

The (Dis)Ability of Child Rights?

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ABSTRACT

This paper offers a deconstruction of the framing of childhood and child rights as ‘disability’, arguing for a strengthening of the legal personhood of children, based on the revolution of personhood and the re-making of the human condition in the disability rights movement. As the general debate on children’s legal capacity and standing tends to take place from within the traditional liberal and existing legal paradigms of children’s rights – which emphasise the legal disability of children and their lack of agency – it occurs in isolation from the broader theoretical debates on personhood and capacity. In re-imagining disability, new insights can be gained by reflecting on the scholarship from other perspectives, such as disability theory.

Keywords

Child rights, disability theory, legal personhood, legal agency, ideology

I. INTRODUCTION

To begin with a metaphor, children’s legal rights can be seen as the ‘miner’s canary’¹ of human rights protection. Where they are protected, it is a sign of the vigour of the system of human rights protection. For a right to be effective, one must have access to remedies, for which legal agency is critical – a right which children continue to be denied the world over. Children have been defined by their developmental incapacities, which have led, in

1. Melissa V Harris-Perry, *Sister Citizen: Shame, Stereotypes, and Black Women in America* (Yale University Press 2011) 37.

the Western liberal legal tradition, to the disablement of children in law. Herein we have the Catch-22 at the heart of this paper: children do not have capacity, and are therefore legally disabled; children cannot be given legal agency, because they do not have capacity. A new international legal norm of universal legal agency can now be said to exist, and we are presently witnessing the movement of child rights from legal status to legal agency. As argued, this seismic shift has occurred not *in spite of* children's disabilities; it is indebted to childhood disabilities for its emergence. Internationally, there is a new norm of universal legal agency that grants children the legal *capacity* (in addition to legal personality) to bring complaints of violations of their human rights.² The disability studies movement has successfully deconstructed the denial of legal personhood to people with disabilities, and the terminology of disability itself. However, a motivation for this paper is that the term 'disability' is still uncritically used in laws and the literature concerning children. There is a need for the child's right to legal agency to be grounded normatively in order for this new legal norm to be rooted firmly in international law through strong horizontal application, and for it to trickle down vertically to domestic practice. Alternatively, absent strong normative and theoretical support, the liberal rights recognised and granted in the international human rights system are vulnerable to 'shifts of opinion.' Graver still, one needs to be cognisant of the view that the 'weaknesses of these theories in upholding basic liberal rights [...] led to the situation that liberal societies have faced since the rise in the 1930s of various forms of totalitarian terror.'³ The need to ground the complaint rights of children in normative theory can therefore not be underestimated, and the susceptibility of the international consensus is of the essence. Children's rights are particularly susceptible to shifts of opinion given that no overarching theory of children's rights has been elucidated to satisfaction: 'children's rights advocates have conceived children's rights in different ways, but seemingly without devising a concept that has been either philosophically or politically persuasive.'⁴ As a result, perhaps, too many states have ratified the Convention 'without giving serious thought to their own laws and practices and to what would be entailed in ratifying the Convention.'⁵

This paper focuses its lens on the construction of the *disability* of the child legal subject. As a critique of the *ideology* of legal liberalism – as manifested in that of the independent, able-bodied legal subject – it 'therefore encompasses in large part – though certainly not entirely – the enterprise of decoding, of identifying structures, contexts, and motives that are not readily visible'⁶ in discussions of children's rights. The theory of disability offers a useful lead to unmasking the workings of ableism and autonomy. The disability studies movement has made great strides in unmasking and revealing the ideologies at the

2. This is not a sweeping claim to self-determination for children. Legal agency is argued only for breaches of the human rights of children, speaking to their right to a remedy.
3. John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (Cambridge University Press 2008).
4. Stephen R Arnott, 'Autonomy, Standing, and Children's Rights' (2006) 33 *Wm Mitchell L Rev* 807, 808.
5. Michael D. A. Freeman, *Children's Rights: A Comparative Perspective* (Issues in Law and Society, Ashgate Publishing Ltd 1996) 4.
6. Michael Freeden, *Ideology: A Very Short Introduction* (Oxford University Press 2003) 11.

heart of the term ‘disability’. However, at law, children are still referred to – uncritically, as argued here – as saddled by ‘legal disabilities’. By juxtaposing disability theory and the child’s rights, it is hoped that the insights gleaned from disability scholarship can be used to strengthen the legal personhood and agency of children.

The main contribution of this paper will be to fortify the legal subjectivity of children: disability theory will be mobilised to demonstrate how its discourse and legal practice can contribute to and enhance the existing debates over the rights of children as legal persons with agency. Here, the disability of children’s rights – far from being inherently negative, justifying the limitation of legal personality to children – is instead employed as an *enabling* concept: as a powerful claim for legal capacity to sue for human rights violations. The very disabilities of children, when shorn of the negative connotations of this respective terminology, forms instead the foundations for the reconstruction of the legal subject, whose *disabilities* are enabling of this broadened legal personality.

In Part 2, I offer an introduction briefly sketching the value of other normative frameworks in unpacking the tension at the heart of legal representations of children. Part 3 then deals with disability theory, elaborating upon three constituent elements: semantics and models; the revolution of personhood and the re-making of the human condition, and intersectionality. Part 4 turns to an analysis of why changes in law regarding the legal agency of children must be accompanied by the concomitant attitudinal shifts on the part of decision-makers, the judiciary, and the legal profession in order to be effective, before concluding in Part 5.

2. NORMATIVE FRAMEWORKS TO STRENGTHEN CHILDREN’S RIGHTS

To remind ourselves of the paradox with which we began, and the basis of the dilemma of legal rights for children: children do not have capacity, and are therefore legally disabled; children cannot be given legal agency, because they do not have capacity. Herein we have a Catch-22 situation due to the apparent intractability in the existing discourse over the rights of children as litigants and the contradictory rules from which children cannot escape. Legal theorist Pierre Schlag presents the ‘Catch-22’ as occupying a central position as an ‘organizing principle’, and an example of the legal distinction, now ascendant: ‘once a rather homely accessory for the interpretation of case law, the legal distinction has now come into its own.’⁷ As an organising principle, and ‘[n]o longer a mere distinction, the dominance of the new creature is confirmed with power names such as “contradictions” and “schisms”, or “alternative models” and “competing paradigms”, imbuing the legal distinction with the ‘stuff of ethics, epistemology, and social theory. This is the golden stage of the legal distinction.’⁸ According to Schlag, legal distinctions offer a ‘helpful entry point into the ideological structure and content of legal discourse’⁹ generally, and the Catch-22

7. Pierre Schlag, ‘Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction’ (1988) 40 *Stanford Law Review* 929, 930.

8. *ibid* 932.

9. *ibid* 970.

specifically does so ‘by locating the contradictions intrinsic to positions and the assumptions that seem to have coherence and integrity.’¹⁰ Thus, interrogating the Catch-22 at the heart of legal representations of children, we can begin to re-imagine the legal personhood and agency of children through the lens of disability.

It is worth noting at the outset that the contradiction with which we began has been dissipated at the level of international law due to the new norm of legal agency;¹¹ a point to which I will return in Part 4, where we witness that ‘independently of whether or not children ought morally to have rights, the law can give children rights.’ As stated by the child rights philosopher David Archard, ‘law and morality do not always perfectly coincide,’¹² but the advantages of giving children legal rights may be in ‘mak[ing] a huge difference to how we think about them. It is hard to see children as moral incompetents if our laws, consistently and persistently, do not. Moreover, children may exploit the status they are given at law to display or to acquire the competence they putatively lack.’¹³

Ideology can help to explain the Catch-22 at the heart of legal discourse concerning children. The permeation of the disabilities of childhood in liberal legal ideology must be revealed and unsettled with a view to ultimately changing the assumptions upon which legal decisions are made. Disability theory offers a way out of the apparent conundrum: children are described, from the influential eighteenth century treatise on the common law of England by William Blackstone, to present-day laws in Western liberal legal systems, as being saddled by ‘disabilities.’ However, disability theory and critical disability studies had upended the exclusionary language of ‘disability’ and unmasked the social systems of oppression through their dismissal of the so-called ‘medical model’ of disability, where people with disabilities were defined – and limited – by their physical or mental impairments, supporting instead the ‘social model’ of disability. They placed the ball of accountability squarely in the social court: that it is not the impairment which disables but social constructions and perceptions, socio-political and institutional arrangements which disable.¹⁴ Here is to be found a home for the paradigm-shifting language that would be necessary to dislodge this impasse in children’s rights. Disability can be seen as the lowest-common denominator of human rights discourse: being in time, all human beings are disabled (or potentially disabled) throughout our lives (childhood, sickness, pregnancy,

10. *ibid* 969. This paper limits its consideration more specifically to the ideology of disability in legal discourse. However, though it cannot be explored here, more broadly, reason in the Western legal tradition is one of these legal categories, the contradictions of which Schlag masterfully deconstructs in his 1998 monograph: Pierre Schlag, *The Enchantment of Reason* (1998). Schlag diagnoses what he believes is an epidemic of pathological reliance on the principle of reason, where reason has been endowed with a mystical quality, arguing that legal thinkers continually fail to recognise the aesthetic and ethical prejudices of rationalism. The child’s exclusion from liberal subjectivity based upon her inability to reason is at best, suspect.

11. Sevda Clark, ‘Child Rights and the Movement from Status to Agency: Human Rights and the Removal of the Legal Disabilities of Vulnerability’ (2015) 84 *Nordic Journal of International Law* 183. However, this is yet to translate domestically, a point that is taken up in Part 4 of this paper.

12. David Archard, *Children: Rights and Childhood* (Routledge 2004) 56.

13. *ibid* 56.

14. I hope to refer to the rich tapestry of critique of the semantics of control in whether or not to use the language of ‘disability’. I use it in this paper as this is how children are still described, and indeed, there is a (dis)ablement in law that I refer to.

old age, etc.). I now turn to an exploration of the enabling discourse of disability studies in order to explore how the theory of disability can contribute to and enhance the existing debates over the rights of children as legal agents.

3. THE ENABLING DISCOURSE OF DISABILITY

The legal disabilities of childhood have flowed naturally and uncritically on from the legal ideology of liberalism, with its veneration of capacity. Sir William Blackstone, father of the English common law tradition, crystallised Enlightenment conceptions of the child as articulated in the political philosophy of John Locke, most instrumentally. Children were subject to the kingdom of their fathers (mothers were expressly excluded) and it was only upon reaching the age of majority – then twenty-one years of age – that a child was liberated from the *disability* of childhood, from the empire of the father to the empire of reason.¹⁵ Children, alongside people with mental infirmities, were to be conceived of as being disabled. Together, they fell short of the standard of the ‘default legal person’ and (often) *his* ability to consent, as defined by American jurists in the nineteenth century through listing classes of *disabled* persons.¹⁶

But ‘disability’ is no longer a pejorative term and, under international human rights law, people with disabilities have now been afforded universal legal capacity, on an equal footing with others. The disability rights movement has made some headway towards de-stigmatising the label of disability, but child rights discourse is yet to follow; ‘disability’ continues to be used in relation to the legal deficiencies of children.

Akin to the medical model of disability – which has led to the exclusion of people with disabilities at law – and its close companion the ideology of ability, childhood has been constructed mostly as a biological rather than a social entity.¹⁷ This is not to deny the developmental differences of children from adults. Rather, what is suggested is that a critical re-evaluation of the conflation of biological/developmental and legal ‘disability’ of the child is necessary; that there needs to be a demarcation between the two, and that biological differences in life cycle can no longer justify the *legal* disablement of children who have been subject to human rights violations. In the writings of nineteenth-century American jurists, we see at least that children straddled the two categories of ‘natural’ or ‘legal’, where the prior was due to mental infirmity as opposed to the latter, which was based instead on ‘public policy and convenience’:¹⁸

15. William Blackstone, Sir, *The Commentaries of Sir William Blackstone, Knt. On the Laws and Constitution of England; Carefully Abridged, in a New Manner, and Continued Down to the Present Time: With Notes, Corrective and Explanatory. By William Curry, of the Inner Temple* (1796).

16. Susanna L. Blumenthal, ‘The Default Legal Person’ (2007) 54 *UCLA Law Review* 1135 (‘This article explores the conceptions of responsible agency that informed legal analysis in nineteenth-century America. Standing behind the “reasonable man” famously drawn by Oliver Wendell Holmes Jr., there was a second figure, which I call the “default legal person,” who personified mental attributes an individual needed to possess – at a minimum – in order to be deemed a legally accountable agent’).

17. For a good description of these constructions see David Oswell, *The Agency of Children: From Family to Global Human Rights* (Cambridge University Press 2013) 41.

18. Blumenthal (n 16).

The class of persons that proved most difficult to distinctively categorize was that of infants. Most often, the disability attaching to this condition was said to be ‘partly natural and partly legal,’ as it was based upon the infant’s immaturity of judgment, which was legally presumed until the age of twenty-one, even in the face of actual proof to the contrary.¹⁹

As will be elaborated upon in Part 3.1, the unpacking of the language and the models of disability readies the conceptual pathways through which to superimpose pioneering disability models onto child rights in order to expand the law’s recognition of children’s legal agency.

A second way that disability rights discourse can aid in strengthening child rights is through its paradigmatic reconceptualization of personhood, which will be advanced in Part 3.2. Specifically, how it is that people with disabilities, especially cognitive disabilities should not be excluded from what it means to be human, which is emblematic of what Quinn terms the principal ‘innovation’ or revolution of the Convention on the Rights of Persons with Disabilities (CRPD). That is to say, the way in which the CRPD grants people with severe cognitive disabilities civil ‘life,’ after being civilly dead, can pave the way to a reconceptualisation of children’s legal agency. Whether this revolution is so far reaching as to include children under its banner of protection is then considered. Lastly, in Part 3.3, I turn to intersectionality as another key innovation of the CRPD, which represents the extent of its transformation of rights protection hitherto, and assess how it can apply to children. While all of the literature cannot be surveyed here, the key positions of theorists will be taken up, in addition to the normative contributions of the United Nations CRPD.

3.1 Semantics and Models

‘The Lord Chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns’²⁰

‘The disabling effects of language is not something that is unique to disabled people,²¹ and children continue to have their legal agency limited through the language of disability. The *disabilities* of childhood so prescribed by law trace their origins back to the eighteenth century, at least. In Sir William Blackstone’s four volume *Commentaries of the Laws of England* (1765–69), the best-known description of the doctrines of English law, we find the juxtaposition of infancy with mental disability, as well as references to the *disabilities* of an infant, one under twenty-one years of age: ‘Infants have various privileges, and various

19. *ibid* 1218.

20. Blackstone (n 15) 90.

21. Michael Oliver, ‘Defining Impairment and Disability: Issues at Stake’ in Colin Barnes and Geof Mercer (eds), *Exploring the Divide: Illness and Disability* (Disability Press Leeds 1996) 43.

disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts.²² Children could only secure themselves from others' hurting them through their guardian, who could sue on the child's behalf, and it was 'generally true, that an infant can do no legal act,'²³ with some exceptions,²⁴ which continue into the present day, in common law jurisdictions.²⁵ The language of the disabilities of childhood has continued unabated into our time, with its inverse – of people with cognitive disabilities being referred to as children – being equally robust, well into the twentieth century: 'Indeed, through the middle of this century, legal authorities and public majorities treated the mentally retarded as eternal children.'²⁶

Historically, in the West, people with disabilities have been viewed as objects of ridicule, from being used as court jesters in the Middle Ages, to being objects of bemusement and paraded about as public spectacle as late as the twentieth century.²⁷ Markedly, under the doctrine of so-called 'ugly laws', from the late 1860s until the 1970s, several cities in the United States rendered it illegal for persons who were 'unsightly' or 'unseemly' to appear in public, punishable by fines.²⁸ Disability theory has heralded fundamental changes in legal thought with regard to people with cognitive disabilities, specifically, by unpacking the term of its semantic negative associations, and through a shift from the so-called medical to the social model of disability. Both of these developments of disability theory can be used as a filter through which the disabilities of children can be reformulated, or at least seen in a different light. Much debate exists in the disability discourse over which terminology to use when referring to people with disabilities, a result of the disjuncting of what is referred to as the 'impairment' from the disablement of the individuals concerned, 'whereby **impairment** refers to a biological or physiological condition that entails the loss of physical, sensory, or cognitive function, and **disability** refers to an inability to perform a personal or socially

22. Blackstone (n 15) 91.

23. *ibid* 92.

24. Even in this early manifestation of the common law, there were exceptions: 'It is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his teaching and instruction, whereby he may profit himself afterwards'. Curiously, an infant could also 'by deed or will, appoint a guardian to his children, if he has any!' at 93.

25. English law recognises that minors, and those who are deemed mentally incapacitated, may need to be able to create binding agreements when acquiring essential items for living, or for employment. Thus, contracts for necessities (goods or services deemed necessary for ordinary living) will always be legally binding. See Roger Halson, *Contract Law* (Pearson Education 2001) 242.

26. Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Cornell University Press 1991) 134. Minow offers a lucid and sweeping history of the exclusion of children and the mentally ill from the status of the 'normal' person. See particularly, Chapter 5 on 'Different Histories.'

27. 'The institution of the "freak show," which reached its heyday in the nineteenth century but lasted in the United States until the 1940s, featured people with disabilities as public spectacle. People with physical disabilities and bodily deformities, as well as tribal non-white "cannibals" and "savages," were displayed for public amusement and entertainment,' in Ronald J Berger, *Introducing Disability Studies* (Lynne Rienner Publishers 2013) 1.

28. See Susan Schweik, *The Ugly Laws : Disability in Public* (The History of Disability, New York University Press 2009).

necessary task because of that impairment or the societal reaction to it.²⁹ These two also mostly correspond with another definitional polarisation, between disability as personal tragedy versus disability as oppressive social practice; as stated by Michael Oliver, one of the founding fathers of disability models, ‘while it cannot be claimed that there has been much grand theorising about disability, it can be argued that almost all studies of disability have a grand theory underpinning them. That grand theory can be characterised as “the personal tragedy theory of disability”;³⁰ itself a product of the nineteenth century, and reflecting the medicalisation of disability, whereby people with disabilities were now deemed worthy of treatment, and to be pitied. Scholarship in disability studies has suggested that the medical model of disability has its roots in the nineteenth century. Disability studies scholar Lennard Davis argues that ‘the social process of disabling arrived with industrialization and with the set of practices and discourses that are linked to late eighteenth- and nineteenth-century notions of nationality, race, gender, criminality, sexual orientation.’³¹ In highlighting the importance of definitions, Michael Oliver characterises the polarisation of what he terms the tragic and the oppressive views of disability; with regard to the former, if disability is seen as tragedy ‘then disabled people will be treated as if they are the victims of some tragic happening or circumstance,’ and ‘[t]his treatment will ... be translated into social policies which will attempt to compensate these victims for the tragedies that have befallen them.’³² This speaks to the critique of the medical model, wherein lies, at its heart, an ablest ideology that depicts people with disabilities as deficient, and disability as ‘a property of the individual body’ that needs to be overcome.³³ The ‘ideology of ability’ as termed by Tobin Siebers ‘defines the baseline by which humanness is determined, setting the measure of body and mind that gives or denies human status to individual persons.’³⁴

As a dominant or hegemonic ideology, ableism is so taken for granted that it remains unconscious and invisible to most people, even though it constitutes an overarching regime that structures the lives of people with disabilities.³⁵

Disability studies have efficaciously brought the ideology of ableism out of the shadows, and into the spotlight.

Alternatively, if defined as social oppression ‘disabled people will be seen as the collective victims of an uncaring or unknowing society rather than as individual victims of circum-

29. Berger (n 27) 6. Emphasis in original.

30. Michael Oliver, *The Politics of Disablement* (Springer 1990) 20. Oliver does not support this superimposition, arguing elsewhere that there is no ‘medical model’ but instead an ‘individual’ model - see Michael Oliver, ‘The Social Model in Context’ in Rod Michalko and Tanya Titchkosky (eds), *Rethinking Normalcy: A Disability Studies Reader* (Canadian Scholars’ Press 2009) 19–30.

31. Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (Verso 1995) 24.

32. Oliver, *The Politics of Disablement* (n 30) 22.

33. Tobin Siebers, *Disability Theory* (University of Michigan Press 2008) 25.

34. *ibid* 8.

35. Berger (n 27) 15.

stance. Such a view will be translated into social policies geared towards alleviating oppression rather than compensating individuals.³⁶ Also known as the social model, such a view ‘has resulted in unparalleled success in changing the discourses around disability,’³⁷ but it has not escaped criticism, and ‘it could be argued that in polarising the tragic and oppressive views of disability, a conflict is being created where none necessarily exists,’ as disability ‘has both individual and social dimensions.’³⁸ This is reflected in one of the internal critiques of the social model, which has stemmed from people with disabilities themselves, such as the denial of the pain of impairment.³⁹

3.1.1 Disability as Enablement

How can the two aspects of disability theory addressed briefly above, namely the importance of language and the social model, be applied to strengthen a theory of children’s rights? In its insistence on the importance of semantics, disability theory has much to offer child rights discourse. In light of disability theory, children’s developmental immaturity – which is then used to support their various legal disabilities – can no longer remain unchallenged. Short of the radical liberationist position, which argues that children should be granted all of the self-determination and autonomy rights granted to adults without any distinction,⁴⁰ the denial of legal capacity to children has scarcely been confronted head-on. The developmental *disability* of childhood has been used as the bedrock of denial. How can we reconcile the so-called disabilities of childhood, whilst trying to accommodate children as legal agents?

Titchkosky and Michalko write:

disability studies, in its various expressions, understands disability as a disruption to normalcy and thus as problematizing it; i.e. making the taken-for-granted character of normalcy ‘visible’ and thus open to both exploration and change. Disability, then, becomes the occasion for disability studies to interrogate normalcy, to make *it* an object of study. Disability brings normalcy into view and allows for the possibility of wondering how normalcy came about or how it was constructed in the first place. No-one ‘normally’ thinks of ‘normalcy’.⁴¹

In the same way that disability studies are not a study of disability,⁴² the study of child rights can be reconceived as a way of interrogating the centre from the margins, using children

36. Oliver, *The Politics of Disablement* (n 30) 22.

37. Oliver (n 21) 29.

38. Oliver, *The Politics of Disablement* (n 30) 27.

39. For a useful summary of external medical and internal critiques of the social model, see Oliver (n 21).

40. This includes most radically, the right to sexual intercourse, as adults. For the Liberationist manifesto, see John Caldwell Holt, *Escape from Childhood* (EP Dutton 1974) generally, and the opening statement specifically: ‘I propose ... that the rights, privileges, duties of adult citizens be made available to any young person, of whatever age, who wants to make use of them.’

41. Rod Michalko and Tanya Titchkosky, *Rethinking Normalcy: A Disability Studies Reader* (Canadian Scholars’ Press 2009) 6.

42. *ibid* 5.

to unearth constructions of the ‘normal’ legal subject.⁴³ A possible way forward begins to open up, when replacing the word ‘impairment’ with ‘children’ in the points made by one of the forerunners of the disability rights movement, the UK Union of the Physically Impaired Against Segregation (UPIAS) in 1975:

In our view, it is society which disables [children]. Disability is something imposed on top of our [childhood] by the way we are unnecessarily isolated and excluded from full participation in society. [Children] are therefore an oppressed group in society. To understand this it is necessary to grasp the distinction between [childhood] and the social situation, called ‘disability’, of [children]. Thus we define [childhood as the necessary stage of human development]; and disability as the disadvantage or restriction of activity caused by a contemporary social organization which takes no or little account of [children] and thus excludes them from full participation in the mainstream of social activities. [Childhood] is therefore a particular form of social oppression.⁴⁴

Here we apply the social model of disability studies. This approach harnesses the theoretical energy of disability studies, described by Siebers as ‘the other other that helps make otherness imaginable.’⁴⁵ Following Siebers, leaving the argument here, that childhood disability is a social construction may, however, be insufficient: ‘How many books and essays have been written in the last ten years, whose authors are content with the conclusion that x, y or z is socially constructed, as if the conclusion itself were a victory over oppression?’⁴⁶ I mean to suggest only that once accepting the socially constructed nature of childhood disability through using the terminology and models of disability studies, exposing the underlying dominant social ideologies would assist in reimagining liberal legal subjectivity.

The move from the medical/individual model to the social model can thus facilitate such a shift. While acknowledging children’s inherent immaturity and stages of development, a distinction can nonetheless be made – equally as persuasively – of the need to distinguish child development from the social construction of childhood, without having to ‘resolve’ the thorny tensions between the two. Unlike the liberationists, we do not need to deny embodiment – the very real developmental stages of childhood; nor do we need to be straitjacketed by it. Again, following Siebers, we can utilise a theory of complex embodiment, itself a response to the embodiment dilemma in disability studies: ‘some scholars complain that the medical model pays too much attention to embodiment, while the social model leaves it out of the picture.’ The result: a theory that ‘views the economy between social representations and the body not as unidirectional as in the social model, or non-existent as in the medical model, but as reciprocal. Complex embodiment theorizes the

43. A mapping of the contours of this exploration I leave to another paper on which I am currently working, on reconstructions of the liberal subject in light of children’s rights and the classical sources of the liberal tradition.

44. Union of the Physically Impaired Against Segregation and The Disability Alliance, ‘Fundamental Principles of Disability’ 1975) <<http://disability-studies.leeds.ac.uk/files/library/UPIAS-fundamental-principles.pdf>> accessed 18 October 2016.

45. Siebers (n 33) 48.

46. *ibid* 32.

body and its representations as mutually transformative.⁴⁷ Applied to the question at hand, it can help in reconstructing spaces for legal subjectivity through an acknowledgment of the socially constructed nature of children's legal disabilities.

The complex embodiment theory put forward by Siebers is one of what can alternatively be called a 'universalist model' that views impairments as being on a continuum and refuses to separate human beings on the basis of those with and without disabilities.⁴⁸ This model is sensitive to the temporal nature of life courses and 'recognizes that across the life span ... everyone experiences limitations and impairments – those who do not currently have disabilities may be referred to temporarily as 'temporarily able-bodied.' This model is inclusive and applies to people who do not currently experience disability.⁴⁹ Viewed this way, disability is advanced as a baseline, lowest common denominator of what it means to be human: we are all potentially disabled. Accordingly, 'disability is seen not as a minority issue, but as a universal experience of humanity. It is a normal part of human variation – we all exist on a continuum of ability and disability, and most of us will experience disability at some point in our lives.'⁵⁰

3.2 The Revolution of Personhood and the Remaking of the Human Condition

Disability theory as articulated by Gerard Quinn invites us to make rights subservient to the human condition 'in order to make them both honour and serve that condition.'⁵¹ Quinn and Arstein-Kerslake interrogate powerful 'myths' speaking to the human condition: 'human rights seem to commit us to an exaggerated caricature (a 'myth system') of the human condition: the rational, self-directing, wholly autonomous individual possessing moral agency unto him/herself. The spacial image at play is that of the masterless man freely choosing his/her own conception of the good and wandering purposively.'⁵² This myth system can be traced back to the dreams of reason during the Enlightenment, which venerated the individual as defined by *his* ability to reason and ability to consent – ideas that then made their way into the legal canon through fathers of the common law such as Blackstone. This liberal foundationalism 'facilitates, is founded on and highly prizes individual "auto-nomy". Our Enlightenment past compels us to assume that this person – *this masterless man – this atom colliding in beneficial ways with other atoms – is rational.*'⁵³ Disability theory and its CRPD Article 12 refraction has been revolutionary in

47. *ibid* 25.

48. See Lisa Schur, Douglas Kruse and Peter Blanck, *People with Disabilities : Sidelined or Mainstreamed?* (Cambridge Disability Law and Policy Series, Cambridge University Press 2013) for a useful summary.

49. *ibid* 12.

50. *ibid*.

51. Gerard Quinn and Anna Arstein-Kerslake, 'Restoring the "Human" in "Human Rights": Personhood and Doctrinal Innovation in the UN Disability Convention' in Conor Gearty and Costas Douzinas (eds), *The Cambridge Companion to Human Rights Law* (Cambridge University Press 2012) 37.

52. *ibid*.

53. Gerard Quinn, *Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD* (2010) 7. Emphasis in original.

its insistence of the full legal personhood or legal agency – inclusive of both legal personality and legal capacity – of people with cognitive disabilities, those historically analogised as infants. As is the case with children, at first glance, ‘the idea that persons with even severe cognitive disabilities may, despite their disabilities, retain full legal capacity might appear counter-intuitive.’⁵⁴ Nonetheless, in this we are witnessing the formation of a new international legal norm of universal legal agency. What the CRPD ‘brought to the surface was an insistence on the capacity of all persons with disabilities to forge their own destinies, a frank acknowledgment of shared personhood and of the myriad of supports – formal and informal – that we all rely on to help us forge our own pathways.’⁵⁵ As a result, ‘[a]t least at the level of ideas, persons with disabilities – and especially those with intellectual disabilities – are now beginning thanks to CRPD to emerge into full personhood.’⁵⁶ As has been previously advanced, this reflects a movement from status to agency, as radical as the movement from status to contract,⁵⁷ which now gives at least standing room to children on the bandwagon of universal legal agency. To what extent are children considered in the personhood transformation as articulated by the disability theorists detailed above will now be considered.

3.2.1 *Children not of the Revolution?*

Children are either invisible in the disability discourse of Quinn, and Flynn, or to be distinguished from the case of people with cognitive disabilities. Flynn overlooks children when she writes: ‘at present, it appears that a diagnosis of a disability, and in particular a cognitive disability, is the one remaining characteristic upon which contemporary society is willing to justify stripping legal capacity from a person.’⁵⁸ Children still fall into this category at the domestic level. Not only are children forgotten, but distinguished from the case at hand. Quinn and Arstein-Kerslake, mistakenly I would add, differentiate the case of children from people with cognitive disabilities in the latter’s ability to interrogate questions of personhood, that

the question of the foundations of personhood could be – and was – postponed in other treaty-drafting processes. No-one seriously doubted that women were human, that racial minorities were human, that immigrants and refugees were human. Of course there was a debate about when is a child a child in the drafting of the Rights of the Child Convention. But that had nothing to do with any intellectual exercise to identify the essential criteria of personhood (leaving to one side the propriety of ‘essentialism’ when it comes to personhood) – and had more to do with the narrower political goal of ensuring that unborn persons count as humans.⁵⁹

54. Quinn and Arstein-Kerslake (n 51) 47.

55. *ibid* 38.

56. *ibid* 43.

57. Clark (n 11).

58. Eilionóir Flynn and Anna Arstein-Kerslake, ‘The Support Model of Legal Capacity: Fact, Fiction, or Fantasy?’ (2014) 32 *Berkeley Journal of International Law* 124, 125.

59. Quinn and Arstein-Kerslake (n 51) 39.

For Quinn then, children were not situated as far from the ‘myth system’ of the masterless man and thus qualified for legal capacity, unlike people with disabilities for whom ‘the distance between their observable lives is so far from the ‘myth system’ of the ‘masterless man’ that they do not count as human [and] are not the fitting subjects of a theory of justice [and] are not to be allowed to stand to benefit from rights.’⁶⁰ Though the issue of legal *personality* may not have arisen during the drafting of the Convention of the Rights of the Child (CRC), thereby not activating what Quinn calls an ‘intellectual exercise to identify the essential criteria of personhood,’ the question of legal *capacity* most certainly arose during the drafting of the most recent treaty to join the CRC family. The absence of this debate for the CRC itself may very well have been due to the said treaty’s lack of an individual complaints mechanism debilitating a child’s access to a remedy, and making the instrument much less subversive of doctrinal legal assumptions – a view that is supported by the state responses during the drafting of the Third Optional Protocol twenty years later. In the view of the author who was present at the drafting sessions for the Third Optional Protocol on a Communications Procedure (OP3 CRC), children’s lack of capacity was certainly used as a rallying cry against the need for the new treaty. More disconcerting was that such arguments were prominently put forward by states usually well reputed for child rights protections, such as Sweden and Norway, who argued against this new instrument precisely on the grounds that children do not have the requisite legal capacity domestically.⁶¹

It is far from clear how Article 12 of the CRPD applies to children with cognitive disabilities: are they discriminated against on account of their being children? Based on the same threshold test, there would appear to be no legal basis upon which to deny children the support assistance provided for in Article 12: ‘By offering the choice of assistance, the supported decision-making paradigm removes the illusion that legal capacity can be exercised only through self-sufficiency. This opens the door for a societal dialogue about the interdependence of all individuals.’ Regrettably, while room is made for the broader implications of this broadening of personhood to be decoupled from cognitive ability and to include possibly new genetic and other medical technology, children are distinguished and left behind. Thus, while the ‘children of the revolution’ are identified,⁶² children as its potential subjects are excluded. If this move is a marked move away from the ‘masterless man’ there is no reason why the act of ‘recovering the human’ – at least in theory – should not include children.

60. *ibid.*

61. Other opposing states, including Canada, the United Kingdom and New Zealand, opposed the complaints mechanism from the vantage point of the non-justiciability of social rights in the CRC. My conclusions are based upon the formal statements made by Sweden during the drafting session. Regarding Norway’s position, their participation at the first session was limited to an intervention against interim measures. Due to the fact that during the first week of the second session at least (December 2010) the Norwegian delegates were expressly instructed not to comment, my observations are based on a series of informal discussions with them. And, in the second week of the second session they merely sent an intern from the Geneva mission, who seemed to be roughly informed of the whole process, if at all.

62. These are the ground-breaking *ideas* manifested in the CRPD, as so outlined by Quinn and Arstein-Kerslake, rather than its subjects.

3.2.2 Theory to Practice: The Support Model Supporting Children

The sea change of disability theory that ‘now tips our understanding of Article 12 decisively in the direction of a support model – one that augments capacity rather than displaces it at the first sign of a human deficit,’⁶³ represents a breath of ‘civil life’ for children after being, in effect, civilly dead at law for centuries. Quoting Quinn again, the ‘point about the revolution is that it does not work unless one abandons cognition as the essence of personhood,’⁶⁴ but it’s very revolutionary potential appears to rupture at the seams with its express exclusion of children. The foundation of the support model is, at its core, based on a relational idea of human autonomy, where ‘connectedness, involvement, participation ... all hold the key to flourishing’ and ‘[r]e-connecting people to social capital in their own communities is one of the keys to human flourishing *especially with respect to persons whose social connectedness is paper thin* – which would certainly include older persons.’⁶⁵ Children, especially the much younger, are archetypal of this connectedness, upon which they in fact depend for their very existence. The support model thus envisaged by disability theory and enunciated in Article 12 of the CRPD thus can not only be extended to, but it can also accommodate children..

It would be interesting to see whether children can claim violations based on this provision tested by the jurisprudence of the CRPD Committee, or whether they will be discriminated on the basis of their age, and if so, upon what legal grounds. My contention is that Article 12 *does* and *should* facilitate child claimants. The legal capacity afforded by Article 12 would be hard-pressed if it is to exclude children, on the very grounds of its existence, as highlighted above. Though hotly contested as a concept, the support model is not only preferred by the CRPD, but substituted decision-making, which it is to replace, has been deemed incompatible with Article 12, by the CRPD Committee. Admittedly, the future judicial considerations of children’s legal capacity under Article 12 will be complicated by the General Comment to Article 12, which arguably muddies the waters with its inconsistent and confusing use of the terms legal personality and legal capacity. I propose instead, legal *agency* as the term to express the legal capacity to *act* in addition to having legal personality, and suggest that this sea change or CRPD ‘revolution’ is eminently capable of bringing children under its umbrella of universal legal capacity to act, limited to its use as a sword for redressing human rights violations. As stated by Bach, ‘the criteria of what it means to be recognized a full person before the law – the criteria of what it means to have rights and to act on those rights – can be changed in law, policy and practice.’⁶⁶

We can begin to get a feel for how accommodating the support model could pan out for children *in practice* through considerations of law reform in the future implementation of this pioneering legal development. As a sophisticated example of how the theory of the support model can apply in practice, let us examine the 2010 proposal of Bach and Kerzner to the Ontario Law Commission as to how legislation can support the

63. Quinn and Arstein-Kerslake (n 51) 47.

64. *ibid* 49.

65. *ibid* 50. Emphasis added.

66. Michael Bach, *The Right to Legal Capacity under the UN Convention on the Rights of Persons with Disabilities: Key Concepts and Directions for Law Reform* (Institute for Research and Development on Inclusion and Society 2009) 7.

exercise of legal capacity and comply with Article 12 of the CRPD. Bach and Kerzner delineate three ways in which legal capacity can be exercised, ‘recognizing different constitutions of decision-making capability, depending on the particular mix of a person’s abilities and supports needed.’⁶⁷ They propose, for example, ‘legally independent status’, for people ‘who have the ability, on their own, to understand information and appreciate the nature and consequences of a decision, and can communicate that to third parties.’ Secondly, they suggest ‘supported decision making status’, through a formal supported decision-making arrangement, and lastly, facilitated decision making for individuals whose ‘decision-making abilities are entirely non-evident to any others who could assist them in decision making, then supports and accommodations cannot be provided to enhance those abilities and constitute decision making capability.’ The reasoning behind this formulation is indicative of the fundamental changes to the way that personhood is viewed post-CRPD, namely, by offering a ‘broader account of human agency and personhood, or of persons who exercise legal capacity, and of the ways in which they exercise it, expands our understanding of how the right to legal capacity can be exercised.’ This broader account uses the conceptual tool of the notion of ‘decision-making capability’ through which to ‘fashion a legal paradigm for recognizing the right to legal capacity that is consistent with the provisions of the CRPD and its social model approach to disability.’ By so doing, it decouples legal capacity from one’s decision-making status, thus:

challenging the idea that the only way to exercise legal capacity is through what could be termed a ‘legally independent’ status; the idea that one enters a contract, gives informed consent, and manages property transactions *independently*. This decision-making status has come to be equated with the right itself. If one cannot manage decision making independently, it is assumed that one does not have legal capacity. It is on this basis that many people with disabilities have the right to legal capacity restricted or denied altogether.⁶⁸

Children have been denied legal capacity on this very basis of their perceived lack of decision-making ability. Following the same reasoning, children can also be afforded legal capacity to sue through being recognised as having legal capacity to act under this supported decision-making model. The category most suited to children, especially the younger, would be the second and the third categories, mentioned above: supported or facilitated decision-making status, dependent on the general principle of the CRPD being respect for the evolving capacities of children with disabilities, as per Article 3(h). Namely, adolescents who are more capable of making decisions may fall under the supported decision-making category, a group defined as ‘need[ing] support from others to communicate, express and represent themselves to third parties, and/or to process information. They cannot, or choose not, to manage these activities on their own.’⁶⁹ Younger infants, on

67. Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity* (Law Commission of Ontario 2010) 23.

68. *ibid* 72.

69. *ibid* 85.

the other hand, would be better provided for by the status of facilitated decision making, where others facilitate the making of necessary decisions.⁷⁰ In both cases there appears to be *prima facie* no apparent reason *how* and *why* children must be excluded.

It remains to be seen whether children with disabilities can avail themselves of the protections of Article 12 of the CRPD, which does not at face value discriminate against children, stating that the addressees of the right are ‘persons with disabilities’. This meaning is supported by the express inclusion in Article 7(1) & 7(3) on ‘Children with Disabilities’ the wording ‘on an equal basis with other children.’ The omission of this terminology, which limits the rights of children with disabilities to the rights possessed by other *children* in Article 12 lends weight to the interpretation that the exclusion of children was not intended.

3.3 At the Intersections of Disability and Childhood

Children are unduly disadvantaged through their unique circumstances at the intersections of legal and developmental ‘disability’. However, as the previous sections exemplify, the sea change in disability theory brings with it new pathways for reimagining the legal enablement of children with agency: with both legal personality *and* legal capacity. Quinn makes mention of intersectionality as one of the ‘children’ of the CRPD:

The more holistic conception of personhood in the CRPD created space for a broader posture to intersectionality than in other instruments ... Article 7 focusses on the special vulnerabilities of children with disabilities. The CRPD is not a perfect instantiation of intersectionality. But it at least makes a stab in the right direction.⁷¹

As has been seen, it is far from clear how Article 7 is to be read in light of the other key innovations of the Convention such as Article 12; that is to say, for example, will children be denied the expansion of legal personhood personified by Article 12, or will they too be beneficiaries? On the other hand it can be argued that by relegating women and children to separate provisions the CRPD is falling into the same trappings of identifying groups with ‘special needs’ and thereby maintaining the independent, single-ground discrimination model that the intersectionality thesis seeks to dismantle. At the very least, this legal instrument opens the space for the interrogation of these issues. Nonetheless, it is not just in the express provisions of the CRPD that address special groups that may be cumulatively disadvantaged, such as women and children, that lends weight to an intersectional enquiry. In the theory of ‘complex positionality’ put forward by disability rights theorist Siebers, we have intersectionality *embodied*:

70. *ibid* 91.

71. Quinn and Arstein-Kerslake (n 51) 50.

Additionally, coming to an understanding of intersecting minorities demands that one imagine social location not only as perspective but also as complex embodiment, and complex embodiment combines social and corporeal factors.⁷²

As opposed to the separation into discrete identities – the ‘privileged’ minority groupings such as women and children having their own provisions – codified in the CRPD, complex embodiment takes shape in that place between representation and the body:

While identities are socially constructed, they are nevertheless meaningful and real precisely because they are complexly embodied. The complex embodiment apparent in disability is an especially strong example to contemplate because the disabled body compels one to give concrete form to the theory of social construction and to take its metaphors seriously.⁷³

So, when a child is denied the legal agency to seek redress for rights violations, to use Siebers’ language ‘a social construction is revealed and must be read’. We would then be required to ‘elaborate claims about social construction in concrete terms’ and to ‘locate the construction in time and place as a form of complex embodiment.’⁷⁴ This is what I have endeavoured to achieve by explicating the strong ideological undercurrents in the legal disabilities of children. Like Siebers:

... my analysis here will always take it as a point of departure from which to move directly to the elucidation of embodied causes and effects. Oppression is driven not by individual, unconscious syndromes but by social ideologies that are embodied, and precisely because ideologies are embodied, their effects are readable, and must be read, in the construction and history of societies.⁷⁵

Childhood disabilities stemming from the embodied vulnerabilities of children, have been a constituent part of Western liberal legal ideology from the period of the Enlightenment onwards, and they continue to occupy a place in laws regarding legal capacity. The idea that the human condition is one where we are all complexly embodied necessitates an intersectionality perspective that is yet to be reflected in human rights instruments, not least the CRPD. Nonetheless, a disability studies perspective offers a rich tapestry on which to pin ideas of the expansion of what it means to be human, and how that translates into a radical reimagining of legal capacity that can ultimately embrace children.

72. Siebers (n 33) 29.

73. *ibid* 30.

74. *ibid* 32.

75. *ibid*.

4. LEGAL CHANGE: OVERCOMING THE FURIES

Neither lawyer nor judge ... is conscious at all times that it is philosophy which is impelling him to the front or driving him to the rear. None the less, the goad is there. If we cannot escape the Furies, we shall do well to understand them.⁷⁶

The ideas of individualism permeate domestic laws in Western liberal states, and the attitudes of judges and decision makers, where children are denied legal agency due to their disability. Often, such philosophies go unstated and serve as powerful and deep-seated norms against which decisions concerning children are made.⁷⁷ Consciously or unconsciously, lawyers and judges do not make decisions in a vacuum, but are rather propelled to make decisions through the 'Furies' of philosophy. Using this analogy, the Furies relevant for our purposes here are the philosophy of liberalism, as well as the more insidious ideology of liberalism, which is 'competing over space in a crowded ideological world,'⁷⁸ a feature of which is 'to decontest the concepts [it] employs – to remove all [its] major concepts from contest by attempting to assign them a clear meaning.'⁷⁹ Individualism is one of the concepts to which legal liberalism has assigned apparently fixed, immutable and unambiguous meaning: the ideology of the individual with the capacity to contract, and subject to the Empire of Reason. The changes in substantive law for children will not be rendered effective unless and until the ideologies of disability permeating legal discourse are challenged and countered. Children are disabled at law in being denied legal agency due to their perceived lack of reason and capacity, which has its densely woven roots buried in Enlightenment philosophy and law. The Enlightenment philosophies of the independent, autonomous, contracting individual remain at the heart of legal subjectivity, and in deliberations of the extension of legal agency to children. The development of the Western liberal legal ideology from the Enlightenment to the present day – the so-called 'movement from status to agency,'⁸⁰ – charts the four stages of progression from the seventeenth century onwards (see Figure 1): (1) the 'Ideology of individualism' which is the first legal codification of the Lockian subject in the common law tradition. This phase is characterised by the creation of the special childhood status, with the associated absence of both legal personality and legal capacity for children; (2) movement from status to contract, where the child is still denied legal personality and legal capacity; (3) the movement from status to rights, which is marked by the recognition of a child's legal personality, but without legal capacity. This stage reflects the current state of child rights at the domestic level in many states; and lastly (4) the movement from status to agency. Here the child has *both* legal personality *and* legal capacity to sue for violations of human rights. Thus, it is no longer tenable for law to disable children's legal agency, and we are now witnessing the movement from status to agency with the new norm of universal legal agency at the international level.

76. Justice Cardozo as quoted in Wiley B Rutledge, 'Legal Personality—Legislative or Judicial Prerogative' (1928) 14 *Louis L Rev* 343, 366.

77. For a survey of the legal representations of children before the law see Clark (n 11).

78. Freedon (n 6) 13.

79. *ibid* 59.

80. Clark (n 11).

TABLE 1 *Movement from status to agency*

	Phase	Status-type	Legal Characteristics
1	Ideology of Individualism	Sortal (S) Fixed/static	No legal personality (In)capacity Ideology of individualism has carved out 'status' as exceptions in the law for certain persons (women, children, slaves etc.)
2	Status to Contract	Condition (C) Fixed/static	No legal personality (In)capacity Legal personality granted to certain classes on basis of capacity to contract (children and people with mental disabilities excluded)
3	Status to Rights	Condition (C) Fixed/static	Legal personality (In)capacity Recognition of legal personality of all people, including children and people with mental disabilities, who still do not have capacity to act (merely to enjoy the right to have rights)
4	Status to Agency	Sortal (S) & (C) Dynamic:	Legal personality (Limited) Capacity to sue Legal status decoupled from capacity All people have capacity to sue in international human rights law for violations of their human rights Status no longer normatively fixed but has to be constantly evaluated by reference to policy determinations

Figure 1.

Movement from Status to Agency. Reproduced with permission. Sevda Clark, *Nordic Journal of International Law*. Copyright 2015, Brill.

Yet, Western Liberal states are at the third stage of progression, domestically: from status to rights, where children are afforded legal personality but not legal agency to act in their own name. An excavation of the legal literature from the Blackstonian canon uncovers the strong ideological layering manifested in the law, where children suffer the 'disabilities of infancy,' as it is uncritically proclaimed in Blackstone and in a host of laws regarding children.⁸¹ Today, this manifests itself in the few cases being brought by children⁸² and, even

81. *ibid.*

82. Less than two per cent of individual communications brought before the UN Treaty Bodies have been brought by children: Malcolm Langford and Sevda Clark, 'The New Kid on the Block: A Complaints Procedure for the Convention on the Rights of the Child' (2010) 28 *Nordic Journal of Human Rights* 371.

in these cases, courts appear reluctant to break the mould of reasoning which denies legal standing, but rather creatively skirt around the procedural rules to find in favour of the child applicants.

4.1 Exemplifying the obstacles faced by children in court proceedings

By way of an example of the challenges children face in litigation, we can turn to the case law of the European Court of Human Rights where, though applications have been accepted by and on behalf of children irrespective of their age, such cases are sparse, and '[m]uch European case law derives from litigation initiated by parents or other legal representatives of children, given the limited legal capacity of children.'⁸³ One such example before the European Court of Human Rights is the case of *Stagno v. Belgium* (2009)⁸⁴ which is illuminating to review. In 1987 the applicants were granted a payout by the company Fortis AG as beneficiaries of their deceased father's life insurance, which their mother, being the statutory administrator of her minor children's property, was paid by the insurer. Subsequently, the mother deposited the funds in a savings account that she then exhausted within less than a year. At that time, the children did not have the capacity to bring a suit against either their mother or the insurance company, and it was ten years later, when the applicants were 18 and 20 years of age respectively that they brought a suit against their mother⁸⁵ and an insurance company (Fortis Banque). The Belgian trial Court declared the applicants' action against company inadmissible on the ground that the three-year limitation period was applicable, to any claim arising from an insurance policy, regardless of the capacity of the parties. The applicants appealed, unsuccessfully, in 2004, and the Court of Appeal rejected their argument that since they had been minors, it had been legally impossible for them to act at the relevant time. A second appeal on the points of law in 2006 was dismissed on the ground that the aim pursued by the limitation period (namely, to avoid the disappearance of evidence and means of verification) could not be fulfilled if it were open to insured persons or their beneficiaries to bring a claim many years after the event on which it was based. The applicants argued that they should not be penalised for failing to apply, at the ages of eight and 10, for the appointment of a special guardian, and that they had found themselves *de facto* in a situation where they had no legal representative through whom they could have asserted their rights. The applicants did not succeed at this appeal either, and the Court of Appeal held that it was not appropriate to allow different treatment for persons without legal representation. Thus, an action was brought by the applicants complaining that the money from their deceased father's life insurance had been partly squandered by their mother while they were still children, had been rejected at the domestic level.

83. The European Union Agency for Fundamental Rights and the Council of Europe together with the Registry of the European Court of Human Rights, *Handbook on European Law Relating to the Rights of the Child* (European Union Agency for Fundamental Rights and Council of Europe 2015) 17.

84. *Stagno v. Belgium*, Application no 1062/07 ECHR 2009

85. The suit against the mother was later dropped due to her agreement to pay back one-third of the monies owed to her children.

Consequently, in 2006, the applicants submitted an application to the European Court of Human Rights, upon which a decision was reached in 2009 when the applicants were in their early thirties. The European Court of Human Rights found, by 6 votes to 1, a violation of Article 6 § 1 (right to a fair hearing) of the European Convention on Human Rights. Importantly, the Court framed the case as a limitation period case, and reiterated that statutory limitation periods pursued the legitimate aim of ensuring legal certainty, as a time limitation on claims protected potential defendants from belated complaints and meant that the courts would not have to give judgments based on evidence that had become uncertain or incomplete with the passing of time. Looking to the specific issues presented by the facts of the case, the Court considered that it had been practically impossible for the Applicants to defend their property rights against the company before reaching majority, and when they did come of age, their claim against the company had become time-barred. In view of this, the Court held that the strict application of a statutory limitation period, without taking into account the particular circumstances of the case, had prevented the Stagno sisters from using a remedy that in principle was available to them. That limitation on their right of access to a court was disproportionate in relation to the aim of guaranteeing legal certainty and the proper administration of justice, in violation of Article 6 § 1.

As demonstrated in *Stagno v. Belgium*, rather than tackling the issue of the legal standing (or agency) of children directly, the European Court of Human Rights missed that opportunity by choosing to approach the case by way of the procedural rules of limitations. What was offered was a Band-Aid remedy, applying a light bandage of relief rather than tackling the substantive issue of legal incapacities of children to bring suits for violations of their human rights. Further, as this case demonstrates, the length of time it takes may offer some inroads as to why so few cases are brought by children. Technically, by the time the case is exhausted at the domestic level and it sluggishly makes its way to the international level, the children are well into adulthood. The Stagno children, aged eight and 10 when the violations occurred, were aged 30 and 32 respectively when the decision was issued by the European Court of Human Rights. Another reason as to why are there so few cases brought by children may be access to justice, which ‘remains a tremendous challenge for children,’ as pointed out in the 2013 Report of the United Nations High Commissioner.⁸⁶ A discernible cause is that ‘Children have no capacity to act without their parents or legal representatives’ and they are ‘sometimes not accepted or seen as rights holders, but rather as subject to the good will of adults, who may not act in the best interest of the child.’⁸⁷

4.2 Ideological barriers to the legal agency of children

One reason for the marginal number of cases brought by children might very well be due to the permeation of the ideology of western liberal individualism, buried beneath legal positivism and assumptions of disability, in legal discourse and in society more broadly.

86. Human Rights Council, *Access to Justice for Children: Report of the United Nations High Commissioner for Human Rights* (Annual Report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, 2013) 13.

87. *ibid* 16.

Thus, in order for the progression to the fourth stage from status to agency at the domestic level, there has to be a concomitant change in the liberal legal ideologies informing the law, and in everyday social relations beyond the judicial process. The latter reflects the heavy socio-cultural baggage, reflecting what Steven Lukes would term ‘invisible power’ – ways of seeing that escape legal attention because it is part of our unquestioned socio-legal repertoire. Lukes referred to this as ‘the most insidious use of power’ because it keeps conflict from emerging in the first place, where A ‘exercises power over [B] by influencing, shaping or determining his very wants,’ through indoctrination, acculturation and socialization.⁸⁸ As to how invisible power is exercised, Hinson and Healey write that it ‘is exercised in part through control of the institutions that shape and create meaning: religious institutions, the media, television, mass consumer culture, popular ideas about government and about workers and bosses, etc.’ Further, Hinson and Healey evocatively capture the powerlessness that these assumptions induce in children:

When those who have the power to name and to socially construct reality choose not to see you or hear you ... when someone with the authority of a teacher, say, describes the world and you are not in it, there is a moment of psychic disequilibrium, as if you looked in the mirror and saw nothing. It takes some strength of soul — and not just individual strength but collective understanding — to resist this void, this non-being, into which you are thrust, and to stand up, demanding to be seen and heard.⁸⁹

Judges and decision makers, too, wield this tool of constructing realities for children. It is this ‘collective understanding’ that this paper seeks to advance as a means of countering the powerlessness of children. That such changes are a necessary component for the effectiveness of legal change was observed by law and society theorist Marc Galanter in his seminal *Haves* article,⁹⁰ where substantive law changes are not likely to be determinative: ‘Rule change is in itself likely to have little effect because the system is so constructed that changes in the rules can be filtered out unless accompanied by changes at other levels.’⁹¹ Accordingly, changes in the laws are unlikely to shape decisively the distribution of power in society,⁹² without the attendant changes in socio-cultural underpinnings of the laws.

Programs of equalizing reform which focus on rule-change can be readily absorbed without any change in power relations. The system has the capacity to change a great deal at the level of rules without the corresponding changes in everyday patterns of practice.⁹³

88. Stephen Lukes, *Power: A Radical View* (2nd ed., Palgrave Macmillian 2005) 27.

89. Sandra Hinson and Richard Healey ‘Building Political Power’, prepared for the State Strategies Fund Convening, Grassroots Policy Project, quoted in Powercube, *Lukes and Invisible Power* (The Participation, Power and Social Change team at the Institute of Development Studies, University of Sussex 2003).

90. Marc Galanter, ‘Why the “Haves” Come out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law & Society Review* 95.

91. *ibid* 149.

92. *ibid*.

93. *ibid*.

Thus, changes in law without the concomitant changes in power relations and everyday patterns of practice cannot but be ineffective.

Disability theory and critical disability studies have been instrumental in de-stigmatising its terms of reference through unpacking the ideologies underlying disability in law and society. As argued there are ‘striking parallels between the ideology of ableism in disability theory as such, and the ideology of disability within child rights discourse and law,’ which were elucidated in Part 3.1 on the Semantics and Models in disability studies. ‘The semantics of legal ‘disabilities’ themselves are ideologically driven, and need to be dismantled in discussing child rights.’⁹⁴ Thus, ‘given the limitations of legal change, the reflection of this norm [of universal legal agency] at the domestic level will not be realised until the legal ideologies underpinning denial of legal standing to children are unearthed, challenged and shown to be wanting.’⁹⁵

In order for substantive legal change to be rendered effective, the socio-cultural baggage of liberal legal ideology, with its associations of the incapacities of the child justifying the limitation of legal agency, needs to be challenged. Offered here is not a survey of Western liberal states and their respective laws governing the legal agency of children; it is probably fairly safe to assert that few (if any) Western liberal states afford legal agency to children to be civil complainants. Few may offer the possibility for children to become parties to custody-related proceedings. Under the Children’s Act (1989) in the UK, the ‘most far-reaching change to child law’ in the twentieth century,⁹⁶

children can apply for a range of orders on issues affecting their lives if they can convince the judge that they understand the consequences of their actions. The much-publicised cases of children vetoing adoption orders and ‘divorcing their parents’ to live with grandparents or foster parents, result from the recognition that children can make rational decisions and they ought to be allowed to take legal action on their own behalf when they can demonstrate this.

Even when granted, legal agency is limited to children who can demonstrate the requisite competence. One exemption may be South Africa, where Section 14 of the Children’s Act 2005 states that ‘Every child has the right to bring, and be assisted in bringing a matter to a court, provided that matter falls within the jurisdiction of that court.’⁹⁷ Such a provision raises the possibility of children instituting proceedings in court. However, in their analysis of the relevant common law rules applicable to a child party to litigation in South Africa and the extent to which they have been amended by Section 14, Boezaart and Bruin find that a child cannot yet litigate in person without the assistance of her parent or guardian. They conclude, bleakly for our purposes, that although Section 14 opens the door for every child to bring a matter to a court that has jurisdiction, it does not ‘remove the common

94. Clark (n 11) 214.

95. *ibid* 185.

96. Maureen Ramsay, *What’s Wrong with Liberalism?: A Radical Critique of Liberal Political Philosophy* (Critical Political Studies, Leicester University Press 1997) 184.

97. The Children’s Act 2005 (Act No. 38 of 2005).

law restrictions imposed on a child's capacity to litigate' which thus far have not been amended.⁹⁸

The judiciary in domestic courts will have to go some way towards heralding the shift in international law into the domestic legal landscape. A change in the pervasive legal liberal philosophy – and ideology – will, it is submitted, have to take place for the movement from status to agency at the domestic level. Constitutional litigation is but one way towards such a change. Using Richard Cortner's classification scheme of the litigants in constitutional cases, as well as their tactics, children are 'disadvantaged litigants' defined as being:

highly dependent upon the judicial process as a means of pursuing their policy interests, usually because they are temporarily, or even permanently, disadvantaged in terms of their abilities to attain successfully their goals in the electoral process, within the elected political institutions or in the bureaucracy. If they are to succeed at all in the pursuit of their goals they are almost compelled to resort to litigation.⁹⁹

Children are also an example of Cortner's 'aggressive' litigant,¹⁰⁰ as opposed to the 'defensive' litigant, differentiated by whether they advocate constitutional change or they depend on the status quo in order to achieve their goals:

A defensive litigant does not seek the creation of new constitutional interpretations by the courts. His purpose is to pursue a strategy which will succeed in convincing the courts that prevailing constitutional norms, already favorable to his interests, should be applied. Such a litigant seeks stability, not change, in constitutional policy. The aggressive litigant, on the other hand, is one who finds the prevailing constitutional policy unfavourable and therefore is forced into pursuing an aggressive strategy by seeking innovative interpretations of the Constitution from the courts in order to succeed.¹⁰¹

It is clear that children fall into the latter category. Being politically disenfranchised results in their need to resort to the law as a means of attaining social change. This is costly, time-consuming, and may result in losses.

A final characteristic of the aggressive litigant in constitutional cases which should be noted is the fact that such litigants probably supply a high proportion of the losers in constitutional cases. This is due to the novelty of the demands which they make upon the judiciary and because, as Justice Holmes once said, judges '...commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind, than to fall in love with novelties.'¹⁰²

If only because any proposed alteration to the status quo may rattle the attitudinal cages of the judiciary, the high value of aggressive litigants in the judicial process is vindicated:

98. T Boezaart and David Wegeling De Bruin, 'Section 14 of the Children's Act 38 of 2005 and the Child's Capacity to Litigate' (2011) 44 *De Jure* 416, 437.

99. Richard C Cortner, 'Strategies and Tactics of Litigants in Constitutional Cases' (1968) 17 *J Pub L* 287, 287.

100. *ibid.*

101. *ibid* 288.

102. *ibid* 306.

It may well be that in losing a substantial portion of their cases however, aggressive litigants educate the Justices so that their 'repose of mind' is not so much disturbed by ideas which, because they have been repeatedly presented to them, have ceased to be novelties to be hated on sight. In any case, when aggressive litigants do succeed, the result is often an historic change in constitutional law. They are, therefore, perhaps the most important class of litigants operating in the judicial process.¹⁰³

Changing the individual 'repose of mind' of the Justices is one significant step closer to unseating entrenched assumptions about legal subjectivity. And Cortner's finding that, as aggressive litigants, children are vital in the initiation of change in constitutional policy that represents the pathway to attitudinal changes in the judiciary, is no less significant. However, if anthropologist Mary Douglas is correct about locating assumptions, not in individuals but rather in *institutions*, challenging the intractable assumptions that deny legal subjectivity to children 'will require more than fresh thinking by individuals. Individual efforts to think differently about difference will be curbed or stymied by existing institutionalized patterns of thought.'¹⁰⁴

5. CONCLUSION

To extend the analogy with which we began, the foregoing analysis actualised the state of the canary's health upon return from the mine. Having sent the proverbial canary into the mine of international human rights law leads us to conclude that there is hope for the canary of children's legal agency yet. The creature is breathing, and may even have been restored with a new lease of life with disability theory. As I have hope to have demonstrated, what it means to be human is very much at the front line of contemporary legal thinking and scholarship, and it is fair to surmise that it will assume more importance as more seek to join the bandwagon of the law's subjects. The law has the power of creation over civil life and death, a power that lies in the law's ability to grant or deny access to its very institutions: in order for legal protections to be effective, one needs to be armed with the sword of legal agency in order to seek redress for rights violations. Children continue to be subject to dire violations of their fundamental or human rights, and if we are to continue to deny children use of this sword of legal agency based on their developmental incapacities, we subject them to graver violation still. It is their age that makes them more susceptible to rights violations; and it is their age that advances the strongest claim for children's right to legal agency to sue for human rights violations.

103. *ibid* 306-307.

104. Minow (n 26).