institution are not only the result of modernization. The practice of polygamy (specifically polygyny), the existence of concubines, and the persistence of other diverse sexual arrangements noted in the Jewish Bible, while not necessarily prescriptive,¹⁴¹ speak to a long history in which the nuclear model said to be instituted by God in

responsibilities. What designates a ‘parent’ in both instances is the desire to obtain a child.” Waters, *Reproductive Technology*, 18. For a less critical stance, see Liao, 362.

¹³⁹ A declaration signed by numerous queer theorists argues that marriage, even loosely defined to include same-sex couples, “is not the only worthy form of family or relationship, and it should not be legally and economically privileged above all others.” Commenting further, these scholars proclaim: “While we honor those for whom marriage is the most meaningful personal – for some, also a deeply spiritual – choice, we believe that many other kinds of kinship relationship, households, and families must also be accorded recognition.” Their examples include: senior citizens living together and caring for one another; adult children living with and caring for their parents; grandparents and other family members raising their children’s children; committed loving households that contain more than one conjugal partner (i.e., polygamous or polyamorous households); blended families; single-parent homes; extended families living together under one roof and caring one for another; queer couples who decide to create and jointly care for a child although in two separate households; close friends and siblings who live together in long-term; committed but non-conjugal relationships where they serve as each other’s main caregivers; and, caregiving relationships organized around supporting those living with HIV/AIDS. “Beyond Same-sex Marriage: A New Strategic Vision for All Our Families & Relationships” (26 July 2006), 2, available online: <http://beyondmarriage.org/BeyondMarriage.pdf> [accessed 11 March 2015].

¹⁴⁰ This is Joan O’Donovan’s assessment of the emphasis on subjective rights today. Joan Lockwood O’Donovan, “Rights, Law, and Political Community,” 37.

¹⁴¹ Michael Berger remarks that polygamy was allowed in ancient Israel so long as birth right customs were not disrupted. He also comments on the influence of environment to note how Jews located in Palestine and Asia Minor were swayed toward Roman and Christian insistence on monogamy, while “Babylonian Jews... clearly tolerated” the practice of polygamy. Michael S. Berger, “Judaism” in *Sex, Marriage, and Family in World Religions* ed. by Don S. Browning, M. Christian Green and John Witte, Jr. (New York: Columbia University Press, 2006), 3, 7. References to the taking of concubines in the Hebrew Scriptures are too numerous to list. A famous example of both polygamy and concubinage is King Solomon: “Among his wives were seven hundred princesses and three hundred concubines” (1 Kings 11:3). Solomon’s example is not prescriptive as 1 Kings 11:3 reads “... and his wives turned away his heart.” Berger asserts that while polygamy is permitted, “grave spiritual dangers accompany the pursuit of women other than one’s wife, and monogamous marriage becomes the metaphor of the God-Israel covenant.”

the creation account of Genesis 2 did not stand as the only way people actually organized family life in the ancient world. Furthermore, early Christianity, from the first century New Testament epistles to at least the fifth century writings of St. Augustine, counted slaves as an assumed part of the household,¹⁴² thereby suggesting an expanded yet socially acceptable model of the family that human rights regimes attempt to outlaw today. Islam has a long, if somewhat complex, history of allowing the practice of polygamous marriage.¹⁴³

In addition to historical evidence, anthropological studies of family pluralism practiced in South Africa (where both polygamy and same-sex marriage were legally recognized for a time) and among the Muomo people of China (where co-parenting outside of romantic ties has long been practiced) support the idea that there is “no single, culturally prescribed domestic norm” into which the goods of sexuality can or should be incorporated.¹⁴⁴ “When a culture comes to presume that ‘love makes a family,’” Judith Stacey observes, “love inevitably will make some families that transgress cultural conventions of gender, number, sexual identity, or race.”¹⁴⁵ Consequently, the notion that the nuclear model represents a universal norm of practice appears historically and anthropologically unviable. It may certainly be argued, as Browning in fact

Berger, 3. While the Hebrew Scriptures reference a diversity of sexual arrangements that are too numerous to list (including, prominently, the adultery committed by Solomon’s father, King David, outlined in 2 Samuel 11-12), one of the seven basic “Noahide laws” perceived to pertain to all human beings includes prohibitions against “sexual license” thought to include bans on “incestuous, adulterous, homoerotic, and bestial acts.” David Novak, *The Jewish Social Contract: An Essay in Political Theology* (New York: Oxford University Press, 2005), 233.

¹⁴² For New Testament household codes see Ephesians 5:22-6:5 and Colossians 3:18-4:1; cf. Titus 2:1-10 and 1 Peter 2:13-3:7. For Augustine’s fifth century inclusion of slaves in the household, see Augustine, *City of God*, XIX.14, 16.

¹⁴³ Al-Hibri and El Habti explain that the Qur’an “was revealed in a culture steeped in polygamy” and it does not represent the “optimal way of arranging marital relations” for Muslims. Azizah Al-Hibri and Raja’ M. El Habti, “Islam” in *Sex, Marriage, and Family in World Religions*, ed. by Don S. Browning, M. Christian Green and John Witte, Jr. (New York: Columbia University Press, 2006), 185-186. There are only two Qur’anic verses on the subject. One gives conditional permission for the practice based on the specific context of attempting to do justice to orphaned girls who might be taken advantage of for their wealth. The other imposes strict conditions of fairness and justice on men who wish to marry more than one woman. See Qur’an 4:3 and 4:129 quoted in Al-Hibri and Eel Habti, 186-187.

¹⁴⁴ Stacey, 79.

¹⁴⁵ Stacey, 79.

does, that an intact mother-father team is the social ideal and is supported as such by historical evidence and everyday observation. It just cannot be argued that this ideal is the only social reality at work across the globe today or throughout human history.¹⁴⁶ There are tradition-based reasons for acknowledging a broader definition of the family in relation to children's rights.

Nussbaum points to preparations for the International Year of the Family in 1994 as an example of the UN grappling more tangibly with the assumption that what counts as a family could be concretely articulated. She cites UN interagency documents in *Sex and Social Justice* in order to underline the futile task of attempting to define an institution that itself appears to have become the very definition of social variability. At the time, any definition approaching universality would have had to account, she asserts, "for cultural variants, including single-parent households, lesbian and gay families, and many more traditional forms of polygamous or multiadult bonding that the deliberators wished to include."¹⁴⁷ Rather than formulating a cumbersome and, to Nussbaum, "ridiculous" definition that sought to incorporate all family forms, it was determined that the best course of action would be to settle on no definition at all, "using the term 'families' without restrictive separation."¹⁴⁸ Following the first observance of the International Year of the Family, UNESCO issued a report affirming the decision to leave the family undefined. That report concluded as follows:

The family has been the locus of major social and demographic changes in this century, and the traditional family models recognizable in every cultural area are no longer unique. Yet what must be preserved in all family forms is the well-being of children. From the viewpoint of the child, it is not legal status that makes a family but the quality of parenting offered and the ability of the carers to meet the child's needs.¹⁴⁹

¹⁴⁶ Don Browning has argued for sexual difference in marriage as the ideal while recognizing the world in which we actually live is marked by a variety of marriage and family forms. Browning, *Equality*, 330.

¹⁴⁷ SSJ, 272.

¹⁴⁸ SSJ, 272.

¹⁴⁹ UNESCO, *International Year of the Family: Final Report and Calendar of Events* (Paris: UNESCO, 1995) ED-95/WS/3, 22, available at: <http://unesdoc.unesco.org/images/0009/000999/099959eb.pdf> [accessed 11 March 2014].

What is perhaps most interesting about this conclusion is that it signals the UN's apparent comfort with being simultaneously conclusive and vague about the institution. That is nowhere more evident than in the 1999 manual already referenced in which the family is referred to in one sentence as being "unquestionably the cornerstone of all life in society" while the next then states: "Nevertheless, this institution is constantly changing and fulfills a great variety of functions depending on its social, political and economic context."¹⁵⁰

Nussbaum's point is well-taken. The UN does not offer a quantitative definition of the family in the same way that it offers a quantitative definition of children as human beings below the age of eighteen.¹⁵¹ Even the term "family environment," found in the Preamble to the CRC as well as Articles 22 and 24, is left undefined.¹⁵² There are, however, hermeneutical parameters that Nussbaum does not acknowledge. The working group drafting the CRC recognized the potential for what counts as a family to vary from "State to State." They emphasized, however, that "when a group of persons is regarded as a family under the legislation and practice of a State, it should be given [protection commensurate with the idea laid out in UDHR Article 16.3 and ICCPR Article 23.1]." Briefly put, if a particular formation counts as family under the

¹⁵⁰ Office of the United Nations High Commissioner for Human Rights, *Human Rights Instruments*, 1. Earlier in the document the same sentiment is expressed in slightly different, but no less ambivalent, terms: "As a universal institution, the family is undoubtedly the cornerstone of life in society. It is, however, constantly evolving and assuming different roles, depending on the social, political and economic context." Office of the United Nations High Commissioner for Human Rights, *Human Rights Instruments*, iii.

¹⁵¹ Article 1 of the CRC states: "For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier." Of course, providing a quantitative definition of childhood is not as simple as defining all human beings from birth to eighteen years of age children. First, "children are not a unified category" as the developmental differences between an infant and an eighteen-year-old are stark, as are various gradients in between. Ballet, Comim, and Biggeri, "Children's Agency," 33. The wording of Article 1 is said to be open to some interpretation on whether childhood begins at "birth, conception, or somewhere in between." Hodgkin and Newell, 1. There was also debate during the drafting process on the status of unborn children. Alston, "Unborn Child," 177-178. Stating the end of childhood carries legal difficulties as the age of majority varies between countries. The CRC is therefore described as "more prescriptive, and not inflexible" about the precise end of childhood. Hodgkin and Newell, 1, 3.

¹⁵² Detrick, 335.

jurisdiction of a particular state, then it should be protected as such by that state.¹⁵³ But that protection is based on the idea of the family as the UDHR's "natural and fundamental group unit." Given historical and cultural variations in the family and its obvious institutional fragility, some flex (perhaps a significant amount) is vital if justice is going to be done. Yet, while the UN leaves aside any quantitative definition of the family, there appears to be something *qualitatively* meaningful in what is stated in the UDHR, the CRC and other human rights instruments. And it is certainly meaningful that despite significant shifts in sexual morality during the time since Article 16.3 was initially articulated, the UN remains committed to the basic conviction it states.

V. The Significance of the Family to Children's Human Rights

What, then, does it mean to be convinced that the family is "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children"? Can the family be said to have any qualitative meaning as it is articulated in the CRC? Perhaps reference to the family in the Preamble is merely a symbolic nod to a view of the institution that may once have been dominant and influential, but is now largely irrelevant due to disruptions to the domestic sphere and evolving social mores around the issue of sex.

Reference to the supremacy of God in the 1982 Canadian Charter of Rights and Freedoms provides an interesting point of comparison. The brief preamble to the Charter reads: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."¹⁵⁴ There are a range of ways that the inclusion of this ostensibly monotheist claim to divine authority has been interpreted. For example, there are grounds to regard it as "a clash of

¹⁵³ Detrick, 304.

¹⁵⁴ See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, available at: <http://laws-lois.justice.gc.ca/eng/const/page-15.html> [accessed 11 March 2015].

ultimate convictions,”¹⁵⁵ a source of “secular humility,”¹⁵⁶ a constitutional empathy toward religion,¹⁵⁷ and a simple fact of national history.¹⁵⁸ Of most interest to this chapter is an assertion by the justices of the British Columbia Court of Appeal that reference to God in the preamble is irrelevant to the actual interpretation of the Charter. In the Court of Appeal’s decision on the constitutionality of Canadian child pornography laws in *R. v. Sharpe*, Justice M.F. Southin consented to the fact that “the law of this country is rooted in its religious heritage.” However, she went on to deny any legal weight to that heritage, claiming to know,

...of no case on the *Charter* in which any court of this country has relied on [an invocation of the words “the Supremacy of God” or an explicit linking of them to “the rule of law” as stated in the *Charter*]. They have become a dead letter and while I might have wished the contrary, this Court has no authority to breathe life into them for the purpose of interpreting the various provisions of the *Charter*.¹⁵⁹

¹⁵⁵ Following Beverley McLachlin, the preamble’s reference to God could be seen as one half of a clash of ultimate commitments between the “overarching demands of the rule of law and of religious conscience.” See Beverley McLachlin, “Freedom of Religion and the Rule of Law: A Canadian Perspective” in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* ed. by Douglas Farrow (Montreal, QC: McGill-Queen’s University Press, 2004), 16.

¹⁵⁶ Bruce Ryder makes this claim, noting that “the supremacy-of-God” clause in the Charter provides “recognition that there are other truths, other sources of competing worldviews, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as counterbalances to state authority.” Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in *Law and Religious Pluralism in Canada* ed. by Richard Moon (Vancouver, BC: UBC Press, 2008), 94.

¹⁵⁷ Iain Benson, commenting on the *Chamberlain v. Surrey School Board* (2000) case from British Columbia, observes that both the British Columbia Court of Appeal and the Supreme Court of Canada held to a “religion-inclusive” secularism in which “religious considerations” were deemed to be valid aspects of a judgment made under the rubric “secular.” Critical to this position was rejection of the idea that religiously grounded moral views have no place in public debate when, in fact, Canada’s constitution states it to be “founded upon principles that recognize the Supremacy of God and the rule of law.” Iain T. Benson, “Considering Secularism” in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* ed. by Douglas Farrow (Montreal, QC: McGill-Queen’s University Press, 2004), 93-94, cf. 94n24.

¹⁵⁸ Douglas Farrow offers the following opinion: “Either Canada is, or is not, ‘founded upon principles that recognize the supremacy of God and the rule of law’. Either it is or is not, committed to the notion that divine worship is linked – one way or another – to ‘a love of laws’, and a love of the laws to divine worship...” He concludes that if Canada is in fact not founded on such principles, or wishes to no longer be so, then the “Whereas” clause of the Charter must be “modified or replaced” unless its “authority and intelligibility... become doubtful.” Douglas Farrow, “Of Secularity and Civil Religion” in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* ed. by Douglas Farrow (Montreal, QC: McGill-Queen’s University Press, 2004), 93-94, cf. 94n24.164.

¹⁵⁹ *R. v. Sharpe*, [1999] B.C.J. No. 1555, 1999 BCCA 416, 175 D.L.R. (4th) 1, at paras. 79 and 80 (B.C.C.A.), available at: <http://www.courts.gov.bc.ca/jdb-txt/ca/99/04/c99-0416.html> [accessed on 26 October 2014].

Even though the “dead letter” interpretation is a rather extreme assessment, it is likely correct to infer that the “supremacy-of-God” clause is unhelpful as an overt and active hermeneutical tool in a purposefully pluralist society like Canada. In fact, the clause is itself significantly shaped by the interpretive influence of other sections. For example, reference to the supremacy of God is bound by rights to religious freedom (Sec. 2a),¹⁶⁰ individual equality (Sec. 15.1),¹⁶¹ and, most notably, respect for multiculturalism (Sec. 27).¹⁶² This does not, however, mean that reference to God in the Canadian Charter means nothing at all. How could it?¹⁶³ But, it would be virtually impossible to remain true to the text of the Charter and at the same time attempt impose a strict Christian or monotheist interpretation of the law in Canada.

This “dead letter” interpretation is a useful device for asking whether the UN affirmation of the family might conceivably function in a similar way. With Chapter 3 of this dissertation as a backdrop, Nussbaum may be understood to be viewing the family similarly, as is suggested by both her explicit discussion of its place in liberal political theory (i.e., chapter 4 of *Women and Human Development*) and by her largely implied discussion of it in relation to children’s rights (i.e., “Children’s Rights and a Capabilities Approach”). The bottom line is that the family, understood in the terms with which the UN describes it, simply does not represent the “agentic” type of relationships demanded by the capabilities question of what people are able to do and to

¹⁶⁰ Section 2a of the Charter secures to “everyone” the “fundamental freedom” of “conscience and religion.” *Canadian Charter*.

¹⁶¹ Section 15.1 reads: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Canadian Charter*.

¹⁶² Section 27 reads: “This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.” *Canadian Charter*.

¹⁶³ Its bare presence, Farrow argues, means that “everything that follows the ‘Whereas’ of the Charter preamble, including the very concept of the rule of law, is subject to theological interpretation.” Farrow, “Of Secularity,” 164. Whether or not one takes it that far, the point is the same: the words mean *something* or else the authority and intelligibility of the document come into question. Farrow, “Of Secularity,” 164.

be.¹⁶⁴ Regardless of whether actual violence occurs within the family, Nussbaum finds it to be a vicious institution for the simple fact of its potential as a group unit to deny weaker members the exercise of choice in any meaningful way (children, remember, are its captives). From Nussbaum's perspective, the only way the family eludes the tyrannical character she attributes to it is by demonstrating itself to be an institution that promotes and protects agency for both parents and children through the cultivation of choice in both attachment and affiliation. Doing so, however, requires a complicated application of human rights to children as Stoecklin and Bonvin's positive assessment of the capabilities approach appears to bear out.¹⁶⁵

In addition to comparative possibilities between Southin's interpretation of reference to God and Nussbaum's interpretation of reference to the family, there are a number of similarities between the family clause of the CRC and the supremacy-of-God clause of the Charter. For instance, each appears in the preamble to its respective document and each thereby sets a context for reading the entitlements that follow. Furthermore, just as reference to God in a constitutional document appears more contentious today than it might have been in the past, reference to the family as a natural group unit in an international rights agreement faces fresh challenges.¹⁶⁶ Finally, like the God clause in the Canadian Charter, the family clause in the CRC does not explicitly resurface in the document.

¹⁶⁴ See Stoecklin and Bonvin, "Conclusion," 274. Clark and Ziegler contend that the UN position on the family fails the test of neutrality: "...the [CRC] is not neutral towards lifestyles of adults, who are parents and is consequently also not neutral towards the lifestyles of their children, but distinguishes between legitimate and illegitimate ways of living." Clark and Ziegler, 225.

¹⁶⁵ See Stoecklin and Bonvin, "Capability Approach," 69-77.

¹⁶⁶ Charles Taylor's *A Secular Age* offers perhaps the most efficient way to support this point. In his analysis of secularity, Taylor aims to demonstrate that belief in God in Western society "isn't quite the same thing in 1500 and 2000." Put in terms that are far too simplistic to do justice to Taylor's analysis, he argues that the basic difference between then and now is that five hundred years ago it was "virtually impossible not to believe in God" while today many find it easy, even inescapable, to do so. Taylor, *A Secular Age*, 13, 25. Similarly, Taylor also remarks that the "moral landscape" around sex and sexuality has changed. This is largely evidenced by a noticeable shift from a nineteenth-century "Victorian" sexual ethic which held that sex "was meant to bond the couple" to the 1920s when young people, and especially women, were enjoying "a new kind of freedom... which took the form of a sensuality unconnected to marriage or procreation." Taylor, *A Secular Age*, 499-502.

However, the family clause is also specifically *dissimilar* to the God clause in that family runs as both an implicit and explicit theme throughout the CRC. It is, in fact, alive and active in ways that suggest it to be more comparable to Section 27 of the Canadian Charter – a hermeneutical requirement related to multiculturalism – than the preambular reference to God.¹⁶⁷ Don Browning and John Witte argue that the CRC is an attempt to “balance the rights of children and parents and to preserve a strong pro-family ethic” while doing so.¹⁶⁸ They point to the following excerpts as examples of that ethic: “taking into account the rights and duties of [the child’s] parents” (Article 3.2); “as far as possible, the right to know and be cared for by his or her parents” (Article 7.1); the right “that a child shall not be separated from his or her parents against their will” unless doing so is legally proven “necessary for the best interests of the child” (Article 9.1); and, the right of a child so separated “to maintain personal relations and direct contact with both parents on a regular basis” except, again, if such contact is found to be “contrary to the child’s best interests” (Article 9.3).¹⁶⁹ To these could be added Article 16’s protection against “arbitrary or unlawful interference” with the child’s family and Article 20’s provision of “special protection and assistance” for any child who has been “temporarily or permanently deprived of his or her family environment.” Nussbaum may of course argue for more singularly spun lines of attachment between the individual child and his or her separate adult caregivers, as was demonstrated in Chapter 3. However, the rich three paragraph statement on the family in the Preamble to the CRC, together with the family emphasis that Browning and Witte identify to be running through the text, suggests that children’s flourishing is linked to the family in a more

¹⁶⁷ See *Canadian Charter*, sec. 27.

¹⁶⁸ Browning and Witte, “Mixed Contribution,” 280. Clark and Ziegler, taking a more negative view of things, also recognize the “explicit naturalization of the family” claimed in the Preamble to the CRC to be “mirrored in all the articles of [it] which link children’s rights, well-being and development to parents’ rights and duties.” Clark and Ziegler, 226.

¹⁶⁹ CRC. See Browning and Witte, “Mixed Contribution,” 280.

profound way. It suggests that the promotion and protection of their organic and interdependent belonging to a thicker web of familial relationships is a basic human right. It also suggests that the CRC cannot be read with any real seriousness unless the family *as* the natural and basic element of society is considered for what it means to the child's prospects for flourishing. In short, the CRC appears deeply invested in the idea that the organic family group is the basic element of society and is vital, as such, to human flourishing in children.

The significance of the family is further stressed when one considers the foundational role that biological connections play in the recognition and preservation of human identity that Article 8 of the CRC aims to protect. Article 8 provides that States Parties to the Convention shall “undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations” and deliver “appropriate assistance and protection, with a view to speedily re-establishing [the child's] identity” where “some or all of the elements of it” have been illegally deprived. It is nestled in the Convention between two other rights that connect identity with family. Article 7 guarantees a child the right “to know and be cared for by his or her parents,” and Article 9 addresses the situation of a child separated from one or both of his or her parents and secures the right to “maintain personal relation and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.”¹⁷⁰ As stated, there is no explicit reference to the biological or blood relationship of natural parent and child in any one of these articles.¹⁷¹ However, concern for natural bonds was certainly vital to the “Grandmothers of the Plaza de Mayo” (*Abuelas de Plaza de Mayo* or *Las Abuelas*) in their

¹⁷⁰ Hearst, 18-19.

¹⁷¹ Douglas Hodgson, “The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness,” *International Journal of Law and the Family* 7, no. 2 (1993): 265, available at: <http://lawfam.oxfordjournals.org/content/7/2/255.full.pdf+html> [accessed 10 March 2015].

grassroots effort to support the Argentine delegation's sponsorship of the child's right to preserve his or her own identity (i.e., Article 8).¹⁷²

Lobbying for this particular provision stems from the tragic history out of which the Grandmothers formed: Argentina's "Dirty War" and the "enforced or involuntary disappearances" of both children and adults that occurred when that nation was ruled by a tyrannical *junta* (military dictatorship).¹⁷³ The following brief summary of this horrific period provides a contextual basis for grasping the significance of biological parent-child connections to a discussion of the family and children's human rights:

In Argentina, between 1975 and 1983, 145 to 170 children "disappeared" when they were either kidnapped with their parents by the authorities or were born in captivity to imprisoned women and then separated from their mothers. So far, some 41 children who disappeared under these circumstances have been located following a diligent search by relatives of the missing children, led by the group called the *Grandmothers of the Plaza de Mayo*. Many of these children were found with adoptive parents, some of whom claimed the children as their own. In one case, a child was discovered in the care of a policeman implicated in her parents' "disappearance". ... The "disappearance" of children is not confined to Argentina; similar cases have been reported in Chile, Guatemala and Peru.¹⁷⁴

That period has for good reason been described as "the bloodiest and most shameful [episode] in Argentine history," one that is said to have "striking similarities with the Nazi regime" of Hitler's Germany.¹⁷⁵ Karen Rotabi explains that this era was "characterized by grotesque human rights abuses" that included torture, mass murder and "disappearances" of people justified

¹⁷² UN Economic and Social Council, Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* (3 April 1985) E/CN.4/1985/64, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/1985/64 [accessed 11 March 2015]; cf. Rita Arditti, *Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina* (Berkeley, CA: University of California Press, 1999), 145 and Detrick, 159-160.

¹⁷³ Detrick, 159.

¹⁷⁴ Defence for Children International (USA), *The Children's Clarion: Database on the Rights of the Child*, p. A-11 (1987), quoted in Detrick, 165 and Hodgson, 264.

¹⁷⁵ Arditti, 7, 13-14. The coup began, Arditti explains, when a prominent political leader, Bernardo Albarte, was killed and thrown out his sixth-floor apartment window in front of his family. Arditti, 7-8.

“under the guise of ‘national security’.”¹⁷⁶ In addition to the tens of thousands of people who were “disappeared” and the thousands of others who were “kidnapped and tortured but ultimately released,” Alison Brysk explains that “[p]regnant women were detained and tortured until they gave birth; their children were then taken and illicitly adopted by friends and relatives of the torturers while the mothers were killed.”¹⁷⁷ The children were, as Rita Arditti describes them, “pieces of property or war booty [given] to highly placed government officials, to members of the military, or to police officers” who supported the *junta*.¹⁷⁸ The aim of the *junta* was underscored by General Ramón Camps when he elaborated on the strategy behind the practice of abducting babies and young children in a 1983 interview:

It wasn't people that disappeared, but subversives. Personally I never killed a child; what I did was to hand over some of them to charitable organizations so that they could be given new parents. Subversive parents educate their children for subversion. This has to be stopped.¹⁷⁹

The “145 to 170 children” estimated above to have been “disappeared” is an understatement as more recent approximations place the number at around 500.¹⁸⁰ The missing are, as the

¹⁷⁶ Karen Smith Rotabi, “Child Adoption and War: ‘Living Disappeared’ Children and the Social Worker’s Post-Conflict Role in El Salvador and Argentina,” *International Social Work* 57, no. 2 (2012): 7, available at: <http://isw.sagepub.com/content/early/2012/10/31/0020872812454314> [accessed 10 March 2015].

¹⁷⁷ Alison Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994), 1; cf. Detrick, 159-160 and Arditti, 50.

¹⁷⁸ Arditti, 51.

¹⁷⁹ Quoted from *Madres de Plaza de Mayo*, No. 8, July 1985 in Jo Fischer, *Mothers of the Disappeared* (Boston, MA: South End Press, 1989), 102. A slightly different translation of the same interview is quoted from Amnesty International, *The Missing Children of Argentina: A Report of Current Investigations* (New York: Amnesty International, 1985), 3 in Arditti, 50. Camps’ notoriety should be recognized: “[I]n December of 1986, Camps was found guilty of 600 counts of homicide and sentenced to 25 years in prison by a civilian court.” Brysk, 80.

¹⁸⁰ Arditti, 50. It is estimated that of the roughly 30,000 people kidnapped, tortured, and murdered, about 500 were new mothers or women who gave birth in the detention facilities. Films for the Humanities & Sciences (Firm), Films Media Group, and Illumination Films (Australia), *Las Abuelas de Plaza de Mayo and the Search for Identity Children of Argentina’s “Disappeared”*, (New York: Films Media Group, 2012), available at: <https://ezproxy.uu.edu/login?url=http://digital.films.com/PortalPlaylists.aspx?aid=13753&xtid=53461> [accessed 10 March 2015]. The difficulty in determining the exact number of disappeared stems in part from longstanding fear of reporting abductions that occurred, instances when entire families disappeared with no one to tell what happened to them, and also from instances in which families might not have known their daughters were pregnant at the time of their abduction. Arditti, 50.

Grandmothers have named them, *desaparecidos con vida* or “the living disappeared.”¹⁸¹ As of August 2012, 106 grandchildren have been recovered.¹⁸²

The chief aim of the Grandmothers is to restore to their “legitimate families” those children “who were kidnapped as a method of political repression” during the Dirty War.¹⁸³ The metric for legitimacy the Grandmother’s demand resides in the biogenetic ties that exist between the living disappeared children, who by now are well into adulthood, and their parents. Once the Grandmothers learned that a biological link between a child and his or her parents could be made through analysis of blood in the early 1980s, they pursued scientific help to move their identification work beyond relying on uncertain photographic evidence to the more reliable basis of genetic testing.¹⁸⁴ Arditti explains that the Grandmothers use of common sense and their prodding of scientists to develop the tools necessary to “put their work on a firmer footing” offers “an outstanding example of lay citizens enlisting scientists to work for human rights.”¹⁸⁵

This pursuit of genetic testing folds seamlessly into the human rights advocacy work of the Grandmothers already mentioned above. Encouraging the development of scientific

¹⁸¹ Arditti, 51.

¹⁸² Grandchild #106 is identified as Pablo Ganoa Miranda. Films for the Humanities & Sciences, *Las Abuelas De Plaza De Mayo*, 53:17.

¹⁸³ Abuelas de Plaza de Mayo, *History of Abuelas de Plaza de Mayo*, available at: <http://www.abuelas.org.ar/english/history.htm> [accessed 11 March 2015]. Brysk describes *Las Abuelas* (The Grandmothers) in the glossary to her book: “a human rights organization founded during the military dictatorship, composed of women whose grandchildren and/or pregnant daughters were kidnapped by the military during the dictatorship. The organization seeks to trace children who may have been illicitly adopted and restore them to their surviving biological families.” Brysk, 175. The Grandmothers are viewed to be an integral part of the Argentine human rights movement and, as such, seek truth and justice on many fronts. Their primary purpose, however, is “the identification and reunion of [the disappeared] children with their families. Arditti, 51. Of the ten human rights groups that arose in Argentina, the Grandmothers are one of three that directly correspond to the family. The other two are the Madres de Plaza de Mayo (*Las Madres*) and Familiares de Detenidos y Desaparecidos por Razones Políticas (*Familiares de los Desaparecidos*). Brysk, 43, 47-49.

¹⁸⁴ Arditti, 69-76; Fischer, 132. This included the pursuit of genetic testing on unidentified bodies that began to be exhumed in late 1983. With the advocacy of *Las Abuelas* to the international community, forensic experts from outside Argentina were brought in to supplement domestic forensic scientists who had begun the exhumations with bulldozers, thus destroying evidence and traumatizing family members. Brysk, 72.

¹⁸⁵ Arditti, 76, 78. The establishment of a National Genetic Bank in Argentina “for identifying the biological relatives of missing children” involved “substantial input” from *Las Abuelas*. Brysk, 113.

procedures useful for identifying biological connections between the “living disappeared” and their murdered parents serves the same primary purpose as lobbying to include an article in the CRC that accounts for the child’s identity. It provides for the restoration of Argentina’s kidnapped children to their legitimate families, protects against such atrocities occurring again, and entrenches these provisions and protections in international law.

With those ends in mind, the Grandmothers have been credited with playing “a key role in formulating and developing the language of Article 8” through their close work with Argentina’s Ministry of Foreign Affairs in the drafting of the proposal on identity presented to the CRC working group.¹⁸⁶ The initial Argentine submission stated:

The child has the inalienable right to retain his true and genuine personal, legal and family identity. In the event that a child has been fraudulently deprived of some or all of the elements of his identity, the State must give him special protection and assistance with a view to re-establishing his true and genuine identity as soon as possible. In particular, this obligation of the State includes restoring the child to his blood-relations to be brought up.¹⁸⁷

The phrase “true and genuine personal, legal, and family identity” is vital to understanding what the Grandmothers hoped to achieve, even if it was ultimately dropped from the final draft. The Argentine delegation intended through its submission to mark a distinction between the child’s legal identity and that which was his or her “true and genuine” identity,¹⁸⁸ the one that the “living disappeared” children had been robbed of by being separated from their parents and extended family of birth. It is that identity that the Grandmothers work attempts to re-establish. Even pared down, however, Article 8 is said by Arditti to “fill an important legal void by forcing the state to respect the right of the child to preserve his or her identity and to take legal action to

¹⁸⁶ Arditti, 146.

¹⁸⁷ UN Economic and Social Council, Commission on Human Rights, *Report of the Working Group on a Draft Convention on the Rights of the Child* (13 March 1986) E/CN.4/1986/39, 8, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/1986/39 [accessed 11 March 2015].

¹⁸⁸ Commission on Human Rights, *Working Group*, E/CN.4/1986/39, 8.

restore that identity when it has been put in jeopardy.”¹⁸⁹ Like participation rights that take Article 12 as their foundational principle, Article 8 represented a novel development in children’s rights while remaining firmly rooted in the tradition of the Geneva Declaration’s provisions and the DRC’s protections.

The precise nature of the void Article 8 is meant to address is difficult to determine as the CRC leaves the concept of identity undefined. Arditti looks to George Stewart’s four-fold taxonomy of identity in the CRC for guidance. He claims:

The possible interpretations of identity [as stated in the CRC] can be divided among four categories: familial, tribal, biological, and political. Familial identity includes natural parents, family and ancestors as well as family name. Tribal identity is intended here to include ethnic, cultural, and religious identity. Biological identity includes medical and genetic information about oneself and one’s ancestors and blood relatives, and also historical data such as place and time of birth records of events important to the person. Political identity is nationality.¹⁹⁰

The perceptible link between biological family ties and human rights evident from Stewart’s interpretive paradigm is also made in a recent documentary on the Grandmothers. In the film *Las Abuelas De Plaza De Mayo and the Search for Identity*, Marcelo Duhalde, spokesman for Argentina’s National Memory Archive, describes the central importance of the right to identity: “After the right to life, which is the principle human right, the right to identity is the next one. Because if people don’t know who they are, they can’t develop their lives fully. I believe the right to identity is essential to being human.”¹⁹¹ This coincides with the position of the Grandmothers articulated in the Argentine proposal (i.e., that a child has “the inalienable right to retain his [or her] true and genuine personal, legal, and family identity”).¹⁹² It also matches up

¹⁸⁹ Arditti, 146.

¹⁹⁰ George A. Stewart, “Interpreting the Child’s Right to Identity in the U.N. Convention on the Rights of the Child” in *Family Law Quarterly*, Vol. 26, No. 3 (1992), 225-226; available at: <http://www.jstor.org/stable/25739908> [accessed 27 October 2014]. Arditti includes a shorter quotation of Stewart. See Arditti, 147.

¹⁹¹ Films for the Humanities & Sciences, *Las Abuelas De Plaza De Mayo*, 51:31.

¹⁹² Commission on Human Rights, *Working Group*, E/CN.4/1986/39, 8.

with what Arditti summarizes in simple terms to be the Grandmothers' position: "Children [have a right] to be told the truth about their history."¹⁹³ Consequently, the demands of minimal justice have not been served from the perspective of the Grandmothers unless and until the children who had been illegally adopted by their repressors have been restored to their biological families, which in most cases has thus far amounted to grandparents.¹⁹⁴ As long as there remain *desaparecidos con vida*, the cruel, callous and calculated regime of the Dirty War *junta* that robbed children of their rightful identity has not been entirely defeated. It is that void which Article 8, at least according to the Argentine proposal, is intended to cover.

However, despite that unambiguous Grandmother-ly aim, the final wording of Article 8 ultimately had to reflect the compromise necessary to gain the endorsement of the other members of the working group drafting the Convention.¹⁹⁵ It could also be questioned whether Article 8 was needed at all. Some territory of that article is covered by Article 7 (i.e., the child's right to a name and nationality) and Article 9 (i.e., the child's right to "family relations").¹⁹⁶ The obvious question, therefore, is whether Article 8 offers anything distinct to the CRC.

Jaime Sergio Cerda argues that Article 8 provides the unique sense that a child's identity is dynamic. It is crucial, from his perspective, that Article 8 (or any overlapping article) should not be perceived to exhaust the meaning of identity. Cerda goes on to claim that the article,

...should henceforward be studied and interpreted in a "positive" manner. The basic premise of the whole Convention should be the application of its provisions with the "best interests of the child" (Art. 3) constantly in mind. This fundamental premise should lead countries in the future to take actions of a "positive nature." Developments that may subsequently occur in the area of genetic engineering should be covered by an element in Article 8 relating to the duty of states to preserve the identity of the child.¹⁹⁷

¹⁹³ Arditti, 145.

¹⁹⁴ Brysk, 84.

¹⁹⁵ Arditti, 146.

¹⁹⁶ See Detrick, 162-163.

¹⁹⁷ Jaime Sergio Cerda, "Draft Convention on the Rights of the Child: New Rights under the Children's Convention" *Human Rights Quarterly* 12, no. 1 (1990): 117, available at: <http://www.jstor.org/stable/762169> [accessed 10 March 2015].

To reify the document at the time of its adoption would deny the dynamic reality of childhood and the diverse ways it is experienced around the globe.¹⁹⁸ Detrick remarks that the word “including” in Article 8.1 “implies that other elements of the child’s identity are not excluded” so that it could be narrowly interpreted as relating to nationality, name, and family relations alone.¹⁹⁹ Jaap Doek goes further, advising that the CRC wisely avoided defining identity because “one could doubt whether such a definition is possible” as the child’s identity itself seems to evolve “in the course of the child’s development” through “different age-related stages.”²⁰⁰

All of this indicates that identity may be a fairly fluid characteristic of one’s existence, and perhaps more fluid than Stewart’s taxonomy allows. Alice Hearst, writing on the issue of transnational adoption and children’s identity, claims that it is “an inherently fluid and ambiguous concept” for both children and adults.²⁰¹ She rests this notion in part on the idea that identities are constantly in progress, “never finished, never complete,”²⁰² an idea that fits well with Nussbaum’s concept of vulnerability as “world openness” discussed in Chapter 2.²⁰³ For Nussbaum, in fact, identity must be entirely fluid as it is neither based in nature, nor in group

¹⁹⁸ Paula Fass describes childhood in globalized terms: “Childhood is at once a universal experience, and one of the most culturally specific. Each culture defines and divides childhood as a stage of development differently, while devising unique means to express its views of what children are like, and practices relating to children through which it fulfills a cultural vision of its own future. So too, each of us has experienced a childhood, and we are therefore strongly attached emotionally to an image of what childhood is and should be like. Thus childhood is a critical point of social contention, a profound test of cultural autonomy, and a basic emotional reference point for all of us as we reflect upon the many meanings and consequences of globalization.” Paula Fass, “Children and Globalization,” *Journal of Social History* 36, no. 4 (2003): 964, available at: <http://search.proquest.com/docview/198924939?accountid=12339> [accessed 10 March 2015]. See also Ballet, Comim, and Biggeri, 27-28, 33 and Hodgkin and Newell, 1-4.

¹⁹⁹ Detrick, 163.

²⁰⁰ Jaap E. Doek, *Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9* (Boston, MA: Leiden, 2006), 10-11, available online: ProQuest ebrary [accessed 10 March 2015].

²⁰¹ Hearst, 19.

²⁰² Stuart Hall, “Old and New Identities, Old and New Ethnicities” in *Culture, Globalization and the World-System*, ed. Anthony D. King (Minneapolis: University of Minnesota Press, 1997), 41-68, 47, quoted in Hearst, 19.

²⁰³ See Chapter 2, section III.

belonging, but is constructed through one's own active engagement with the uncertain social and material elements of the world and his or her exercise of choice within it.

Even so, claiming identity to be an open and malleable characteristic of human existence is not the same thing as claiming it to be entirely undefinable. Doek, who doubts how definable identity is, somewhat counterintuitively leans on Erik Erikson to provide a base definition.²⁰⁴ Erikson, in *Identity: Youth and Crisis* (1968), designates identity to be “a subjective sense of an invigorating sameness and continuity.”²⁰⁵ He further describes an identity crisis as the loss of “a sense of personal sameness and historical continuity.”²⁰⁶ Without denying how intensely subjective the concept is, it seems feasible from Erikson's definition to argue that there must be something objective about identity as well, something initial and foundational that should be recognized as the basis for both continuity and crisis. Something, that is, akin to the “true and genuine” identity for which the Grandmothers sought provisions and protections from the international community in the form of a tangibly articulated entitlement. And it also seems feasible to maintain that the subjective and objective aspects to identity do not necessarily cancel each other out. Hearst, for whom identity is a fundamentally indistinct concept, nevertheless also demonstrates sympathy for, possibly even deference to, something like the Grandmother's project by acknowledging how children are tied in “complicated ways to their beginnings” and also how “imperative it is to provide them with both social and biogenetic narratives.”²⁰⁷

From this perspective, it would seem like Nussbaum's acknowledgment that all human beings have biological parents is not only obvious, but significantly understated. To acknowledge biological parentage but deny that anything of moral significance flows from it is

²⁰⁴ Doek, 10.

²⁰⁵ Erik H. Erikson, *Identity: Youth and Crisis* (New York: W.W. Norton & Company, 1968), 19.

²⁰⁶ Erikson, *Identity*, 17.

²⁰⁷ Hearst, 29.

odd for a scholar so concerned with human agency and choice. Is there any intersection of social life more vibrantly filled with impactful agency and choice than the relationship between parents and their children? How is it possible to treat the fact that *all* human beings are born of biological parents as though it has no moral weight?

Once it is asserted that organic connections between parent and child do matter, the answer to the question of what is unique about Article 8 can be stated with more clarity by considering a subtle but key difference between it and other relevantly linked articles in the CRC. Hearst defines identity in the CRC in somewhat broad terms by lumping Articles 7, 8 and 9 together as “rights that allow a child to make and maintain connection with families or communities.”²⁰⁸ Even more broadly, she takes Article 8 up with other articles pertinent to identity and adoption – specifically Articles 9, 12, 20, 21 and 30 – to claim that the CRC speaks to the matter of “retaining the child’s links to his or her family, and his or her national, ethnic, or religious community of origin.” Other than Article 8, however, all of the articles speak to the child’s right to *possess* something:

- Article 7 speaks to the child’s right to a registered name and a particular nationality;
- Article 9 speaks to the child’s right to secure family relations;
- Article 12 to his or her right to access information which “arguably includes information about a child’s family and community of origin” (but not specifically so);
- Article 20 addresses the child’s right to care and protection when deprived of his or her family environment;
- Article 21 demands that the best interests of the child be “the paramount consideration with regard to all manner of adoption”;
- Article 30 affirms the child’s right to belong “in community with other members of his or her group, to enjoy his or her culture.”²⁰⁹

²⁰⁸ Hearst, 18-19.

²⁰⁹ See Hearst, 169-170.

Without diminishing the significance of the entitlements just listed, it is important to recognize that Article 8 specifically states the child's right to *preserve*, at minimum, name, nationality and family relations,²¹⁰ and not merely to possess those things and others like them that become defining features of one's being. This marks a subtle but important characteristic of Article 8, especially given that it could be construed as unnecessary or thought to most importantly define identity as malleable and inclusive. It also signals how crucial it is that Article 8 not be uncritically subsumed within Articles 7 and 9. The reason for this is that bringing Article 8 together with Articles 7 and 9 or the rest of those listed above without noting its emphasis on preservation risks obscuring that which is unique about it and the legal void it covers.

In light of Article 8's unique task of *preserving* and not just *ensuring* identity, it is odd, as Douglas Hodgson has remarked, that no stronger reference to organic familial relationships was incorporated into it to more explicitly demonstrate that "the provision is also concerned with the biological or blood relationship of natural parent and child." It is likely that the UN's preference for open-textured documents that "reserve the maximum discretion to the States Parties" on the issue to allow for more universal consensus provides the reason in this case,²¹¹ as it does in others. For instance, nothing like the Canadian Charter's reference to the supremacy of God was thought to be appropriate for the UDHR at the time of its drafting. Although such an amendment was proposed, P.C. Chang – Vice Chairman of the Human Rights Commission and head of the Chinese delegation²¹² – persuaded the drafting committee that less precise language on

²¹⁰ This observation is based on Detrick's comparison of Article's 7, 8, and 9 in her commentary on Article 8. Detrick, however, does not appear to notice the important distinction she has uncovered, concluding that "the obligation of States parties to respect the right of the child to preserve his or her nationality, name and family relations under Article 8.1 would seem to provide nothing new to the CRC." Detrick, 162-163.

²¹¹ Hodgson, 265.

²¹² Glendon, *World*, 33.

contentious questions like the nature of humanity and the existence of God would yield broader acceptance of the text without depriving anyone the ability to accept it on the basis of their own philosophical or religious convictions.²¹³ Additionally, as noted earlier in this chapter, Malik's proposed reference to "the Creator" or nature was deemed inappropriate to Article 16.3 on the family.

But the drafters of the UDHR did not leave reference to God out of that agreement because the concept of God lacks definition. Rather, they left it out because the concept of God is too open to a range of rather particular definitions that have their starting points in very precise metaphysical positions (e.g., monotheism, deism, polytheism, atheism and agnosticism, etc.). Including reference to God would have made the building of consensus virtually impossible. It is similarly unlikely that the drafters of CRC left identity undefined because the term, as Doek maintains, has no definite meaning. The specific and unique aim of the Grandmothers was to set a firm objective basis for the article. Their purpose was to assert that forcibly and violently separating children from their natural parents and extended family is an egregious violation of the right to their "true and genuine personal, legal and family identity," aside from every other moral and legal violation doing so also represents. Furthermore, while the definite meaning of identity might need to remain open-ended and flexible, it is not a term that lacks a conceptual foundation. The Grandmothers, at the very least, understood identity to contain a concrete biological basis. Without that basis they have no project and no focus as a human rights group. They would, in effect, have no identity themselves. But the Grandmother's identity is evident from their name. Moreover, the UN is noted for having been "particularly responsive" to the

²¹³ See UN Economic and Social Council, Human Rights Commission, *Ninety-Eighth Meeting: Draft International Declaration of Human Rights (E/800)* (9 October 1948) A/C.3/SR.98, available at: http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.98 [accessed 11 March 2015].

Grandmothers' campaign to trace their missing biological grandchildren.²¹⁴ In fact, the group was awarded UNESCO's 2010 Félix Houphouët-Boigny Peace Prize for their persistent social justice efforts. The justification for this award is stated as "recognition of [the Grandmothers of the Plaza de Mayo's] tireless battle over more than thirty years in favour of human rights, justice, and peace."²¹⁵ If the UN wants to discourage people from making a connection between biology and identity with regard to the family in children's rights discourse, or if it wants to diminish the meaning of such a link, it is doing an extremely poor job of doing so.

It seems difficult, then, to treat the family clause in the preamble to the CRC as some kind of dead letter that may easily be read out of the discourse. Rather, the idea of the family as the natural and fundamental group unit of society appears to be alive and well in the organization of the UN, its rights instruments, and in particular in the CRC. Even with the growing emphasis on agency in children's rights discourse that is built, in no small part, on the novel recognition of participation rights for children included in the Convention, acknowledgment of the UN's position on the family has persisted in a wide range of forms right from the adoption of the UDHR in 1948 up to the twentieth anniversary of the International Year of the Family in 2014. Moreover, that position on the family has been continually heralded by the UN even though social mores around sexuality and domestic life have shifted significantly over the years since the CRC was adopted. Finally, the UN's position on the family is affirmed also through the strong pro-family ethic that runs through the CRC and, in particular, through the important

²¹⁴ And this despite Argentina's status as a "pariah" at the UN given the human rights violations of the Dirty War. Brysk, 54.

²¹⁵ See UNESCO, "2010 Prizewinner: The Grandmothers of the Plaza de Mayo Organization, represented by its President Mrs. Estela Barnes de Carlotto," *Félix Houphouët-Boigny Peace Prize*, available at: <http://www.unesco.org/new/en/houphouet-boigny-peace-prize/award/prizewinners/2010-prizewinner/> [accessed 10 March 2015].

connection that Article 8 at least implies between biological relations (not only parent-child, but broader kin relations as well) and the preservation of identity.

This chapter has not argued that biology means everything. Nor has it contended that the UN's standard position on the family should be used to bend public policy to favor families that fit a narrowly construed form and a precisely molded function that only genetically related parents and children living within the confines of a nuclear structure are able to fulfill. Its purpose has not been to advocate for the elimination from rights discourse those families that do not match a certain form or a specific function. Rather, it accentuates as foundational to that discourse the altruistic factors generally evident between children and their biological parents.²¹⁶ It insists that the UN's qualitative description of family as "the natural and fundamental group unit of society" means *something* to rights discourse. To malign the family and read it out of that discourse altogether, and children's rights discourse in particular, casts the "authority and intelligibility" of a document like the CRC into question.²¹⁷ In doing so, Nussbaum has not settled the frontier of justice that she identifies as children's rights; she just makes it less inhabitable. The major role that the family plays in the international discourse on children's rights, in fact, makes it seem odd that Nussbaum and other theorists would even attempt to apply the capabilities theory to the CRC. If the family must be ignored without explanation (i.e., Nussbaum's approach) or if significant hurdles must be jumped to make the document intelligible absent the idea of the family (e.g., Stoecklin and Bonvin, Clark and Ziegler), then a match between capabilities and the CRC appears to be poorly made. Furthermore, one must question how to take a capabilities interpretation of the CRC seriously when a factor that has

²¹⁶ Browning, *Equality*, 330, 344-345.

²¹⁷ This paragraph is co-opting the point Farrow makes about the supremacy-of-God clause in the Canadian Charter. See Farrow, "Of Secularity," 163-164.

been intentionally and carefully woven into it is marginalized. In short, the family does not appear to be easily disentangled from discourse on children's rights and interests even in an era where the recognition of their capacity for agency has become increasingly important. Removing the family from the CRC pulls a critical thread from the fabric of their rights. Whether doing so is justifiable merits further investigation.

Chapter 5 – Engaging an Integrative Model of Children’s Rights

Common sense observations into the investments stemming from kin altruism traditionally have linked procreation and child-rearing. This linkage not only reinforced parental affections but integrated parents and offspring with grandparents, uncles and aunts, and the wider extended families. The family as a group unit has been and remains today an intergenerational reality that spreads mutual care outward into society and forward into the future cycle of the generations. It is, of course, the greatest welfare system ever devised by the human race, the one upon which all other support systems, either private or governmental, finally depend and only modestly enhance.

~ Don S. Browning, *Equality and the Family*, 342.

One reason Martha Nussbaum applies her capabilities approach to international children’s rights is that she finds the tradition – and notably its defining feature, the UN’s CRC – to be under-theorized.¹ The problem, as she and Rosalind Dixon explain it, is that the CRC identifies in children an adult-like capacity to *bear* rights without accounting for their emerging capacity to *exercise* them.² Moreover, the fragility of that emerging capacity is exacerbated by power-differentials which exist between children and adults, particularly those that exist between children and their parents or other primary adult caregivers. The capabilities approach, they argue, better accounts for relationships like these in which “great differences of power exist.”³ Central to their argument is the claim that their theory “sanctions the idea of imposing limits on parental rights and freedoms, in order to protect the future rights or capabilities of children.” And it does so without also sanctioning a special priority for children over other political

¹ CRCA, 551-552.

² CRCA, 552-553, 563. In addition to the CRC, a variety of national constitutions are said to face this problem. CRCA, 552. This concern was expressed earlier by Martha Minow. According to Minow, “Advocates for children [in the 1960s and 1970s] used the rhetoric of rights not only to place children in the same legal position as adults but also to seek special protections.” Martha Minow, “What Ever Happened to Children’s Rights?” *Minnesota Law Review* 80 (1995-1996): 275, available at: <http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/mnlr80&page=267&collection=journals#312> [accessed March 10, 2015]; cf. CRCA, 552n11.

³ CRCA, 593, cf. 553-554, 559-560.

subjects.⁴ Nussbaum's method for accomplishing this is to politicize the family so that each member of it is recognized as a distinct social agent and political subject in his or her own right (see Chapter 3). Her claim is that the CRC lacks the theoretical basis necessary to demonstrate a similar respect for the full human dignity of children. She and Dixon promote the capabilities approach as a way to make up for that deficiency.

This chapter questions whether the CRC is as theoretically wanting as Nussbaum and Dixon claim it to be. The first section introduces Don Browning's integrative model of children's rights as a counter to Nussbaum's theory for the way it connects the love and care received from biological parents to a child's prospects for flourishing. The second section identifies early contributors to the intellectual tradition underlying this model, particularly Aristotle and his medieval interpreter Thomas Aquinas. The third section discusses the idea of kin altruism as an important basis for this thick and multi-dimensional model of children's rights. With this denser model as a backdrop, the fourth section then criticizes Nussbaum's appropriation of Aristotle's anthropology (i.e., the concept of *zōon politikon*) for lacking sensitivity to its significant reliance on the idea of kin altruism. The final section contends that Nussbaum's engagement with Aristotle's family theory is inadequate for a theorist promoting her own theory of social justice as a neo-Aristotelian model that takes his anthropological basis as a strategic starting point. There are two main arguments advanced in this chapter. First, that integrative theories like the one championed by Browning provide key perspectives for reconceptualizing the crucial role of the family in discourse on children's rights. And, second, that Nussbaum does not offer a very convincing argument for severing children's rights and interests from their web of biogenetic relations.

⁴ CRCA, 554, cf. 567.

I. Browning and an Integrative View of Children's Rights

Martha Nussbaum's former University of Chicago School of Divinity colleague, the late Don Browning, poses a substantial challenge to the idea that the CRC is under-theorized. Browning's primary academic field is "practical theology" which, as he describes it, offers "critical reflection on the church's dialogue with Christian sources and other communities with the aim of guiding its action toward social and individual transformation."⁵ Like Nussbaum, whose scholarly work began with the study of ethics in classical Greek philosophy,⁶ Browning's practical theology also shifted focus to contemporary ethics, law, and public policy.⁷ The overlap between Browning and Nussbaum's work extends also to their common concern for the concrete circumstances of human action.⁸ Additionally, and not unrelated, both of their moral theories concede a significant indebtedness to Aristotelian thought.⁹ One key difference, however, is Browning's more positive assessment of the family as a foundational social and political unit.¹⁰ Another is

⁵ Browning, *Equality*, 6, 9-10.

⁶ Nussbaum's earlier focus on Aristotle and Greek philosophy in *Aristotle's De Motu Animalium* and *The Fragility of Goodness* is not lost as she articulates her capabilities approach.

⁷ The rich migration of Browning's scholarly work is outlined in John Witte, Jr., M. Christian Green, and Amy Wheeler, eds., *The Equal Regard Family and its Friendly Critics: Don Browning and the Practical Theological Ethics of the Family* (Grand Rapids, MI: Eerdmans, 2007), vii-viii.

⁸ Browning breaks the focus of his "strategic practical theology" into four basic questions: "First, how do we understand this concrete situation in which we must act? ...Second, what should be our praxis in this concrete situation? Third, what means, strategies, and rhetorics should we use in this situation? And fourth, how do we critically defend the norms of our praxis in this concrete situation." Browning, *Equality*, 15.

⁹ E.g., Aristotle, as well as various interpretations of his work in the history of intellectual thought, figure prominently in Don S. Browning, *Marriage and Modernization: How Globalization Threatens Marriage and What to Do about it* (Grand Rapids, MI: Eerdmans, 2003), *passim* and Browning, *Equality*, *passim*.

¹⁰ Browning and others describe this as "critical familism." Like any "familistic" method, this one possesses a pro-family cultural attitude that promotes marriage and family stability. However, *critical* familism involves full equality between husband and wife and a commitment to the reflection, communication and openness that its implementation demands. Browning, et al., *Culture Wars*, 2-3; cf., Browning, *Equality*, 254-257 and Don S. Browning and Elizabeth Marquardt, "What about the Children? Liberal Cautions on Same-Sex Marriage" in *The Meaning of Marriage: Family, State, Market, and Morals*, ed. by Robert P. George and Jean Bethke Elshtain (Dallas, TX: Spence, 2006), 51. It does not, therefore, promote "cohesive families" at any cost. Familism is no excuse for "physical and mental mistreatment, alcohol and drug abuse, or other forms of oppressive behavior within families." Browning, *Equality*, 255. The theological basis of this model is found in the biblical ethic of love as "equal regard" rooted in the Gospel command (found in Matthew 22:39) to "love your neighbor [with the same seriousness] as [you naturally] love yourself." Browning, *Equality*, 96. See also Browning, et al., *Culture Wars*, 316 and Browning and Marquardt, "What about the Children?", 51.

Browning's substantial engagement with religious sources that, from Nussbaum's point of view, are highly problematic bases for ethical reflection on social and political matters.¹¹

Browning has argued that the longstanding UN position discussed in the preceding chapter rests on an integrative view of sex, marriage and family that should meaningfully shape one's understanding of children's rights. The main idea of the integrative stance is that natural parents have an obvious right to raise their own offspring that is matched, under normal circumstances, by the corresponding right of children to be raised by the parents who conceived them.¹² These correlative entitlements should be recognized as more substantial to children's rights discourse than the brief reference to the family located in the preamble to the CRC would suggest. Recall from Chapter 4 that the family's right to protection from society and the state was well established in the UDHR (16.3) and is given legal form in the two 1966 International Covenants (Article 10.1 of the ICESCR and Article 23.1 of the ICCPR). In addition to these external authorities, the previous chapter sides with Browning and Witte's claim that a substantial pro-family ethic runs through the articles of the CRC.¹³ That chapter attempted to

¹¹ Nussbaum's general concern about religion is found in the "liberal dilemma" she discusses in SSJ, 81-87 and WHD, 168. That general concern turns into something of a rough caricature of religion in *From Disgust to Humanity*. The first chapter of that book links religious critiques of same-sex sexual practices to the emotion of disgust. See Nussbaum, *Disgust*, 1-30. While Nussbaum might be justified in aspects of her critique, there are at least two problems with it. First, her argument that even "fundamentalist" Christians today "disregard statements in the Bible all the time" (e.g., imperatives from the book of Leviticus in the Hebrew Scriptures) demonstrates a poor understanding of important distinctions to be made between Jewish theological ethics and Christian theological ethics with regard to law. Nussbaum, *Disgust*, 25. A review of Thomas Aquinas's study of divine law would help to clarify distinctions within the law as it is outlined in the Pentateuch. See St. Thomas Aquinas, *Summa Theologiae* Vol. 29, trans. by David Bourke and Arthur Littleale (New York: Blackfriars/McGraw-Hill, 1969), IaIIæ.98-105. Second, her critique ignores Christian arguments – including liberal ones – that demonstrate foundations for reservations about same-sex marriage that are not based on disgust. See Browning and Marquardt, "What about the Children?" and Daniel Cere and Douglas Farrow, eds. *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment* (Montreal, QC & Kingston, ON: McGill-Queen's University Press, 2004). Browning's reliance on religious sources will be made evident in section II of this present chapter.

¹² Browning, "Rights of Children," 283; cf. Browning, *Equality*, 330.

¹³ Browning and Witte, "Mixed Contribution," 280-281.

demonstrate the presence of that ethic in Article 8 with its implied mandate to ensure for each child the preservation of his or her biogenetically-grounded identity.¹⁴

That said, the integrative model that Browning promotes has a more significant agenda than securing acknowledgement that identity is indelibly linked to one's natal origin. He seeks to firmly anchor the responsibility to love and care for children in what he believes to be its evolutionary foundation: the altruistic sensibilities of parents toward their offspring and the links created by those sensibilities to a broader web of affectionate familial ties.¹⁵ Nussbaum specifically denies a moral role to altruism of a natural or genetic kind.¹⁶ As her references to infants as models of human vulnerability attest, what matters most significantly to Nussbaum about children is their lack of control in a world of desirable objects and their need to recognize others, especially their caregivers, as ends that are differentiated from themselves.¹⁷ Biologically-based family altruism does not register in any meaningful way under her theory of social justice. For Browning, on the other hand, natural parent-child affections stand as a basis for human flourishing that he finds rights discourse, and particularly the CRC, to both implicitly and explicitly acknowledge and support.

Linda McClain and Daniel Cere explain why the model Browning champions is called an “integrative” one: “it regards marriage – between one man and one woman – as the central social institution for integrating sexuality, reproduction, and parenthood so that children grow up with their two biological parents.”¹⁸ They further attribute to this approach an emphasis on “the

¹⁴ See Chapter 4, section V.

¹⁵ Browning, *Equality*, 342.

¹⁶ Nussbaum finds the social construction of sex and families to be a more certain foundation for cultural patterns of love and care than any biological ties. Nussbaum, *Cultivating Humanity*, 122; SSJ, 256, 272. For discussion of this issue in this dissertation, see Chapter 3, section IV. See also Clark and Ziegler, 213.

¹⁷ E.g., see Nussbaum, “Précis,” 449; PE, 176.

¹⁸ Linda C. McClain, and Daniel Cere, “Introduction” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 2.

importance of biological connection, the significance of sex difference, and the need – indeed, the right – of children to two biological parents: their mother and father.”¹⁹ According to Browning, interpreting the UDHR and CRC through an integrative lens results in a model of children’s rights that is focussed on “the front door of family formation” rather than allowing legal doctrine on family dissolution or social doctrine shaped by a fragmented view of human sexuality to dominate the dialogue.²⁰ For that reason, he argues that this approach provides the basis for “a thick multi-dimensional model of the rights and needs of the child.”²¹

Browning is not alone in championing an integrationist perspective. Nor does his starting point of “practical theology” mean that such an approach is primarily or only supported through religious convictions.²² Arguably, a wide array of theorists and disciplinary approaches lean toward this point of view. Included, at minimum, are scholars working in academic fields like ethics,²³ theology,²⁴ legal history,²⁵ anthropology,²⁶ evolutionary psychology, kinship studies,²⁷ and attachment theory.²⁸ Browning just offers one of the more developed versions of an integrative model, one that draws on a wide range of disciplinary contributions and provides a direct application of it to children’s rights.²⁹

¹⁹ McLain and Cere, “Introduction,” 3.

²⁰ Browning, “Legal Parenthood,” 105.

²¹ Browning, “Rights of Children,” 285.

²² McClain and Cere, “Introduction,” 3.

²³ See, e.g., Margaret Somerville, *The Ethical Imagination: Journeys of the Human Spirit* (Toronto, ON: Anansi Press, 2006), 102-104, 126-129, 146-152.

²⁴ See, e.g., Stanley Hauerwas, *A Community of Character: Toward a Constructive Christian Ethic* (Notre Dame, IL: University of Notre Dame Press, 1985), 186-193, 206-211.

²⁵ See, e.g., Witte, *Sacrament*, *passim*.

²⁶ See, e.g., Peter Wood, “The Anthropological Case for the Integrative Model” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 85-100.

²⁷ For an overview of support that evolutionary, kinship and attachment theory lend to the integrationist perspective, see Daniel Cere, “Toward an Integrative Account of Parenthood” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 19-35.

²⁸ See, e.g., Terence E. Hébert, Ellen Moss, Daniel Cere, and Hyun, Song, “Biological and Psychological Dimensions of Integrative Attachments” in *What is Parenthood? Contemporary Debates About the Family*, ed. by Linda C. McClain and Daniel Cere (New York: New York University Press, 2013), 193-193-207.

²⁹ See Browning, “Rights of Children,” 283-301 and Browning, “Legal Parenthood,” 105-120.

Browning's primary concern for promoting the integrative view is to counter a "powerful legal trend" that he claims has "narrowed the child's rights and best interests to a thin and one-dimensional affective intersubjective relationship."³⁰ When describing this thin model, he expressly refers to the American Law Institute's (ALI) efforts to reform family law in the United States. Browning's critique of the institute's 2002 *Principles of the Law of Family Dissolution* underscores three ways that he perceives it to fail at the task of adequately addressing children's rights concerns: first, by thinking about their rights "mainly from the angle of family disruption" and dissolution; second, by claiming that the state must remain neutral about family formation; and, third, by promoting the exercise of adult subjective rights related to sex and reproduction as a modern necessity.³¹ The result, he explains, is that the ALI model "injects into family formation and childbearing a world of contingency without conscious intentions, commitments, promises, and covenants witnessed publicly by friends, community, and whatever metaphysical reality the couple might assume."³²

Early signs of the contingencies that concern Browning are observed by Mary Ann Glendon when, roughly a decade prior to the publishing of the ALI *Principles*, she reflected on the period during the 1960s when birth control laws were struck down in the United States. She remarks in *Rights Talk* (1991) how the image of marriage had "shifted suddenly" in constitutional law "from a community of life to an alliance of independent individuals." As a result, she continues, "the law began to treat families primarily as collections of individuals, bound loosely together with ties that were increasingly fluid, detachable, and interchangeable."³³

³⁰ Browning, "Rights of Children," 284.

³¹ Browning, "Rights of Children," 283, 295. The issue of family disruption was an academic concern for Browning reaching at least as far back as 1973 with the publication of Browning, *Generative Man*, 9. This theme was, of course, more directly and fully considered in *Marriage and Modernization*. See also Glendon, *Rights Talk*, 119.

³² Browning, "Rights of Children," 296.

³³ Glendon, *Rights Talk*, 123.

In light of the revolution of social morality that has taken place since the 1960s and its impact on sexual ethics and domestic life,³⁴ the *ALI Principles* can be viewed as Glendon's concern brought to full(er) maturity.³⁵ That maturation process, put in terms of the main concepts discussed in the first two chapters of this dissertation, appears at present to mean prioritizing the cultivation of agency over protections and provisions related to vulnerability. Yet placing such a priority on agency is only accomplished by focusing on a "backdoor" effort to generate fairness in the process of family dissolution as it is carried out by the conjugal couple. This means that the "world of contingency" that Browning claims the *ALI Principles* to inject into family life (particularly family formation and childrearing) is fundamentally adult in orientation and, as such, "stunningly disconnects the pattern of subjective rights between parents and children" that function within the context of the "objective family rights implicit in the UDHR and the [CRC]."³⁶ Glendon's earlier assessment supports Browning's point: "[O]ur individual rights-laden public language makes it surprisingly difficult to take account of the obvious fact that the public has a much greater interest in the conditions under which children are being raised than in the ways that adults generally choose to arrange their lives."³⁷

Browning's critique of the *Principles* is easily transferred onto Nussbaum's capabilities framework. First, while Nussbaum's theory does not begin with family dissolution *per se*, her principle of treating each person as an agentive end is meant to ensure that the family's moral

³⁴ See Chapter 4 section IV of this dissertation.

³⁵ Although the *ALI Principles* were published in 2002, its relevance to family law is evidenced by the yearly citation update that accompanies this thick tome. The introduction to this annual update states: "This Cumulative Annual Pocket Part contains all citations through June 2013 to The American Law Institute's *Principles of the Law of Family Dissolution: Analysis and Recommendations* (2002). See American Law Institute, *Case Citations to the Principles of the Law: Cumulative Annual Pocket Part For Use in 2014, Reporting Cases Through June 2013 That Cite Principles of the Law of Family Dissolution* (St. Paul, MN: American Law Institute Publishers, 2014), v.

³⁶ I.e., rights related to and deriving from the idea of the family as the "natural and fundamental group unit of society." Browning, "Rights of Children," 296, cf. 290.

³⁷ Glendon, *Rights Talk*, 125.

standing as an organic or legal group is nevertheless dissolved. As a result, the *ALI Principles* and the capabilities approach share at least some common ground, even if their respective footing on that ground is distinctly established.³⁸ Second, her ethic of sex and family indicates that Nussbaum shares *at least* the ALI's concern for neutrality about family formation. Recall that she finds any "simple definition of its structure" problematic for leaving out a range of "cultural variants" in what constitutes a family. But given Nussbaum's view of how the state "constitutes and regulates the family" there is something more than a basic neutrality built into the capabilities approach. The state, in fact, is charged with ensuring via the principle of moral constraint that individual actors will be protected in the development and exercise of capabilities related to family formation. More precisely, Nussbaum seeks to guarantee that choice in relation to loving and caring relationships is protected in a way that will allow for "a highly various group of social constructs" to justifiably be called "family."³⁹ In other words, while Nussbaum arguably shares a basic commitment to neutrality with the *ALI Principles*, her capabilities framework extends beyond mere impartiality in order to actively ensure the individual's agency in forming affiliations of love and care. Hence the inclusion of "affiliation" on her list of central human capabilities.⁴⁰ Finally, and directly related to the preceding, it is also a central human capability that human beings be entitled to opportunities for choice in the area of sexual activity and reproduction.⁴¹ The sexual domain is, like any other sphere of life, one that Nussbaum wants infused with as much deliberate choice as possible. Consent and harm mark the main boundaries she deems appropriate in that domain.⁴²

³⁸ This is particularly discussed in Chapter 3, section II.

³⁹ SSJ, 272; WHD, 275-277. See also Chapter 3, section II and V of this dissertation.

⁴⁰ Appendix, 7.

⁴¹ In fact, included as an aspect of the capability of "Bodily health and integrity" are "opportunities for sexual satisfaction and for choice in matters of reproduction." Appendix, 2, 3.

⁴² SSJ, 11, 21-22.

Ultimately, the main reason to compare Browning's critique of the ALI *Principles* and key features of Nussbaum's family ethic is to establish his assessment of the one as a narrowing of children's rights and best interests into "one-dimensional affective intersubjective relationships" that meshes almost seamlessly with the other.⁴³ Nussbaum's intersubjective description of the family in *Sex and Social Justice* and her efforts to protect individual capabilities against their potential obscuring by natural or collective notions of the family in *Women and Human Development* indicate that Browning's critique of the ALI *Principles* implicitly targets the thin family ethic inherent to her capabilities theory. Given the evident similarities, it is curious that Browning did not offer a more direct appraisal of Nussbaum's theory of the family when he critically engaged *Women and Human Development* in an extended section of *Marriage and Modernization* (2003).⁴⁴

Browning's promotion of the integrative view is not meant to suggest that the UN position, or any generally family affirming ethic, justifies either an obstinately rigid interpretation of the institution or a blind naiveté about its assorted manifestations throughout history or across cultures.⁴⁵ In his essay titled "The Meaning of the Family in the Universal Declaration of Human Rights"⁴⁶ Browning acknowledges the kinds of family diversity that were discussed already in Chapter 4:

It is a matter of cultural variability as to whether families are patriarchal or egalitarian; extended, joint, or nuclear; multigenerational households or two-generational parent-child

⁴³ Cf., Browning, "Rights of Children," 284-285 and SSJ, 273-274.

⁴⁴ See Browning, *Marriage*, 166-173, 176-181. It is odd that while Browning engages *Women and Human Development* in that section, he says absolutely nothing about the family that is related to the chapter devoted to that topic in Nussbaum's book. See Browning, *Marriage*, 168n25. Also, he cites SSJ once in that section, as well as a previously published paper that became the chapter on the family in *Sex and Social Justice*. However, he again says nothing about the family as it relates to those works. See Browning, *Marriage*, 167n20, 21.

⁴⁵ Browning describes his family theory as a specifically *critical* one in order to distinguish it from "a profamily cultural attitude that promotes marriage and family stability at any cost to the individuals involved and neglects to investigate alternatives to the breadwinner-homemaker industrial family ideal." Browning et al., *Culture Wars*, 2-3. See also Browning, *Equality*, 225, 255, 313-316.

⁴⁶ See Browning, *Equality*, 327-346.

systems; polygamous or monogamous; built around divided spheres of public and private or flexible in allowing both males and females access to domestic as well as nondomestic pursuits; and specialized in their economic activity or built around a single-household economy.⁴⁷

He insists that the UN position remains meaningful despite evidence from both history and anthropology that prove the existence of variety in family forms and functions. In addition, Browning finds the UN description of the family to retain its worth despite the proliferation of diverse family forms and functions produced by modernity. He claims that,

...within all this pluralism of family forms and functions, there is a rather persistent core value that is widely cherished and protected around the world. This is the importance of the people who procreate the infant also being, as nearly as possible, the ones who care for it. This value was based on the widely held assumption that people who conceive a child, when they recognize their relation to it, will on average be the most invested in its nurture and well-being.⁴⁸

Browning's emphatic call for a strong integration of sex and family indicates that something more needs to be made of Nussbaum's acknowledgment that all human beings have biological parents.⁴⁹ The most that could be implied from a capabilities perspective is that being the biological parent of a child carries moral implications of a strictly intersubjective nature that run directly between singular parent and individual child. Even then, however, Nussbaum's capabilities approach permits no ongoing moral implications to *necessarily* flow from the genetic line that connects a child with his or her mother and father.⁵⁰ Whatever moral implications do exist from that connection are considered to be socially conditioned with biology's influence on them being, at best, indeterminate.

Browning view of things differs considerably. According to his integrative model, the biological parents of the child and the broader and expanding web of kin relations into which he

⁴⁷ Browning, *Equality*, 330. See section IV of Chapter 4 in this dissertation.

⁴⁸ Browning, *Equality*, 330.

⁴⁹ See Nussbaum, *Cultivating Humanity*, 122.

⁵⁰ See Chapter 3, section IV.

or she is born are critical to that child's flourishing in his or her humanity. He declares the significance of these relationships in *Equality and the Family*:

Public recognition of who is partnered with whom, who is the procreator of this child, who is the spouse of this person, and who is the son or daughter of this elderly person are all essential for the social and legal assignment of responsibilities of care and provision. In this fragile and vulnerable finite world, there will be a variety of failures and exceptions to the normative complex integration of these four goods, but in order even to make adequate provision for the exceptions, the institutions that promote this central integration must be energetically protected by law, culture, and traditions of human rights. Law must complete and refine the inclinations of nature.⁵¹

Browning attributes more significance to the way that nature impacts our understanding of the family than Nussbaum and, furthermore, less to the constitutive role of social conditioning on the institution. As already noted, he is not blind to the array of cultural variations that claim the term "family." Nevertheless, as the next section contends, he finds deep moral meaning in the relationship between parents and their offspring.

Browning's attempt to underline the significance of biological attachment and "natural inclinations" is meant to address separations introduced by modernizing forces into the domain of sex and family. In particular, he finds there to be problematic ways that modernity divides human sexuality from this vital institution. The modern disruptions that Browning has in mind include the disconnection of marriage from sexual intercourse, marriage from childbirth, marriage from child rearing, childbirth from parenting, and even childbirth from sexual intercourse and biological filiation (due to advances in assisted reproductive technologies).⁵² Rather than being isolated from each other, Browning asserts that these goods should be integrated through marriage and family. The "stable integration" of goods like "sexual desire, affection, procreation, and child-rearing" serve to enhance "care of children by parents, care

⁵¹ Browning, *Equality*, 342.

⁵² Browning, "Rights of Children," 284; Browning, "Legal Parenthood," 106-107. See Chapter 4, section IV.

between father and mother, intergenerational care between the young and the elderly, and care throughout the extended family.”⁵³ Even so, Browning is careful not to overstate the significance of natural parent-child bonds or those that mark broader kin relations. He, like Nussbaum, is conscious of the fact that family can often enough stand for neglect and abuse instead of love and care.⁵⁴ Unlike Nussbaum, however, Browning takes family bonding – especially the marital bonds between mother and father – as an elemental beginning point for thinking about children’s rights and the matter of doing justice within the family structure.⁵⁵ He maintains that the human rights tradition does the same by offering a moral and legal framework aimed at reinforcing the natural inclinations which exist between children, their parents and broader kin relations.⁵⁶ Alice Hearst, while holding to an intersubjective notion of family that is similar to Nussbaum’s,⁵⁷ nevertheless demonstrates support for something like Browning’s integrative view when she claims that an “intact family provides the child with his or her cultural (racial, ethnic, or religious) bearings” and marks the starting point for their own personal engagement with the world.⁵⁸

These concerns imply that something more should be made of the fact that all human beings have biological parents than Nussbaum’s theory allows. Although the drafters of the CRC had to carefully navigate the issue of birth due to contentious debate over the practice of abortion,⁵⁹ the Convention arguably underwrites the moral significance that goes along with

⁵³ Browning, *Equality*, 342.

⁵⁴ In *Equality and the Family* Browning states: “It is an exaggeration to argue that biological attachment alone converts humans into good and nurturing parents.” Browning, *Equality*, 343. See also Browning, *Marriage*, 114.

⁵⁵ Browning, *Equality*, 357.

⁵⁶ Browning, *Equality*, 342.

⁵⁷ Hearst, 15, cf. 17.

⁵⁸ Hearst, 26, 27 and 29.

⁵⁹ Alston, “Unborn Child,” 156-157, 177-178. Debate centered on three specific articles (Arts. 1, 6 and 41) and the Preamble. See Alston, “Unborn Child,” 162-172.

being the offspring of a particular mother and father.⁶⁰ For Browning, preambular reference to the family as a “group unit” is particularly important since it suggests that the institution continues today to maintain its traditional role of spreading “mutual care outward into society and forward into the future cycle of the generations.” It does so, he alleges, by way of affectionate intergenerational links that have their origin in the genetically formed bonds that exist between parents and their offspring.⁶¹ In short, Browning’s integrative model implies that taking the biological connections that exist between parents and their offspring more seriously – as well as the web of kin relationships those connections represent – is an important part of any discourse that intends to address children’s rights as human rights in a meaningful way.

II. Surveying the Intellectual Tradition of the Integrative Model

According to Browning, the integrative model rests on an intellectual tradition that reaches back to some of the foundational figures in Western thought.⁶² It significantly includes Aristotle and, relatively more recently, Aquinas’s medieval Catholic re-appropriation of his moral thought. Although these are the two main figures he points to, Browning reasons that the conceptual history of this model is, in fact, richer still. He cites an array of theorists from a variety of philosophical and religious traditions that include first century Roman Stoic Musonius Rufus,⁶³

⁶⁰ See an earlier reference in this section to the pro-family ethic that Browning and Witte argue is running through the CRC’s articles, the right specified in Article 8 to have one’s identity preserved, and the affirmation of UDHR Article 16.3 located in its Preamble – all of which were discussed in Chapter 4, sections II and V.

⁶¹ Browning, *Equality*, 342.

⁶² Conversely, Martha Minow argues that “by the start of the 1980s” the international movement for children’s rights “had failed to secure a coherent... intellectual foundation.” Minow, “What Ever Happened?” 287. Nussbaum and Dixon build, at least partially, upon that basic critique. CRCA, 551n10.

⁶³ Browning, *Equality*, 333; cf. Browning, *Marriage*, 125-128. Browning emphasizes the integrative aspect of Rufus’s Stoic perspective by observing how marriage was not only about procreation, but also about mutual and enduring companionship and love between mother and father. Browning, *Marriage*, 128.

medieval Jewish scholar Nachmanides,⁶⁴ medieval Muslim scholar al-Ghazali,⁶⁵ the 20th century tradition of Roman Catholic social teaching inaugurated with Leo XIII's encyclical, *Rerum Novarum* (1871) and Pius XI's *Quadragesimo Anno* (1931),⁶⁶ and Nazi era German Protestant theologian Emil Brunner's complementary reliance on both nature and revelation to "anticipate the recognition of the one-flesh union of mother, father and child."⁶⁷ Browning's aim in citing these scholars and traditions is to signal the rich intellectual basis for his model of children's rights and to demonstrate that the UN's position on the family is not only supported by naturalistic and moral arguments, but by interreligious ones as well.⁶⁸ In one of his final publications, Browning writes of his efforts to uncover what he believes to be "the deeper-seated intellectual history" of the UDHR and the CRC.⁶⁹ He mentions the CRC as a particularly "excellent case study" of how the integrative tradition with its rich philosophical and religious traditions of discourse have been overlooked. The result, Browning laments, is a children's rights regime that teeters on a very weak understanding of its own intellectual foundations.⁷⁰

⁶⁴ Browning draws on medieval rabbinic scholar Nachmanides's interpretation of Genesis 2:24 (the biblical concept of "one flesh") to "communicate the value of kin altruism for parental care" by noting how mother and father are one flesh with the child while, through marriage, being one flesh with each other. Browning, *Equality*, 333. For Browning's fuller discussion of Nachmanides and Judaism, see Browning, *Marriage*, 117-122.

⁶⁵ Browning cites medieval Muslim scholar al-Ghazali who celebrated the importance of both "lineage and marriage" and linked them to "the preservation of one's 'descendants'." Browning, *Equality*, 333. For his fuller discussion of al-Ghazali and Islam, see Browning, *Marriage*, 122-124. Browning remarks that "concern with lineage and the continuity of self through offspring are tremendously powerful themes in Islam" that receive ample attention from al-Ghazali. Browning, *Marriage*, 123.

⁶⁶ Browning, *Equality*, 337-339; cf. Browning, *Marriage*, 137-140. He makes particular note of Leo XIII's criticism of "both state and market" for disrupting the "initiatives and responsibilities of the family and workers" when given to excess. Browning, *Marriage*, 139.

⁶⁷ Browning, *Equality*, 339-341; cf. Browning, *Marriage*, 140-144.

⁶⁸ It is the UDHR that is directly influenced by that religions dimension. See Browning, *Equality*, 333-341. The CRC is at least indirectly influenced, however, because of how "powerfully influenced the drafters of the CRC" were by the UDHR. Browning, "Legal Parenthood," 108. Browning connects this religions dimension more directly to children's human rights in Browning, "Rights of Children," 283-284, 287-289 and Browning and Witte, "Mixed Contribution," 282, 283-288. His discussion of how the religions dimension joins natural and moral dimensions to influence the drafting of the UDHR (which is the basis for attaching it to the CRC) appears to be derived from an even fuller discussion of religious contributions to marriage and family theory that fills the greater part of two chapters in Browning, *Marriage*, 113-151.

⁶⁹ Browning, "Legal Parenthood," 106.

⁷⁰ Browning, "Legal Parenthood," 107-108.

Explicit reference to a religious dimension was excluded from the final draft of the UDHR⁷¹ and receives no explicit mention in the CRC. Nevertheless, it remains an important factor in rights discourse, according to Browning, especially as it relates to children and their families.

Browning pursues this point further in his later work by arguing that religious sources come together with naturalistic and moral ones to round out the thick multi-dimensional model of children's rights that is the integrative perspective.⁷² In fact, it is for her lack of attentiveness to the religious dimension that Browning criticizes Nussbaum's capabilities approach:

There is little evidence in Nussbaum's view of religion that she thinks it has value beyond what can be grasped by her [principle of treating each person as an end] and her principle of [moral] constraint. Religion may help motivate people to be better, it may be good for the moral formation of children, it may be a preferred arena for the exercise of one's capabilities, and it may give us a sense of life's meaning. But, for Nussbaum, all of these functions can be performed by other social and institutional functions.⁷³

He also challenges Nussbaum for being too narrow in her view of religion by failing to recognize that philosophy "does not stand on its own two feet." Quoting Paul Ricœur's claim that "the symbol gives rise to thought," Browning proposes that she should more seriously weigh the possibility that "supposedly rational philosophical arguments for such things as human rights are little more than the tip of a deep mountain of religious vision, symbol, metaphor, and narrative."⁷⁴ Recognizing the major contribution of religious sources is critical for "a proper understanding of the grounds of the contemporary human rights revolution," he maintains, and vital to an "adequate understanding of the foundations" for ongoing dialogue on marriage and family.⁷⁵

The conceptual history that Browning draws upon to support his integrative model is too

⁷¹ Browning, *Equality*, 341.

⁷² Browning, "Rights of Children," 285, cf. 283-284.

⁷³ Browning, *Marriage*, 172-173.

⁷⁴ He is leveling this same criticism at Susan Okin as well. Browning, *Marriage*, 178-179.

⁷⁵ Browning, *Marriage*, 179.

complex to discuss in detail in this dissertation. However, the Aristotelian-Thomistic dimensions deserves consideration, especially given the prominence of Aristotelian thought to Nussbaum's work. Browning refers to Aristotle as an "early champion, long before Malik, of the idea that the family is a basic group unit of society and that without a good amount of investment between biologically related individuals, family love will run thin, violence will rise, and social well-being and cohesion will decline."⁷⁶ That claim is based on Aristotle's discussion of the family in Book I of the *Politics* and his rebuttal to Plato's controversial idea of abolishing the institution for the sake of civic harmony in Book II.⁷⁷ Aristotle's basic assertion is that the family remains the "first form of association naturally instituted for the satisfaction of daily recurrent needs."⁷⁸ Browning maintains that this assertion provides the classical foundation for the intellectual tradition supporting his integrative view of children's rights.⁷⁹ His theory of kin altruism builds on Aristotle's conviction that family members will care about and identify with one another in ways distinct from the manner in which they generally care about and identify with others. This is due in part to the biogenetic ties that exist between them. Put more poetically by Aristotle: "Just as a little sweet wine, mixed with a great deal of water, produces a tasteless mixture, so family feeling is diluted and tasteless when family names have so little meaning as they have in a constitution of the Platonic order [...]."⁸⁰ Central to Aristotle's articulation of this idea is a fundamental tension between the three key social elements he describes in the *Politics*: the individual, the family, and the state. The individual, as Aristotle explains, is a political animal

⁷⁶ Browning, *Equality*, 333.

⁷⁷ Aristotle, *The Politics of Aristotle*, ed. and trans. by Ernest Barker (New York: Oxford University Press, 1978), I.2, 1252b12-13, II.2-4, 1261a10-1262b35. For Plato's idea, see Plato, *The Republic*, trans. by R.E. Allen (New Haven, CT: Yale University Press, 2006), V, 457b6-466d4.

⁷⁸ Aristotle, *Politics*, I.2, 1252b12-13.

⁷⁹ Browning, "Rights of Children," 287 and Browning and Witte, "Mixed Contribution," 282-283; cf. Browning, *Equality*, 331-333 and Browning, "Legal Parenthood," 109.

⁸⁰ Aristotle, *Politics*, II.4, 1262b15-17.

for whom two societies – the family and the state – are of critical importance.⁸¹

In addition to Aristotle's naturalistic family theory, Thomistic versions of natural law are identified by Browning as central to this intellectual tradition. He argues that although Aquinas's full position on marriage and family draws on scriptural interpretation, it also relies on elements of natural law to explain "the origins of family formation and its link with marriage."⁸² According to Browning, "Aquinas defined matrimony as the joining of the male to the primordial mother-infant family" and perceived this bond to have four critical outcomes:

1. Mothers seeking aid from the fathers of their children due to the difficult task of raising a child through "the long period of human infant dependency."
2. The "likely fathers" being "much more inclined to attach to their infants" if they are relatively certain that the child is their progeny and, therefore, a continuation of "their own biological existence."
3. The fathers attach to both their infant and its mother due to the "mutual assistance and affection that they receive from the infant's mother."
4. Sexual exchange between the mother and father "helped to integrate the male to the mother-infant dyad."⁸³

While Browning recognizes that Aquinas could not support his theories about sex and family with the scientific theories or evidence that are available today, he finds it noteworthy that these four conditions "are almost perfectly parallel" to discoveries in the contemporary fields of evolutionary psychology and anthropology. In addition, he finds Aquinas to echo and develop Aristotle's conviction that "parental investment is more intense and durable between natural

⁸¹ See Aristotle, *Politics*, I.2, 1252b12-13 and 1253a1-4.

⁸² Browning, *Equality*, 334-335; Browning, "Rights of Children," 288.

⁸³ Browning, *Equality*, 335; cf. Browning, et al., *Culture Wars*, 111-113 and Browning, *Marriage*, 109-111. According to Browning, the case of the father and mother are different for at least one simple reason: "human mothers attach more easily to their infants because they carry them for months and expend enormous energy in given them birth." Browning, "Rights of Children," 288. Nature, as Browning explains Aquinas's position, supplements attachment for the father through the four ways discussed above.

parents and their offspring.”⁸⁴ It is perhaps because Aquinas’s ideas stand as something of a weigh station between ancient Greek philosophy, modern scientific inquiry, and a range of theological perspectives that Browning leans so heavily on them in his work.⁸⁵

These two grounding points to the integrative view’s intellectual tradition are interestingly and significantly connected to Nussbaum. One comes from a philosophical position to which she, in her own words, is deeply committed (i.e., Aristotelian philosophy).⁸⁶ The other is tied to a theological position that, given Nussbaum’s Millian bent, she could not likely find less appealing (i.e., natural law).⁸⁷ Evidence suggests that dependence on ethical appeals to nature and affirmations of familial group belonging deriving from this Aristotelian-Thomistic emphasis informed such influential voices in the drafting of the UDHR as Charles Malik and Jacques Maritain.⁸⁸ Even so, Nussbaum has no place in her theory of social justice for the positive view of the family implicit to the UDHR and CRC. As long as the institution is promoted as a group unit derived from nature to which individuals belong as interdependently related members rather than intersubjectively related actors (or at least developing ones), children’s rights remains a frontier of justice to her.

⁸⁴ Browning, *Equality*, 335.

⁸⁵ Browning rarely discusses this model without acknowledging Aquinas’s important contributions to the evolving discussion, whether taken more generally or narrowed to the integrative model of children’s rights. For reference to Aquinas in relation to children’s rights or human rights and the family, see Browning, “Rights of Children,” 287-288; Browning and Witte, “Mixed Contribution,” 283-287; Browning, *Equality*, 334-337; Browning, “Legal Parenthood,” 110-111; and, Browning, “The Best Love of the Child?” 369. For Aquinas’s influence on Browning’s moral thought and family ethic more generally, see Browning, *Marriage, passim*; Browning, *Equality, passim*; and, Browning et al., *Culture Wars, passim*. If this dissertation was focused primarily on Browning’s ideas, then a fuller discussion of Aquinas would be necessary at this point. Since the primary interest is Nussbaum, Aristotle will be more central. For more on Browning’s engagement with Aquinas on sex and family, see Browning et al., *Culture Wars*, 111-124 and Browning, *Marriage, passim*.

⁸⁶ FG, 11; Martha C. Nussbaum, *Love’s Knowledge: Essays on Philosophy and Literature* (New York: Oxford University Press, 1990), 25.

⁸⁷ See Chapter 3, section III of this dissertation.

⁸⁸ Browning, *Equality*, 337. Evidence in support of Browning’s hunch is found in Maritain, *Man and the State*, 91-92, 98, cf. 84-103 and Malik, 169-172, 245-247. On Malik, see also Morsink, *Universal Declaration*, 256.

III. Kin Altruism and Browning's Aristotelian-Thomistic Perspective

Aquinas's deep engagement with Aristotle's work forged an intellectual bond that helped to ensure the continued salience of Aristotelianism to Western thought.⁸⁹ However, Browning draws this tradition into conversation with the relatively young field of evolutionary psychology and the theory of "kin altruism" as he explores an integrative view of children's rights.⁹⁰ The basic premise of kin altruist theory highlights "our tendency to invest ourselves more in those to whom we are biologically related even if, in certain ways, we like or admire other people even more."⁹¹ Browning, as a Christian ethicist, attempts to offer a theological spin on this key concept in evolutionary psychology: "[It] is the idea that in both creation as God intended it and in the rhythms of nature as revealed through naturalistic observation, it was commonly assumed that 'natural' parents were more deeply invested in their children and, on average, more consistent sources of care and nurture than all substitutes."⁹²

Closely connected to the concept of kin altruism within the field of evolutionary psychology is the companion theory of "inclusive fitness." According to this concept, human behavior is not only driven by an individual interest in survival (i.e., the "selfish" gene), but also,

⁸⁹ R.W. Dyson remarks that the extent to which Aquinas's philosophy is "informed by the ideas and thought-patterns of Aristotle" (always called "the Philosopher by Aquinas) is the "most obvious feature of St. Thomas's philosophy taken as a whole." R.W. Dyson, "Introduction: St. Thomas Aquinas" in *Aquinas: Political Writings*, ed. by R.W. Dyson (New York: Cambridge University Press, 2007), xxiii. See Frederick Christian Bauerschmidt, *Holy Teaching: Introducing the Summa Theologiae of St. Thomas Aquinas* (Grand Rapids, MI: Brazos Press, 2005), 14. Michael Banner notes that while his contemporaries struggled to get past a perceived contradiction between the thought of Augustine and that of Aristotle (or, a contradiction between faith and reason), Aquinas worked toward a synthesis and, therefore, the capacity for a mutual embrace between Christianity and Aristotelian philosophy. Michael Banner, *Christian Ethics: A Brief History* (Malden, MA: Wiley-Blackwell, 2009), 46-47.

⁹⁰ Browning, "Rights of Children," 286-289. Browning, *Equality*, 331. Evolutionary psychology is described by Browning as "a relatively new discipline that uses the concepts of evolutionary theory to order the facts of human psychology." Browning, *Marriage*, 106.

⁹¹ Browning, *Marriage*, 102; cf. Browning, *Equality*, 331. This is a near repetition of an earlier definition where kin altruism is defined as "the preferential treatment people tend to give to their biologically related family members." Browning, et al., *Culture Wars*, 71. Note that in *Culture Wars* it is one of three main ideas, and not the chief one. Yet in subsequent writings it stands more prominently in Browning's work.

⁹² Browning, *Equality*, 352.

using Aristotelian terms, by humankind's "natural desire to leave behind them an image of themselves."⁹³ This natural desire, as Browning explains it, means "that our concern for our individual fitness is likely, under certain circumstances, to include a concern for others who share and can help preserve our genes."⁹⁴ He comments further that this idea also "predicts that parents, especially in the early phases of their children's lives, will sometimes sacrifice for their welfare at considerable, and sometimes even ultimate, cost to themselves – partially because their progeny are veritable continuations of themselves."⁹⁵

Browning maintains that the theory of kin altruism and the large body of evidence in support of the theory should shape the way we understand the relationship between parents and their biological offspring, and accordingly, ought to influence the way we think about children's rights today. Although ancient theories of kin altruism had no technical or genetic evidence to rely upon, Aristotle and Aquinas did appeal to "everyday, naturalistic observations that children tend to look like their parents, and that this motivates parents to care for offspring out of a sense of preserving what is partially the parents themselves – what extends their 'personality' and their substance."⁹⁶ It was Aristotle, Browning declares, who "provided much of the naturalistic and philosophical language for the centrality of kin altruism in family theory found in Western philosophy, law, and religion."⁹⁷ Central to Aristotle's sexual ethics is the idea that human beings – like all animals and plants – have a "natural impulse... to leave behind something of the same nature as themselves."⁹⁸

⁹³ Browning, *Marriage*, 107; cf. Aristotle, *Politics*, I.2, 1252a26-31.

⁹⁴ Browning, *Marriage*, 107.

⁹⁵ Browning, *Marriage*, 108.

⁹⁶ Browning, *Equality*, 353.

⁹⁷ Browning, "Legal Parenthood," 109.

⁹⁸ Aristotle, *Politics*, I.2, 1252a26-31.

If the urge to leave behind a biogenetic continuation of oneself was the extent of Aristotle's sexual ethic, then Nussbaum's admission that all human beings have biological parents might be enough to spell out his position. However, even in Aristotle's *Politics* that most rudimentary sexual ethic supports his belief that the family exists for the meeting of everyday needs,⁹⁹ thereby indicating a firm link between procreation and childcare. Later, in *Nicomachean Ethics*, Aristotle extends this sexual ethic beyond concerns for mere biological or political expediency to emphasize both conjugal and parental attachment:

The friendship of man and woman also seems to be natural. For human beings form couples more naturally than they form cities, to the extent that the household is prior to the city, and more necessary, and childbearing is shared more widely among the animals. For the other animals, the community goes only as far as childbearing. Human beings, however, share a household not only for childbearing, but also for the benefits in their life. For the differences between them implies that their functions are divided, with different ones for the man and the woman; hence each supplies the other's needs by contributing a special function to the common good. For this reason their friendship seems to include both utility and pleasure. And it may also be friendship for virtue, if they are decent. For each has a proper virtue, and this will be a source of enjoyment for them. Children seem to be another bond, and that is why childless unions are more quickly dissolved; for children are a common good for both, and what is common holds them together.¹⁰⁰

Regardless of whether one agrees with Aristotle, this passage represents an early articulation of kin altruism that is supportable, from Browning's perspective, by appeal to modern scientific disciplines. Although Nussbaum's own appeal to attachment theory suggests that parent-child bonding need not be interpreted beyond a connection between a single caregiver to a particular child,¹⁰¹ she cannot rely on Aristotle to support this weaker version of child-adult bonds.

Canadian psychologist Susan Johnson lends important support to the "everyday" evidence of kin altruism that Browning finds Aristotle and Aquinas to rely upon. She contends

⁹⁹ See Aristotle, *Politics*, I.2, 1252a26-31, 1252b12-13.

¹⁰⁰ Aristotle, EN, VIII.12.7, 1162a15-29. Witte, *Sacrament*, 19, cf. 83.

¹⁰¹ See UT, 181-190.

that there is too often “a focus on what occurs *between* individuals” with emotions – “viewed as occurring *within* those individuals” – too infrequently being addressed (author’s emphasis).

While Nussbaum is obviously not one to ignore emotions, her philosophical psychology does not recognize them as what Johnson refers to as “a primary link between the biological and the social, the self and the system.”¹⁰² Interestingly, for Nussbaum it is precisely these links which drive her concern that children will be obscured by the system of the family. Recall that she believes emotions to be highly rational and, as is evident with her theory of the family, she rejects the idea of any necessary emotional link existing between the biological and the social.¹⁰³

To be clear, both Nussbaum and Johnson yoke the social and the emotional together. The difference between the two theorists is located in what each takes as the main element of the emotional. Nussbaum emphasizes the rational while Johnson emphasizes the biological. In so doing, Johnson challenges the idea that the family as a natural group unit will necessarily pose a problem to its members. Quite the opposite, she finds through her clinical studies “that distressed couples and distressed families are dealing with the same monster – disconnection and attachment insecurity.”¹⁰⁴ It is, she argues, “sustained connection” that makes possible one’s ability to function well as an individual.¹⁰⁵ Kin altruism, as Browning explains it, follows Johnson’s thought by relying on the view that, generally speaking, a rich emotional bond exists naturally between parents and their offspring and should be encouraged and sustained through law and public policy.¹⁰⁶

¹⁰² Susan M. Johnson, *The Practice of Emotionally Focused Couples Therapy: Creating Connection*, 2nd Edition (Florence, KY: Brunner-Routledge, 2004), 243.

¹⁰³ Nussbaum argues that emotions are “not simply given in our biological makeup (although they may have a biological basis); they embody a good deal of learning.” Nussbaum, *Cultivating Humanity*, 227. She defines emotions as “forms of evaluative thought.” UT, 11, cf. 19. See Chapter 3, section IV of this dissertation.

¹⁰⁴ Johnson, 265.

¹⁰⁵ Johnson, 244, 263-264.

¹⁰⁶ Browning, *Equality*, 344-345.

The kind of attachment that kin altruism represents is carefully defined by Browning as a “pre-moral good.” Such goods are “various finite objects, experiences, or tendencies that we experience as good in the sense of satisfying and enjoyable.” Their opposite, pre-moral evils, are “objects, experiences, or tendencies that are unsatisfying or harmful.”¹⁰⁷ The influence of Aquinas on Browning’s thought seems unmistakable at this point. Browning’s distinction between pre-moral goods and evils echoes what Aquinas declared to be the “first principle” of natural law and the basis for any other precepts deriving from it, specifically, that “good ought to be done and pursued, and evil avoided.”¹⁰⁸ According to Aquinas, “human” or “positive” law (*ius positum*) represents specific legal arrangements that are derived from natural law (*ius naturale*) and its first principle. Anglican theologians Oliver and Joan O’Donovan describe human law as “constructed from natural law by reasoned deliberation under particular historical circumstances.”¹⁰⁹ The moral force of human law *qua* law obtains, Aquinas states, only insofar as it is “derived from natural law.”¹¹⁰ Pre-moral goods or values function in a similar way. They form “the basement – the archeology or foundational natural values – that get organized and, indeed, reorganized” in human institutions like that of marriage or the family.¹¹¹ As a result, such goods stand behind Browning’s appeal that the “front door” of family formation and bonding shape moral and legal reflection on children’s rights to a significantly greater degree than the ALI *Principle*’s “back door” of family dissolution.

¹⁰⁷ Browning, *Equality*, 353.

¹⁰⁸ St. Thomas Aquinas, *Summa Theologiae*, IaIIæ.94.2 in *Aquinas: Political Writings*, ed. by R.W. Dyson (New York: Cambridge University Press, 2007), 117.

¹⁰⁹ Oliver O’Donovan and Joan Lockwood O’Donovan, eds., *From Irenaeus to Grotius: A Sourcebook on Christian Political Thought* (Grand Rapids, MI: Eerdmans, 1999), 324.

¹¹⁰ St. Thomas Aquinas, *Summa Theologiae*, Vol. 28, trans. by Thomas Gilby, O.P. (New York: Blackfriars/McGraw-Hill, 1966), IaIIæ 95.2. For Maritain’s definition of natural law, see Maritain, *Man and the State*, 86.

¹¹¹ Browning, *Marriage*, 113-114.

Browning goes on to describe premoral goods more fully as “the peculiar compromise of natural needs and inclinations that are satisfied, suppressed, redirected, and given moral form by more fully human principles, rules, and institutions... Premoral goods can contribute to the moral good, but without higher-level ordering, they are not themselves strictly moral.”¹¹² These goods, like kin altruism, do not by themselves offer adequate moral guidance. As a pre-moral good, kin altruism offers the basis for a family ethic without being that ethic itself. The following is Browning’s explanation:

To speak about the naturalistic foundations of marriage is not to say that marriage is natural. It is, rather, to suggest that marriage organizes natural tendencies and places them into wider and more properly moral patterns of organization – ones that increase respect and equal regard for all parties and that also increase and coordinate a wider range of premoral goods. To speak of the natural foundations of marriage is not, as well, to argue that monogamy is natural or to imply that it is more natural than polygyny. There may be naturalistic considerations in discussing the relative advantages of monogamy and polygyny. But, following Aquinas, the more weighty and decisive arguments are moral ones; they pertain to how the two organizations of sexuality and procreation handle the questions of both the well-being of children and the dignity and respect of both women and men, husbands and wives.¹¹³

Jewish philosopher and theologian David Novak similarly captures the way marriage and family serve to organize natural tendencies and place them within a moral framework reflective of premoral goods such as sexual differentiation, procreation, or kin altruism. In his critique of Nussbaum’s argument for more inclusive marriage laws, Novak insists that,

... ‘marriage’ did not become the name of the domestic union of a woman with a man because someone said ‘let there be marriage!’ Instead, ‘marriage’ became the name used to designate this already existing social relationship when it had to be distinguished from other social relationships that might look like it in some ways, yet are different from it in more essential ways.¹¹⁴

¹¹² Browning, *Marriage*, 114.

¹¹³ Browning, *Marriage*, 117-118.

¹¹⁴ David Novak, “Response to Nussbaum’s ‘A Right to Marry?’” *California Law Review* 98, no. 3 (2010): 712-713, available at: <http://www.jstor.org/stable/27896691> [accessed 10 March 2015].

Novak's argument contradicts Nussbaum's statist assertion that "the very definition [of the family] is legal and political" today.¹¹⁵ Regardless of how significantly the state is or is not involved in marriage and family, when it comes to conjugality, childrearing, and ancestry, to name only three examples, the state addresses existing social relationships and not ones of its own making. Regardless also of how narrow or expansive the state might define the family, it is the social relationships described by the term that warrant the use of human language – including the legalese of the state – to find symbols and utterances with which to capture its meaning. The family is not created by some *ex nihilo* declaration that "this" and not "that" should be defined as *the* family. Insofar as the term refers to a moral framework organized around the altruistic inclinations that biological parents demonstrate toward their children, the word "family" speaks primarily to a phenomenon and not to a legislative act, a juridical decision, or even a religious doctrine. It was observance of mundane occurrences recognizable as premoral goods that led thinkers like Aristotle and Aquinas (among a litany of others) to theorize about the family in a way that distinguishes it from other social relationships. That, it seems fair to say, represents the ethical connection that Browning's integrative model attempts to make between nature and the family by way of the theory of kin altruism.

Kin altruism also provides an avenue for more fully grasping how the UN position on the family relates to children's rights. For Browning, this idea is built right into Article 16.3 of the UDHR: "The phrase 'group unit' invokes this rich [idea of kin altruism] that refers to the web of natural inclinations toward the sense of solidarity, continuity, and deep attachment that spring from bonded mother-father partnerships and their children."¹¹⁶ As such, Article 16.3 is a strong

¹¹⁵ WHD, 263.

¹¹⁶ He is more directly referring here to the principle of subsidiarity expounded in and promoted by Catholic social teaching. As an aspect of his discussion of kin altruism, though, this comment may be justifiably applied to the broader category of kin altruism without altering Browning's basic point. Browning, *Equality*, 339, cf. 337-339.

and clear affirmation that children's interests cannot be easily disentangled from those of their parents. However, Browning also reads it as an assertion that a child's interests are not only affected by the intersubjective relationship that she has directly with her mother and father as separate individuals, but also by the intersubjective relationship that exists between her mother and father as a conjugal pair. In other words, he holds that a child's prospects for flourishing are impacted by whether or not her parents' relationship is defined by a conjugal bond.¹¹⁷

Marriage and family factor into this issue for Browning as the institutional methods for integrating the goods of sexual desire, affection, procreation, and child-rearing that modernizing forces have helped to disintegrate. Integrating these goods through the institution of marriage results, from his perspective, in enhanced relationships of care across all the varied immediate and extended sectors of family life.¹¹⁸ This is the positive action of the integrative perspective that Browning takes the UN position on the family to mean at its most basic level. The integrative view does not rely on an appeal to nature alone. It recognizes that "the inclinations of kin altruism at the human level are fragile." Some parents, Browning reflects, "are emotionally damaged themselves and project their wounds onto their children."¹¹⁹ Therefore, integrative models look to institutionalize natural inclinations through marriage and family formation in order to add "additional powerful social, legal, cultural, and religious reinforcements" to the premoral goods expressed by kin altruism.¹²⁰

Browning's perspective, aside from being distasteful to Nussbaum, also raises a question of compatibility between Articles 16.3 and 25.2 of the UDHR. The concern to include children

¹¹⁷ Browning, *Equality*, 342. Based on his appropriation of Margaret Brinig's empirical research in the field of family law, Browning points out that "the status of legal marriage is a leading positive asset for the well-being of children and has important implications for children's rights." Browning, "Rights of Children," 299.

¹¹⁸ Browning, *Equality*, 342.

¹¹⁹ Browning, *Equality*, 343.

¹²⁰ Browning, *Equality*, 342.

born outside of marriage is addressed by Article 25.2 and contributed to the participants in the drafting process rejecting Malik's proposed inclusion of the phrase "deriving from marriage" to qualify the conception of family offered in Article 16.3.¹²¹ Why, then, does Browning push the significance of marriage to children's rights and their prospects for living well? His aim is not likely that of making life more arduous for children or families that fail to meet the marital norm. He is convinced, however, that social science research demonstrates "children raised by their married natural parents" to do better "on average" in numerous ways than those in families raised by nonbiological parents.¹²² According to Browning, "mounting evidence" of the various trials and tribulations that are more likely to face children being raised by nonbiological parents "should alert us that, for the purposes of the law and public policy, some family arrangements are generally more worthy of encouragement than others."¹²³ Such a stance would be essentially indefensible from a capabilities perspective.¹²⁴ However, the fact that children require universal protections should not, from Browning's point of view, "come at the price of inadequate theories of human rights and law which themselves contribute to the weakening of family as their primary institution of care."¹²⁵ In other words, things are amiss for Browning if the care of children is thought of primarily in terms of their relation to the state rather than in terms of their relation to biological parents. The family, as was stated at the start of this chapter, represents for

¹²¹ Morsink, *Universal Declaration*, 254-256; cf. Browning, *Equality*, 328-329. See Chapter 4, section III of this dissertation.

¹²² Browning points to research suggesting that children being raised by their biological parents "do significantly better in their schoolwork, are less likely to have children out of wedlock, are more likely to have stable marriages themselves, are less likely to become involved in criminal behavior, and are more likely to have stable employment as adults." Furthermore, he states there to be "evidence, as Aristotle predicted, that in those families where children are raised by nonbiological parents, children are far more subject to violence, physical harm, and sexual molestation." Although the data is incomplete on a global scale, he perceives these findings to "hold up" where social-science surveys do exist. Browning, *Equality*, 344.

¹²³ Browning, *Equality*, 345.

¹²⁴ See Clark and Ziegler, 225.

¹²⁵ Browning, *Equality*, 346.

Browning “the greatest welfare system ever devised by the human race, the one upon which all other support systems, either private or governmental, finally depend and only modestly enhance.”¹²⁶

His claim, however difficult it might be for Nussbaum and other capabilities theorists to accept, is that international human rights instruments should be interpreted in a way that supports “a thick multi-dimensional model of the rights and needs of the child.”¹²⁷ That, he argues, is accomplished by showing measured respect for kin altruism. Leaning on both the everyday observations of Aristotle and Aquinas, as well as current scientific theories, Browning argues that children’s rights should work to actualize a premoral good like kin altruism that is important to flourishing while respecting at the same time the “emerging personhood” of the child.¹²⁸ Doing so means embracing a perspective on children’s rights that allows for the maintenance of the important tension Aristotle identified as existing between the individual, the family and the state. Browning seems to believe that UN rights regimes provide an avenue for accomplishing this by their repeated references to the family as a basic and organic unit of society. Yet critical to grasping Browning’s point is that this statement and the theory he identifies as underlying it provide an elemental starting point for reflection on social justice with regard to children. Neither the theory of kin altruism nor the UN’s statement on the family are understood by Browning to articulate any kind of final or concluding word for children’s rights discourse.¹²⁹ The capabilities approach challenges his perspective by questioning whether “family” as it is described in the UN instruments and informed by an intellectual tradition that features Aristotle and Aquinas (among others) should be considered relevant to that discourse at all.

¹²⁶ Browning, *Equality*, 342.

¹²⁷ Browning, “Rights of Children,” 285.

¹²⁸ Browning, “Rights of Children,” 285; cf. Browning, “Legal Parenthood,” 107.

¹²⁹ Browning, *Equality*, 346, 357.

IV. Aristotle's *Zōon Politikon*, the Family, and the State

Aristotle represents rather rocky common ground between Browning's integrative model and Nussbaum's capabilities approach. Browning points to him as "the place to begin" for reflection on theories of family formation in philosophy, law and religion.¹³⁰ Nussbaum's commitment to the Aristotelian tradition is an obvious component of her philosophical method and evident to anyone even remotely familiar with her writing.¹³¹ More significantly, Aristotelian thought provides the conceptual basis for her capabilities approach.

The Aristotelian grounding of her theory is highlighted in *Frontiers of Justice*.¹³² In the epigraph to that work, Nussbaum underlines the link she will be forging between sociality and human flourishing [*eudaimonia*] by quoting Aristotle from his *Nicomachean Ethics*: "And it is rather peculiar to think of the happy person as a solitary person: for the human being is a social creature [*zōon politikon*] and naturally disposed to live with others."¹³³ Remarking on that passage, Nussbaum confirms that an Aristotelian account of justice like her own "insists that the good of a human being is both social and political."¹³⁴ "The Aristotelian conception [of the person]," Nussbaum explains, "sees the human being as a 'political animal', that is, not just a moral and political being, but one who has an animal body, and whose human dignity, rather than being opposed to this animal nature, inheres in it, and in its temporal trajectory."¹³⁵ As was discussed in Chapter 1, this Aristotelian political anthropology is central to Nussbaum's theory

¹³⁰ Browning, *Equality*, 331.

¹³¹ See FG, 11; Nussbaum, *Love's Knowledge*, 25, cf. 35-44 (on Aristotelian ethical procedure).

¹³² FJ, 1, 5.

¹³³ See FJ, xvii. All other quotations from *Nicomachean Ethics* are taken from Aristotle, EN. In that edition, the epigraph selected for *Frontiers of Justice* by Nussbaum reads: "Presumably it is also absurd to make the blessed person solitary. For no one would choose to have all [other] goods and yet be alone, since a human being is a political [animal], tending by nature to live together with others." See Aristotle, EN, IX.9, 1169b17-20.

¹³⁴ FJ, 86.

¹³⁵ FJ, 87.

and forms the basis for her articulation of central human capabilities.¹³⁶

The significance of human animality is never lost on Nussbaum. From her doctoral dissertation onward she has, more or less, been guided by questions and issues that take our animal embodiment seriously, especially the vulnerability or “world openness” that is inherent to it. In *Frontiers of Justice*, she demonstrates how her conceptualization of vulnerability rises out of this Aristotelian interest in the animality of human nature:

Human beings begin as needy babies, grow up slowly, and require lots of care as they grow. In the prime of life they have the “normal” needs that the social contract model typically incorporates, but they may also have other needs, stemming from accidents or illnesses that put them in a position of asymmetrical dependency for a shorter or longer time. If they live to old age, they typically need a great deal of care again and are likely to encounter disabilities, either physical or mental or both.¹³⁷

Nussbaum, like Aristotle, is not only concerned with constraints that result from the condition of vulnerability. A core feature of Nussbaum’s doctoral dissertation is her investigation of Aristotle’s questions about animal motion.¹³⁸ Later, in *The Fragility of Goodness*, she draws on his view of such motion in order to understand vulnerability and get to the basis of her anthropology, namely, human striving for those objects necessary to flourishing. As was already discussed in Chapter 2, Nussbaum concludes her discussion of Aristotle’s account of human action by joining vulnerability to agency in a way that prioritizes the latter: “Neither inert objects nor perfected gods, neither simply pushed around from without or spontaneously self-moving, we all reach out, being incomplete, for things in the world. *That is the way our movements are caused*” (emphasis added).¹³⁹ For Nussbaum, as should by now be obvious, moral action is no

¹³⁶ See Chapter 1, section II.

¹³⁷ FJ, 87-88.

¹³⁸ She describes Aristotle’s basic interests in *De Motu Animalium* as follows: “We see animals moving around – walking, swimming, flying, creeping. And we see ourselves as also moving animals.” She then has Aristotle asking, “Why? What role does motion from place to place play in animal lives in asking questions about embodied action? Is there some general account we can give of these phenomena that will hold good for humans and animals alike?” Nussbaum, *Aristotle’s De Motu Animalium*, xvii, cf. *passim*.

¹³⁹ FG, 281.

less relevant to familial relationships than any other aspect of life, thus her emphasis on choice in the sexual field and her politicization of the family discussed in Chapter 3. According to her neo-Aristotelian viewpoint, the family poses a threat to each of its members as political subjects and social agents or, more concisely, as *zōon politikon*.

However, Nussbaum's employment of the Aristotelian account as an anthropological basis for her capabilities approach generates a significant problem that threatens to undermine it as a suitable account of children's rights, much less a well-articulated neo-Aristotelian political theory. While the term *zōon politikon* does speak to a being who exists relationally, "with and toward" others, as Nussbaum's capability of affiliation specifies,¹⁴⁰ it does so with more nuance than she suggests. Nussbaum expounds on this notion more fully in *Frontiers of Justice*:

Because they are *political* animals, their interests are thoroughly bound up with the interests of others throughout their lives, and their goals are shared goals. Because they are political *animals*, they depend on others asymmetrically during certain phases of their lives, and some remain in a situation of asymmetrical dependency throughout their lives (author's emphasis).¹⁴¹

The problem is that this description is a rather generic and imprecise way of employing the idea. Concern for the manner in which one's human interests are bound up with those of others throughout life is certainly an important issue. So, too, is awareness that human beings are asymmetrically dependent on one another over the course of that life, whether temporarily or permanently. However, it is evident from Nussbaum's work that when she thinks of human beings as political animals she primarily has in mind their co-existence as those whose chief relations to one another are as fellow citizens. The capabilities approach is, after all, specifically articulated for citizens.¹⁴² This is nowhere more starkly evident than when Nussbaum justifies

¹⁴⁰ See Appendix, 7.A.

¹⁴¹ FJ, 88-89.

¹⁴² WHD, 6, 59, 278; FJ, 78, 91, 202.

state intervention into the family on the basis of its concern that citizens' capabilities be respected in an institution that it has constructed.¹⁴³

However, lost in Nussbaum's exploration of the *zōon politikon* is the subtlety with which Aristotle appears to use the concept in order to balance the individual's relationship to both family and state. To explain, one must consider Aristotle's challenge to Plato's infamous proposal to abolish the family. In Book II of the *Politics* Aristotle rejects as counterintuitive Plato's demolition project, articulated through the voice of Socrates in Book V of *The Republic*, to counteract the nepotistic tendencies he perceived to be at the root of civic discord.¹⁴⁴ Plato suggests that the unity of the *polis* could be better promoted if the family was eradicated so that women and children could be held in common by all men.¹⁴⁵ "That all women belong in common to all men, and none shall live privately with any man," was the basic idea as he explained it. "And again, that children are common; parent shall not know his own offspring, nor child his parent."¹⁴⁶ According to this idea, children would be raised by state nurses and have all ties to their parents severed except for civic ones.¹⁴⁷ In doing so, the unity of the state would be ensured, Plato claims, because citizens would "possess nothing private except their bodies; the rest is common." Thus, people would be freed from "those quarrels which set men at odds, through possession of money, or children and kin."¹⁴⁸

Nussbaum downplays the significance of Plato's call for the abolition of the family. According to her reading of *The Republic*: "The city will not exactly eliminate either ownership

¹⁴³ WHD, 261-264, 274-275, 276-278, 279.

¹⁴⁴ Browning explains that Plato believed "the preferential treatment of kin by blood relatives" was a root cause of civic discord. Browning, *Equality*, 332.

¹⁴⁵ Plato did not have in mind *all* men *per se*, but the "more elite men of the city." Browning, *Equality*, 332.

¹⁴⁶ Plato, *The Republic*, V, 457d2-3.

¹⁴⁷ Witte, *Sacrament*, 20.

¹⁴⁸ Plato, *The Republic*, V: 464e1-2. Witte remarks that Plato later abandoned this idea in his *Laws* and "again recommended monogamous marriage and joint parentage of children." Witte, *Sacrament*, 20.

or the family: but it will spread these around in common among members of the city. There is no city-family conflict if, for every young citizen, the whole city simply *is* the family; if any other kind of family tie is unknown to it” (author’s emphasis).¹⁴⁹ Nevertheless, as Cere observes, the alleged nepotism of familial relationships ends up replaced “by an extensive system of public institutions dedicated to child care and rearing.”¹⁵⁰ The result, according to Plato, is that such citizens “will everywhere live in peace with one another” by living in a unity whereby words “such as ‘mine’ and ‘not mine’” apply for all “to the same things in the same way.”¹⁵¹ Life in a city governed according to this manner, he declares, will mean the sharing of both joy and sorrow, for “when anything happens to one of its citizens, for good or ill, such a city will claim the part affected as especially its own.”¹⁵² It is perhaps because Nussbaum has already defined the family in a politicized way – neither natural nor a fundamental group as such – that she feels justified in stating that Plato’s project does not actually abolish familial relations.¹⁵³ However, if one is dealing with the family as it is described in the UDHR, there is no way to view Plato’s experiment as anything but an abolishment of that institution. Intriguingly, although Nussbaum is an Aristotelian and not a Platonist,¹⁵⁴ her politicization of the family is strikingly similar to Plato’s proposal in at least one core aspect: both deny moral weight to the household.¹⁵⁵

¹⁴⁹ FG, 159; cf. 57.

¹⁵⁰ Cere, “Toward an Integrative Account,” 19.

¹⁵¹ Plato, *The Republic*, V, 462c3-4, 465b4.

¹⁵² Plato, *The Republic*, V: 462e1-2.

¹⁵³ Nussbaum’s argument is what Farrow has referred to as a viciously circular one. Having already defined the family according to her own Millian sensibilities, Nussbaum is able to interpret *zōon politikon* in a way that renders the family irrelevant even though it appears patently relevant to Aristotle’s discussion of the concept in Book I of the *Politics*. For Farrow’s explanation of a viciously circular argument, see Douglas Farrow, “Rights and Recognition” in *Divorcing Marriage: Unveiling the Dangers in Canada’s New Social Experiment* ed. by Daniel Cere and Douglas Farrow (Montreal, QC: McGill-Queens University Press, 2004), 99. Taylor also disagrees with Nussbaum and views Plato’s project as the abolition of the family. Taylor, *A Secular Age*, 640.

¹⁵⁴ Nussbaum does find and appreciate a shift in Plato’s later work, specifically *Phaedrus*, away from the rigidity of his early and middle dialogues and toward a more Aristotelian-like acceptance of “the positive role of vulnerable values in the good life.” FG, 87, cf. 201-202, 230-232.

¹⁵⁵ Nussbaum appears quite sympathetic to the Platonic view in this instance for the feminist potential of his position. By denying the moral value of the household, Plato was “free to accord to women a more equal intellectual

Aristotle's position on the family is quite different, as is obvious from the opening book of the *Politics*. Society is "a plurality of separate parts," he claims, in which state, family, and individual each have their own particular role to play.¹⁵⁶ The individual human being is "by nature an animal intended to live in a polis" (i.e., *zōon politikon*).¹⁵⁷ Aristotle explains the social nature of human beings further in *Nicomachean Ethics* by asserting the absurdity of making the blessed (*eudaimonistic*) person a solitary one: "For no one would choose to have all [other] goods and yet be alone, since a human being is a political [animal], tending by nature to live together with others."¹⁵⁸ The social life begins with the family, he explains in the *Politics*, as "[t]he first form of association naturally instituted for the satisfaction of daily recurrent needs is thus the family."¹⁵⁹ Based on that description it is not difficult to recognize this Aristotelian approach as a likely source for Malik's proposed article on the family in the UDHR. Yet Aristotle's affirmation of the family was neither a rejection of the state nor a fear that it would encroach on the household. He did not take the family to be "the particular association which is the most sovereign of all, and includes all the rest, [one which] will pursue [the aim of the good] most, and will thus be directed to the most sovereign of all goods." That association, Aristotle insists, is the state.¹⁶⁰

It is possible to end up with a confused interpretation of how Aristotle views the family at this point. Does he mean for the family to be basic, or the state? And how does the individual fit in this tripartite theory of society? In the *Politics*, Aristotle explains that the family and the state

place" while Aristotle, with his emphasis on the family as a key factor in human flourishing, was more constrained. FG, 370.

¹⁵⁶ Aristotle, *Politics*, I.2, 1252b1-3, 27-35, cf. II.2, 1261a15-31. The phrase "plurality of separate parts" is borrowed from Nussbaum. FG, 353.

¹⁵⁷ Aristotle, *Politics*, I.2, 1253a2.

¹⁵⁸ Aristotle, EN, IX.9, 1169b18-20.

¹⁵⁹ Aristotle, *Politics*, I.2, 1252b12-13.

¹⁶⁰ Aristotle, *Politics*, I.1, 1252a3-6.

are, in fact, fundamental in different ways that both relate to the individual:

We may now proceed to add that [though the individual and the family are prior in the order of time] the polis is prior in the order of nature to the family and the individual. The reason for this is that the whole is necessarily prior [in nature] to the part... All things derive their essential character from their function and their capacity; and it follows that if they are no longer fit to discharge their function, we ought not to say that they are still the same things, but only that, by an ambiguity, they still have the same names.¹⁶¹

Browning helpfully explains that in Aristotle's view of the relationship between the individual, the family and the state, the family is more fundamental than the state when it comes to children's development and the state is more fundamental than the family when it comes to the common good.¹⁶² Aquinas, in his own comment on Aristotle's *Politics*, similarly identifies a separation of functions between social institutions. In response to a question about who may make laws, Aquinas differentiates between the family and the state:

Just as one man is part of a household, so a household is part of a State, and a State is a perfect community, as is said at *Politics* I. And so, just as the good of one man is not the final end, but is subordinated to the common good, so too the good of the whole State, which is a perfect community. Hence he who governs a family can indeed make precepts or statutes of a kind, but these do not have the character of law properly so called.¹⁶³

This division of functions between social institutions is, according to Aristotle, a matter of justice: "Justice [which is his salvation] belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association."¹⁶⁴ The crucial point to be taken here is that the *zōon politikon* is an animal functioning on more than one social level. John Witte goes as far as to suggest that Aristotle viewed human beings to be "marital animals" as much as they are 'political animals'.¹⁶⁵ Whether or not such a claim can be sustained by

¹⁶¹ Aristotle, *Politics*, I.2, 1253a18-24.

¹⁶² Browning, *Equality*, 333.

¹⁶³ Aquinas, *Summa Theologiae*, IaIIæ 91, in *Aquinas: Political Writings*, 82.

¹⁶⁴ Aristotle, *Politics*, I.2, 1253a37-39.

¹⁶⁵ Witte, *Sacrament*, 83.

exegesis, it is at the very least arguable that as *zōon politikon* human beings are perceived by Aristotle as having natural and fundamental ties to both family and state and, furthermore, that he appeared to hold these bonds in a fruitful rather than a futile tension with one another.

The ancient Greek philosopher, therefore, appears to have perceived there to be a complex relationship existing between the family, the state and the individual political animal. In that relationship the family is indispensable vis-à-vis both the rearing of children *and* the maintaining of public order. From his perspective any transferring of the unity of the family to the state would be destructive to the state itself, for a state (i.e., *polis*) only,

...becomes fully a [state], when the association which forms it is large enough [and diversified enough] to be self-sufficing. On the assumption, therefore, that the higher degree of self-sufficiency is the more desirable thing, the lesser degree of unity is more desirable than the greater.”¹⁶⁶

Furthermore, Aristotle did not believe that the natural connection of kinship is something that it would benefit society to legislate away. In fact, he found the inverse to be true. Noting the significance of blood relations and legal connections made through marriage, Aristotle proclaimed that it was much better to be the real cousin to someone “than to be his son after the Platonic fashion.”¹⁶⁷ Brent Waters provides an apt summation that maintains the complexity of the relationship between the family, the state and the individual: “The *polis* was not a state composed of individual citizens, but more akin to a family of families, capturing Aristotle’s adage that the family is the seed or foundation of the *polis*.”¹⁶⁸

V. Nussbaum’s Divorce from the Aristotelian Family

Overlooking the complexities of Aristotle’s theory of human beings as *zōon politikon* by

¹⁶⁶ Aristotle, *Politics*, II.2, 1261b12-15.

¹⁶⁷ Aristotle, *Politics*, II.3, 1262a12-13.

¹⁶⁸ Brent Waters, *The Family in Christian Social and Political Thought* (New York: Oxford University Press, 2007), 4.

dropping the family from the triad of individual, family and state that accompanies it is symptomatic of a larger difficulty with the way Nussbaum's capabilities approach relates to children's rights and the family: her troubling departure from Aristotle's approach to the family. Aristotle views the family to be a vital facet of a complex social order that also includes the individual political subject and the state. Nussbaum's neo-Aristotelian ethics removes the family from that order without really providing a well-defined argument for doing so, at least not one that explains this departure as consistent with her significant reliance on an Aristotelian anthropology. It was already remarked at the end of Chapter 3 that her explicit critique of Rawls in *Women and Human Development* results in an implied critique of the family in human rights instruments and the effective displacement of the family from any discernibly positive contribution to those instruments. However, that shift is only accomplished after first having read the family out of her neo-Aristotelian ethical system. So, while Nussbaum's capabilities approach is deeply influenced by Aristotle's anthropology, she appears to rather uncritically repackage that concept as a dyadic relationship between the individual and the state in which the family as an organic group unit wields no moral force and bears no political weight outside of that wielded and borne by its individual participants. Those introduced to Nussbaum through her sexual ethics and family theory alone could surely be excused for thinking her to be more firmly entrenched in a Platonist worldview than an Aristotelian one.¹⁶⁹

Of course, whether Nussbaum sides with Plato or Aristotle on the issue of the family is really her choice. However, and this is the main concern of this section, she promotes her

¹⁶⁹ Her apparent affinity for Plato's thought experiment is evident in telling instances in both *The Fragility of Goodness* and *Love's Knowledge*. In the former, Nussbaum acknowledges how important the family is to human flourishing for Aristotle, but appears to nevertheless reconcile his rejection of Plato's idea with "how difficult it would have been for a fourth-century Greek to imagine" ways around the problems that the family poses to social life (she is referring particularly to gender equality in this instance). FG, 370. Furthermore, she praises Plato's "courageous" recognition that "the most troublesome and pervasive of our moral conflicts have their roots in the family [as we know it] and could be eliminated by eliminating the family." Nussbaum, *Love's Knowledge*, 133n12.

capabilities approach as a neo-Aristotelian theory of social justice and human development, yet fails to adequately engage his theory of the family, a theory which could hardly be featured more prominently in his discourse on political associations.¹⁷⁰ Should she not provide some explanation for her unique employment of Aristotle's political anthropology, especially given that the family is, for him, both a basic element of society and a key feature to that anthropology?

Nussbaum gives Aristotle's position brief mention in *Upheavals of Thought* when affirming the moral significance of parent-child attachments that are established at infancy. The experience of "mature interdependence" that she sets as the aim of parenting can only be attained by a careful and gradual movement away from the acute dependency of early childhood (i.e., infantile omnipotence). The "watery" love Aristotle perceives to result from Plato's proposal would, in fact, subvert this crucial aim by negating the vital attachments between parent and child that sit at the beginning of such a project.¹⁷¹ In *The Fragility of Goodness*, Nussbaum briefly states support for Aristotle's position by citing a key problem with Plato's idea. It "deprives emotion and sense of the nourishment of close ongoing attachments," including those provided by family relations.¹⁷² In this early work she seems to align herself with Aristotle in rejecting Plato's proposed abolishment of the family. But her critique focuses on intersubjective adult-child ties and specifically not on the necessity of the family as a natural or basic group unit.

¹⁷⁰ As mentioned, the family is part of an individual-family-state triad that Aristotle discusses, featuring significantly in Aristotle, *Politics*, I.2-3 and II.1-5.

¹⁷¹ UT, 388-389, cf. Ch. 4. Nussbaum's concern with Plato's idea here seems to be more about timing than substance. The problem, that is, appears to be one of demanding too much from the infant: "...to demand from the start equal concern, or any other normatively good type of properly ranked concern, is unrealistic; no human mind can achieve this. One has to build on the meanings one understands, or one is left with an equality that is empty of urgency..." UT, 388. Abolishing intimate attachments from the start seems to be what Nussbaum finds problematic about Plato's project because of the potential it holds for undercutting early emotional development. Gaining a civic unity of the sort that begins to collapse lines of difference with others, however, does not seem to be a problem from Nussbaum's perspective. UT, 388-389.

¹⁷² FG, 214. Nussbaum is making the observation that Plato himself seems to realize in *Phaedrus* that the "ascetic plan of the *Republic*... may result in crippling the personality even while it purifies it." FG, 214.

“It is a fundamental point in [Aristotle’s argument against Plato],” she explains, “that both family ties and property must be given to individuals taken as separate units.”¹⁷³ Yet, it is her sharp break with Aristotle’s family theory in *Women and Human Development* that is most striking. It is that work in which she both outlines her Aristotelian inspired capabilities approach *and* devotes a thick chapter to a thoroughgoing critique of a family theory that is implicitly Aristotelian. Nowhere, however, does she openly engage and challenge the philosophical tradition that anchors that theory.¹⁷⁴

More recently, in *Political Emotions*, Nussbaum has alluded to Aristotle’s response to Plato’s proposal. She appears in that work, however, to dilute his point rather than properly address or challenge it. Summarizing Aristotle’s position, Nussbaum posits that,

...to make people love something requires making them see it as ‘their own’, and preferably also as “the only one they have.” This point, of course, is the point we have made all along: the major emotions are “eudaimonistic,” tied to the person’s conception of flourishing and the circle of concern that is involved in any such conception. To make people care, you have to make them see the object of potential care as in some way ‘theirs’ and ‘them’.¹⁷⁵

She takes up the side of Aristotle’s argument that deals with parental care, but leaves aside that which acknowledges the family to be a natural group and social institution constitutive of a distinct and critical level of society. It is a person’s “circle of concern” that remains critically important. Noting a connection between herself, Rawls, and Aristotle, she speaks to the importance of children “loving real, particular parents, not abstract norms of Parenthood [*sic*].”¹⁷⁶ But even real and particular parents are not attached by nature to their children in any

¹⁷³ Martha C. Nussbaum, “Nature, Function, and Capability: Aristotle on Political Distribution,” *United Nations University-WIDER Working Papers* 31 (1987): 19, available at: http://www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-31/ [accessed 10 March 2015].

¹⁷⁴ For reference to the Aristotelian basis of her theory see WHD, 11. The chapter on the family covers pp. 241-297 with only a single reference to her theory as an “Aristotelian/Marxian view of human functioning.” WHD, 244.

¹⁷⁵ PE, 219; cf. Aristotle, *Politics*, II.4, 1262b22-23.

¹⁷⁶ PE, 221. Nussbaum is also noting a mild connection between Rawls and Plato on the family. Rawls’s position is not Plato’s in that he has children loving actual and specific parents. But she finds his position to require critical

morally necessary way. The meaning of family is found, Nussbaum argues, in individual ties that, at their best, result from the exercise of human agency – “the individual capabilities to choose relationships of love and care”¹⁷⁷ – and not from natural and unchosen group belonging.

Despite her reluctance to directly engage Aristotle on the family in any of the previously mentioned works, Nussbaum does critically address his naturalistic family ethic in *Sex and Social Justice*. In fact, in that work she draws on Aristotle himself to cut ties with the conviction that a natural parent-child connection is of critical importance to the philosopher. Nussbaum attempts to support that argument by underlining the following question which, according to *The Problemata*, was posed to Aristotle by an inquisitive student:

Why is it that when a human child is born from one’s semen, one calls it one’s ‘offspring’ (*ekognon*), but when one’s semen falls on the ground and a worm comes out of it (Aristotelians believed in the spontaneous generation of life from waste products) one does not call it one’s ‘offspring’? The answer comes back: It would be very strange to do so because [the worm] seems foreign and unnatural.¹⁷⁸

Nussbaum draws from this anecdote the conclusion that what “really is salient” here is, from Aristotle’s perspective, that the worm is “just as physically contiguous with the semen as the human child is.” The meaning she draws from this interpretation is clear: being a parent of offspring “is a cultural and social matter, a matter of recognition and responsibility not of mere bodily continuity.”¹⁷⁹ As such, families are not inherently places of love and care by nature. They become so by human agency exercised in specific social and historical contexts.

Does this anecdote cast doubt on the validity of Browning’s appeal to Aristotle as support for the theory of kin altruism? Actually, Nussbaum’s attempt to undermine the idea that the

revision if the particularities of parent-child love is to be grounded in principles of justice which reflect the real imperfections that mark human life and that life in social context. PE, 221-222.

¹⁷⁷ WHD, 275.

¹⁷⁸ SSJ, 273.

¹⁷⁹ SSJ, 273.

family is derived in some meaningful way from nature raises more questions than it answers. For instance, why is Nussbaum *the Aristotelian* not situating Aristotle's flawed reproductive biology in the history of scientific inquiry before employing it in a peculiar exercise that only serves to deflect attention from critical aspects of his family theory? Although Aristotle's biology might have been well ahead of his times,¹⁸⁰ the resources for observing nature in his era hardly allowed for any fully formed scientific conclusions about reproduction. John Ferguson is reluctant to criticize the scientific method behind Aristotle's observations on animal reproduction, but he nevertheless recognizes its limitations: "Of course there is error; how should there not be? But even the error is often a false interpretation of a careful observation."¹⁸¹ To this Browning adds that it "is commonly known that Aristotelian biology was crude by today's standards and very bad in its misogynistic depiction of women as intellectually inferior, material, passive, and unspirited."¹⁸² Yet, Nussbaum uncritically employs Aristotelian biology to underscore a constructionist reading of familial relations and to reject core facets of Aristotelian perspectives on the family.

Browning's comment leads to a second question: Why would Nussbaum *the feminist* attempt to draw on Aristotle's observations about semen without pointing to the deep gender bias undergirding his discussion of reproductive biology? In *On the Generation of Animals* Aristotle proposes that semen (i.e., "male secretion") is the active "workman" making something of the passive raw material supplied by the female (i.e., "female secretion"). When the semen succeeds

¹⁸⁰ David Ross comments on "the enormous superiority of [Aristotle's] biology to any that preceded it, and to any that followed it within many centuries." David Ross, *Aristotle* (Florence, KY, USA: Routledge, 1995), 131, available online: ProQuest ebrary [accessed 30 October 2014]. Although Anthony Serafini acknowledges Aristotle's advancement on previous scientific inquiry into sexual reproduction, he nonetheless refers to that account as "bizarre." Anthony Serafini, *The Epic History of Biology* (New York: Plenum, 1993), 35.

¹⁸¹ John Ferguson, *Aristotle* (New York: Twayne Publishers, 1972), 78. Ferguson claims that Aristotle's account of human reproduction "has suffered more interpolation than most." He goes on to remark, however, that it is "refreshing to see [human beings] treated in context as a natural phenomenon." Ferguson, 79.

¹⁸² Browning, *Equality*, 139.

at its creative task, a male is the result; when the semen fails, the result is either a female or the destruction of both male and female secretions.¹⁸³ In short, a female is female because of the basic creative inability of the ovum compared with the raw creative capacity of the sperm.

Christopher Gill summarizes Aristotle's view of reproductive biology as follows: "the female is a 'disabled' male and a departure from the species type." In particular, Aristotle saw the "ideal outcome of reproduction [to be] one in which a male offspring resembles its father perfectly."¹⁸⁴

In her remarks relating to *On the Generation of Animals*, Marguerite Deslauriers provides a more nuanced approach to Aristotle's concept of reproduction than that which Nussbaum offers in *Sex and Social Justice*. She maintains that it is in the difference between the male and female roles in reproduction where "we find Aristotle constructing a sex difference plainly tainted by male bias [...]."¹⁸⁵ Deslauriers wants to carefully note that Aristotle holds to the "essential sameness of the sexes" in substantive animality, but difference in corresponding attributes.¹⁸⁶ Presumably, then, Nussbaum would reject Aristotle's observations on semen in *On the Generation of Animals* as not merely chauvinistic or misogynistic, but also as an outdated and false view of human sexuality which contributes to the notion that females are physically

¹⁸³ Aristotle, *On the Generation of Animals* (South Bend, IN, USA: Infomotions, Inc., 2001), IV.1, p. 74, available online: ProQuest ebrary [accessed 31 October 2014]. Christopher Gill makes note of two significant errors in Aristotle's view of reproduction outlined in *On the Generation of Animals* and summarizes them as follows: that "the male contributes the 'form' or generation and the female the 'matter', and that the female is necessarily deficient in natural heat." Christopher Gill, "Essentialism in Aristotle's Biology," *Critical Quarterly* 53, no. 4 (2011): 18, available at: <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8705.2011.02019.x/epdf> [accessed 13 March 2015].

¹⁸⁴ Gill, 18. See also Marguerite Deslauriers, "Sex and Essence in Aristotle's *Metaphysics* and Biology" in *Feminist Interpretations of Aristotle* ed. by Cynthia A. Freeland (University Park, PA: The Pennsylvania State University Press, 1998), 147.

¹⁸⁵ Deslauriers, 154, cf. 160.

¹⁸⁶ Deslauriers observes a collision between Aristotle's philosophy of sexual difference and his biological observations of it: "Aristotle's philosophical commitment to the essential sameness of the sexes does not prevent his unreflective views on the differences between the sexes from intruding on other philosophical arguments that have implications for that commitment to the essential sameness of the sexes." She does not perceive this more complex view of Aristotle's reproductive biology to save him from a charge of misogyny, but it better situates that charge within the interplay between his philosophy and biology. Deslauriers, 160-161, cf. 147, 153-154.

inferior to males. In other words, it appears duplicitous to draw on Aristotle's reproductive biology in an attempt to support a particular version of feminist social constructionism. Nussbaum appeals to Aristotle's discredited biology to advance her polemic against an integrationist theory of family that can be traced back to Aristotle.

This leaves her readers to question how well such an argument stands when she discredits ethical appeals to nature in *Women and Human Development*. Would it not make her neo-Aristotelian argument appear stronger if she had explained how Aristotle's reference to "nature" in Book I of *Politics* simply means that it was the custom of Athens in his day to think of the family as the foundational element of society? Furthermore, when Nussbaum discusses the sexual mores of ancient Greece in *Cultivating Humanity* she also silences Aristotle's voice. She explains in the chapter titled "The Study of Human Sexuality" that "puritanism and evasiveness have exerted a pernicious influence, eclipsing straightforward matters of scholarship" in the interpretation of Greco-Roman sexuality.¹⁸⁷ As a result of such tactics, Nussbaum finds obscured the fact that sexual desire and arousal, including same-sex desire and arousal, were considered natural and normal in ancient Greco-Roman culture. Using terms that reflect Aristotle's view of reproduction, she goes on to contend that the primary distinction to be made in that place and at that time was between active and passive sexual roles: "Being an active penetrator was thought to be manly and good, and it was usually a matter of moral indifference whether one penetrate a woman or a man."¹⁸⁸ Yet no mention is made of Aristotle's claim in Book I of the *Politics* which, at the very least, should be thought to inflect her constructionist perspective given the significance with which he infuses opposite-sex sexual relations:

...there must necessarily be a union or pairing of those who cannot exist without one another. Male and female must unite for the reproduction of the species – not from

¹⁸⁷ Nussbaum, *Cultivating Humanity*, 233.

¹⁸⁸ Nussbaum, *Cultivating Humanity*, 235.

deliberate intention, but from the natural impulse, which exists in animals generally as it also exists in plants, to leave behind them something of the same nature as themselves.¹⁸⁹

The purpose here is not primarily to challenge Nussbaum's interpretation of sexuality in ancient Greece. The exegetical work and expertise that would require is beyond the scope of this project. However, it seems fair to question her lack of engagement with Aristotle's position on the family in *Women and Human Development* when the tension with her own seems so explicit.

Nussbaum's fullest account of Aristotle's dispute with Plato over the family is found in an essay titled "Nature, Function, and Capability: Aristotle on Political Distribution." In that essay, she connects an early discussion of her capabilities approach to Aristotelian political theory and poses a primitive form of her capabilities question, remarking that the Aristotelian approach asks, "which good human functions [people] are in fact able to perform."¹⁹⁰ She further derives her capabilities approach from Aristotle's thought by noting an affinity for his concern that the goodness of the city is a function of the goodness of its parts.¹⁹¹ This adds up to an individualist interpretation of his argument in Book II of the *Politics*. "It is a fundamental point in the arguments against Plato," she observes, "that both family ties and property must be given to individuals taken as separate units... [flourishing or *eudaimonia*] applies to a whole only if it applies to 'all or most' of the parts, taken as individuals."¹⁹² She presses further by stating that Aristotle's argument in Book II rejects "family communism by pointing to the way in which it will erode attachments that are at the root of [one's flourishing as a human being]."¹⁹³

The point she understands him to be making is one marked by the individuality of agency:

The institutional structure of the city must be such that the morally capable individual has scope to exercise the functions corresponding to the various personal and social

¹⁸⁹ Aristotle, *Politics*, I.2, 1252a26-30.

¹⁹⁰ Nussbaum, "Nature, Function, and Capability," 14.

¹⁹¹ Nussbaum, "Nature, Function, and Capability," 16.

¹⁹² Nussbaum, "Nature, Function, and Capability," 19.

¹⁹³ Nussbaum, "Nature, Function, and Capability," 22.

excellences. This idea is used by Aristotle in a number of concrete and striking ways... It is used, somewhat more oddly [than its application to property ownership], to argue against communal holding of women and in favor of monogamy, on the grounds that the communal system would remove scope for the choice of temperate actions (1236b10-11). (The idea behind this seems to be that if women are not private possessions there will be no room to abstain virtuously from taking another man's possession.) In short, it is used to argue against institutions that block [people with the basic capabilities] from turning those capabilities into action by their choice.¹⁹⁴

In short, Aristotle's argument for the "communal holding of women" is "odd" because it constrains choice. Nussbaum argues that the idea that the family exists by nature belongs to the Greek philosopher's more primitive thought.¹⁹⁵ Women, for Aristotle, possess the key capability of practical reason "in a deficient degree, in such a way that they are by nature incapable of governing their own lives."¹⁹⁶ As a result, women's capabilities are such that they, just like slaves, could never achieve a state of flourishing.¹⁹⁷ This chauvinistic perspective is then further compounded by the family's obscuring of those perceived to be its weaker members, particularly the female ones. Separating Aristotle's philosophical principle from this "unjust and unpleasant" application, Nussbaum draws the following conclusion about his view on the distribution of basic capabilities:

At least a necessary condition of being a recipient of such distribution is that one should already possess by nature a less developed capability to perform the functionings in question, a capability such that, given the appropriate education and external resources, one in time, becomes fully capable of functioning.¹⁹⁸

Recognizable in this quotation is what Nussbaum would later state as an essential aspect of human being: the presence of capabilities that are not necessarily exercisable, but "exert a moral

¹⁹⁴ Nussbaum, "Nature, Function, and Capability," 23.

¹⁹⁵ See Nussbaum, "Nature, Function, and Capability," 19 on Aristotle's primitive thought. She does not mean by the term his earlier thought.

¹⁹⁶ Nussbaum, "Nature, Function, and Capability," 27. Women, at least when compared to men, are for Aristotle "elements naturally ruled." They possess, that is the "rational and ruling" element of the soul "in a form which remains inconclusive." *If* children possess it, they possess it "only in an immature form." Aristotle, *Politics*, I.13, 1260a2-13.

¹⁹⁷ Nussbaum, "Nature, Function, and Capability," 27.

¹⁹⁸ Nussbaum, "Nature, Function, and Capability," 27.

claim that they should be developed.”¹⁹⁹ That which is natural about human being, from her neo-Aristotelian outlook, is one’s individual capabilities and not one’s belonging to a family.

Perhaps less obvious, however, is that Nussbaum has again moved the target when dealing with Aristotle’s dispute with Plato. Rather than addressing the straightforward matter of whether the family could be viewed as a natural institution, she has focussed on the question of whether individuals have a natural capacity for capabilities that ought to be developed. She finds it unjust to think of women or slaves in this way, but also finds a strong grounding for what would develop into her view of childhood capabilities. Children, she explains, exist for Aristotle “in a state of incomplete fulfillment of their natures” but nonetheless possess basic capabilities “as things that in their very nature reach out to and demand fulfillment in an appropriate mode of activity.”²⁰⁰ Missing in this equation, of course, is the family. While the family, the state and the individual are all key players in human flourishing for Aristotle, Nussbaum displaces the family as a foundational feature of society while acknowledging the importance of the specific bonds or attachments to the individuals involved. As a result, she effectively eliminates it as the seedbed of society from her reading of Aristotle’s work, a preliminary move to its exclusion from her broader political philosophy and discourse on human rights.

In so doing, however, Nussbaum does not reject the importance of institutional structures to human flourishing. She finds Aristotle to “[insist] that human flourishing has material and institutional [*sic*] necessary conditions that can be described and also realized.”²⁰¹ Her path to realization makes no mention of the natural family, but it does foreshadow her view of the family as an artifact of state action:

Good functioning, and even good thinking and good desiring, are not independent of the

¹⁹⁹ WHD, 83; cf. CC, 31.

²⁰⁰ Nussbaum, “Nature, Function, and Capability,” 28.

²⁰¹ Nussbaum, “Nature, Function, and Capability,” 33.

resources people have and the institutions in which they live. It is the job of political thought to imagine such conditions. This is Aristotle's view. The barrier between the child's incomplete capability and adult flourishing cannot be crossed without political planning; and it is thus a most urgent task of the philosopher, *qua* worker for the human good, to think about such (to some modern eyes) unphilosophical topics as the number of children one should encourage, the nature of funding for public meals, the purity of a water supply, the distance of a marketplace from the sea.²⁰²

Missing from this summary of the Aristotelian view is the conception of human beings who in their life as *zōon politikon* are immersed in a more complex set of relations than the merely intersubjective ones existing between individuals who are each separately subject to the authority of the state. At minimum, a summary of "Aristotle's view" should also include the natural family as a foundational element of society discussed in the preceding section. It is inaccurate for Nussbaum to suggest that this represents an adequate overview of his position given the exclusion of the family, and the biological web of kin relations the family represents, from his political thought.

The aim of this chapter has been to demonstrate that significant philosophical arguments exist which support the idea that a child's flourishing and the rights meant to support it are not easily separated from his or her biological heritage. Browning's integrative model was introduced as a thick and multidimensional way of representing this perspective. His argument connects contemporary scientific theories of attachment, evolutionary biology and kin altruism with a rich intellectual tradition that reaches back to Aristotle. A weakness of Nussbaum's work is her failure to engage this evolving body of arguments that, like Browning's integrationist view, insist on the importance of familial attachments in human social ecology. That weakness is exacerbated by her seemingly uncritical departure from the nuanced relationship that Aristotle's concept of the *zōon politikon* entails between the state, the family, and the individual.

²⁰² Nussbaum, "Nature, Function, and Capability," 33.

While Nussbaum grounds her ideas in an appeal to Aristotelian anthropology, she offers little substantive engagement with his account of the nature and role of the family. Even in works where she offers some discussion of the family in relation to Aristotle (e.g., *Sex and Social Justice* or “Nature, Function, and Capability”), she evades any direct engagement and obfuscates by teasing constructionist insights out of the cruder elements of his biological theories. She fails, overall, to articulate cogent reasons for rejecting core and enduring aspects of Aristotle’s social anthropology of the family when employing a concept like *zōon politikon* that is so central to it. And that failure appears all the more egregious when compared against Browning’s integrative model and the robust conceptual lines he draws between Aristotle’s family theory and the intellectual tradition underlying contemporary discourse on children’s rights.

Chapter 6: Fragility as Goodness

We were all conceived and born in littleness and weakness. We could do nothing by ourselves. We depended totally on our parents for food and for protection; our greatest need was for their enfolding, protective, and stimulating love. Children cannot live and grow humanly without love. For a human being, love is as vital as food.

~ Jean Vanier, *Becoming Human*, 19.

The purpose of this concluding chapter is to assess how successfully Martha Nussbaum's emphasis on agency serves her stated concern for advancing the rights and dignity of children. The previous two chapters have claimed that children's interests are not easily separated from those of their parents and family in rights discourse. Support was found in the international human rights movement and its repeated affirmation of the family as the natural and fundamental group unit of society (see Chapter 4). Support was also found in integrative models of children's rights like Don Browning's which insist that the biogenetic link between parents and their offspring is a key starting point for policy making. As a result, it was concluded that the project of displacing the family in rights discourse demands more critical attention than Martha Nussbaum has thus far provided (see Chapter 5).

Nussbaum could counter by claiming that her capabilities model is intended to reform children's rights rather than maintain a status quo.¹ After all, she and Rosalind Dixon refer to children's rights as a "frontier of justice" primarily because they deem discourse on it to lack a sufficient emphasis on agency.² In response, they propose the capabilities approach as "a clear account for why children's rights should be recognized as human rights" since even very young

¹ CRCA, 552. See Chapter 3.

² See also CRCA, 593.

children, like all other human beings, are “entitled to respect for [their] full human dignity.”³

The respect Nussbaum has in mind is the recognition of children as emerging agents whose maturing capacity for self-determination ought to be protected and nurtured.

Making this claim does not exempt Nussbaum from the need to address arguments for the place of the family and biological parentage in children’s rights. However, analysis of Nussbaum’s theory should also be attentive to her insistence that respect for the full humanity of children has not been demonstrated unless a more significant priority is placed on the cultivation of their agency. The ensuing discussion argues that the emphasis Nussbaum envisions actually complicates the task of demonstrating that respect because her capabilities approach rests on an impoverished notion of vulnerability.

This chapter is organized as follows. The first section posits that children fit awkwardly into the core idea of Nussbaum’s capabilities approach due to the inescapable and unchosen circumstances of life that are thrust upon each and every human being during the initial stages of existence. The second section argues that Nussbaum’s emphasis on agency colors childhood as a problem to be overcome rather than an inherently vital stage of life that contributes as such to human flourishing. The third section proposes that difficulties reconciling children and childhood with the capabilities approach follow from a conception of vulnerability that does not adequately incorporate the significance of belonging. The chapter concludes by briefly claiming that agency should be more clearly recognized as subject to vulnerability if respect for the full humanity of children is to be demonstrated.

³ CRCA, 552-553.

I. The Passive Aspect of Truly Human Living

Children's needs, particularly at birth and during the earliest stages of development, are not easily reconciled with the emphasis that the capabilities approach places on agency. As stated at the outset of this dissertation, Nussbaum locates the dignity of truly human living in the pursuit of actual opportunities to shape one's life through the exercise of choice.⁴ She maintains that human dignity has not been secured to the individual "unless the person has the opportunity to exercise choice in matters of actual functioning" related, at minimum, to the central human capabilities she lists.⁵ Underscoring this pivotal concern for self-determination, Nussbaum argues that children are entitled to "the maximum scope" for exercising agency commensurate with their intellectual and emotional maturity.⁶ Any life worthy of being called "human" entails a "meaningful chance to determine the future shape of [that] life."⁷

Nussbaum reinforces her stance by combining this positive claim with a negative one. She maintains that a life which consists of "being passively shaped or pushed around by the world" is one that lacks in dignity and, as a result, is less than human.⁸ Nussbaum reiterates this position by drawing on her development work in India to state how important it is for women to have the ability to "control and plan their own lives." She is concerned for women to recognize "that they are not merely passive, not objects to be pushed around by others or mere pawns or servants of others: they can make choices, they can plan their futures."⁹ With Dixon she expresses a similar sentiment with regard to children by referring to them as "striving agents" who should not have "to live with parental choices that in fact compromise their development, in

⁴ WHD, 72. See Introduction, section I.

⁵ Dixon and Nussbaum, "Abortion," 10.

⁶ See CRCA, 559-560.

⁷ Nussbaum and Dixon are speaking to the issue of access to abortion in this case. Dixon and Nussbaum, "Abortion," 8.

⁸ WHD, 72.

⁹ CC, 10.

health, education, and other areas.”¹⁰ A truly human life is one marked by the pursuit of self-determining activity. Passivity is, by definition, not part of such a life.

However, the image of being pushed around by the world is arguably a fitting way to describe various aspects of the human experience, especially during its initial and earliest stages. No one gets to choose the place or time of his or her birth. Yet, one’s prospects for a good life are greatly tied to those factors. Canadian political theorist Ayelet Shachar refers to the idea of a “birthright lottery” in order to capture the arbitrary nature of birth and citizenship. One’s national and social context (inherited as property with birth) “corresponds to strikingly different prospects for the well-being, security, and freedom of individuals.” She argues that “citizenship regimes” can be perceived to not only “generate intricate rules that define the allocation of membership, but also as bearing considerable effects on the distribution of power, wealth, and opportunity.”¹¹ Shachar questions whether political salience should be attached to one’s access to citizenship and its benefits based solely on “ancestral pedigree or the brute and random luck of birthplace.”¹² Central to this issue is the fact that the vast majority of the world’s population “still acquire citizenship as a function of passive birthright and not as a result of active adult consent.”¹³ Shachar’s argument for reassessing citizenship in light of inequalities established by the accident of birth is beyond the scope of this dissertation. However, the argument she makes is relevant. Personal agency plays no part in one of the more critical factors to one’s flourishing, namely, one’s place of birth and the citizenship that is generally bestowed as a result.

¹⁰ CRCA, 559-560, 576.

¹¹ Ayelet Shachar, *The Birthright Lottery: Citizenship and Global Inequality* (Cambridge, MA: Harvard University Press, 2009), 8.

¹² Ayelet Shachar, “Children of a Lesser State” in *Child, Family, and State*, ed. by Stephen Macedo and Iris Marion Young (New York: New York University Press, 2003), 347.

¹³ Shachar, “Children of a Lesser State,” 359.

Something similar can be said of human embodiment. Nussbaum writes in *Sex and Social Justice* that there are realities which come to us as, in some sense, “given in the body”:

The body is not simply a cultural sign – as some culture theorists tend to suggest it is. Questions of life and death, of good and bad nutritional status, of fitness and strength, of good and ill health, are not simply matters of cultural advertising, though of course experiences that are culturally shaped may influence them in many ways.

Interestingly, she pursues this idea further in relation to sexuality:

And in the domain of sexuality the same is also true: There is much that is independent of cultural representation. The fact that individuals begin to feel sexual desire at a certain age, for example, or that sexual desire fluctuates with fatigue or changing health status – all these things appear to be rooted in the body independently of culture, though at every point they interact with culturally shaped factors in highly complex ways.¹⁴

Less “given” for Nussbaum, though, is the meaning of sexual embodiment. She argues that “[b]odily parts are not self-interpreting.” Just as social conditioning determines much about what is and is not the epitome of beauty,¹⁵ so too there is much to be interpreted with regard to our external genitalia:

[Sexual organs] have to some extent a form and a biological function independently of culture’s interpretation of them, but much of their role in people’s lives depends on what parents and other social actors make of them, what uses they ascribe to them, what metaphors they use about them, what roles and experiences they attach to them.

Moreover, she contends that parents are “insistent” in “classify[ing] children on the basis of their external genitalia, forcing a binary choice even when the genitalia themselves do not clearly announce their affiliation.” “Genital organs,” she concludes, “...do not interpret themselves; they do not announce to their bearers what they are and what is salient about them.”¹⁶ This position takes concrete form today in emerging cases where parents, in the name of protecting and promoting allegedly “real” agency, refrain from assigning their child a gender at birth or in

¹⁴ SSJ, 269.

¹⁵ Naomi Wolf, *The Beauty Myth: How Images of Beauty are Used Against Women* (New York: W. Morrow, 1991), 12-14.

¹⁶ SSJ, 270.

early childhood that is conventionally thought to correlate to the physical embodiment the child presents.¹⁷ Jane Ward argues that “*all* children deserve the gender recognition they long for, and they should have access to the tools – medical, therapeutic, aesthetic, political – to achieve this recognition.”¹⁸

Oliver O’Donovan counters that sexual differentiation and its connection to procreation is a natural and given fact of life that may either be welcomed or resented.¹⁹ Conceiving embodiment and its sexual dimensions in explicitly dimorphic terms, O’Donovan asserts that,

When God made [humankind] male and female, to exist alongside each other and for each other, he gave a form that human sexuality should take and a good to which it should aspire. None of us can, or should, regard our difficulties with that form, or with achieving that good, as the norm of what our sexuality is to be. None of us should see our sexuality as a mere *self*-expression, and forget that we can express ourselves sexually only because we participate in this generic form [i.e., male and female] and aspire to this generic good [i.e., procreation]. We do not have to make a sexual form, or posit a sexual good. We have to exist as well as we can within that sexual form, and in relation to that sexual good, which has been given to us because it has been given to humankind.²⁰

Any agency exercised, O’Donovan holds, is exercised within that *given* framework. Nussbaum’s argument about parental control over gender assignment coupled with recent cases of parents seeking to protect agency for their children in this domain testify to the way that traditionally dimorphic²¹ patterns for interpreting the body have been giving way to more open or polymorphic approaches in recent decades.²² Underemphasized, however, is that the body under

¹⁷ Witterick, “Dancing in the Eye of the Storm,” 32-33, 35.

¹⁸ Jane Ward, “Get Your Gender Binary Off My Childhood: Towards a Movement for Children’s Gender Self-Determination” in *Chasing Rainbows: Exploring Gender Fluid Parenting Practices*, ed. by Fiona Joy Green and May Friedman (Bradford, ON: Demeter Press, 2013), 43-44.

¹⁹ O’Donovan, *Begotten*, 16.

²⁰ O’Donovan, *Begotten*, 29-30.

²¹ Christine Gudorf refers to dimorphism as the assumption that “humans [are] ‘naturally’ divided into two sexes, male and female, and that the fact of maleness or femaleness determined individual gender – masculinity or femininity – as a social role.” She further notes that this is especially evident in religious communities and texts. Christine E. Gudorf, “The Erosion of Sexual Dimorphism: Challenges to Religion and Religious Ethics,” *Journal of the American Academy of Religion* 69, no. 4 (2001): 866, available at: <http://jaar.oxfordjournals.org/content/69/4/863.full.pdf+html> [accessed 10 March 2015].

²² See Gudorf, 865, 886-887. Jenell Paris recently offers an update on Gudorf’s thesis. She argues: “While human concepts and systems of understanding people are probably never flawless, they can be in greater or lesser harmony

interpretation has a concrete starting point. It is sexed from birth as either male, female or, in rare cases, as indeterminate.²³ Whether one accepts O'Donovan's position or not, the fact of concrete embodiment does not change. Whatever interpretive licence may be taken with the human body, it is always taken in response to the corporeal reality that originally presents. It is actual embodiment that is either resented or welcomed. In addition, whether the parent "insistently" classifies the child as male or female or commits to provide them with "radical" agency in this area, the child cannot escape that perspectives on their actual body will be imposed by others. No human being has the first word in this matter, only a responsive one.

This leads to a third example of being "pushed around" during the initial stages of life. Children receive an initial perspective or worldview – whether religious, philosophical, or moral in character – that instructs them on how to understand and evaluate the world around them.²⁴ A relatively accessible way to briefly explore this issue is by appeal to religious affiliation and practice.²⁵ Since children lack relational agency at birth, they also do not get to choose whether they are raised in a religious or irreligious atmosphere, what religion their parents might practice and pass on to them, how devout that practice might be, or whether that religion will be a majority or minority tradition where they live. The practice of infant baptism stands as a more

with the pattern of creation. I believe that any of... [r]igidly held sexual dimorphism, openly held sexual dimorphism or sex as spectrum – could fit with a Christian understanding of creation. Each of the views has strengths and weaknesses, and each reflects the reality that God created humans male and female and charged them with being fruitful and multiplying." Jenell Williams Paris, *The End of Sexual Identity: Why Sex is too Important to Define Who We Are* (Downers Grove, IL: InterVarsity Press, 2011), 34.

²³ Gudorf claims that the "sheer numbers of persons" whose chromosomal make-up lands outside the dimorphic range of XX (female) and XY (male) is daunting. She asserts that in 2001 over 5.5 million people suffer from some form of unusual chromosomal pattern, roughly the population of Finland or El Salvador at that time. Gudorf, 874, cf. 874-880. While 5.5 million people is no doubt a large number, it represents less than one percent of the 6 billion people living on earth in 2001. For confirmation of the world population in 2001, see UN Population Fund, *State of World Population 2001* (New York: United Nations, 2001), 1, available at: http://www.unfpa.org/sites/default/files/pub-pdf/swp2001_eng.pdf [accessed 24 February 2015].

²⁴ This notion of worldview is derived from what Rawls refers to as a "comprehensive doctrine." See Rawls, *Restatement*, 14.

²⁵ The importance of religion is emphasized by John Witte who describes it as "an ineradicable condition of human lives and human communities." Witte, *God's Joust, God's Justice*, 68.

specific and formal example of children being bestowed a worldview that they did not choose. The child is initiated into the church without having any religious understanding or having given any consent to the experience.²⁶

It would be very difficult to justify infant baptism under Nussbaum's capabilities theory.²⁷ The practice illustrates her claims that children are hostages to the family and suffer the potentially constricting consequences of parental decision-making.²⁸ Similarly, for Karl Barth – whose theological perspectives remain extremely influential in contemporary Protestant Christianity – infant baptism fuels the concern that children are, through its practice, taken hostage by the church in a way that ultimately wounds both the institution and the child.²⁹ Although there is much more to Barth's baptismal theology than a rejection of infant baptism,³⁰ the ecclesial wound is easily identified with the nationalism of the Nazi-era Germany that was his home. Along with Emil Brunner, Barth rejected this practice in part because he thought it perpetuated the idea that the people of God could be identified by virtue of their nationality or ethnic background.³¹ In rejecting infant baptism during the 1940's, then, Barth was rejecting the idea of a national church in which the Christian life was a matter of inheritance: "What is really

²⁶ According to Barth, no infant has the capacity to responsibly understand the Gospel message, let alone the moral agency to receive, accept and acknowledge it as he finds Scripture to demand. Karl Barth, *Church Dogmatics* IV/4 (*Fragment*): *The Foundation of the Christian Life*, ed. by G.W. Bromiley and T.F. Torrance (New York: T. & T. Clark, 1969), 191 (subsequent references to this work are cited as CD IV/4).

²⁷ The only support would come from her acknowledgement that "parents have at least some legitimate rights" over their children that include, in some way, religious education. WHD, 230-231. Although Nussbaum does not speak out against infant baptism *per se*, her concern is that children have a broad experience with religion rather than a narrow one. Nussbaum, *Not for Profit*, 83.

²⁸ See WHD, 274 and CRCA, 576.

²⁹ Barth argued that the "arbitrary and despotic" practice of infant baptism is "a wound in the body of the Church and a weakness for the baptized." Karl Barth, *The Teaching of the Church Regarding Baptism*, trans. by Ernest A. Payne (London, UK: SCM Press, 1948), 40-41.

³⁰ It should be noted that Barth's convictions on baptism evolved over time and migrated across a number of traditions. See Nico den Bok, "Barth on Baptism: Concerning a Crucial Dimension of Ecclesiology," *Zeitschrift für Dialektische Theologie Supplement Series* 5 (2011): 139ff. His foundational position is stated in Barth, CD IV/4, 41.

³¹ Barth, *Baptism*, 53 and Barth, CD IV/4, 162, 184; cf. Emil Brunner, *Dogmatics: Volume III – Christian Doctrine of Church, Faith and the Consummation*, trans. by Olive Wyon, D.D. (London, UK: Lutterworth Press, 1962), 78, 98.

wanted,” he argued at the time, “[is] for the Church to remain a National Church in the present-day sense of the term: a Church *of* the people instead of a Church *for* the people?”³²

This wound to the church is mirrored and compounded by the weakness Barth saw it to instill in children as baptismal candidates. He observed that in infant baptism the faith of the child is understood to effectively regenerate the individual and ratify their justification before God, but then appears to leave the work of the indwelling Holy Spirit somehow barren until maturity. This runs against the expectations held for the baptism of adults.³³ Furthermore, and related to his growing view of baptism as a subject of ethics, Barth grew dissatisfied with the practice of infant baptism due its impact on the moral agency of the candidate. The “unconscious faith” of the infant lacks “the possibility of its confession and the request for baptism.”³⁴ The weakness of such a baptism, indeed the violent character Barth suspected of it, was obvious to him from the passivity of the infant as an object of the ritual rather than “the free partner of Jesus Christ... freely deciding, freely confessing, declaring on his part his willingness and readiness” to take this step of obedience.³⁵ For Barth, baptism is ultimately about a free and decisive response to the Gospel message, one that children lack the agency to accomplish.

There are, of course, other ways of understanding infant baptism. Karl Rahner, a German Jesuit and a contemporary of Barth, affirms in volume thirteen of his *Theological Investigations* the Barthian stance that baptism marks the beginning of the Christian life on the basis of a grace that God has already bestowed upon the candidate. Unlike Barth, Rahner holds that the baptism of children is meaningful also as a response to the actual circumstances of life that were likewise unknown and un-chosen by the child. Barth's rejection of the practice must therefore be seen, in

³² Barth, *Baptism*, 53.

³³ Barth, *Baptism*, 46.

³⁴ Barth, *Baptism*, 47.

³⁵ Barth, *Baptism*, 54; cf. 40, 47.

part, as a rejection of the situated nature of the child. He wants to provide them instead, when they come to a fuller rationality, with their own “first word” of response to God that is untainted by that which has been spoken by someone else on their behalf. But children born to Christian parents are situated in a context and lineage in which a first word has already been spoken, perhaps generations before their birth. No postponement of baptism until an informed, responsible and individual first word can be uttered by the child can change that history.³⁶

Consequently, regardless of whether a child is born into a religious family or not, their life is a response to pre-given social, religious and embodied realities. They are growing up under a perspective of the world that they did not choose. In the case of infant baptism, an unchosen religious identity is undeniably imposed. But, according to Peter Leithart, we are all nurtured to maturity through communities and relationships in which we are inescapably acted upon before we have a chance to act.³⁷ The worldview into which we are socialized may be embraced or rejected at a later stage. We may, as Rahner suggests, come to hate the view of the world that has been taught and ingrained in us. But that hatred is only and always responsive to the initial circumstances of life.³⁸ This, as Leithart remarks, is not an odd thing. Rather, it fits neatly with what we know about how the world really works.³⁹ That is, it is a common feature of human existence to learn and develop a view of the world and, ultimately, to embrace and make that view our own, to modify our appropriation of it, or to reject it and find some other way to

³⁶ Karl Rahner, *Theological Investigations, Vol. XXIII: Final Writings*, trans. by Joseph Donceel, S.J. and Hugh M. Riley (New York: Crossroad, 1992), 200-201.

³⁷ In Leithart’s words, we are a “thou” before an “I.” Peter J. Leithart, *The Baptized Body* (Moscow, ID: Canon Press, 2007), 121.

³⁸ Rahner, *Theological Investigations, Vol. XXIII*, 200-201.

³⁹ Leithart, 118.

make sense of things. And it is inescapable that parents – through either attentive care or neglect – will shape the spiritual identity of their children one way or another.⁴⁰

A similar argument could be made in relation to language. Children do not choose a language of their own as they develop powers of speech. Rather, language is learned – whether poorly or well – from those living in close contact with the child and communicating with her.⁴¹ And the list of pre-givens goes on: e.g., the endless array of historical, political, economic, cultural, and kinship contexts. In short, no one gets to choose their place of birth. No one selects any aspect of their initial embodiment, much less how their body is sexed or even how clearly it is. And whether one is raised according to a religious tradition, which tradition, or how devoutly is beyond the preference of the young child. These common aspects of life are simply given and can only be received.

John Wall argues a similar point in *Ethics in Light of Childhood* (2010) when he refers to human beings as “historical creatures” who, like all things, “live within time.” Noting how children acutely “demonstrate this historicity of human life,” he states that “[n]o child chooses the inherited languages and mores that already shape the structures of their lives and thinking from birth.”⁴² Wall pursues the point further: “Each human being at birth simply appears to the world, physically and otherwise, as a new gift to that world. But each also, in this very appearing, is vulnerable to that world’s given relations and constructions.”⁴³ Central to Wall’s argument is the idea that each human being is “passively being given meaning” by the world

⁴⁰ See Annette Mahoney and Kenneth I. Pargament, “Does Best Love of the Child Mean Parents Should Facilitate a Love of the Sacred?” in *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*, ed. by Timothy P. Jackson (Grand Rapids, MI: Eerdmans, 2011), 54.

⁴¹ Peter Leithart makes this intriguing claim in his argument for the practice of infant baptism. Leithart, 10-11.

⁴² Wall, *Ethics*, 13.

⁴³ This statement comes in the midst of a discussion on the complicated idea of “giftedness” that Wall draws out from Jacques Derrida and Marcel Mauss. Wall, *Ethics*, 43; cf. 41-44. The complex notion of human giftedness lays beyond the scope of this dissertation.

and, as such, becomes “concretely situated” within it.⁴⁴ Although the overlap between Wall’s argument and the examples given above is not complete,⁴⁵ the common perspective is that human beings are *situated* from the beginning of life in circumstances that they have not chosen. Nussbaum does not deny that passively received aspects of life must be endured as “blows” of fortune.⁴⁶ But she maintains that a well-lived human life, and certainly the best of human living, is marked by the exercise of deliberate and decisive action against those blows and not the passive acceptance of them.

II. Is Childhood a Problem to be Overcome?

The premise that the capabilities approach offers a way to demonstrate respect for the full humanity of children is also difficult to accept because its emphasis on agency casts the dependency of childhood as a problem to be overcome rather than as a stage of life that is itself inherently good. This is especially evident from Nussbaum’s repeated references to “infantile omnipotence” and other similarly narcissistic characteristics of childhood discussed in Chapter 2.⁴⁷ From her perspective, the earliest stages of life are marked by “a primitive and rudimentary emotion of shame” that materializes as the infant realizes he is dependent on others.⁴⁸ Upon discovering the helplessness of his “vulnerable and often powerless” body, the infant resents and refuses the limited animal condition of human embodiment.⁴⁹ This is referred to as “anthropodenial” and it represents the infant’s expectation “to be above the human lot.”

Explaining further, Nussbaum states:

⁴⁴ Wall, *Ethics*, 42.

⁴⁵ Wall stresses that at the same time the child receives her being from the world she “active[ly] gives being” to it. Wall, *Ethics*, 42.

⁴⁶ PE, 120.

⁴⁷ See Chapter 2, section II. E.g., see UT, 181-199; HH, 177-189; PE, 168-174.

⁴⁸ UT, 196.

⁴⁹ PE, 172-173.

Infants cannot imagine a human sort of interdependency, since they are not aware that human life is a life of need and reciprocity and that, through reciprocity, needs will be regularly met. Their helplessness produces an intense anxiety that is not mitigated by trust in the world or its people. The only solution is perfection, and the only way of achieving perfection is making other people one's slaves.

Nussbaum then follows this assertion with a hopeful question: "How could a human being cease to be like this?"⁵⁰

Wall criticizes her for taking such a stance. In an essay on children and human rights, he acknowledges the dilemma discussed in the previous section when observing that Nussbaum grounds rights in the "functional capabilities" thought of as necessary to leading a "truly human life."⁵¹ The problem, as Wall views it, is that these capabilities are generally going to be defined by adults, "indeed by those adults who hold greater social power."⁵² Later, in *Ethics in Light of Childhood*, he briefly revisits Nussbaum's position and concludes that her way of approaching children's rights inherently "works against children." His apprehension is with her tendency "to interpret childhood through the lens of what children *are not yet*, namely, developed adults."⁵³

Drawing a comparison with the plight of women, Wall expounds:

While women, for example, can at least in principle acquire the power to influence how societies define and prioritize their interests, on the whole children are more likely to have their interests defined by others – and the more so the younger the child. Children, then, will tend to be included in interest rights only from the point of view of adults rather than as different others.⁵⁴

Identifying children based on what they are not yet rather than what they are now infers that there is nothing intrinsically good about childhood itself.⁵⁵ The presumed good of childhood is that of developing toward the mature exercise of agency typically defined by adults.

⁵⁰ PE, 173.

⁵¹ Wall, "Human Rights," 532; cf. SSJ, 40-41.

⁵² Wall, "Human Rights," 532.

⁵³ Wall, *Ethics*, 119.

⁵⁴ Wall, *Ethics*, 119-120.

⁵⁵ A similar concern is raised by Noam Peleg, 536.

Colin Macleod offers a fuller critique of Nussbaum's outlook. Like Wall, he acknowledges the dilemma discussed in the first section of this chapter. In his words, "children do not comfortably fit the paradigm of agency that plays an animating role" in the capabilities approach.⁵⁶ Unlike Wall, Macleod does register some value in the general sensitivity of Nussbaum's theory "to human diversity." He maintains that the capabilities approach "seems to provide a way of capturing relevant differences between children and adults." In particular, children face real and systemic difficulties converting opportunities to choose and act (i.e., capabilities) into actual functionings that adults typically do not. A potential benefit of Nussbaum's theory, then, could be its insistence on acknowledging different stages of human life and fashioning a metric of justice appropriate to each one.⁵⁷

However, Macleod finds this potential to be undercut by Nussbaum's prioritizing of agency. In an essay addressing both John Rawls and Nussbaum, he argues that there are intrinsic goods of childhood that remain entirely separable from the development of agency.⁵⁸ "I do not want to deny the crucial importance of moral development," Macleod allows, "but we should be alert to the possibility that there are intrinsic goods of childhood that are developmentally inert."⁵⁹ Those goods are also independent from satisfaction. That is, they need not be pleasant in order to be valuable. Instead, he asserts,

...we should think of the goods as emerging from various forms of creative stimulation of distinctive human faculties. To realize the goods, we engage and activate the physical, emotional, aesthetic, cognitive, and moral faculties of children by exposing them to circumstances in which they can experience and give expression to their faculties and face challenges involved in using these faculties. Thus parents read to children and play

⁵⁶ Macleod, "Primary Goods," 174.

⁵⁷ Macleod, "Primary Goods," 184.

⁵⁸ Macleod, "Primary Goods," 182, 185.

⁵⁹ Macleod, "Primary Goods," 182. Macleod is more directly commenting on Rawls in this case, but the critique is applicable to Nussbaum as well and agency theorists in general.

music for them, incorporate them in cultural traditions and send them out to play with friends.⁶⁰

Macleod is sympathetic to Nussbaum's perspective in this matter. "The idea that childhood goods are rooted in distinctive human faculties has clear affinities with Nussbaum's suggestion that valuable functionings derive from 'truly human' capacities."⁶¹ His critique is not directed at the idea of valuable human functioning itself, but at the presumptive emphasis she places on progressing toward mature agency. "The value of sharing a knock-knock joke with a child is typically simply that the child finds it amusing," he explains, "It's not valuable because it helps pave the way for later appreciation of Woody Allen."⁶² This poses a direct challenge to Nussbaum's view of childhood as a prelude to adulthood.⁶³ Macleod insists that there are good things about childhood as a station of life that are not directly tied to preparation for adulthood or attempts to guarantee that it is pleasant:

Although a necessary part of childhood involves preparation for entry into the adult world, childhood should not be viewed as merely as [*sic*] a transitory phase. We should also be concerned to ensure that children have good lives as children and that they are fairly treated as children, not merely as prospective adults.⁶⁴

This appraisal does not necessarily condemn Nussbaum's position. It simply charges that her emphasis on agency problematizes childhood in a way that overlooks various goods inherent to it. In short, Macleod challenges the notion that a focus on the "choice-sensitivity for adults" which is central to Nussbaum's theory can be reconciled with concerns for the equal-treatment of children.⁶⁵ His position seems to pose a significant test to Nussbaum's claim that the capabilities approach offers a way to more completely respect the humanity of children in discourse on their

⁶⁰ Macleod, "Primary Goods," 187.

⁶¹ Macleod, "Primary Goods," 188.

⁶² Macleod, "Primary Goods," 188.

⁶³ See CC, 26.

⁶⁴ Colin M. Macleod, "Liberal Equality and the Affective Family" in *The Moral and Political Status of Children* (New York: Oxford University Press, 2002), 222.

⁶⁵ Macleod, "Liberal Equality," 226.

rights. Doing so certainly seems difficult for a theory that locates the good of being a child in the prospect of escaping the narcissism and immaturity of childhood.

Martin Marty, Professor Emeritus at the University of Chicago Divinity School, helps sharpen the critique that is evident in both Wall and Macleod. In *The Mystery of the Child* (2007) he claims that the provision of care to children is greatly diminished if the child is viewed “first as a problem faced with a complex of problems.”⁶⁶ Regarding the child “first and fundamentally or even only” as a problem means she is “‘complete’ before us” and the question of “who is this child” has consequently been answered in full. Explaining further, Marty remarks that “[w]ho she is and what she represents can be ‘laid siege to’ by physicians, psychologists, ministers, or coaches, or ‘reduced’ by psychological analysts.”⁶⁷ The complex of problems with which the child is consequently labeled tend to mean that “all the other dimensions of his childhood will also get overlooked and remain underdeveloped.”⁶⁸ According to Marty, it is possible that the child identified *as* a problem or *by* his problems,

...is also good at writing poetry or using Lego blocks, speaking to frogs or going on hikes, but no on notices or cares. Similarly, when the expert labels a child “mentally deficient” or “hyperactive” or “prone to losing” – all of such terms possibly quite accurate in clinical and laboratory senses – she risks obscuring the other elements of the child’s life. Some of these might have provided resources for the child’s life beyond therapy and for freedom from being reduced to “nothing but” the subject of existing treatments. This is also the case when, according to labels, a child “*is* a diabetic” or “*is* autistic” because he “has” diabetes or “suffers” autism.⁶⁹

Marty’s fear is that the child’s whole world “becomes oriented to one conditioning feature of a name or label” and that this label sticks regardless of how well the child navigates life.⁷⁰

⁶⁶ Martin E. Marty, *The Mystery of the Child* (Grand Rapids, MI: Eerdmans, 2007), 1.

⁶⁷ Marty, 18.

⁶⁸ Marty, 26.

⁶⁹ Marty, 26.

⁷⁰ Marty, 26.

On one hand, Nussbaum does not seem open to the Marty's criticism. Her list of central capabilities is diverse and each capability itemized is rather open-ended. For instance, the capability of "play," which is particularly relevant to children,⁷¹ entitles the individual to laughter, play, and recreational activities.⁷² But the range of what one might find amusing, what games one might play, and what activities one might undertake would be difficult to exhaust (as would the possibilities represented by the rest of Nussbaum's list). On the other hand, the capabilities approach narrows so sharply to the issue of agency that it arguably becomes the "one conditioning feature" to which childhood is oriented. Nussbaum's emphasis therefore makes it difficult to justify other humanizing aspects of childhood besides their mostly future potential for effecting deliberate and self-determining choice. And it is that emphasis on the future exercise of agency, linked to an apparent discomfort with present immaturity and passivity, that largely renders childhood a problem to be resolved.

Other perspectives paint a different picture, one that broadens rather than narrows the scope of what it means to recognize humanity in children. Gareth Matthews, for one, envisions children as "partners in inquiry." In contrast to the issues around the development of agency that concern Nussbaum, Matthews proposes that respect for children means recognizing with excitement the "new philosophical perspective" they have to offer. "Parents and teachers are often so impressed with the burdens they bear in having to nurture, instruct, reassure, and inspire their children," he explains, "that they fail to appreciate what children have to offer adults."⁷³ Matthews does not oppose development and its goal of maturity, nor does he reject the idea that the maturation process occurs through a number of stages.⁷⁴ However, he is wary of too

⁷¹ PE, 177-182; Nussbaum, *Not for Profit*, 99-101.

⁷² See Appendix.

⁷³ Garth B. Matthews, *The Philosophy of Childhood* (Cambridge, MA: Harvard University Press, 1994), 14.

⁷⁴ Matthews, 16-17.

forcefully characterizing the early stages of that process by their primitive nature. His view of children as “little philosophers” is meant to challenge the “conventional view of childhood as development through a sequence of roughly age-related stages that aims at maturity.”⁷⁵ As such, Matthews aims to blur distinctions that are important to Nussbaum’s view of children due to the emphasis her capabilities theory places on agency. Childhood, for Matthews, should not primarily be about overcoming obstacles to maturity. When it is, elements of that which children contribute to the enrichment of life are concealed.

Wall (somewhat obviously) also understands childhood in more generous and inclusive terms. He views societies as “webs of otherness” that can include a range of human rights at once within a “full circle of responsibility to each human other.”⁷⁶ Children, he goes on, are born into an already constructed relational circle that is, in turn, reshaped by their appearance. This means that “all selves, child and adult both, are simultaneously owed responsibility *by* others and obliged *to* others to provide them their own singular response.”⁷⁷ As a result, the role of human rights is to “ultimately derive their meaning and purpose from their capacity to expand the diversity and inclusiveness of human relations,” a conception of the discourse that can “at last fully include children.”⁷⁸ But Wall’s reconceptualization of social justice does not include children through a merely derivative notion of their rights. Instead, he seeks to rethink human rights, and ethics as a whole, in light of childhood.⁷⁹ As the clearest representatives of what Wall means by his circle of responsibility (because they come into a circumstance that is shaped for them but then shape it by their presence), children are really models, indeed, catalysts for

⁷⁵ Matthews, 18.

⁷⁶ Wall, “Human Rights,” 537.

⁷⁷ Wall, “Human Rights,” 539.

⁷⁸ Wall, “Human Rights,” 541.

⁷⁹ Wall, “Human Rights,” 542; Wall, *Ethics*, 1-2.

thinking about justice. Human rights need to be “regrounded,” he argues, “not in autonomy, liberty, entitlement, or even agency,” but in the type of inclusive and other-aware circle of responsibility to one another that accounts for “the full diversity of human age.”⁸⁰

Judith Gundry-Volf provides a theological companion to the philosophical and ethical perspectives offered by Matthews and Wall. She relies on the Gospel narratives of the Christian tradition to argue that children share in the life of faith and are capable on their own of receiving spiritual insight.⁸¹ This does not mean that Gundry-Volf’s review of the Gospels glosses over the vulnerability of children. However, neither is childhood viewed as a problem. Rather, as she points out, children are recipients of the reign of God, models for entering it, positive examples of humility, catalysts for social change, and virtual representatives of Christ himself.⁸² Far from representing an obstacle to truly human living, children come across in the biographies of Christ as exemplars of it.

Matthews, Wall and Gundry-Volf propose a significantly more positive perspective on childhood than that which is found in Nussbaum. Along with Macleod and Marty, they serve as models of a broader literature which refuses the idea that childhood is an impediment to be surmounted.⁸³ However, the point could be overstated. Childhood is undoubtedly a stage of growth and development in a variety of areas. And any life altogether devoid of agency is

⁸⁰ Wall, “Human Rights,” 524. For more on the “circle of responsibility” Wall proposes, see Wall, “Human Rights,” 536-541 and Wall, *Ethics*, 31, 127-132.

⁸¹ Judith M. Gundry-Volf, “The Least and the Greatest: Children in the New Testament” in *The Child in Christian Thought*. Grand Rapids, MI: Eerdmans, 2001), 60.

⁸² Gundry-Volf, 37-46.

⁸³ See also Peleg, 536.

arguably a tragic one.⁸⁴ One could even argue that the vocation of childhood is that of learning and, in particular, learning from adults.⁸⁵ Elmer Thiessen states this viewpoint in strong terms:

I want to boldly suggest that much of this talk about children's capabilities and responsibilities and even rights with regard to learning is patently absurd. The young child is not in a position to critically review his or her political values! A young child is not able to think independently about ends, nor is a child able autonomously to affirm and revise these ends. Young children are not in a position to choose who influences or teaches them. They are stuck with 'fate,' if you will, or a 'divine lottery' if you prefer religious language. The learning vocation of the young child is really very much out of his or her control.⁸⁶

Thiessen's statement offers a rhetorically charged affirmation of the claim stated in the first section of this chapter. There is a "plain silliness" to ascribing an agency to childhood that is impossible for them to exercise (e.g., the idea of a young child choosing his or her own primary care-givers).⁸⁷ Childhood *just is* a time of being passively pushed around by the world and, thereby, situated within it. Yet Thiessen's claim is also oddly compatible with Nussbaum's application of capabilities to children. Although she decries the lack of agency in childhood, Nussbaum also lives with it as a fact of life by requiring development toward its mature exercise in adulthood. Thiessen, likewise, maintains that young children have a unique status with regard to learning.⁸⁸

However, both Thiessen and Nussbaum focus too narrowly on development by stressing as a problem to be overcome the child's lack of adult decision-making power.⁸⁹ It would be odd to challenge the existence of power differentials between children and adults. Nevertheless,

⁸⁴ It is not necessarily the absence of *active* and *self-determining* agency that makes it tragic, though. O'Donovan points out the risk that "the self we discover in the world is an agent *before* we discover it, acting on the world already, even in the very act of reflective self-awareness through which we catch sight of it." Oliver O'Donovan, *Self, World, and Time: Ethics as Theology, Vol. 1* (Grand Rapids, MI: Eerdmans, 2005), 14.

⁸⁵ Elmer John Thiessen, "The Vocation of the Child as a Learner" in *The Vocation of the Child*, ed. by Patrick McKinley Brennan (Grand Rapids, MI: Eerdmans, 2008), 381-382.

⁸⁶ Thiessen, 385.

⁸⁷ Thiessen, 387.

⁸⁸ Thiessen, 386.

⁸⁹ Thiessen, 386-387.

Matthews and Gundry-Volf join Wall in cautioning against the danger of defining children in terms of *what they are not yet* because doing so obfuscates *what they are now*. The point Wall wishes to highlight is that regardless of age, to be human is “to occupy a particular historical time and place by forming it anew.”⁹⁰ And children, he insists, are shapers of society by the mere fact of their presence.⁹¹ Wall underscores this assertion with an illustration that, despite its cultural specificity, challenges the idea that childhood is a problem. He describes the impact of an infant born among the Beng people in the Ivory Coast:

She cannot yet speak or feed herself, is utterly dependent on the care of those around her, and, today, has among the highest chances in the world of not surviving her first years. Yet, she is still a contributing member of her society, bringing to it what I am calling her own giftedness for meaning. It is this that makes all human beings as fully human as all others.⁹²

This young child, as young children elsewhere in the world, is helpless. But an utter lack of control over the world does not deprive her of wielding meaning within it. Hauerwas affirms this idea by referring to children as a community’s sign that life is worthwhile.⁹³ He goes on to say that “children are symbols of our hope... which sustains us in our day-to-day existence. Life may be hard, but it can be lived... with zest and interest to the extent that we have confidence to introduce it to others.”⁹⁴ A similar point may be made negatively also. In *The Children of Men* (1993), novelist P.D James imagines a dystopian future in which an unremitting despair settles over the world with the end of human fertility.⁹⁵ Children infuse the world with meaning, not the least of which is the hope that their mere presence inspires if it does not go unnoticed.

⁹⁰ Wall, *Ethics*, 57.

⁹¹ Wall, *Ethics*, 42-43, 57.

⁹² Wall, *Ethics*, 57.

⁹³ Hauerwas, *Community of Character*, 209.

⁹⁴ Hauerwas, *Community of Character*, 209, cf. 191. See also Hannah Arendt, *Between Past and Future* (New York: Penguin Books, 1961), 196.

⁹⁵ P.D. James, *The Children of Men*, (New York: A.A. Knopf, 1993).

The sources reviewed in this section suggest that childhood is neither a problem to be resolved nor an obstacle to truly human living. On the contrary, they support the claim that there are characteristics inherent to childhood that adults should recognize as desirable and choiceworthy. Children are, in a number of ways, models to adults of what really human living looks like. Rahner insists that the openness of childhood – that is, its innate vulnerability – “must be present and active as an effective force at the very roots of our being.”⁹⁶ His purpose is not to promote as a good one’s attempt to remain in the immaturity of biological childhood. But neither does he maintain that childhood is an impediment to our full humanity. It is a “foretaste and a promise” of a maturity that seeks the fuller experience of openness that childhood represents.⁹⁷ By comparison, the capabilities approach struggles to accommodate both the humanity of children and their childishness. As a result, Nussbaum’s claim that her theory offers a way to more fully respect children’s rights as human rights is challenged. Childhood is certainly not devoid of the need for development, but neither does development necessarily mean leaving childhood entirely behind.

III. Vulnerability, Loneliness, and Belonging

The difficulties outlined in the preceding two sections provide a reason to revisit the tension Nussbaum maintains between vulnerability and agency (referred to in Chapter 2 as a “calculus of human flourishing”). In particular, the complications that ensue from attempting to reconcile children and childhood with the priority she places on agency infer that Nussbaum might be working with a somewhat impoverished notion of vulnerability.

⁹⁶ Karl Rahner, *Theological Investigations, Vol. VIII: Further Theology of the Spiritual Life*, trans. by David Bourke (New York: Herder and Herder, 1971), 47.

⁹⁷ Rahner, *Theological Investigations, Vol. VIII*, 47. Timothy Jackson also affirms the significance of childhood without looking past the work of development inherent to it. See his description of the “love of the child” in Jackson, “General Introduction,” 9-10.

Such a critical assessment might appear odd given that Nussbaum was lauded in Chapter 2 of this dissertation for providing a way to think more positively about vulnerability when compared to other theorists. She does so in a fairly general way by broadening the meaning of vulnerability to stress “world-openness” rather than remaining with the more common emphasis on “susceptibility-to-harm.” More specifically, though, Nussbaum’s main employment of “world-openness” conveys that human beings are helpless and, amidst worldly contingencies, lack control over their circumstances. Beneficial as that definition might be, it is apparent from the main idea of her theory that lacking control is not itself a mark of humanity, much less a positive one.⁹⁸ Furthermore, a life without the capacity to even strive for self-determination is not, she contends, a human one.⁹⁹ Anything beautiful about vulnerability is located in the capacity to make something of one’s life despite the uncertainty of successfully doing so. This involves the claim that being capable to “deliberate and choose, to decide actively what is to have value and how much” must count for something in the face of our fragility.¹⁰⁰ Or, as with children, it means at least the presence of “something inherent in the person that exerts a claim that it should be developed.”¹⁰¹ Yet, even with that claim exerted, she describes young children as captives due to their lack of meaningful relational agency.¹⁰²

So, while Nussbaum may be appreciated for articulating a *more* positive view of vulnerability, she sets a limit on how much vulnerability a truly or even basically human life may reasonably endure. From her perspective, there must be some evidence that individual agency is already possible or will in the future become so. Nussbaum really has nothing very positive to

⁹⁸ See section I above.

⁹⁹ FJ, 187. See Chapter 2, section I of this dissertation.

¹⁰⁰ FG, 2.

¹⁰¹ CC, 31.

¹⁰² WHD, 274.

say about vulnerability if it is thought to be entirely detached from or unconditioned by one's capacity for exercising deliberate choice. She makes this abundantly clear in *Political Emotions*: "it is on account of their capacity for activity and striving that human beings are entitled to support for their vulnerability."¹⁰³ For vulnerability to be truly human under her theory it must be subject in some way to the question of what people are able to do and to be. That is, this common human condition must itself be conditioned at every turn by agency.

Interestingly, the experience of loneliness – arguably a core element of human vulnerability – poses a challenge to Nussbaum. In *Becoming Human* (1998), Jean Vanier – founder of the worldwide L'Arche movement that works to cultivate community in a way that includes people with disabilities¹⁰⁴ – initially describes the "wound of loneliness" in a variety of ways: weakness, exclusion, "a painful reality," a "terrible feeling of chaos," "a faint dis-ease, an inner dissatisfaction, a restlessness of heart," and a constant threat.¹⁰⁵ He then brings them together to define it in a way that heavily emphasizes our common frailty:

Loneliness seems to be an essentially human experience. It is not just about being alone. Loneliness is not the same thing as solitude. We can be alone yet happy, because we know that we are part of a family, a community, even the universe itself. Loneliness is a feeling of not being part of anything, of being cut off. It is a feeling of being unworthy, of not being able to cope in the face of a universe that seems to work against us.¹⁰⁶

The concept is described in more clinical terms by Lucy Betts and Anna Bicknell as "a unique and multidimensional phenomenon that represents the extent to which an individual's perceived

¹⁰³ PE, 120.

¹⁰⁴ Vanier founded L'Arche in 1964. He describes it as "a network of small homes and communities where we live together, men and women with intellectual disabilities and those who feel called to share their lives with them." Jean Vanier, *Becoming Human* (Toronto, ON: Anansi Press, 1998), 6. L'Arche celebrated its 50th anniversary in 2014 and currently operates in 35 countries. See "Our History." *L'Arche International*, available at: <http://www.larche.org/discover/larche-since-its-creation/> [accessed March 11, 2015].

¹⁰⁵ Vanier, 6, 7.

¹⁰⁶ Vanier, 33.

social network is either smaller or less satisfying than they desire.”¹⁰⁷ Like Vanier, they agree that loneliness is inherent to the human condition. However, while Betts and Bicknell conclude it to be a transient phenomenon that most individuals will experience “at some time across the life-span,”¹⁰⁸ Vanier finds the potential for loneliness to be a more pervasive feature of life. “Loneliness is part of being human,” he explains, “because there is nothing in existence that can completely fulfill the needs of the human heart.”¹⁰⁹ Vanier came to this realization through his efforts to welcome people with intellectual disabilities into community. He proposes that loneliness is a basic element of the human condition because it “can never actually go away” but “can only be covered over.”¹¹⁰ It therefore appears to have a tragic and inescapable certainty: “Loneliness is a feeling of being guilty. Of what? Of existing? Of being judged? By whom? We do not know. Loneliness is a taste of death.”¹¹¹

Nussbaum likewise recognizes the potential for harm in loneliness. She observes that while it is more easily recognizable in others, we should at least consider the possibility that within ourselves is “some loneliness and harshness about human life that makes us feel small, afraid, and victimized.”¹¹² She also identifies it as one of the “grave consequences that reality offers.”¹¹³ In addition, Nussbaum includes loneliness among other signs of victimization and tragedy like poverty, political oppression, illness, loss, and death.¹¹⁴ She turns to the tragic character of Philoctetes as an example. In the Sophoclean play that bears his name, Philoctetes is

¹⁰⁷ Lucy R. Betts and Anna S.A. Bicknell, “Experiencing Loneliness in Childhood: Consequences for Psychosocial Adjustment, School Adjustment and Academic Performance” in *Psychology of Loneliness*, ed. by Sarah J. Bevinn (New York: Nova, 2011), 2.

¹⁰⁸ Betts and Bicknell, 2-3.

¹⁰⁹ Vanier, 7.

¹¹⁰ Vanier, 7.

¹¹¹ Vanier, 33.

¹¹² Nussbaum, *Liberty of Conscience*, 40.

¹¹³ PE, 178.

¹¹⁴ UT, 365, 408, 415.

abandoned by his army commander on a deserted island after incurring a debilitating injury. After ten years, his fellow soldiers return and can only imagine with sympathy the life he has led, “picturing his loneliness, his pain, his struggle for survival.”¹¹⁵

But the wound of loneliness, like vulnerability as a whole, is conditioned for Nussbaum by agency. As an emotion, it is understood to be a “form of evaluative thought” that requires development.¹¹⁶ Through being alone one may experience the “exhilaration of solitary contemplation, of awe before the silence of nature, of peaceful solitary joy at the air and light that surround them” and also “the gloomy horror that can seize one in the middle of a forest, in whose shadows one finds images of one’s own death.”¹¹⁷ The point, of course, is not to develop a capacity for the horror that can accompany this emotion. That, as Nussbaum asserts, would run contrary to the nature of human beings as the social creatures (*zōon politikon*) discussed in Chapter 5.¹¹⁸ Human life is not meant to be lived alone or under the guise of self-sufficiency.¹¹⁹ In *The Fragility of Goodness*, she describes “the solitary life” as “insufficient for *eudaimonia* because we would not find such a life choiceworthy or sufficient for us. A solitary view of *eudaimonia* is at odds with the choices we make and the beliefs we share.”¹²⁰ In fact, being alone is thought to be so contrary to human nature “that no being identical to us would survive in such a life.”¹²¹

However, Nussbaum, like Vanier, distinguishes between being alone and loneliness. She identifies the capacity for solitude as a key aspect of human development. The child’s budding ability to “‘be alone in the presence of mother,’ occupying itself with its own projects rather than

¹¹⁵ Nussbaum, *Cultivating Humanity*, 86-87.

¹¹⁶ For this discussion see Introduction, section II and Chapter 3, section IV.

¹¹⁷ UT, 149.

¹¹⁸ See Chapter 5, section IV.

¹¹⁹ FG, 344-345.

¹²⁰ FG, 350.

¹²¹ FG, 366.

constantly seeking comfort” is an important accomplishment.¹²² The ability to be alone is also closely linked to sociality: “...since human beings are more fully social [than other animals], they are also more fully capable of being alone.”¹²³ A good human life under the capabilities approach – a life shaped by the development and exercise of active choice – is not one that could at the same time be defined by a sense of loneliness. But solitude is not similarly problematic. It is part of learning to manage one’s social nature. Furthermore, if one takes into account Nussbaum’s principle of treating each person as an end,¹²⁴ the capacity for being alone helps to distinguish each human being from every other one. It is part of counting each one as a singular individual with his or her own goals and ends. Nussbaum therefore brings the wound of loneliness firmly within the scope of her theory by conditioning it in this manner. It becomes subject to her ethical question, reconciled with the core idea of her theory, and measurable by her central human capabilities (particularly those of emotion and affiliation).¹²⁵

That said, Nussbaum seems open to the charge of covering over this injury rather than addressing it.¹²⁶ *Doing*, according to Vanier, is no substitute for *belonging*. As he explains:

An individualism that manifests itself in doing things alone, in being concerned only for one’s own interests and glory, one’s own growth toward autonomy, competence, and power, is the antithesis of belonging. Such an individualism can grow out of anger towards an oppressive belonging, a demand to conform within a too-rigid group. It can come from a desire to become more fully oneself and to develop one’s potential and personal consciousness. It can also come from a need to free oneself from all authority and all law in order to have more power and wealth. It is easy to forget that the sense of belonging is a necessary mediation between an individual and society. It is, above all, necessary to help us in our growth towards maturity and freedom.¹²⁷

¹²² UT, 207-208.

¹²³ UT, 149. Betts and Bicknell add that loneliness is not necessarily dependent on being “socially isolated and lacking in companionship.” It can occur in the presence or absence of social relationships. See Betts and Bicknell, 3.

¹²⁴ See Chapter 1, section I.

¹²⁵ See Appendix.

¹²⁶ Vanier, 7.

¹²⁷ Vanier, 57.

Nussbaum's attention to social cooperation and her respect for state authority suggests that any critical application of Vanier's perspective to her theory must be carefully attempted. Hauerwas, for one, appears guilty of both imprecision and overstatement when he draws on Vanier to criticize the implications that Nussbaum's theory holds for people with disabilities.¹²⁸ Even so, he comes to the important conclusion that belonging is a balm to the wound of loneliness that the cultivation of agency cannot replace. Nussbaum offers justifications for helping people with disabilities by empowering them to make meaningful choices for themselves (i.e., *doing*), but Vanier's vision involves sharing one's life with them (i.e., *belonging*).¹²⁹ In Vanier's words, belonging is the means through which the child "knows she is loved and that she brings a sense of joy to her parents." The child's embodiment, growth, nourishment, language, and security "all come from belonging."¹³⁰ It is also "the place where we can find a certain emotional security... where we learn a lot about ourselves, our fears, our blockages, and our violence, as well as our capacity to give life; it is the place where we grow to appreciate others, to live with them, to share and work together, discovering each one's gifts and weaknesses."¹³¹ Belonging,

¹²⁸ First, Hauerwas expresses concern over Nussbaum's alleged failure to think critically about a liberal project that balances mutual advantage with social cooperation. Hauerwas, "Politics of Gentleness," 85. Yet, *Frontiers of Justice* is a pointed challenge to the traditional (and Rawlsian) liberal vision of free, equal and independent citizens motivated to engage in social cooperation for mutual advantage alone. See, e.g., FJ, 3, 88-89, 156-157, 222-223, 414. Second, Hauerwas claims that Nussbaum's theory is an attempt to "imagine politics without the contingencies of human life." Hauerwas, "Politics of Gentleness," 87. But *The Fragility of Goodness* is concerned precisely with the impact of worldly contingencies on one's prospects for living well. Nussbaum, FG, 2. *Women and Human Development* applies the capabilities approach to the problem of people "beaten down by the currents of chance." WHD, 73. And *Frontiers of Justice*, the work that Hauerwas is analyzing, is itself addressing overlooked subjects of justice, like issues facing people with disabilities, to ensure that their atypical needs are taken into account. FJ, 14-22, *passim*. Finally, Hauerwas claims that Nussbaum's theory is plagued by being "just that – a theory." He punctuates this claim by noting that the "significance in sharing one's life with another person... cannot be found outside the activity itself." Hauerwas, "Politics of Gentleness," 88-89. However, concern for the actual circumstances of life is central to Nussbaum's work. See Nussbaum, "Non-Relative Virtues," 259. Furthermore, as discussed in Chapter 1, her capabilities approach is not only a theory of social justice but also of human development that engages with the lives of real people. See WHD, 15-30 and CC, 1-16; cf. Chapter 1, section I of this dissertation. Elements to Hauerwas's critique of Nussbaum, therefore, appear questionable.

¹²⁹ Hauerwas, "The Politics of Gentleness," 90.

¹³⁰ Vanier, 41.

¹³¹ Vanier, 57.

for Vanier, is another name for family and, therefore, is found to express the “to-and-fro” of life and love that bonds children to their parents and other important caregivers.¹³²

The implied critique of Nussbaum in the work of Vanier and Hauerwas is that she obscures the real issue at stake with the wound of loneliness. It is not about *choosing* to belong, but *belonging* itself. Vanier asserts this in the passage quoted at the beginning of this chapter, repeated once again here in full for emphasis:

We were all conceived and born in littleness and weakness. We could do nothing by ourselves. We depended totally on our parents for food and for protection; our greatest need was for their enfolding, protective, and stimulating love. Children cannot live and grow humanly without that love. For a human being, love is as vital as food.¹³³

Of course, Nussbaum also affirms the worth of love. It is, as she explains in *Political Emotions*,

...a delighted recognition of the other as valuable, special, and fascinating; a drive to understand the point of view of the other; fun and reciprocal play; exchange, and... ‘subtle interplay’; gratitude for affectionate treatment, and guilt at one’s own aggressive wishes or actions; and, finally and centrally, trust and suspension of anxious demands for control.¹³⁴

Put more succinctly, love, for Nussbaum, refers to “intense attachments to things outside the control of our will.”¹³⁵ By this she obviously does not mean that one should passively endure the uncertainties of life. Restating her position on passivity, Nussbaum proclaims that “[h]uman beings are not just passive recipients of fortune’s blows. Instead, they are active beings who pursue aims and who seek lives rich in activity.” Neither does she mean that “fortune’s blows” can always or even often be avoided. There is much that “impinge[s] seriously on the quality” of human life.¹³⁶ Rather, Nussbaum’s idea of love appears to involve acknowledging the basic helplessness of the human condition while at the same time affirming the principle of treating

¹³² Vanier, 43.

¹³³ Vanier, 19.

¹³⁴ PE, 176.

¹³⁵ PE, 15.

¹³⁶ PE, 120.

each person as an end. Alternatively, it involves, at minimum, recognizing relational agency (i.e., the capacity to secure “intense attachments” for oneself) in everyone.

Vanier concedes that some find belonging painful and frustrating for the ways they perceive it to constrain their freedom. Yet he also finds that love in the form of belonging contributes to the goodness of human life. “The beautiful side of belonging is how it calls forth what is most precious in the human heart,” Vanier explains. Belonging is particularly central to the well-being of children:

Belonging is equally beautiful for the child. She knows she is loved and that she brings joy to her parents. Her body, her growth, her nourishment, her language, and her security all come from belonging. It is through this sense of belonging that she begins to discover who she is and who she is called to become.¹³⁷

Such a perspective challenges the idea that being “pushed around by the world is somehow less than human. Vanier also challenges Nussbaum’s Millian perspective on the family when he refers to belonging as “a school of love where we learn to open up to others and to the world around us, where each person, creature, and thing in our world is important and is respected.”¹³⁸

He echoes words written by the third century theologian Lactantius that were quoted in this dissertation’s epigraph:

For God, in denying them wisdom, equipped other animals with better natural defences against attack and danger; human beings he created naked and vulnerable that he might teach them wisdom instead; and gave them, beside all else, this *deep sense of obligation to protect, love, and cherish one another, to proffer and accept assistance against every danger* (emphasis added).¹³⁹

¹³⁷ Vanier, 41.

¹³⁸ Vanier, 41. For a discussion of Nussbaum’s commitment to Mill, see Chapter 3, section III of this dissertation.

¹³⁹ Lactantius, “Divine Institutes, VI.10” in *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*, ed. by Oliver O’Donovan and Joan Lockwood O’Donovan (Grand Rapids, MI: Eerdmans, 1999), 53-54.

Despite the utter lack of relational agency it entails, to be situated at childhood in circumstances of belonging appears from the vantage point of Vanier to be an important companion to the condition of vulnerability.

The relationship between vulnerability and belonging could also be thought of as part of a “fragile ecology” in which children are initially situated.¹⁴⁰ Mary Ann Glendon remarks that to function effectively, families “need to be composed of individuals capable of commitment, and supported by communities of various sorts” which, in turn, “require certain kinds of individuals and families.”¹⁴¹ This ecology is not a fragile one simply because it is at risk of being disturbed or degraded. Rather, it is fragile because it is made up of the types of human beings this dissertation has focussed upon. Taking Nussbaum’s perspective, that ecology is made up of people (including those in the earliest stages of life) who are susceptible to harm and lacking in control. Vanier’s perspective adds a third dimension by portraying human beings as living “a mystery of growth from weakness to weakness” that may nevertheless be marked by “peace and joy if [they] are accepted, listened to, appreciated, and loved.”¹⁴² As a result, it seems obvious that human existence is inescapably embedded in the fragile ecology of uncertain surroundings.

Less obvious, especially to Nussbaum, are benefits that might come from embracing this fragile ecology – with our vulnerable humanity at its core – as the focus of ethical reflection and the making of public policy. Xavier Le Pichon, a world-renowned geophysicist and an active participant in Vanier’s L’Arche movement, argues in favor of “taking [the] seemingly foolish gamble” of placing our weakest members at the center of social and political thought and

¹⁴⁰ This term and its application are derived from Glendon, *Rights Talk*, 110, 124, cf. 138-139.

¹⁴¹ Glendon, *Rights Talk*, 138.

¹⁴² Vanier, 39.

practice.¹⁴³ On the one hand, this approach grants a place in community to those – like children and people with disabilities – who are largely defined by their lack of utility.¹⁴⁴ But the payoff runs both ways. Le Pichon maintains that the political decision to welcome the suffering, helpless, and weak fosters catalytic and constructive developments for the society that does so. The moment we welcome “anyone who is marked by their difficulties in life, someone who may no longer be [thought of as] ‘productive’, a transformation is operative in both the one who welcomes and the one who is welcomed.”¹⁴⁵ “[T]he humanization of society,” Le Pichon reasons, “comes through the way in which it welcomes its most wounded members. It is, in fact, the response society brings to such a challenge that makes it more, or less, human/humane.”¹⁴⁶ His argument is that our humanity is more fully addressed in social and political thought and public policy when vulnerability is a core concern.

This way of thinking poses a distinct challenge to Nussbaum’s version of the capabilities approach. It implies that her theory makes it extremely difficult for discourse on children’s rights to account for “the [seemingly] obvious fact” that a child’s need for belonging ought to outweigh any priority placed on agency, especially when that priority is defined according to an adult-centric notion of maturity.¹⁴⁷ The enduring problem, therefore, is that the premium Nussbaum places on agency seems, at best, to mask the wound of loneliness. But doing so leaves the injury untreated and, according to Le Pichon, deprives us of the intellectual and social

¹⁴³ Xavier Le Pichon, “Ecce Homo: To Welcome Suffering is the Sign of Our Humanity” in *Spiritual Information: 100 Perspectives on Science and Religion*, ed. by Charles L. Harper (Philadelphia, PA: Templeton Foundation Press, 2005), 458, 462-463.

¹⁴⁴ Le Pichon, 458.

¹⁴⁵ Le Pichon, 459. A similar point is made by Wall in *Ethics*, 43.

¹⁴⁶ Le Pichon, 460, cf. 459-459.

¹⁴⁷ This is a gloss of Glendon’s concerns about moral ecology. It is stated in her work as follows: “But our individual rights-laden public language makes it surprisingly difficult to take account of the obvious fact that the public has a much greater interest in the conditions under which children are being raised than in the ways that adults generally choose to arrange their lives.” Glendon, *Rights Talk*, 125.

resources needed for building a more humane society. It also conceals that which is perhaps the real beauty of vulnerability, namely, that the fragility of human existence elicits a call for children to belong when they most desperately need to, but are unable to choose to do so for themselves.¹⁴⁸

IV. Conclusion: Balancing Agency and Vulnerability in a More Human Way

This dissertation argues that the condition of vulnerability should factor more prominently into discourse on children's rights than concern for the development and exercise of individual agency. But it does not attempt to undermine the significance of agency. Insofar as discourse on children's rights is moral in nature, agency is vital to it.¹⁴⁹ O'Donovan, hardly an apologist for Nussbaum's theory, nevertheless champions the importance of agency in his recent book *Self, World, and Time* (2013). Moreover, he does so in a way that ostensibly echoes Nussbaum:

We are in some sense debtors to the business of living, but that means there is a difference between *being alive* and *living*, between the life we live without trying to do so and the life we must *reach out* to live... Human beings cannot live as vegetables, which grow, leaf, and flower simply by virtue of being alive. They must appropriate life, make it their own. We make a difference between "life," as such, and "a life" which has to be lived for ourselves (author's emphasis).¹⁵⁰

¹⁴⁸ This could be emphasized in stronger terms by leaning on what Hannah Arendt refers to as the "fact of natality." Arendt means by this that all human beings "come into the world by being born and that this world is constantly renewed through birth." See Arendt, *Past and Future*, 196, cf. 174. A discussion involving Arendt with what has already been said about belonging (Vanier), ecology (Glendon), and weakness (Le Pichon) might be employed to support to the following claim: the real beauty of vulnerability is that when children desperately needed to belong, but could not choose to, they did already. Supporting that claim, however, would require more argumentation than space allows. The point would not be to argue for the moral superiority of biological connections, but, as was discussed in Chapter 5, section III, that biological connections are an important starting point for children's rights.

¹⁴⁹ Aquinas makes a distinction between human acts (*actus homini*) and acts of human beings (*actus hominis*) that helps to articulate why moral discourse and agency are closely linked. Actions that are simply characteristic of human beings (falling when dropped, hunger or thirst, breathing, aging) are not human acts in the moral sense. They are acts of human beings that could be attributed to any other animal. Human acts, in the sense that Aquinas uses the term, are moral acts. That is, they count as human actions because they are voluntary, knowingly and willingly performed or engaged in by the rational human agent. St. Thomas Aquinas, *Summa Theologiae*, Vol. 17, trans. by Thomas Gilby, O.P. (New York: Blackfriars/McGraw Hill, 1970), IaIIæ.6.1.

¹⁵⁰ O'Donovan, *Self*, 5.

Action, as he perceives it, is “the first and elementary horizon of human existence.”¹⁵¹ In addition, O’Donovan shares with Nussbaum the conviction that “practical thought” and sociality are key aspects of human being.¹⁵² Wall, while critical of how Nussbaum’s emphasis on agency plays out for children, also claims that it must prominently factor into ethical reflection.¹⁵³ Similarly, this dissertation takes seriously how imperative moral agency is to children’s rights.

However, paying close attention to the concept of agency shows it to be subject to vulnerability in a number of ways. For instance, while Nussbaum’s repeated allusions to infancy highlight “reaching out” and striving as key characteristic of even the earliest stages of life,¹⁵⁴ she does not explore the passive manner with which human agency begins. O’Donovan explains that human beings are paradoxically “agents before we know it,” acting before we are conscious of our acting.¹⁵⁵ Human beings lack agency in the onset of their own agency. Instead, we awaken to it through no action of our own. It is thrust upon us.¹⁵⁶ This suggests that there is a foundational element to agency that is marked by a certain dependency or receptivity.

Agency is also unstable in ways that make it difficult to universalize. Legal theorist Martha Fineman provides the basis for a comparison between dependency and agency through her work on vulnerability. After arguing for “the assertion of collective or public responsibility for dependency” in *The Autonomy Myth* (2004),¹⁵⁷ she has recently claimed that vulnerability is

¹⁵¹ O’Donovan, *Self*, 3.

¹⁵² See O’Donovan, *Self*, 3, 44.

¹⁵³ Wall, *Ethics*, 38-39.

¹⁵⁴ See Introduction, section I.

¹⁵⁵ O’Donovan, *Self*, 14. The self-reflection of practical reasoning, O’Donovan asserts, “is already active” so that “the self we discover in the world is an agent *before* we discover it, acting on the world already, even in the very act of reflective self-awareness through which we catch sight of it.” O’Donovan, *Self*, 14.

¹⁵⁶ O’Donovan, *Self*, 14. He uses the metaphor of waking to flesh this out. “Waking is thrust upon us. We do not consider it, attempt it and then perhaps achieve it; we are claimed for it, seized by it. That is why it is not just one metaphor among many for moral experience, but stands guard over the birth of a renewed more responsibility.” O’Donovan, *Self*, 9.

¹⁵⁷ Fineman, *Autonomy Myth*, xv.

actually “a more encompassing concept and, for that reason, analyses centered around [it] are more politically potent.”¹⁵⁸ Although vulnerability and dependency are similar and derivative concepts for Fineman, vulnerability “expands upon and complements” dependency as she previously conceptualized it.¹⁵⁹ Dependency, she claims, “is episodic and shifts in degree on an individual level for most of us.” Vulnerability, on the other hand, “is ever-present and enduring” as an aspect of human embodiment and “suggests a critique of dominant modes of thinking about inequality that is at once complementary to but more powerful than dependency.”¹⁶⁰

Fineman’s assessment of dependency may also be applied to agency. The core idea behind Nussbaum’s theory – that of the human being who defines and determines his or her own life rather than being passively shaped by the world – is, likewise, episodic, shifting in degree, and entirely less encompassing when compared to vulnerability. For example, even Nussbaum’s most ideal agents – mature adults – lack the capacity for active and deliberate choice during episodes of life when they are dependent on others to make decisions for them and to act on their behalf due to the onset, for example, of illness, injury, incarceration or some other constraining factor. Moreover, in the course of a single day most adults move from one domain in which they might exercise significant agency over their own person and that of others (e.g., home life, operating a business, coaching, teaching, etc.) to another in which they most likely exercise less agency (e.g., being a group member, an employee, a pupil or apprentice of some sort, etc.).¹⁶¹

¹⁵⁸ Fineman, “Vulnerable Subject,” 11.

¹⁵⁹ Fineman, “Vulnerable Subject,” 9.

¹⁶⁰ Fineman, “Vulnerable Subject,” 11. Her point, importantly, is not that vulnerability should “supplant dependency.” Fineman recognizes that in each concept “different and important things” are revealed. Rather, she argues that “vulnerability analysis may ultimately prove more theoretically powerful” than analysis based on dependency because it “captures this present potential for each of us to become dependent based on our persistent susceptibility to misfortune and catastrophe.” Fineman, “Vulnerable Subject,” 11, 12.

¹⁶¹ Assuming that the average post-dissertation day includes sleep, there is a significant segment of it in which deliberate actions are lacking entirely.

Agency also shifts in degree as one moves through various stages of life. Nussbaum's frequent portrayal of children as developing toward a mature manifestation of agency at adulthood demonstrates gradations to it.¹⁶² Hinduism more formally acknowledges there to be distinct periods of agency in life by delineating four twenty-five year *āśramas* or "stages of life" with different notions of agency attached to each.¹⁶³ Additionally, the breadth of childhood itself is such that one could not describe the agency of an average toddler and the agency of an average teenager without appreciably distinguishing between the two.¹⁶⁴ Even the variances between what counts as deliberate activity for a newborn and a toddler are stark. It also seems reasonable to say that one's capacity for agency is greatly dependent upon cognitive ability, living environment, access to education, individual talents or skills, and a multitude of other factors. In short, agency, like dependency, appears to be problematic if applied to human beings in any stable or uniform way. Additionally, taking children into account demonstrates, according to Wall, "that the notion of human agency can be paradoxical and even self-defeating."¹⁶⁵

Finally, agency is also shaped by human finitude. Bryan Turner claims that vulnerability includes within its scope "the idea that human beings of necessity have an organic propensity to disease and sickness, that death and dying are inescapable, and that aging bodies are subject to impairment and disability." As a result, he acknowledges that embodied human life is defined by "its finite possibilities."¹⁶⁶ Brent Waters concurs, remarking that "finitude and mortality" are

¹⁶² CC, 26.

¹⁶³ In ascending order, the four *āśramas* of Hinduism include: 1) the "celibate student" who must "[l]earn the principles of morality and vocation"; 2) the "householder" whose agencies revolve around "earn[ing] wealth and enjoy[ing] sensual pleasures"; 3) the "hermit" who is to "lead a virtuous and pious life"; and, 4) the "renunciant" who "seek[s] liberation" (i.e. *mokṣa*). Arvind Sharma, "Hinduism" in *Our Religions*, ed. by Arvind Sharma (San Francisco, CA: HarperCollins, 1995), 24. Liberation or *mokṣa* refers more broadly to "freedom from finitude" and more narrowly to "freedom from rebirth." Sharma offers a simpler description of the term as the capacity "to walk away from the snares of the world." Sharma, 22.

¹⁶⁴ See Caseldine-Bracht, 228.

¹⁶⁵ Wall, *Ethics*, 39.

¹⁶⁶ Turner, 29.

“definitive features of what it means to be human.”¹⁶⁷ There is really nothing too controversial about acknowledging morbidity, senescence (i.e., aging), and mortality as aspects of the basic human condition. Debate arises in articulating what finitude means. For Turner, limits imposed by sickness, aging and death represent an “inescapably tragic” circumstance.¹⁶⁸ For Nussbaum, human life is not tragic simply because certain limits exist, but it turns tragic if one is somehow kept from pushing against them.¹⁶⁹ In other words, the tragic character of finitude corresponds with the degree to which it closes off the question of what one can do or be.

Waters, bringing an entirely different perspective, maintains that there is nothing at all tragic to be found “in the fact that humans grow old and die” because these are “definitive features of what it means to be human.”¹⁷⁰ Moreover, it is as “embodied, and therefore, necessarily finite and mortal, creatures that human beings” flourish.¹⁷¹ On one hand, Waters’ assertion is largely comparable to that of both Turner and Nussbaum. All imply that sickness, aging, and death have an impact on agency. Waters, however, emphasizes the constraints this places on human action. Finitude means we are “subject to bodily limitations” and, therefore, “cannot do everything [we] want.”¹⁷² Hauerwas agrees and expands on the meaning of finitude in his critique of Nussbaum’s theory:

Long story short: we don't get to make our lives up. We get to receive our lives as gifts. The story that says we should have no story except the story we chose when we had no story is a lie. To be human is to learn that we don't get to make up our lives because we're creatures... Much of modern political theory and practice is about creating a society where we do not have to acknowledge that our lives are gifts we receive from one another.¹⁷³

¹⁶⁷ Brent Waters, *This Mortal Flesh* (Grand Rapids, MI: Brazos Press, 2009), 69.

¹⁶⁸ Turner, 29.

¹⁶⁹ See WHD, 72-73. See also Chapter 2, section III of this dissertation.

¹⁷⁰ Waters, *This Mortal Flesh*, 69.

¹⁷¹ Waters is referring directly to fulfillment of the theological imperatives to love God and neighbor here. But the point is applicable to ethics more generally construed as well. Waters, *This Mortal Flesh*, 70.

¹⁷² Waters, *This Mortal Flesh*, 157.

¹⁷³ Hauerwas, “The Politics of Gentleness,” 92-93.

Hauerwas infers that the recognition of our own finitude requires human beings, in at least some initial and basic sense, to accept their circumstances in life. Put another way, finitude, as an aspect of vulnerability, requires human beings to accept the premise that their agency is situated.

Charles Taylor, developing his analysis of the situated nature of freedom, claims that it means,

...recovering a conception of free activity which sees it as a response called for by a situation which is ours in virtue of our condition as natural and social beings, or in virtue of some inescapable vocation or purpose. What is common to all the varied notions of situated freedom is that they see free activity as grounded in the *acceptance* of our defining situation (author's emphasis).¹⁷⁴

Accepting and responding to our own defining situation – that which “history and others” have molded for us¹⁷⁵ – appears therefore to be a necessary precondition to any free activity we undertake. Human action is, by definition, limited action. From that perspective, finitude is not tragic. Rather, it is the starting point for whatever genuine agency one will exercise.¹⁷⁶

Accordingly, it is important to consider whether there is a juncture at which pushing too heavily against one's finitude translates into pushing too heavily against one's humanity. Nussbaum's largely negative view of childhood risks moving her capabilities theory in that direction.

What, then, does this brief reflection on the vulnerability of agency contribute to the main argument presented in this dissertation? If agency is both an important aspect of children's rights *and* an untrustworthy conceptual basis for dialogue on it, then it is reasonable to contend that it should feature prominently in that dialogue without being the most central focus of it. More specifically, the fragility of agency further confirms that it should not feature more centrally in children's rights discourse than vulnerability. And this assertion fits well with the foregoing analysis of Nussbaum's theory that has been the subject of Chapters 4-6. Chapter 4

¹⁷⁴ Charles Taylor, *Hegel and Modern Society* (New York: Cambridge University Press, 1979), 159-160.

¹⁷⁵ Wall, *Ethics*, 57, cf. 36.

¹⁷⁶ See Rahner, *Theological Investigations*, Vol. XXIII, 200-201.

demonstrated that the priority Nussbaum's capabilities theory places on agency runs counter to the international human rights movement's persistent promotion of the family and organic ties between parents and their children. Chapter 5 maintained that Nussbaum has provided little to counter evidence and arguments that point to the biogenetic ties between parents and their offspring as a critical consideration in discourse on children's rights. And finally, as discussed in this present chapter, the emphasis Nussbaum places on agency (outlined in Chapters 1-3) seems to introduce difficulties into the task of treating children's rights as human rights by viewing both their childishness and needfulness (for belonging) as problems to be overcome rather than basic signs of their humanity.

Does the emphasis Nussbaum places on agency serve children well? Does it advance the task of getting justice right for them? This dissertation claims that placing the cultivation of agency at the center of discourse on children's rights ultimately undercuts attempts to respect their full humanity. The aim is not to deny the importance of cultivating agency in children. But prioritizing it over vulnerability is self-defeating. Human agency, like anything human, is fragile. Consequently, Nussbaum's theory advocates for the prioritization of a human characteristic that is only beginning to develop at childhood over one that is, in many ways, fully developed from the start. One is "world-open" in a sense that incorporates harm, helplessness, and the need for belonging in a relatively stable way throughout the entire course of life. In fact, Nussbaum's frequent use of children to describe the human condition indicates that she likely views childhood as an extremely potent example of the basic human condition. In short, treating children's rights as human rights means prioritizing vulnerability over agency in a manner that still carefully recognizes the significance of the latter.

This critique of Nussbaum's capabilities approach is obviously not an exhaustive investigation of the relationship between capabilities and children's rights. For instance, it has not fully explored the moral relevance of biological parentage. Hannah Arendt's essay "A Crisis in Education" offers an interesting starting point for that question given the connection she observes between the "fact of natality" and education,¹⁷⁷ a connection the capabilities approach and theories like it appear to ignore or sever.¹⁷⁸ Additionally, Nussbaum's conceptualization of agency could also be more directly examined against other notions of it. Oliver O'Donovan, for example, claims that the dominant contemporary notion of freedom understood in individualistic terms as "the power to act" could be evaluated against the idea that freedom means "the realization of individual powers within social forms."¹⁷⁹ This alternative conception of agency would seem to fit with the findings of this dissertation. But, given the limits of this project, Nussbaum's capabilities theory has been primarily investigated in light of vulnerability rather than other more general debates about deliberate human action, let alone a comparative analysis of agency in children. Finally, while Nussbaum's capabilities approach does work with the idea that a clear tension exists between agency and vulnerability,¹⁸⁰ the veracity of that tension may be questioned. If agency as a concept is marked by passivity, instability, and finitude, it seems to be more conceptually subjugated to vulnerability than its binary.¹⁸¹ How, then, should

¹⁷⁷ Arendt connects the "fact of natality" directly to education. Arendt, *Past and Future*, 196, cf. 174.

¹⁷⁸ Nussbaum, as was noted, acknowledges that fact that all human beings are born of human parents, but denies any moral force to that relationship. See Nussbaum, *Cultivating Humanity*, 122; CC, 24; WHD, 251, 275. See also Chapter 3, section V and Chapter 5, section I in this dissertation.

¹⁷⁹ O'Donovan describes freedom as "the power to act" as "that ownership of one's behavior that distinguishes the intelligent agent from creatures of instinct." This seems a fair description of the notion of agency with which Nussbaum is working in her capabilities approach. Oliver O'Donovan, *The Ways of Judgment* (Grand Rapids, MI: Eerdmans, 2005), 67-68; cf. WHD, 72.

¹⁸⁰ See Chapter 2. The same charge could be levelled at Wall. See Wall, *Ethics*, 37-41, cf. 18-20, 23-24.

¹⁸¹ When some contemporary vulnerability theorists refer to the "special vulnerability of children" they seem to refer more strictly to children's dependency than their vulnerability. See Amy Mullin, "Children, Vulnerability, and Emotional Harm" in *Vulnerability: New Essays in Ethics and Feminist Philosophy*, ed. by Catriona Mackenzie, Wendy Rogers, and Susan Dodds (New York: Oxford University Press, 2013), 269 and Mianna Lotz, "Parental Values and Children's Vulnerability" in *Vulnerability: New Essays in Ethics and Feminist Philosophy*, ed. by

vulnerability and agency be related to each other in discourse on human rights? How might clarifying that issue impact children's rights?

In addition to critical questions that require further examination, the argument posed in this dissertation invites a more constructive turn. For instance, what would it mean for a conception of vulnerability-as-world-openness to be the center of children's rights discourse? At the beginning of this chapter it was observed that Nussbaum might find a central focus on vulnerability to be tantamount to maintaining the status quo. The growing application of the capabilities approach to children's rights, however, suggests that a case for vulnerability should be made anew. So, too, does the emphasis that the academic field of children and childhood studies places on agency. If vulnerability should truly be the focus of discourse on children's rights, then that argument must be articulated in ways which address the seemingly inordinate attention that agency is receiving in literature on their rights today.

A more constructive argument should include reflection on the relationship between the family and the state in rights discourse. Nussbaum's largely statist position on that relationship was discussed in Chapter 3.¹⁸² However, the persistent inclusion of the family in international human rights regimes and the intellectual history of supporting integrative models of children's rights (discussed in Chapters 4 and 5 respectively) together indicate that one should think about the family-state relationship in a way that substantially includes the family. Perhaps we should recover, or at least revisit, a perspective on that relationship in which the state's role is to assist the family when assistance is needed without doing so in a way that disrupts the sociality of the

Catriona Mackenzie, Wendy Rogers, and Susan Dodds (New York: Oxford University Press, 2013), 243-244. Yet, as Fineman argues, vulnerability and dependency do not mean the same thing. Fineman, "Vulnerable Subject," 11.

¹⁸² See also WHD, 261-264.

group.¹⁸³ That way of thinking about the relationship between the family and the state can reasonably be deduced from documents like the UHDR and CRC.¹⁸⁴ It is not, however, a conclusion one would draw from Nussbaum's capabilities approach.

Additionally, a more constructive argument for the centrality of vulnerability would need to offer a thoughtful reply to the moral anthropology of *striving* for agency that supports Nussbaum's capabilities framework. Hauerwas and Taylor already offer interesting paths forward in their explorations of the situated nature of freedom and the giftedness of the human condition. Rahner advances a similar perspective that is tied more directly to childhood:

When we are born, we may accept or we may hate our existence, but we cannot get rid of it. Human freedom is always and unquestionably a reaction to something that we have not chosen; it is not merely creative in an empty space.¹⁸⁵

Recovering the condition of vulnerability as most central to discourse on children's rights, and doing so in a way that does not lose sight of agency, would mean taking seriously the idea that human action is about responding to the fragile and precarious circumstances of life and not, in the first place, about striving to shape one's life in spite of them.

This dissertation has attempted to lay a few foundations for a constructive vulnerability argument of that kind. It has done so in a manner that reflects the question Eleanor Roosevelt

¹⁸³ This definition of the "principle of subsidiarity" is based on one provided by Russell Hittinger, "The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation" in *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together*, ed. by Margaret S. Archer and Pierpaolo Donati (Vatican City: The Pontifical Academy of Social Sciences, 2008), 109, available at: <http://www.pass.va/content/dam/scienzesociali/pdf/acta14/acta14-hittinger.pdf> [accessed 10 March 2015].

Subsidiarity is concerned that duties of governance be assigned to the level of society appropriate to them. It assumes the persistence of something like legal pluralism. It "presupposes that there are plural authorities and agents having their 'proper' (not necessarily, lowest) duties and rights with regard to the common good." Hittinger, 109-110. This principle is described by Browning as "a view of the family-state relation... [that] has its own natural law backing," both inspired by Aristotle and made explicit through the tradition of Catholic social teaching that began with Pope Leo XIII's encyclical *Rerum Novarum* in 1891. Browning, *Equality*, 106.

¹⁸⁴ Browning claims that the principle of subsidiarity is "doubtless what Malik and the UDHR mean when they referred to the family as the natural and fundamental 'group unit' that is 'entitled to protection by both society and the State'." Browning, *Equality*, 338-339.

¹⁸⁵ Rahner, *Theological Investigations*, Vol. XXIII, 200-201.

posed at the tenth anniversary of the UDHR's adoption: "Where, after all, do universal human rights begin?" The growing trend has been to claim that such rights begin with something like Nussbaum's concern for what people are able to do and to be. They begin, that trend suggests, with the cultivation of agency. This dissertation has argued, however, that vulnerability may be an equally significant or potentially more appropriate starting point. In so doing, it has in many ways affirmed Roosevelt's claim that human rights begin "[i]n small places, close to home" which are "the world of the individual person."¹⁸⁶ Charles Malik, another architect of the UDHR, lends support to this idea by proclaiming that among those places we "enjoy our deepest and truest freedom and humanity" is in our families.¹⁸⁷ The point, to state it clearly once more, is not that the family – understood as an organic and basic social group – is the final word on what it means to do justice to children. It is, rather, that the condition of vulnerability strongly suggests this domain of our human ecology to be a key and rudimentary starting point for "settling" children's rights as a "frontier of justice."

¹⁸⁶ Eleanor Roosevelt, "The Great Question," speech before the United Nations, New York, 1958, quoted in Becky Reardon, *Educating for Human Dignity: Learning about Rights and Responsibilities* (Philadelphia, PA: University of Pennsylvania Press, 1995), 62.

¹⁸⁷ Malik, 95.

Appendix: The Central Human Capabilities*

1. *Life*. Being able to live to the end of a human life of normal length; not dying prematurely, or before one's life is so reduced as to be not worth living.
2. *Bodily Health*. Being able to have good health, including reproductive health; to be adequately nourished; to have adequate shelter.
3. *Bodily Integrity*. Being able to move freely from place to place; to be secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and for choice in matters of reproduction.
4. *Senses, Imagination, and Thought*. Being able to use the sense, to imagine, think, and reason – and to do these things in a “truly human” way, a way informed and cultivated by an adequate education, including, but by no means limited to, literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with experiencing and producing works and events of one's own choice, religious, literary, musical, and so forth. Being able to use one's mind in ways protected by guarantees of freedom of expression with respect to both political and artistic speech, and freedom of religious exercises. Being able to have pleasurable experiences and to avoid nonbeneficial pain.
5. *Emotions*. Being able to have attachments to things and people outside ourselves; to love those who love and care for us, to grieve at their absence; in general, to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety. (Supporting this capability means supporting forms of human association that can be shown to be crucial in their development.)
6. *Practical Reason*. Being able to form a conception of the good and to engage in critical reflection about the planning of one's life. (This entails protection for the liberty of conscience and religious observance.)

* As listed in PE, 415n5; cf. SSJ, 41-42; WHD, 78-80; UT, 416-418; FJ, 76-78; CC, 33-34; Martha C. Nussbaum, *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age* (Cambridge, MA: Belknap Press, 2012), 257n35; and CRCA, 558n37.

7. *Affiliation*

- A. Being able to live with and toward others, to recognize and show concern for other human beings, to engage in various forms of social interaction; to be able to imagine the situation of another. (Protecting this capability means protecting institutions that constitute and nourish such forms of affiliation, and also protecting the freedom of assembly and political speech.)
- B. Having the social bases of self-respect and nonhumiliation; being able to be treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, and national origin.

8. *Other Species*. Being able to live with concern for and in relation to animals, plants, and the world of nature.

9. *Play*. Being able to laugh, to play, to enjoy recreational activities.

10. *Control over One's Environment*

- A. *Political*. Being able to participate effectively in political choices that govern one's life; having the right of political participation, protections of free speech and association.
- B. *Material*. Being able to hold property (both land and moveable goods), and having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having the freedom from unwarranted search and seizure. In work, being able to work as a human being, exercising practical reason and entering into meaningful relationships of mutual recognition with other workers.

Bibliography

Abuelas de Plaza de Mayo. *History of Abuelas de Plaza de Mayo*. Accessed 11 March 2015. <http://www.abuelas.org.ar/english/history.htm>.

Al-Hibri, Azizah and Raja' M. El Habti. "Islam." In *Sex, Marriage, and Family in World Religions*. Ed. by Don S. Browning, M. Christian Green and John Witte, Jr. New York: Columbia University Press, 2006.

Alston, Philip. "The Best Interests Principle: Toward a Reconciliation of Culture and Human Rights." *International Journal of Law and the Family* 8, no. 1 (1994): 1-25. Accessed 10 March 2015. <http://lawfam.oxfordjournals.org/content/8/1/1>.

_____. "The Unborn Child and Abortion under the Draft Convention on the Rights of the Child." *Human Rights Quarterly* 12, no. 1 (1990): 156-78. Accessed 10 March 2015. <http://www.jstor.org/stable/762174>.

Althusius, Johannes. *The Politics of Johannes Althusius*. Trans. by Frederick S. Carney. Boston, MA: Beacon Press, 1964.

Alexander, John M. *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum*. Burlington, VT: Ashgate, 2008.

American Law Institute. *Case Citations to the Principles of the Law: Cumulative Annual Pocket Part For Use in 2014, Reporting Cases Through June 2013 That Cite Principles of the Law of Family Dissolution*. St. Paul, MN: American Law Institute Publishers, 2014.

Arditti, Rita. *Searching for Life: The Grandmothers of the Plaza de Mayo and the Disappeared Children of Argentina*. Berkeley, CA: University of California Press, 1999.

Arendt, Hannah. *Between Past and Future*. New York: Penguin Books, 1961.

_____. *The Origins of Totalitarianism*. New York: Harcourt, 1966.

Aristotle. *Aristotle: Nicomachean Ethics*. Second ed. Ed and trans. by Terence Irwin. Indianapolis, IN: Hackett Publishing, 1999.

_____. *On the Generation of Animals*. South Bend, IN: Infomotions, Inc., 2001. Accessed 31 October 2014. ProQuest ebrary.

_____. *The Politics of Aristotle*. Ed. and trans. by Ernest Barker. New York: Oxford University Press, 1978.

Augustine. *The City of God Against the Pagans*. Ed. and trans. by R.W. Dyson. New York: Cambridge University Press, 2007.

- _____. *The Good of Marriage*. In *Treatises on Marriage and Other Subjects*. Ed. by Charles T. Wilcox, M.M., Charles T. Huegelmeier, M.M., John McQuade, S.M., Sister Marie Liguori, I.H.M., and Robert P. Russell, O.S.A. Washington, DC: The Catholic University of America Press, 2010. Project MUSE. Web. 11 March 2015. <http://muse.jhu.edu/>.
- Aquinas, St. Thomas. *Summa Theologiæ*, Vol. 28. Trans. by Thomas Gilby, O.P. New York: Blackfriars/McGraw-Hill, 1966.
- _____. *Summa Theologiæ* Vol. 29. Trans. by David Bourke and Arthur Littledale. New York: Blackfriars/McGraw-Hill, 1969.
- _____. *Summa Theologiæ*, Vol. 17. Trans. by Thomas Gilby, O.P. New York: Blackfriars/McGraw-Hill, 1970.
- _____. *Summa Theologiæ* IaIIæ 90-97. In *Aquinas: Political Writings*. Ed. by R.W. Dyson. New York: Cambridge University Press, 2007.
- Ballet, Jérôme, Flavio Comim, and Mario Biggeri. "Children's Agency and the Capability Approach." In *Children and the Capability Approach*. Ed. by Mario Biggeri, Jérôme Ballet, and Flavio Comim. New York: Palgrave MacMillan, 2011. Accessed 10 March 2015. <http://www.palgraveconnect.com/pc/doifinder/10.1057/9780230308374.0001>.
- Banchoff, Thomas. "The International Human Rights Regime." In *Religion and the Global Politics of Human Rights*. Ed. by Thomas Banchoff and Robert Wuthnow. New York: Oxford University Press, 2011.
- Banner, Michael. *Christian Ethics: A Brief History*. Malden, MA: Wiley-Blackwell, 2009.
- Bauerschmidt, Frederick Christian. *Holy Teaching: Introducing the Summa Theologiæ of St. Thomas Aquinas*. Grand Rapids, MI: Brazos Press, 2005.
- Barth, Karl. *Church Dogmatics IV/4 (Fragment): The Foundation of the Christian Life*. Ed. and trans. by G.W. Bromiley and T.F. Torrence. New York: T. & T. Clark, 1969.
- _____. *The Teaching of the Church Regarding Baptism*. Trans. by Ernest A. Payne. London: SCM Press, 1948.
- Bauerschmidt, Frederick Christian. *Holy Teaching: Introducing the Summa Theologiæ of St. Thomas Aquinas*. Grand Rapids, MI: Brazos Press, 2005.
- Becker, Jo. "Dispatches: Will the US be the Last to Endorse Child Rights Convention?" *Human Rights Watch*. 26 November 2013. Accessed 10 February 2014. <http://www.hrw.org/news/2013/11/26/dispatches-will-us-be-last-endorse-child-rights-convention>.

- Benson, Iain T. "Considering Secularism." In *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*. Ed. by Douglas Farrow. Montreal, QC: McGill-Queen's University Press, 2004.
- Berger, Benjamin L. "Religious Diversity, Education, and the 'Crisis' in State Neutrality." *Canadian Journal of Law and Society* 29, no 1 (2014): 103-122. Accessed 12 March 2015.
http://muse.jhu.edu/journals/canadian_journal_of_law_and_society/v029/29.1.berger.htm
1.
- Berger, Michael S. "Judaism." In *Sex, Marriage, and Family in World Religions*. Ed. by Don S. Browning, M. Christian Green and John Witte, Jr. New York: Columbia University Press, 2006.
- Betts Lucy R. and Anna S.A. Bicknell. "Experiencing Loneliness in Childhood: Consequences for Psychosocial Adjustment, School Adjustment and Academic Performance." In *Psychology of Loneliness*. Ed. by Sarah J. Bevin. New York: Nova, 2011.
- "Beyond Same-sex Marriage: A New Strategic Vision for All Our Families & Relationships." 26 July 2006. Accessed 11 March 2015. <http://beyondmarriage.org/BeyondMarriage.pdf>.
- Bonvin, Jean-Michel and Daniel Stoecklin. "Introduction." In *Children's Rights and the Capabilities Approach: Challenges and Prospects*. Ed. by Daniel Stoecklin and Jean-Michel Bonvin. New York: Springer, 2014.
- Breen, Claire. *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law*. The Hague, NL: Martinus Nijhoff Publishers, 2002.
- Brinig, Margaret F. "A Case for Integrated Parenthood." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- Brown, Brené. *The Gifts of Imperfection: Let Go of Who You Think You're Supposed to Be and Embrace Who You Are*. Center City, MN: Hazelden, 2010.
- Browning, Don S. "The Best Love of the Child: An Integrational View." In *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*. Ed. by Timothy P. Jackson. Grand Rapids, MI: Eerdmans, 2011.
- _____. "Christianity and the Rights of Children." In *Christianity and Human Rights: An Introduction*. Ed. by John Witte, Jr. and Frank S. Alexander. New York: Cambridge University Press, 2010.
- _____. *Equality and the Family: A Fundamental, Practical, Theology of Children, Mothers, and Fathers in Modern Societies*. Grand Rapids, MI: Eerdmans, 2007.

- _____. *Generative Man: Psychoanalytic Perspectives*. Philadelphia, PA: The Westminster Press, 1973.
- _____. "Legal Parenthood, Natural and Legal Rights." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- _____. *Marriage and Modernization: How Globalization Threatens Marriage and What to Do about It*. Grand Rapids, MI: Eerdmans, 2003.
- Browning Don S. and Elizabeth Marquardt. "What about the Children? Liberal Cautions on Same-Sex Marriage." In *The Meaning of Marriage: Family, State, Market, and Morals*. Ed. by Robert P. George and Jean Bethke Elshtain. Dallas, TX: Spence, 2006.
- Browning, Don S., Bonnie J. Miller-McLemore, Pamela D. Couture, K. Brynolf Lyon, and Robert M. Franklin. *From Culture Wars to Common Ground: Religion and the American Family Debate*. Louisville, KY: Westminster John Knox Press, 1997.
- Browning, Don S. and John Witte, Jr. "Christianity's Mixed Contribution to Children's Rights." In *Children, Adults and Shared Responsibilities*. Ed. by Marcia J. Bunge. New York: Cambridge University Press, 2012.
- Brunner, Emil. *Dogmatics: Volume III – Christian Doctrine of Church, Faith and the Consummation*. Trans. by Olive Wyon, D.D. London, UK: Lutterworth Press, 1962.
- Brysk, Alison. *The Politics of Human Rights in Argentina: Protest, Change, and Democratization*. Stanford, CA: Stanford University Press, 1994.
- Bunge, Marcia J. "Introduction." In *Children Adults, and Shared Responsibilities: Jewish, Christian, and Muslim Perspectives*. Ed. by Marcia J. Bunge. New York: Cambridge University Press, 2012.
- Burr, Vivian. *Social Constructionism*. New York: Routledge, 2003.
- Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11*. Accessed 11 March 2015. <http://laws-lois.justice.gc.ca/eng/const/page-15.html>.
- Caseldine-Bracht, Jennifer. "Pragmatism, Capabilities, and Children's Rights in Development Ethics." In *Child Rights: The Movement, International Law, and Opposition*. Ed. by Clark W. Butler. West Lafayette, IN: Purdue University Press, 2012. Project MUSE. Web. 25 September 2014. <http://muse.jhu.edu>.
- Cerda, Jaime Sergio. "Draft Convention on the Rights of the Child: New Rights under the Children's Convention." *Human Rights Quarterly* 12, no. 1 (1990): 115-19. Accessed 10 March 2015. <http://www.jstor.org/stable/762169>.

- Cere, Daniel. "Human Rights and the Family." *Academic Questions* 22, no. 1 (2009): 63-78. Accessed 10 March 2015. <http://link.springer.com/article/10.1007/s12129-008-9098-y/fulltext.html>.
- _____. "Toward an Integrative Account of Parenthood." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- Cere, Daniel and Douglas Farrow, eds. *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*. Montreal, QC & Kingston, ON: McGill-Queen's University Press, 2004.
- Clark, Zoë and Holger Ziegler. "The UN Children's Rights Convention and the Capabilities Approach – Family Duties and Children's Rights in Tension." In *Children's Rights and the Capabilities Approach: Challenges and Prospects*. Ed. by Daniel Stoecklin and Jean-Michel Bonvin. New York: Springer, 2014.
- Cohen, Cynthia Price. "United Nations Convention on the Rights of the Child: Developing International Norms to Create a New World for Children." In *Children as Equals: Exploring the Rights of the Child*. Ed. by Kathleen Alaimo and Brian Klug. Lanham, MD: University Press of America, 2002.
- Comim, Flavio, Jérôme Ballet, Mario Biggeri, and Vittorio Iervese. "Introduction: Theoretical Foundations and the Book's Roadmap." In *Children and the Capability Approach*. Ed. by Mario Biggeri, Jérôme Ballet, and Flavio Comim. New York: Palgrave MacMillan, 2011. Accessed 10 March 2015. <http://www.palgraveconnect.com/pc/doi/10.1057/9780230308374.0001>.
- "Commission on Human Rights Verbatim Record Fourteenth Meeting [Excerpt]." In *The Eleanor Roosevelt Papers: The Human Rights Years, 1945-1948, Vol. 1*. Ed. by Allida Black. Detroit, MI: Charles Scribner's Sons, 2007.
- "Co-ParentMatch: Find Your Perfect Parenting Partner." *Co-ParentMatch.com*. Accessed 11 March 2015. <http://www.co-parentmatch.com/about.aspx>.
- Council of Europe. *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*. 4 November 1950. ETS 5. Accessed 21 May 2014. <http://www.refworld.org/docid/3ae6b3b04.html>.
- _____. *European Convention on the Exercise of Children's Rights*. 25 January 1996. ETS 160. Accessed 23 October 2014. <http://www.refworld.org/docid/3de78d964.html>.
- Coward, Harold. "Are there Human Rights in Hinduism?" In *Human Rights and the World's Major Religions: Volume 4, The Hindu Tradition*. Westport, CT: Praeger, 2005.

- Culp, Kristine A. *Vulnerability and Glory: A Theological Account*. Louisville, KY: Westminster John Knox Press, 2010.
- Denny, Frederick Mathewson. "Muslim Ethical Trajectories in the Contemporary Period." In *The Blackwell Companion to Religious Ethics*. Malden, MA: Blackwell Publishing, 2005.
- Detrick, Sharon. *A Commentary on the United Nations Convention on the Rights of the Child*. The Hague, NL: Martinus Nijhoff Publishers, 1999.
- den Bok, Nico. "Barth on Baptism: Concerning a Crucial Dimension of Ecclesiology." *Zeitschrift für Dialektische Theologie Supplement Series 5* (2011): 135-151.
- Deslauriers, Marguerite. "Sex and Essence in Aristotle's *Metaphysics* and Biology." In *Feminist Interpretations of Aristotle*. Ed. by Cynthia A. Freeland. University Park, PA: The Pennsylvania State University Press, 1998.
- Dixon, Rosalind and Martha C. Nussbaum. "Abortion, Dignity and a Capabilities Approach (March 30, 2011)." In *Feminist Constitutionalism*. Ed. by Beverly Baines, Daphne Barak-Erez, Tsvi Kahana. Cambridge, UK: Cambridge University Press, 2011. University of Chicago Public Law Working Paper No. 345. Accessed 10 March 2015. <http://ssrn.com/abstract=1799190>.
- _____. "Children's Rights and the Capabilities Approach: The Question of Special Priority." *Cornell Law Review* 97 (2012): 549-594. University of Chicago, Public Law Working Paper No. 384. Accessed 10 March 2015. <http://ssrn.com/abstract=2060614>.
- Doek, Jaap E. *Commentary on the United Nations Convention on the Rights of the Child, Articles 8-9*. Boston, MA: Brill Academic Publishers, 2006. Accessed 10 March 2015. ProQuest ebrary.
- Donnelly, Jack. *Universal Human Rights in Theory and Practice*. Ithaca, NY: Cornell University, 1989.
- _____. *Universal Human Rights in Theory and Practice*. 3rd ed. Ithaca, NY: Cornell University Press, 2013. Accessed 10 March 2015. ProQuest ebrary.
- Dyson, R.W. "Introduction: St. Thomas Aquinas." In *Aquinas: Political Writings*. Ed. by R.W. Dyson. New York: Cambridge University Press, 2007.
- Erikson, Erik H. *Childhood and Society*, 2nd Edition. New York: W.W. Norton & Company, 1963.
- _____. *Identity: Youth and Crisis*. New York: W.W. Norton & Company, 1968.

- Esau, Alvin. "Living By a Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups." In *Law and Religious Pluralism in Canada*. Ed. by Richard Moon. Vancouver, BC: University of British Columbia Press, 2008.
- Euripides. *Hecuba*. Trans. by Christopher Collard. Warminster, UK: Aris & Phillips Ltd, 1991.
- Farrow, Douglas. "Of Secularity and Civil Religion." In *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*. Ed. by Douglas Farrow. Montreal, QC: McGill-Queen's University Press, 2004.
- _____. "Rights and Recognition." In *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment*. Ed. by Daniel Cere and Douglas Farrow. Montreal, QC: McGill-Queens University Press, 2004.
- Fass, Paula. "Children and Globalization." *Journal of Social History* 36, no. 4 (2003): 936-77. Accessed 10 March 2015.
<http://search.proquest.com/docview/198924939?accountid=12339>.
- Ferguson, John. *Aristotle*. New York: Twayne Publishers, 1972.
- Fields, A. Belden. *Rethinking Human Rights for the New Millennium*. New York: Palgrave Macmillan, 2003.
- Films for the Humanities & Sciences (Firm), Films Media Group, and Illumination Films (Australia). *Las Abuelas de Plaza de Mayo and the Search for Identity Children of Argentina's "Disappeared"*. New York: Films Media Group, 2012. Accessed 10 March 2012.
<https://ezproxy.uu.edu/login?url=http://digital.films.com/PortalPlaylists.aspx?aid=13753&xtid=53461>.
- Fineman, Martha Albertson. *The Autonomy Myth: A Theory of Dependency*. New York: The New Press, 2004.
- _____. "Introduction." In *What is Right for Children? The Competing Paradigms of Religion and Human Rights*. Ed. by Martha Albertson Fineman and Karen Worthington. Burlington, VT: Ashgate, 2009. Accessed 9 March 2015. ProQuest ebrary.
- _____. "Taking Children's Interests Seriously." In *What is Right for Children? The Competing Paradigms of Religion and Human Rights*. Ed. by Martha Albertson Fineman and Karen Worthington. Burlington, VT: Ashgate, 2009. Accessed 9 March 2015. ProQuest ebrary.

- _____. "The Vulnerable Subject: Anchoring Equality in the Human Condition." *Yale Journal of Law and Feminism* 20, no. 11 (2008): 1-24. Accessed 10 March 2015. <http://www.lexisnexis.com/hottopics/lnacademic/?shr=t&csi=152480&sr=TITLE%28The+Vulnerable+Subject%3A+Anchoring+Equality+in+the+Human+Condition%29+and+DATE+IS+2008+and+AUTHOR%28fineman%29>.
- "First Fridays: Ivan Fatovic, Founder and CEO of Modamily." Cassandra Daily. 1 June 2012. Accessed 11 March 2015. <http://www.cassandradaily.com/life/first-fridays-ivan-fatovic-founder-and-ceo-of-modamily/>.
- Fischer, Jo. *Mothers of the Disappeared*. Boston, MA: South End Press, 1989.
- Florida, Robert. "Are there Human Rights in Buddhism?" In *Human Rights and the Major World's Religions: Volume 5, The Buddhist Tradition*. Westport, CT: Praeger, 2004.
- Freeman, Michael. *The Moral Status of Children: Essays on the Rights of the Child*. The Hague, NL: Martinus Nijhoff Publishers, 1997.
- Freeman, Samuel. "Introduction: John Rawls – An Overview." In *The Cambridge Companion to Rawls*. Ed. by Samuel Freeman. New York: Cambridge University Press, 2003.
- _____. *Rawls*. New York: Routledge, 2007.
- Freud, Sigmund. "On Narcissism." In *Freud's 'On Narcissism: An Introduction*. Ed. by Joseph Sandler, Ethel Spector Person and Peter Fonagy. New Haven: Yale University Press, 1991.
- Gehlen, Arnold. *Man: His Nature and Place in the World*. Trans. by Clare McMillan and Karl Pillemer. New York: Columbia University Press.
- Gergen, Kenneth J. *Social Construction in Context*. London: SAGE, 2001. Accessed 10 March 2015. ProQuest ebrary.
- Gill, Christopher. "Essentialism in Aristotle's Biology." *Critical Quarterly* 53, no. 4 (2011): 12-20. Accessed 13 March 2015. <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8705.2011.02019.x/epdf>.
- Glendon, Mary Ann. *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. New York: Random House, 2001.
- _____. *Rights Talk: The Impoverishment of Political Discourse*. New York: The Free Press, 1991.
- Goodin, Robert E. *Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities*. Chicago, IL: The University of Chicago Press, 1985.

- Graf, Gunter. "Realizing the Life Chances of Children – an Application of the Capability Approach." In *The Capability Approach on Social Order: Proceedings of Unseld Lecture 2010*. Ed. by Niels Weidtmann, Yanti Martina Hölzchen and Bilal Hawa. Zurich: Lit, 2012.
- Green, Fiona Joy and May Friedman, eds. *Chasing Rainbows: Exploring Gender Fluid Parenting Practices*. Bradford, ON: Demeter Press, 2013.
- Gudorf, Christine E. "The Erosion of Sexual Dimorphism: Challenges to Religion and Religious Ethics." *Journal of the American Academy of Religion* 69, no. 4 (2001): 863-892. Accessed 10 March 2015.
<http://jaar.oxfordjournals.org/content/69/4/863.full.pdf+html>.
- Gundry-Volf, Judith M. "The Least and the Greatest: Children in the New Testament." In *The Child in Christian Thought*. Grand Rapids, MI: Eerdmans, 2001.
- Habimana, Aloys. "Africa's Newest State Should Sustain the Dream." Africa's Newest State Should Sustain the Dream. July 9, 2011. Accessed March 11, 2015.
<http://www.hrw.org/news/2011/07/09/africa-s-newest-state-should-sustain-dream>.
- Hague Conference on Private International Law. *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*. 29 May 1993. Accessed 11 March 2015. <http://www.refworld.org/docid/3ddcb1794.html>.
- Hart, Caroline Sarojini. "Introduction." In *Agency and Participation in Childhood and Youth: International Applications of the Capability Approach in Schools and Beyond*. Ed. by Caroline Sarojini Hart. New York: Bloomsbury Academic, 2014.
- Hauerwas, Stanley. *A Community of Character: Toward a Constructive Christian Social Ethic*. Notre Dame, IN: University of Notre Dame Press, 1981.
- _____. "The Politics of Gentleness." In *Living Gently in a Violent World*. By Stanley Hauerwas and Jean Vanier. Downers Grove, IL: InterVarsity Press, 2008.
- Hearst, Alice. *Children and the Politics of Cultural Belonging*. New York: Cambridge University Press, 2012.
- Hébert, Terence E., Ellen Moss, Daniel Cere, and Hyun, Song, "Biological and Psychological Dimensions of Integrative Attachments," In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- Hefner, Robert W. "Human Rights and Democracy in Islam." In *Religion and the Global Politics of Human Rights*. Ed. by Thomas Banchoff and Robert Wuthnow. New York; Oxford University Press, 2011.

- Hittinger, Russell. "The Coherence of the Four Basic Principles of Catholic Social Doctrine: An Interpretation." In *Pursuing the Common Good: How Solidarity and Subsidiarity Can Work Together*. Ed. by Margaret S. Archer and Pierpaolo Donati. Vatican City: The Pontifical Academy of Social Sciences, 2008. Accessed 10 March 2015.
<http://www.pass.va/content/dam/scienzesociali/pdf/acta14/acta14-hittinger.pdf>.
- Hobbes, Thomas. *Hobbes: Leviathan*. Ed. by Edwin Curley. Indianapolis, IN: Hackett Publishing, 1994.
- Hodgkin, Rachel and Peter Newell. *Implementation Handbook for the Convention on the Rights of the Child*. Third ed. Geneva, CH: UNICEF, 2007. Accessed 10 March 2015.
http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child.pdf.
- Hodgson, Douglas. "The International Legal Protection of the Child's Right to a Legal Identity and the Problem of Statelessness." *International Journal of Law and the Family* 7, no. 2 (1993): 255-70. Accessed 10 March 2015.
<http://lawfam.oxfordjournals.org/content/7/2/255.full.pdf+html>.
- Holzscheiter, Anna. *Children's Rights in International Politics: The Transformative Power of Discourse*. New York: Palgrave MacMillan, 2010.
- Ignatieff, Michael. *The Rights Revolution*. Toronto, ON: Anansi Press, 2000.
- Inter-American Commission on Human Rights (IACHR). *American Declaration of the Rights and Duties of Man*. 2 May 1948. Accessed 21 May 2014.
<http://www.refworld.org/docid/3ae6b3710.html>.
- Irwin, Terence, ed. *Aristotle: Nicomachean Ethics*. Second ed. Indianapolis, IN: Hackett Publishing, 1999.
- Jackson, Timothy P. "General Introduction." In *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*. Ed. by Timothy P. Jackson. Grand Rapids, MI: Eerdmans, 2011.
- James, Allison. "Understanding Childhood from an Interdisciplinary Perspective: Problems and Potentials." In *Rethinking Childhood*. Ed. by Peter B. Pufall and Richard P. Unsworth. New Brunswick, NJ: Rutgers University Press, 2004. Accessed 9 March 2015. ProQuest ebrary.
- James, P.D. *The Children of Men*. New York: A.A. Knopf, 1993.
- Johnson, Susan M. *The Practice of Emotionally Focused Couples Therapy: Creating Connection*, 2nd Edition. Florence, KY: Brunner-Routledge, 2004.

- Kaime, Thoko. *The Convention on the Rights of the Child: A Cultural Legitimacy Critique*. Groningen, NL: Europa Law Publishing, 2011.
- Kittay, Eva Feder. *Love's Labor: Essays on Women, Equality, and Dependency*. New York: Routledge, 1999.
- Lactantius. "Divine Institutes, VI.10." In *From Irenaeus to Grotius: A Sourcebook in Christian Political Thought*. Ed. by Oliver O'Donovan and Joan Lockwood O'Donovan. Grand Rapids, MI: Eerdmans, 1999.
- League of Nations. *Geneva Declaration on the Rights of the Child*. Geneva, CH: UN Documents, 26 September 1924. Accessed 11 February 2014. <http://www.un-documents.net/gdrc1924.htm>.
- Le Pichon, Xavier. "Ecce Homo: To Welcome Suffering is the Sign of Our Humanity." In *Spiritual Information: 100 Perspectives on Science and Religion*. Ed. by Charles L. Harper. Philadelphia, PA: Templeton Foundation Press, 2005.
- Lehr-Lehnardt, Rana and T. Jeremy Gunn. "What's Love Got to Do with It? (Part II): The Best Interests of the Child in International and Comparative Law." In *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*. Ed. by Timothy P. Jackson. Grand Rapids, MI: Eerdmans, 2011.
- Leithart, Peter J. *The Baptized Body*. Moscow: ID: Canon Press, 2007.
- Liao, S. Matthew. "The Right of Children to be Loved." In *What is Right for Children? The Competing Paradigms of Religion and Human Rights*. Ed. by Martha Albertson Fineman and Karen Worthington. Burlington, VT: Ashgate, 2009. Accessed 9 March 2015. ProQuest ebrary.
- Liebel, Manfred. *Children's Rights from Below: Cross Cultural Perspectives*. New York: Palgrave, 2012.
- Linden, Ian. "Border Crossings: Secular Versus Religious Arguments in the Public Domain." In *New Media and Communication Across Religions and Cultures*. Ed. by Rukhsana Ahmed and Isaac Nahon-Serfaty. Hershey, PA: IGI Global, 2014.
- Locke, John. "The Second Treatise of Government." In *John Locke: Political Writings*. Ed. by David Wootton. Indianapolis, IN: Hackett Publishing, 2003.
- Lotz, Mianna. "Parental Values and Children's Vulnerability." In *Vulnerability: New Essays in Ethics and Feminist Philosophy*. Ed. by Catriona Mackenzie, Wendy Rogers, and Susan Dodds. New York: Oxford University Press, 2013.
- MacIntyre, Alasdair. *Dependent Rational Animals: Why Human Beings Need the Virtues*. Chicago: Open Court Publishing, 1999.

- Macleod, Colin M. "Liberal Equality and the Affective Family." In *The Moral and Political Status of Children*. New York: Oxford University Press, 2002.
- _____. "Primary Goods, Capabilities, and Children." In *Measuring Justice: Primary Goods and Capabilities*. Ed. by Harry Brighouse and Ingrid Robeyns. New York: Cambridge University Press, 2010.
- McClain, Linda C. "A Diversity Approach to Parenthood." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- McClain, Linda C. and Daniel Cere. "Introduction." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.
- McEwan, Ian. *Saturday*. New York: Nan A. Talese/Doubleday, 2005.
- McLachlin, Beverley. "Freedom of Religion and the Rule of Law: A Canadian Perspective." In *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy*. Ed. by Douglas Farrow. Montreal, QC: McGill-Queen's University Press, 2004.
- Mahoney, Annette and Kenneth I. Pargament. "Does Best Love of the Child Mean Parents Should Facilitate a Love of the Sacred?" In *The Best Love of the Child: Being Loved and Being Taught to Love as the First Human Right*. Ed. by Timothy P. Jackson. Grand Rapids, MI: Eerdmans, 2011.
- Malik, Charles H. *The Challenge of Human Rights: Charles Malik and the Universal Declaration*. Ed. by Habib C. Malik. Oxford, UK: Charles Malik Foundation, 2000.
- Maritain, Jacques. "Introduction." In *Human Rights: Comments and Interpretations; A Symposium*. Ed. by UNESCO. Paris: UNESCO, 25 July 1948. Accessed 10 March 2015. <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.
- _____. *Man and the State*. Chicago, IL: The University of Chicago Press, 1951.
- Martin, Rex. "Are Human Rights Universal?" In *Human Rights: The Hard Questions*. Ed. by Cindy Holder. New York: Cambridge University Press, 2013.
- Marty, Martin E. *The Mystery of the Child*. Grand Rapids, MI: Eerdmans, 2007.
- Matthews, Garth B. *The Philosophy of Childhood*. Cambridge, MA: Harvard University Press, 1994.
- Mill, John Stuart. "Nature." In *Three Essays on Religion*. By John Stuart Mill. New York: Henry Holt and Company, 1874.

- _____. *The Subjection of Women*. Ed. by Susan Moller Okin. Indianapolis, IN: Hackett Publishing Company, 1988.
- Miller, David. *National Responsibility and Global Justice*. New York: Oxford University Press, 2007.
- Miller-McLemore, Bonnie J. and Don S. Browning. "Introduction: Children and Childhood in American Religions." In *Children and Childhood in American Religions*. Ed. by Don S. Browning and Bonnie J. Miller-McLemore. New Brunswick, NJ: Rutgers University Press, 2009.
- Minow, Martha. "All in the Family and In All Families." In *Sex, Preference, and Family: Essays on Law and Nature*. Ed. by David M. Estlund and Martha C. Nussbaum. Cary, NC: Oxford University Press, 1998. Accessed 10 March 2015. ProQuest ebrary.
- _____. "What Ever Happened to Children's Rights?" *Minnesota Law Review* 80 (1995-1996): 267-298. Accessed March 10, 2015. <http://www.heinonline.org/HOL/Page?public=false&handle=hein.journals/mnlr80&page=267&collection=journals#312>.
- Mitoma, Glenn. "Charles H. Malik and Human Rights: Notes on a Biography." *Biography* 33, no. 1 (2010): 222-241. Project MUSE. Web. 10 March 2015. <https://muse.jhu.edu/>.
- "The Modamily Mission." *Modamily*. Accessed March 11, 2015. <http://modamily.com/contact-us/>.
- Morsink, Johannes. *International Human Rights: Philosophical Roots of the Universal Declaration*. Philadelphia, PA: University of Philadelphia Press, 2009.
- _____. *The Universal Declaration of Human Rights: Origins, Drafting, and Intent*. Philadelphia, PA: University of Pennsylvania Press, 1999.
- Mullin, Amy. "Children, Vulnerability, and Emotional Harm." In *Vulnerability: New Essays in Ethics and Feminist Philosophy*. Ed. by Catriona Mackenzie, Wendy Rogers, and Susan Dodds. New York: Oxford University Press, 2013.
- Novak, David. "A Jewish Theory of Human Rights." In *Religion and Human Rights: An Introduction*. Ed. by John Witte, Jr. and M. Christian Green. New York: Oxford University Press, 2012.
- _____. *The Jewish Social Contract: An Essay in Political Theology*. Princeton, NJ: Princeton University Press, 2005.
- _____. "Response to Nussbaum's 'A Right to Marry?'" *California Law Review* 98, no. 3 (2010): 709-720. Accessed 10 March 2015. <http://www.jstor.org/stable/27896691>.

Nussbaum, Martha C. *Aristotle's De Motu Animalium: Text with Translation, Commentary, and Interpretive Essays*. Princeton, NJ: Princeton University Press, 1978.

_____. "Capabilities and Human Rights." *Fordham Law Review* 66, no. 2 (1997): 273-300. Accessed 10 March 2015. <http://ir.lawnet.fordham.edu/flr/vol66/iss2/2>.

_____. "Capabilities as Fundamental Entitlements: Sen and Social Justice." *Feminist Economics* 9, no. 2-3 (2003): 33-59. Accessed March 10, 2015. <http://www.tandfonline.com/doi/abs/10.1080/1354570022000077926#.VP5hCOER8gU>.

_____. "The Capabilities of People with Cognitive Disabilities." *Metaphilosophy* 40, nos. 3-4 (2009): 331-351. Accessed 10 March 2015. <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9973.2009.01606.x/epdf>.

_____. "The Complexity of Groups: A Comment on Jorge Valadez." *Philosophy & Social Criticism* 29, no. 1 (2003): 57-69. Accessed 11 March 2015. <http://psc.sagepub.com/content/29/1/57.full.pdf+html>.

_____. *Creating Capabilities: The Human Development Approach*. Cambridge, MA: Belknap Press, 2011.

_____. *Cultivating Humanity: A Classical Defense of Reform in Liberal Education*. Cambridge, MA: Harvard University Press, 1997.

_____. *The Fragility of Goodness*. New York: Cambridge University Press, 1986.

_____. *From Disgust to Humanity: Sexual Orientation and Constitutional Law*. New York: Oxford University Press, 2010.

_____. *Frontiers of Justice: Disability, Nationality, Species Membership*. Cambridge, MA: Belknap Press, 2006.

_____. *Hiding from Humanity: Disgust, Shame, and the Law*. Princeton, NJ: Princeton University Press, 2004.

_____. *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*. New York: Basic Books, 2008.

_____. *Love's Knowledge: Essays on Philosophy and Literature*. New York: Oxford University Press, 1990.

_____. "Nature, Function, and Capability: Aristotle on Political Distribution." *United Nations University-WIDER Working Papers* 31 (1987): 1-50. Accessed 10 March 2015. http://www.wider.unu.edu/publications/working-papers/previous/en_GB/wp-31/.

- _____. *The New Religious Intolerance: Overcoming the Politics of Fear in an Anxious Age*. Cambridge, MA: Belknap Press, 2012.
- _____. "Non-Relative Virtues: An Aristotelian Approach." In *The Quality of Life*. Ed. by Martha C. Nussbaum and Amartya Sen. New York: Oxford University Press, 1993.
- _____. *Not For Profit: Why Democracy Needs the Humanities*. Princeton, NJ: Princeton University Press, 2010.
- _____. *Political Emotions: Why Love Matters for Justice*. Cambridge, MA: Belknap Press, 2013.
- _____. "Précis of *Upheavals of Thought*." *Philosophy and Phenomenological Research* 68, no. 2 (2004): 443-49. Accessed 10 March 2015. <http://onlinelibrary.wiley.com/doi/10.1111/j.1933-1592.2004.tb00356.x/pdf>.
- _____. "Rawls and Feminism." In *The Cambridge Companion to Rawls*. Ed. by Samuel Freeman. New York: Cambridge University Press, 2003.
- _____. "Rawls's *Political Liberalism*. A Reassessment." *Ratio Juris* 24, no. 1 (2011): 1-24. Accessed 10 March 2015. <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9337.2010.00471.x/epdf>.
- _____. *Sex and Social Justice*. New York: Oxford University Press, 1999.
- _____. *Upheavals of Thought: The Intelligence of Emotions*. New York: Cambridge University Press, 2001.
- _____. *Women and Human Development*. New York: Cambridge University Press, 2000.
- O'Donovan, Joan Lockwood. "Rights, Law, and Political Community: A Theological and Historical Perspective." *Transformation: An International Journal of Holistic Mission Studies* 20, no. 1 (2003): 30-38. Accessed 10 March 2015. <http://trn.sagepub.com/content/20/1/30.full.pdf+html>.
- O'Donovan, Oliver. *Begotten or Made?* New York: Oxford University Press, 1984.
- _____. *The Desire of the Nations: Rediscovering the Roots of Political Theology*. New York: Cambridge University Press, 1996.
- _____. "The Language of Rights and Conceptual History." *Journal of Religious Ethics* 37, no. 2 (2009): 193-207. Accessed 10 March 2015. <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9795.2009.00382.x/abstract>.
- _____. *Self, World, and Time: Ethics as Theology, Vol. 1*. Grand Rapids, MI: Eerdmans, 2013.

_____. *The Ways of Judgment*. Grand Rapids, MI: Eerdmans, 2005.

O'Donovan, Oliver and Joan Lockwood, eds. *From Irenaeus to Grotius: A Sourcebook on Christian Political Thought*. Grand Rapids, MI: Eerdmans, 1999.

Office of the United Nations High Commissioner for Human Rights. *Legislative History of the Convention on the Rights of the Child, vol. 1*. New York and Geneva: United Nations, 2007. Accessed 13 November 2014.
<http://www.ohchr.org/documents/publications/legislativehistorycrc1en.pdf>.

Office of the United Nations High Commissioner for Human Rights and the Department for Economic and Social Affairs. *The Family in International and Regional Human Rights Instruments*. New York: United Nations Publications, 1999.

Okin, Susan Moller. "Editor's Introduction." In *The Subjection of Women*. Ed. by Susan Moller Okin. Indianapolis, IN: Hackett Publishing, 1988.

_____. *Justice, Gender, and the Family*. New York: Basic Books, 1989.

Organization of African Unity (OAU). *African Charter on Human and Peoples' Rights ("Banjul Charter")*. 27 June 1981. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982). Accessed 21 May 2014. <http://www.refworld.org/docid/3ae6b3630.html>.

_____. *African Charter on the Rights and Welfare of the Child*. 11 July 1990. CAB/LEG/24.9/49. Accessed 23 October 2014.
<http://www.refworld.org/docid/3ae6b38c18.html>.

Organization of American States (OAS). *American Convention on Human Rights "Pact of San Jose, Costa Rica"*. 22 November 1969. Accessed 21 May 2014.
<http://www.refworld.org/docid/3ae6b36510.html>.

_____. *Charter of the Organisation of American States*. 30 April 1948. Accessed 21 May 2014. <http://www.refworld.org/docid/3ae6b3624.html>.

Oswell, David. *The Agency of Children: From Family to Global Human Rights*. West Nyack, NY: Cambridge University Press, 2012. Accessed 9 March 2015. ProQuest ebrary.

"Our History." *L'Arche International*. Accessed March 11, 2015.
<http://www.larche.org/discover/larche-since-its-creation/>.

Paris, Jenell Williams. *The End of Sexual Identity: Why Sex is too Important to Define Who We Are*. Downers Grove, IL: InterVarsity Press, 2011.

- Peleg, Noam. "Reconceptualising the Child's Right to Development: Children and the Capability Approach." *The International Journal of Children's Rights* 21, no. 3 (2013): 523-42. Accessed 10 March 2015. <http://booksandjournals.brillonline.com/content/journals/10.1163/15718182-02103003>.
- Pew Research Center. *The Decline of Marriage and the Rise of New Families: A Social and Demographic Trends Report*. 18 November 2010. Accessed 11 March 2015. <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf>.
- Plato. *The Republic*. Trans. by R.E. Allen. New Haven, CT: Yale University Press, 2006.
- Pufall, Peter B. and Richard P. Unsworth, "Introduction: The Imperative and the Process for Rethinking Childhood." In *Rethinking Childhood*. Ed. by Peter B. Pufall and Richard P. Unsworth. New Brunswick, NJ: Rutgers University Press, 2004. Accessed 9 March 2015. ProQuest ebrary.
- R. v. Sharpe*, [1999] B.C.J. No. 1555, 1999 BCCA 416, 175 D.L.R. (4th) 1, at paras. 79 and 80 (B.C.C.A.). Accessed 11 March 2015. <http://www.courts.gov.bc.ca/jdb-txt/ca/99/04/c99-0416.html>.
- Rahner, Karl. *Theological Investigations, Vol. VIII: Further Theology of the Spiritual Life*. Trans. by David Bourke. New York: Herder and Herder, 1971.
- _____. *Theological Investigations, Vol. XXIII: Final Writings*. Trans. by Joseph Donceel, S.J. and Hugh M. Riley. New York: Crossroad, 1992.
- Rancière, Jacques. "Who is the Subject of the Rights of Man?" *The South Atlantic Quarterly* 103, no. 2 (2004):297-310. Project MUSE. Web. 10 March 2015. <https://muse.jhu.edu/>.
- Rawls, John. "The Idea of an Overlapping Consensus." In *John Rawls: Collected Papers*. Ed. by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.
- _____. "The Idea of Public Reason Revisited." In *John Rawls: Collected Papers*. Ed. by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.
- _____. "Justice as Fairness: Political not Metaphysical." In *John Rawls: Collected Papers*. Ed. by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.
- _____. *Justice as Fairness: A Restatement*. Ed. by Erin Kelly. Cambridge, MA: Belknap Press, 2001.
- _____. *The Law of Peoples*. Cambridge, MA: Harvard University Press, 1999.
- _____. *Political Liberalism*. New York: Columbia University Press, 1996.

_____. "The Priority of the Right and Ideas of the Good." In *John Rawls: Collected Papers*. Ed. by Samuel Freeman. Cambridge, MA: Harvard University Press, 1999.

_____. *A Theory of Justice*. Cambridge, MA: Belknap Press, 1971.

Reardon, Becky. *Educating for Human Dignity: Learning about Rights and Responsibilities*. Philadelphia, PA: University of Pennsylvania Press, 1995.

Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588. Accessed 11 March 2015.

<http://www.canlii.org/en/bc/bcsc/doc/2011/2011bcsc1588/2011bcsc1588.html>.

Rist, John M. *Augustine: Ancient Thought Baptized*. New York: Cambridge University Press, 1994.

Robeyns Ingrid and Harry Brighouse. "Introduction." In *Measuring Justice: Primary Goods and Capabilities*. Ed. by Harry Brighouse and Ingrid Robeyns. New York: Cambridge University Press, 2010.

Roosevelt, Eleanor. "Statement by Mrs. Franklin D. Roosevelt U.S. Representative to the General Assembly." In *The Eleanor Roosevelt Papers: The Human Rights Years, 1945-1948 (Vol. 1)*. Ed. by Allida Black. Detroit, MI: Charles Scribner's Sons, 2007.

Ross, David. *Aristotle*. Florence, KY: Routledge, 1995. Accessed 30 October 2014. ProQuest ebrary.

Rotabi, Karen Smith. "Child Adoption and War: 'Living Disappeared' Children and the Social Worker's Post-Conflict Role in El Salvador and Argentina." *International Social Work* 57, no. 2 (2012): 1-17. Accessed 10 March 2015.
<http://isw.sagepub.com/content/early/2012/10/31/0020872812454314>.

Rousseau, Jean-Jacques. "Discourse on Political Economy." In *Rousseau: The Social Contract and Other Later Political Writings*. Ed. by Victor Gourevitch. New York: Cambridge University Press, 1997.

_____. "The Naturalness of the Family." In *Rousseau on Women, Love, and the Family*. Ed. by Christopher Kelly and Eve Grace. Hanover, NH: Dartmouth College Press, 2009.

_____. "Of the Social Contract," In *Rousseau: The Social Contract and Other Later Political Writings*. Ed. by Victor Gourevitch. New York: Cambridge University Press, 1997.

Ryder, Bruce. "The Canadian Conception of Equal Religious Citizenship." In *Law and Religious Pluralism in Canada*. Ed. by Richard Moon. Vancouver, BC: UBC Press, 2008.

Sen, Amartya. "Capability and Well-Being." In *The Quality of Life*. Ed. by Martha C. Nussbaum and Amartya Sen. New York: Oxford University Press, 1993.

- _____. "Children and Human Rights." *Indian Journal of Human Development* 1, no. 2 (2007): 1-11. Accessed 10 March 2015.
<http://www.ihdindia.org/ihdjournals/pdf.aspx?cid=34>.
- _____. *Development as Freedom*. New York: Knopf, 1999.
- _____. "Equality of What?" In *Tanner Lectures on Human Values, Volume I*. Ed. by Sterling M. McMurrin. Salt Lake City, UT: University of Utah Press, 1980.
- _____. "Human Rights and Capabilities." *Journal of Human Development* 6, no. 2 (2005): 151-66. Accessed March 10, 2015.
<http://www.tandfonline.com/doi/abs/10.1080/14649880500120491#.VP569-ER8gU>.
- Serafini, Anthony. *The Epic History of Biology*. New York: Plenum, 1993.
- Serrarens, P.J.S. *Memorandum on Human Rights presented for the International Federation of Christian Trade Unions, Human Rights Commission*. 3 December 1947. E/CN.4/45. Accessed 23 November 2014.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/45.
- Shachar, Ayelet. *The Birthright Lottery: Citizenship and Global Inequality*. Cambridge, MA: Harvard University Press, 2009.
- _____. "Children of a Lesser State." In *Child, Family, and State*. Ed. by Stephen Macedo and Iris Marion Young. New York: New York University Press, 2003.
- _____. *Multicultural Jurisdictions: Cultural Differences and Women's Rights*. New York: Cambridge University Press, 2001.
- Shakespeare, William. *Romeo and Juliet*. Ed. by René Weis. London, UK: Arden Shakespeare, 2012.
- Sharma, Arvind. "Hinduism." In *Our Religions*. Ed. by Arvind Sharma. San Francisco, CA: HarperCollins, 1995.
- Solomon, Andrew. *Far from the Tree: Parents, Children and the Search for Identity*. New York: Scribner, 2012.
- Somerville, Margaret. *The Ethical Imagination: Journeys of the Human Spirit*. Toronto, ON: Anansi Press, 2006.
- Stacey, Judith. "Uncoupling Marriage and Parenting." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.

- Stewart, George A. "Interpreting the Child's Right to Identity in the U.N. Convention on the Rights of the Child." *Family Law Quarterly* 26, no. 3 (1992), 221-233. Accessed 27 October 2014. <http://www.jstor.org/stable/25739908>.
- Stoecklin, Daniel and Jean-Michel Bonvin. "The Capability Approach and Children's Rights." In *Agency and Participation in Childhood and Youth: International Applications of the Capability Approach in Schools and Beyond*. Ed. by Caroline Sarojini Hart. New York: Bloomsbury Academic, 2014.
- _____. "Conclusion." In *Children's Rights and the Capabilities Approach: Challenges and Prospects*. Ed. by Daniel Stoecklin and Jean-Michel Bonvin. New York: Springer, 2014.
- Taylor, Charles. "Conditions of an Unforced Consensus on Human Rights." In *The East Asian Challenge for Human Rights*. Ed. by Oanne R. Bauer and Daniel A. Bell. New York: Cambridge University Press, 1999.
- _____. *Hegel and Modern Society*. New York: Cambridge University Press, 1979.
- _____. *A Secular Age*. Cambridge, MA: Belknap Press, 2007.
- Thiessen, Elmer John. "The Vocation of the Child as a Learner." In *The Vocation of the Child*. Ed. by Patrick McKinley Brennan. Grand Rapids, MI: Eerdmans, 2008.
- Tierney, Brian. *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*. Atlanta, GA: Scholars Press, 1997.
- Trebay, Guy. "He's Pregnant. You're Speechless." *The New York Times*. June 21, 2008. Accessed 11 March 2015. http://www.nytimes.com/2008/06/22/fashion/22pregnant.html?_r=2&.
- Turner, Bryan S. *Vulnerability and Human Rights*. University Park, PA: The Pennsylvania State University Press, 2006.
- UN. *Global Issues: Family*. Accessed 11 March 2015. <http://www.un.org/en/globalissues/family/>.
- _____. "State Parties to Child Rights Convention Elect Nine Candidates as Members of Monitoring Committee." *Meetings Coverage and Press Releases*. 25 June 2014. HR/5200. Accessed 11 March 2015. <http://www.un.org/News/Press/docs/2014/hr5200.doc.htm>.
- UN Economic and Social Council, Commission for Social Development. *Observance of the twentieth anniversary of the International Year of the Family and beyond*. 19 February 2014. E/CN.5/2014/L.5. Accessed 11 March 2015. <http://undesadspd.org/Family/InternationalObservances/TwentiethAnniversaryofIYF2014/ResolutionsandReports.aspx>.

UN Department of Public Information. *The United Nations System*. July 2015. DPI/2470 rev.4. Accessed 22 September 2015.
http://www.un.org/en/aboutun/structure/pdfs/UN_System_Chart_30June2015.pdf.

UN Economic and Social Council, Human Rights Commission. *American Declaration of the Rights and Duties of Man*. 10 June 1948. E/CN.4/122. Accessed 12 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/122.

_____. *Ninety-First Meeting: Draft International Declaration of Human Rights (E/800)*. 2 October 1948, A/C.3/SR.91. Accessed 11 March 2014.
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.91.

_____. *Ninety-Eighth Meeting: Draft International Declaration of Human Rights (E/800)*. 9 October 1948. A/C.3/SR.98. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=A/C.3/SR.98.

_____. *Report of the Working Group on a Draft Convention on the Rights of the Child*. 3 April 1985. E/CN.4/1985/64. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/1985/64.

_____. *Report of the Working Group on a Draft Convention on the Rights of the Child*. 13 March 1986. E/CN.4/1986/39. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/1986/39.

_____. *Summary Record of the Fifty-eighth Meeting*. 16 June 1948. E/CN.4/SR.58. 11 March 2015. http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.58.

_____. *Summary Record of the Sixty-second Meeting*. 11 June 1948. E/CN.4/SR.62. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.62.

_____. *Summary Record of the Thirty-eighth Meeting*. 26 May 1948. E/CN.4/AC.1/SR.38. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/AC.1/SR.38.

_____. *Summary Record of the Thirty-seventh Meeting*. 13 December 1947. E/CN.4/SR.37. Accessed 11 March 2015.
http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/SR.37.

UN General Assembly. *Convention on the Rights of the Child*. 20 November 1989. United Nations, Treaty Series, vol. 1577. Accessed 8 February 2014.
<http://www.refworld.org/docid/3ae6b38f0.html>.

_____. *Declaration of the Rights of the Child*. 20 November 1959. A/RES/1386(XIV). Accessed 10 March 2015. <http://www.refworld.org/docid/3ae6b38e3.html>.

-
- . *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*. 25 November 1981. A/RES/36/55. Accessed 15 August 2014. <http://www.refworld.org/docid/3b00f02e40.html>.
-
- . *Declaration on Social Progress and Development*. 11 December 1969. A/RES/2542(XXIV). Accessed 21 May 2014. <http://www.refworld.org/docid/528c97704.html>.
-
- . *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999. Accessed 11 November 2014. <http://www.refworld.org/docid/3ae6b3aa0.html>.
-
- . *International Covenant on Economic, Social and Cultural Rights*. 16 December 1966. United Nations, Treaty Series, vol. 993. Accessed 22 May 2014. <http://www.refworld.org/docid/3ae6b36c0.html>.
-
- . *International Year of the Child*. 18 October 1979. A/RES/34/4. Accessed 3 June 2014. <http://www.refworld.org/docid/3b00f1b462.html>.
-
- . *International Year of the Family: resolution / adopted by the General Assembly*. 14 December 1990. A/RES/45/133. Accessed 22 May 2014. <http://www.refworld.org/docid/3b00efe918.html>.
-
- . *International Year of the Family: 78th Plenary Meeting*. 8 December 1989. A/RES/44/82. Accessed 11 March 2015. <http://www.un.org/documents/ga/res/44/a44r082.htm>.
-
- . *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*. 25 May 2000. Accessed 22 November 2014. <http://www.refworld.org/docid/47fdfb180.html>.
-
- . *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*. 16 March 2001. A/RES/54/263. Accessed 23 October 2014. <http://www.refworld.org/docid/3ae6b38bc.html>.
-
- . *Preparations for and observance of the tenth anniversary of the International Year of the Family: Resolution adopted by the General Assembly*. 16 January 2003. A/RES/57/164. Accessed 10 March 2015. <http://www.refworld.org/docid/3f422a7f4.html>.
-
- . *Preparations for and observance of the tenth anniversary of the International Year of the Family: Resolution adopted by the General Assembly*. 16 January 2003. A/RES/57/164. Accessed 10 March 2015.
-
- . *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Accessed 11 November 2014. <http://www.refworld.org/docid/3ae6b3712c.html>.

- _____. *A world fit for children: resolution / adopted by the General Assembly*. 11 October 2002. Accessed 3 June 2014. <http://www.refworld.org/docid/5290a8624.html>.
- UN High Commissioner for Refugees (UNHCR). *UNHCR Guidelines on Determining the Best Interests of the Child*. May 2008. Accessed 15 November 2014. <http://www.refworld.org/docid/48480c342.html>.
- UN Human Rights Council. *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure: resolution / adopted by the Human Rights Council*. 14 July 2011. A/HRC/RES/17/18. Accessed 22 November 2014. <http://www.refworld.org/docid/4e72fbb12.html>.
- UN Population Fund. *State of World Population 2001*. New York: United Nations, 2001. Accessed 24 February 2015. http://www.unfpa.org/sites/default/files/pub-pdf/swp2001_eng.pdf.
- UN Treaty Collection. *Chapter IV: Human Rights, Convention on the Rights of the Child*. Accessed 11 March 2015. http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en.
- UNESCO. “2010 Prizewinner: The Grandmothers of the Plaza de Mayo Organization, represented by its President Mrs. Estela Barnes de Carlotto.” *Félix Houphouët-Boigny Peace Prize*. Accessed 10 March 2015. <http://www.unesco.org/new/en/houphouet-boigny-peace-prize/award/prizewinners/2010-prizewinner/>.
- _____. *International Year of the Family: Final Report and Calendar of Events*. Paris: UNESCO, 1995. ED-95/WS/3. Accessed 11 March 2014. <http://unesdoc.unesco.org/images/0009/000999/099959eb.pdf>.
- UNICEF. “Advancing the CRC.” *UNICEF: Convention on the Rights of the Child*. 19 May 2014. Accessed 10 March 2015. http://www.unicef.org/crc/index_protocols.html.
- _____. *The State of the World's Children: Special Edition*. New York: UNICEF, 2009. Accessed 10 March 2015. http://www.unicef.org/publications/files/SOWC_Spec_Ed_CRC_Main_Report_EN_090409.pdf.
- _____. “A World Fit for Us: Children’s Forum Message.” *Meeting of Under-18 Delegates to the United Nations Special Session on Children*. New York: UNICEF, 5-7 May 2002. Accessed 16 March 2015. <http://www.unicef.org/specialsession/documentation/documents/childrens-statement.pdf>.
- Vanier, Jean. *Becoming Human*. Toronto, ON: Anansi Press, 1998.
- Veerman, Philip. *The Rights of the Child and the Changing Image of Childhood*. Norwell, MA: Kluwer Academic Publishers, 1992.

Wall, John. *Ethics in Light of Childhood*. Washington, DC: Georgetown University Press, 2010.

_____. "Human Rights In Light Of Childhood." *The International Journal of Children's Rights* 16, no. 4 (2008): 523-43. Accessed 10 March 2015.
<http://booksandjournals.brillonline.com/content/journals/10.1163/157181808x312122>.

Walsh, Mary Barbara. "Private and Public Dilemmas: Rawls on the Family." *Polity* 44, no. 3 (2012): 426-45. Accessed 10 March 2015.
<http://search.proquest.com/docview/1035633661?accountid=12339>.

Ward, Jane. "Get Your Gender Binary Off My Childhood: Towards a Movement for Children's Gender Self-Determination." In *Chasing Rainbows: Exploring Gender Fluid Parenting Practices*. Ed. by Fiona Joy Green and May Friedman. Bradford, ON: Demeter Press, 2013.

Waters, Brent. *The Family in Christian Social and Political Thought*. New York: Oxford University Press, 2007.

_____. *This Mortal Flesh*. Grand Rapids, MI: Brazos Press, 2009.

_____. *Reproductive Technology: Toward a Theology of Procreative Stewardship*. Cleveland, OH: Pilgrim Press, 2001.

Witte, John Jr. *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*. Louisville, KY: Westminster John Knox Press, 2012.

_____. *God's Joust, God's Justice: Law and Religion in the Western Tradition*. Grand Rapids, MI: Eerdmans, 2006.

_____. *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism*. New York: Cambridge University Press, 2007.

Witte, John Jr. and M. Christian Green, "Introduction." In *Religion and Human Rights: An Introduction*. Ed. by John Witte, Jr. and M. Christian Green. New York: Oxford University Press, 2012.

Witte, John Jr., M. Christian Green, and Amy Wheeler, eds. *The Equal Regard Family and its Friendly Critics: Don Browning and the Practical Theological Ethics of the Family*. Grand Rapids, MI: Eerdmans, 2007.

Witterick, Kathy. "Dancing in the Eye of the Storm." In *Chasing Rainbows: Exploring Gender Fluid Parenting Practices*. Ed. by Fiona Joy Green and May Friedman. Bradford, ON: Demeter Press, 2013.

Wolf, Naomi. *The Beauty Myth: How Images of Beauty are Used Against Women*. New York: W. Morrow, 1991.

Wolterstorff, Nicolas P. "Christianity and Human Rights." In *Religion and Human Rights: An Introduction*. Ed. by John Witte, Jr. and M. Christian Green. New York: Oxford University Press, 2012.

_____. *Justice: Rights and Wrongs*. Princeton, NJ: Princeton University Press, 2008.

Wood, Peter. "The Anthropological Case for the Integrative Model." In *What is Parenthood? Contemporary Debates About the Family*. Ed. by Linda C. McClain and Daniel Cere. New York: New York University Press, 2013.

Woodhouse, Barbara Bennett. "The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine." *Journal of Constitutional Law* 2, no. 1 (1999): 1-52. Accessed 10 March 2015. <http://scholarship.law.upenn.edu/jcl/vol2/iss1/1>.

_____. *Hidden in Plain Sight: The Tragedy of Children's Rights from Ben Franklin to Lionel Tate*. Princeton, NJ: Princeton University Press, 2008.

World Institute for Development Economics Research. *United Nations University: World Institute for Development Economics Research: UNU-WIDER*. 1995-2014. Accessed 10 March 2015. <http://www.wider.unu.edu/>.

World Summit for Children, *World Declaration on the Survival, Protection and Development of Children*. 30 September 1990. Accessed 11 March 2015. <http://www.un-documents.net/wsc-dec.htm>.

Young, Iris Marion. *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy*. Princeton, NJ: Princeton University Press, 1997.