PRELUDE

It is impossible to enter the tangled terrain of children's rights without a concept of a child as a guide. It is easy, deceptively so, to take our understanding of 'child' from the Convention on the Rights of the Child (CRC). Article 1 of this proclaims that a child is

> every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

When I first studied children's rights in the 1970s, this was about as far as we went. We took it as a given that the concept 'child' embraced all those under eighteen years of age, at least two of Shakespeare's 'ages of man' (*As You Like It*, II, vii, 143). We ignored the obvious differences between babies, children proper (whatever that means) and adolescents or youth. Concepts like 'evolving capacities', maturity and vulnerability were passed over with little contemplation. Maturity (Buss, 2009; Todres, 2012), vulnerability (Herring, 2014), development (Grugel and Piper, 2011) are now vigorously debated and contested within and across disciplines. The first book on the human rights of adolescents appeared only recently (Bhabha, 2014; and see now UN Committee on the Rights of the Child, 2016) – note, 'human' rights. And Priscilla Alderson has written of 'young children's rights' (2008), and with fellow

researchers has explored the participation rights of premature babies (Alderson, Hawthorne and Killen, 2005).

During the CRC's gestation period (it took ten years), there was no consensus as to when childhood began. Pragmatism prevailed, there being no philosophers present. That the drafters got as far as they did may be explained as an example of what Cass Sunstein has called, though not in relation to the CRC, incompletely theorised agreements (Sunstein, 1995/6, and see Tobin, 2013). The gulf between Catholic and liberal states was left gaping. A compromise was affected by designing a paragraph in the Preamble which recognised life before birth, and permitted states parties to choose their own start date for the beginning of life. But the rights, if any, of the unborn child (Alston, 1990; Cornock and Montgomery, 2011; Joseph, 2009) are no nearer being resolved than they were at the onset of negotiations in 1979. Reconciling the pregnant woman's rights with those of the unborn baby – and much hinges upon language, since I could have labelled it [*sic*] as 'foetus' – may prove impossible. Two dignities remain on a collision course (Siegel, 2013). The definition of 'child' in Article 1 of the CRC is expressed to be 'for the purposes of the present Convention', but not surprisingly it has taken over as the definition of a child. It was congruent with standard practice anyway. An inevitable consequence is that all persons under eighteen are lumped together under one category. It is not uncommon to refer to all persons under the age of eighteen as 'kids', which, apart from being derogatory, as kids are baby goats, it infantilises adolescents (Abramson, 1996a).

It is becoming almost as difficult to determine when childhood ends. It is often said it is getting longer (Future

Foundation, 2000, see *The Independent*, 29 May 2000). To impose closure at the age of eighteen is arbitrary, though it reflects what is generally felt appropriate (but see Grover, 2004). But the CRC permits recruitment into the armed forces at fifteen (an Optional Protocol raises this to eighteen), steers clear of interfering with domestic policies on the age of criminal responsibility (Cipriani, 2009), and on the age at which marriage is permitted, thus leaving both dismally low in many countries (in England, it is ten and sixteen, respectively). Veerman (2010) and Desmet (2012) have both pointed to the 'ageing' of the Convention (see also Freeman, 2000b). The twenty-eight years since the Convention was finalised have seen developments in neuroscience which make us question our understanding of adolescence (Steinberg, 2014). The evidence is now clear that adolescence is a period when significant changes in brain structure and function occur. Important changes in brain anatomy and activity take place far longer into development than was previously thought (Casey, Jones and Somerville, 2011). Such evidence was put to the US Supreme Court in *Roper* v. *Simmons* in 2005, and must have influenced its decision to declare the death penalty unlawful where the crime is committed by a juvenile. Subsequently, it led the court to come to the same conclusion where the sentence was life imprisonment without parole (see *Graham* v. *Florida*, 2010). In *Graham*, there is explicit reference to neuroscientific evidence. Justice Anthony Kennedy stated that:

> Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in

> behavior control continue to mature through late adolescence. (2010: 17)

This use of evidence has continued. In *Miller* v. *Alabama* and in *Jackson* v. *Hobbs* (2012) it was invoked to rule out life without parole for homicide committed by juveniles.

The implications of neuroscientific evidence are profound. They suggest the brain is not fully developed until about the age of twenty-five, and that it declines from about forty-five years. Should we reconsider our whole criminal justice system to take account of this evidence? And, what are the implications of this evidence from neuroscience for civil and political rights? It seems likely that sixteen-year-olds may soon be given the right to vote. Opponents will inevitably point to neuroscience. Justice Scalia did just this in his dissenting opinion in *Roper* v. *Simmons*. He criticised the American Psychological Association: in *Hodgson* v. *Minnesota* in 1990 it had submitted an *amicus curiae* brief arguing that adolescents should be permitted to make decisions about abortion without involving their parents.

What looks like inconsistency – both having one's cake and eating it – can easily be explained. It is more likely that criminal activity is impulsive, whereas the decision to terminate a pregnancy is considered. Similarly, the exercise of voting in an election. This certainly seemed to be the case with sixteen-year-olds in Scotland, who in 2014 were given the vote in the independence referendum. It can thus be argued that neuroscience should not affect the trend, exemplified by Article 12 of the CRC, to pay more and more attention to children's input into decision-making in areas

such as divorce, care and medical questions. Neuroscience may yet come to assist us understand concepts in the CRC like the 'evolving capacities' of children (in Article 5), and better inform us as to when a child is capable of forming his or her own views so that account can be taken of them in accordance with the relevant child's 'age and maturity' (see Article 12). It may enable some content to be poured into the *Gillick* competence test (1986). It may offer us some guidance on whether the judicial retreat from *Gillick* when a child refuses medical treatment can be justified. Why is it easier to accept a child's decision when it is an acceptance of treatment (see *Re R* (1992); *Re W* (1993); Freeman, 2007b)?

This conflict between autonomy and protection, we will see, has dogged the modern study of children. In the nineteenth century, the need for protection led to the child-saving movement. In the latter third of the twentieth century, there was a shift to emphasising the autonomous child, capable of agency, though this image co-existed with that of the vulnerable child. The image of the autonomous child features prominently in childhood studies literature which has blossomed since the 1980s (Alanen, 2011; Alderson, Hawthorne and Killen, 2005; Corsaro, 1997; James, Jenks and Prout, [1998] 2002; Mayall, 2003; Prout, 2005). But the emphasis on protection (and prevention) remains, though this is now looked at more critically than was once the case. This is not surprising as more forms of abuse emerge and new ways of exploiting children are uncovered (Davies, 2014; Furedi, 2015; Wild, 2013). But, as Richard Farson noted more than forty years ago, we must protect not only children, but also their rights (1974). To take one simple example, make it unlawful to punish children

physically and you will take a major step towards the elimination of child abuse (Freeman and Saunders, 2014). English law retains the 'compromise' position that reasonable chastisement is a defence if the parent commits only a common assault (see Children Act 2004, s. 58, and below, p. 136).

The Convention on the Rights of the Child of 1989 is the clearest and fullest statement of children's rights. It is one of the nine core human rights treaties, all of which are of relevance to children, who are, of course, human beings. It is tempting to regard it as a definitive code of children's rights but this would be to ignore a number of considerations.

It was drafted without the input of children and reflects a top-down understanding of children's interests. In the twenty-eight years since, there has developed an awareness of a different picture that would emerge from a bottom-up construction of children's rights. There are now advocates who wish to approach children's rights in this way (Liebel, 2012a; Vandenhole, 2012); see, however, the highly critical riposte of Gertrud Lenzer (2015). In relation to human rights more generally, see De Feyter (2007) and De Gaay Fortman (2011). There is nothing new in this. As long ago as 1928, Janusz Korczak wrote of children that 'They [children] ought to be trusted and allowed to "organise" as "the expert is the child"' (Korczak, 1928, English translation, 2009: 33). Korczak was critical of the Declaration of Geneva of 1924 (the 'Geneva lawmakers'). Writes Korczak, 'The child is neither given nor trusted to be able to act on his/her own "The Child-nothing. We-everything"' (2009: 25). How different would the Convention look if there had been input by children? (Liebel, 2013). Would it have reflected more the interests of children of the Global

South? For example, what would the education/work equation have looked like? Would there have been greater emphasis on socio-economic rights than civil and political ones? Would there be new rights, perhaps the right to vote? Or the right to work? Would children have pursued a rights strategy at all, perhaps preferring an ethics of care approach? Or a greater emphasis on well-being? (Ben-Arieh et al., 2014). There are children starving in Britain today for many of whom the right of association – to take but one rather obvious example – is meaningless (Chakrabortty, 2015).

A second reason why the 1989 text cannot be regarded as definitive is that the world changes ever more rapidly. The CRC was finally constructed as the Berlin Wall was pulled down, and with it the beginning of the end of Communism. The CRC reflects a world emerging from the Cold War. It is rooted in the historical context of the last days of the Cold War. Poland proposed a Convention as a riposte to the United States which, with Jimmy Carter as President, was pushing rather for a Convention against Torture. The United States dropped its opposition to a Children's Convention when it was able to insert a basket of civil and political rights. But it pushed for this more because it wanted to make what became the CRC a less attractive package for the Communist bloc. The Convention was thus negotiated against the backdrop of power politics which changed contemporaneously with the finalising of the document. A few years later we might have had a different Convention.

The end of Communism is not the only cataclysmic rupture. The rise of a capitalist China, an epidemic of civil wars in Africa, wars of religion in the Middle East and elsewhere, 9/11

and its aftermath – the 'war on terror', Guantánamo (which warehoused more than a few children), Islamophobia and antisemitism, the collapse of economies, the refugee crisis. We are more aware of the impact of globalisation, of the results, real and potential, of climate change, of the challenges of the IT revolution (it is difficult to believe that the World Wide Web was only invented in 1989), of the ways the reproduction revolution can question the meaning of life itself (reproduction without sex, a plurality of parents, human enhancement, sex selection, saviour siblings). We have also awakened to new forms of abuse polluting the lives of our children, like cyber bullying and grooming. Childhood has become 'toxic' (Palmer, 2006), children are exploited (Wild, 2013) in ways barely imaginable to those who formulated the CRC in the 1980s (the global sex trade is but one example, O'Connell Davidson, 2005).

This is a book about children's rights. Children's rights are a sub-set of human rights. Had children not been marginalised, seen as 'becomings' rather than as 'human beings', separate treatment of children might not have been necessary. The same might be said about the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Disabilities Convention. There is a view that we should be working to a future when a children's Convention is superfluous. This vision was seen by Richard Farson (1974) and John Holt (1974), the child liberationists of the 1970s. But children do need protection, justifying a degree of paternalism – I long ago called this 'liberal paternalism' (Freeman, 1983). I now prefer 'limited' paternalism. It is important, therefore, that we retain children's rights, whilst not regarding the CRC as the definitive statement of these rights,

or even thinking that children's rights can be reduced to a set of rules. We need to go beyond rules to change structures, embrace new forms of governance (Falk, 2013), rethink justice and citizenship, change our values (Minow, 1986: 297). These are major ventures and I can only sketch the beginnings of such an agenda. This I attempt to do in the coda of this book in its final chapter.

PART I

Is it Wrong to Think of Children as Human Beings?