

# THE ALTERNATIVE

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Dear Reader,

The topic of this issue is *Care of children, Rights of children.* The topic emerges from two sources: the recent Elian Gonzalez case and, in a larger perspective, the observance of the tenth anniversary of the United Nations Convention on the Rights of the Child.

The Elian case is mostly atypical but it exposes some of the intricate legal structure pertaining to children in the United States. If this child were not Cuban, his case would not likely attract attention. Nonetheless, the confusing, at times contradictory, attitude toward children in the U.S. made it possible for a six-year-old child to rivet the attention of the federal government and the news media.

The UN Convention on the Rights of the Child was intended to call the world's attention to the plight of children. The 1990s was to be a decade when things got better for children. With the decade now complete, the world has to examine the record and ask why more progress was not made.

In this issue's first essay from Amnesty International, the background and contents of the UN Convention are described. The provisions of the document may seem unexceptionable. And indeed, every country in the world, except two, ratified the convention: Somalia and the United States of America.

The second essay by Gabriel Moran examines the philosophical underpinnings of a children's rights movement. Documents such as those from the UN cover over ambiguities in the idea of children's rights. The United States might therefore have some legitimate complaints about the UN document but this nation's complete isolation leaves it in a bizarre position. Furthermore, the US opposition is based less on the possible shortcomings of the document and more on where the document is morally strongest, for example, its ban on the death penalty for juveniles. Seventy juveniles await execution in the United States. During the 1990s, eight were executed in the United States; in the rest of the world there were nine such executions.

The final essay by Gareth Matthews focuses on a famous case in which a twelve-year-old divorced his parents. More pointedly than the Elian Gonzalez furor, the case of Gregory Kingsley embodies the complex relation of parents, children and the law. In this case the great majority of the country agree with the boy but more ambiguous cases are sure to follow.

INVESTING IN THE FUTURE

By Amnesty International

As human beings, children are entitled to all the rights guaranteed by the Universal Declaration of Human Rights and the various treaties that have developed from it. But children also need special protection and care. They must be able to depend on the adult world to take care of them, to defend their rights and to help them to develop and realize their potential. Governments pay almost universal lip service to this ideal, yet have signally failed to ensure that the rights of children are respected.

Children suffer many of the same human rights abuses as adults, but may also be targeted simply because they are dependent and vulnerable. Children are tortured and mistreated by state officials; they are detained, often in appalling conditions; in some countries they are subject to the death penalty. Countless thousands are killed or maimed in armed conflicts; many more have fled their homes to become refugees. Children forced by poverty or abuse to live on the streets are detained, attacked or killed in the name of social cleansing. Many millions of children work at exploitative jobs or are the victims of child trafficking and forced prostitution. Because children are easy targets they are sometimes threatened or beaten to punish family members who are not so accessible.

The international community has long recognized the need to protect children from such abuses. The 1959 UN Declaration of the Rights of the Child set out 10 principles which provided a moral framework for children's rights, but which were not legally enforceable. The Convention on the Rights of the Child was adopted by the UN General Assembly in 1989, and entered into force the following year. Since then, the Convention has been ratified by every single UN member state in the world, except Somalia - which has had no central government able to do so for many years - and the United States of America.

The Convention elaborates rights according to the special needs and perspectives of the child. It is the only human rights treaty that covers the full spectrum of civil, political, economic, social and cultural rights, stressing their indivisible and interdependent relationship. Its comprehensive nature and near universal ratification makes the Convention a landmark for the consensus on the basic principles of the universality and indivisibility of all human rights.

According to the Convention, every human being under the age of 18 is a child, unless majority is attained earlier under national law. This stipulation poses important challenges for the application of the Convention, especially in countries where the age of majority is linked to puberty, often different for boys and girls. Under the Convention, all states are required to establish a minimum age of criminal responsibility, which according to the Beijing Rules, should not be fixed

at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity. And even though a state may set the age of criminal responsibility below 18, the rights in the Convention still apply, especially those governing the child's treatment at the hands of law enforcement.

One of the guiding principles of the Convention is that the best interests of the child should be the primary consideration in all decisions or procedures related to the child. Children have the right to be heard and to have their own opinions on matters affecting them taken into account, in accordance with the age and maturity of the child. Very young children rely on others to express their views and protect their best interests; as they grow older, they become more and more able to speak for themselves and to engage in their own decision-making.

It is up to governments to ensure that all children enjoy their rights. No child should suffer discrimination. The rights of the Convention apply regardless of race, color, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. The essential message is equality of opportunity. Girls should be given the same opportunities as boys. Poor children, disabled children, refugee children, should have the same rights as others, the same opportunity to learn and to enjoy an adequate standard of living.

The rights contained in the Convention fall into four broad categories:

1. Subsistence rights, including the rights to food, shelter and health care;
2. Development rights, which allow children to reach their fullest potential, including education and freedom of thought, conscience, and religion.
3. Protection rights: the right to life, and to protection from abuse or neglect.
4. Participation rights that allow children to take an active role in community life.

One of the key differences between the Convention and other treaties is that it recognizes that rights must be actively promoted if they are going to be enforced. People who know their rights are better able to claim them, and article 42 imposes a responsibility on governments to make the Convention widely known to adults and children alike.

While the Convention emphasizes that the family is the natural environment for nurturing the child, it places the primary obligation on the state to protect children from all forms of abuse, neglect and exploitation, even where these are not carried out directly by state agents. In this way, the Convention challenges the traditional perception that states are not responsible for abuses committed within the family or the community.

ARE RIGHTS WHAT CHILDREN NEED?

By Gabriel Moran

The theme of this issue is Care of children, Rights of children. The first phrase is in tension with the second. The apparent parallel of the two phrases is misleading. In the first phrase, care is what adults exercise toward adults; in the second phrase, rights are what children claim in opposition to adults. Most people would probably say that both rights and care are important. I wish to agree with that. But because the rhetoric of children's rights is often endorsed without much examination, the care of children is obscured. It seems to be assumed that the care of children can be included within the rights of children. Possibly that can happen but it will not happen unless some ambiguities are highlighted not only about the nature of rights but about the meaning of *Children*.  
And those two ambiguities are related to a third that I examine: reasonableness.

I am amazed at how little attention is given in discussions of children's rights to a confusion inherent in the English word *Child*. The UN document simply stipulates that *Child* means under 18. While that clears up some confusion, it runs up against most ordinary uses of the word *Child*. If I were to address 16 or 17 year-old students as children, they would be insulted - with good reason. However, in educational writing for the past century, the terms student and child have been used interchangeably. The relation of teacher-student becomes conflated with the relation of adult-child. The *Adult education* movement claimed that *Adults* and *Children* learn in opposite ways. Not surprisingly, *Adult education* literature has always been banal with reference to adults and insulting in reference to children.

The adult education literature is not, of course, the source of the problem. It is merely a confused expression of the division that began in the 18th century when the idea of childhood was invented. The problem became especially severe with Freud who posited a world of childhood totally unknown to adults. Freud was talking mostly of infants but the idea of an unknown world of childhood was extended by Piaget to 12 years old. Piaget's biological and logical studies came to dominate the study of children. As for social, political, or economic distinctions to describe younger human beings, Piaget is of almost no help.

With the simplistic opposition of adult vs child, there was no need to develop useful and accurate age distinctions. We do have words such as youth, teenager, adolescent, juvenile, but they carry a special, often disparaging, connotation. How often does one hear *Juvenile* outside of references to *Juvenile delinquents* or *the juvenile justice system*?

The absence of words for important realities is a symptom of confusion and oppression. How can we discuss care of children and rights of children if the

reference may be to someone 3 years old or 17 years old? The only current remedy is to state the age in question for each context and each problem. When people make claims about Rousseau's view of the child, they are usually wrong because Rousseau makes precise distinctions about the age of his student (0-21) for each of his statements. In contrast, when John Dewey discusses the child and the curriculum one can only guess that he is referring to someone between ages 6 and 16.

The ambiguity in the meaning of rights overlaps and goes beyond the ambiguity of the child. Some rights obviously presuppose a degree of mental and physical development. One could argue that the age for the right to vote should be lowered (21 to 18 did not succeed in encouraging political participation). I think 12 or 13 would make sense; one could even argue for 6 or 7 but I do not think one could go lower than that. Each line (drinking, driving, curfews, marrying) has to be drawn in a way that respects the maturing young person while being realistic about protecting him or her from harm..

The fundamental ambiguity concerning rights is whether it carries a positive or a negative meaning. That is, rights originated as a negation of intrusion by the government. The idea of right was not intended to carry the whole weight of law, let alone morality. One person's right entails a duty on the part of another; for the most part the duty is not to interfere. Still, one can see that a right to life or a right to liberty implies that conditions are supportive of life or liberty. A right to life for an infant requires the infant to have (a right to) food, health care, a home. Non-intervention is not enough. It would be a good policy never to use the term right without using the term duty or obligation- words seldom seen in recent decades.

Here in brief is the UN's problem with its 50 years of declarations, covenants and conventions. It can announce all kinds of rights but who is going to enforce them? The members of the UN are not persons but nation-states. And rights began as protections of persons against nation states. So who is the UN speaking to? One logical development would be to develop a trans-national authority to which an individual could appeal for redress from his or her own nation. This is the basis of the European Court of Human Rights which can receive petitions from individuals. Many European nations, including France and England, refused to recognize that Court's legitimacy.

Part of the reason why the United States refused to ratify the Convention on the Rights of the Child is the suspicion that it is a devious move to overrule national authority. James Grant of UNICEF advocated using children as a cutting edge of human rights generally which would contribute to international peace and security, to democracy and development. Perhaps his choice of

phrase was just unfortunate but one must be skeptical of a project using children as a cutting edge. Manipulating sentiment through grandiose rhetoric is not a good route to political reform.

In the UN Convention, the idea of child care is folded into the 42 articles that spell out the rights of the child. Here is where the ambiguity concerning its use of "child" becomes central. If one is speaking of a 17 year old, care might take a second place to freedom of expression (article 13), freedom of conscience (article 14) or freedom of association (article 15). If one is referring to a 4 year old, then the right to be cared for is the primary need. But is "right" the appropriate term when one speaks of care. At the least, one has to emphasize that the issue is not what the child should be allowed to do but what adults are required to do. And then one would have to draw a series of lines to differentiate the kind of care required for infants, young boys and girls, pre-puberty, early teen years, later teen years, etc. Both the UN and other discussions of children's rights often seem oblivious of this tension.

The third ambiguity concerns what it means to be reasonable, the quality invoked for the exercise of most rights. Does a child have the power of reason? Obviously, some age distinction is necessary. In the Middle Ages a child was judged to have reached the age of reason (and thus capable of sin) by about age 6. John Locke, at the end of the 17th century, assumes that same age and advocates giving reasons to 6 year olds. Rousseau in 1762 ridiculed Locke on this point, saying it was a waste of time and worse to reason with a 6 year old. Later in the same work, however, Rousseau acknowledges that although 12 is the age of reason, children between 6 and 12 reason very well in everything they know that relates to their immediate and palpable interest. But one is mistaken about their knowledge, ascribing to them knowledge they do not have.

Rousseau was quite accurate here, more helpful than Piaget. A child of 6 can indeed reason but lacks experience, knowledge and long-range foresight. The 6 year old, despite having reason, lacks what is necessary for functioning in a fully reasonable manner. Thus, the 6 year old should be given reasons for obeying but should not have the right to choose parents, residence or education, choices that require knowledge and experience that a 6 year-old lacks. The term "equal" is especially misleading in this discussion. Not only are children not equal to adults, 6 year-old children are not equal to 13 year-old children.

Adults ought to respect the emerging private life of a 6 year-old, but caring for the child of that age imposes limits. Restriction on equality is necessary to provide protection. But in the other direction, courts have been lax about protecting legitimate rights of young people, especially in school matters. The rhetoric of rights in the U.S. seems to stop at the schoolhouse door. The Court's

decision in June, 1995, allowing the random drug testing of high school athletes, was particularly outrageous. Justice O'Connor, in the dissenting view, called it a mass, suspicionless search regime. The courts, like the UN, throw together the rights of a 6 year old and a 16 year old. Then the rhetoric oscillates between neglecting the care of 6 year-olds and trampling on the rights of the 16 year-old.

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## CHILDREN'S RIGHTS

By Gareth Matthews

On July 9, 1992, a judge in a Florida state court ruled that a twelve-year-old boy had legal standing to petition to terminate his parents' rights so that he could be legally adopted by his foster parents, George and Elizabeth Russ. Initially referred to, presumably for his own protection, as Gregory K, Gregory himself revealed that his family name was Kingsley. It seemed appropriate that, in seeking to have the right to take his mother to court, on his own behalf, Gregory should also waive the protection of anonymity usually accorded minors.

After Gregory had appeared on national TV, he became something of a celebrity. Because the case came to public attention in the midst of a presidential election campaign, indeed one in which the Republicans tried to make family values a central campaign issue, politicians soon tried to use Gregory's petition for their own political purposes. The relevance of the case to Bill Clinton's candidacy was enhanced by the fact that Hillary Rodham Clinton had worked for the Children's Defense Fund and had written several significant articles on children's rights. George Bush took the opportunity of the judge's ruling to warn voters against advocates of the liberal agenda who, according to Bush, even encourage kids to hire lawyers and haul their parents into court.

Gregory's father had signed papers consenting to the termination of parental rights. And Gregory had lived for only eight months of the previous eight years with his mother; she had told the authorities when she gave him up the last time, "You take him back." Gregory won his case in the Florida court. He seems also to have won widespread support in the court of U.S. public opinion. To mark the start of his new life, Gregory changed his name. Upon being officially adopted by his new parents he was to be Shawn Russ.

The case of Gregory Kingsley does not stand alone. We can see in both the United States and Europe a gradual extension of the legal rights children are recognized to have. The question of their moral rights, though separate, is not entirely distinct either. As we saw during the Civil Rights Movement of the 1960s, recognizing the moral rights of a certain group of people often motivates us to work to change their legal status as well; conversely, changing the legal status of people often encourages us to change our moral attitudes toward them as well.

Children raise an issue for two ethical principles in particular; namely the Autonomy Principle and the Paternalism principle. According to the Autonomy Principle, rational individuals should be self-determining. According to the Paternalism Principle, the autonomy of an individual may be restricted if such restriction is in that individual's own interest.

Was Gregory sufficiently rational, at eleven or twelve years of age, or rational in the required way, to be able to exercise a right of self-determination? Most television viewers who saw him interviewed by Barbara Walters, or watched him in court on CNN, seem to have decided that he was. Hardly anyone who followed this court case could have doubted that it was in Gregory's best interest to be adopted by the new family. Since that is certainly what Gregory himself wanted to happen, there is no reason to think that restricting his autonomy would somehow have served his own interests. So in this case, anyway, the outcome might be thought to be the same whether Gregory's autonomy takes precedence or, alternatively, paternalism wins out over autonomy.

The case of Gregory Kingsley came exactly a quarter of a century after *In Re: Gault* (1967), the famous U.S. Supreme Court case in which minors were, for the first time, recognized to have the constitutional rights of due process, for example, the right to counsel and the right to be warned that anything they say might be used in evidence against them.

We can expect that children will slowly be given more and more autonomy within our legal system, and that they will be allowed to exercise that autonomy at a younger and younger age. Some philosophers have discussed the idea of children having a right to divorce their parents as if, having such a right, they could simply walk out on their parents with impunity. As we can see from the case of Gregory Kingsley, however, having such a right might simply give children standing in a court of law to make certain petitions on their own behalf and have the court respond to them (as well as to their parents, of course) rather than simply to a court-appointed or court-recognized guardian.

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