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# Taking Account of the 'To and Fro' of Children's Experiences in Family Law

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## Abstract

*This paper will outline the possibilities and tensions that emerge in legal and social discourse when popular images and narratives of children as 'at risk', are juxtaposed with more revised constructions of the child as capable and autonomous. The paper explores this shift in representation of children against a background of radical family law reform currently underway in Australia. It then reports insights from a pilot study which found that children 'to and fro' between accounts of hurt and powerlessness associated with divorce and their desire to participate in the processes and decisions taking place around them. In identifying the different voices that children move between when they speak of their experiences of divorce transitions, the paper posits that discourses of participation taken up in research, practice and policy need to acknowledge a dialectic relationship between agency and vulnerability if we are to respond to children in ways that include rather than marginalise. The paper concludes by exploring some of the challenges that exist for researchers and practitioners seeking to be open to new ways of thinking, based on an ethic that refuses the kind of subjectification, normalisation and neat analyses conventionally pursued through research endeavours.*

## Introduction

What I say ought to be taken as "propositions", "game openings" where those who may be interested are invited to join in: they are not meant as dogmatic assertions to be taken or left *en bloc*.

(Foucault 1981, p.4)

The views and perspectives of children are critical if we are to create social institutions (families, schools, legal systems, government and non-government services) that are responsive to children and young people. This implies that we need to engage methods and processes in our professional work that enable us to listen and learn from what children have to tell us about their experiences and to integrate this into our responses to them. Our paper builds upon the case for participation that has already been well argued by others (Hart, 1992; Landsdown, 1995; James & James, 1999) and challenges a reflexive engagement with the paradoxes and ambiguities evident in children's participation.

Our interest in writing about children's participation in decision-making in the context of family law has been influenced by a number of key factors, not the least of which is the increasingly evident emergence of tensions inherent in both the 'principles and pragmatism' of participation (Prout, 2000, p. 304). As both researchers and practitioners we at times occupy a tense and disconcerting space between competing conceptualisations of the child as *being* either 'subject' or 'object, 'autonomous' or 'dependent', 'competent' or 'vulnerable' - and an emerging realisation through our dialogue with children that they can simultaneously be all of these. In listening to children's stories about the world and their place in it, we suggest children 'to and fro' between discourses, sometimes assuming power to speak in their own voice, sometimes speaking in ways they consider permissible and sometimes allowing silence to communicate the essence of their lived experiences (Belenky, Field, McVicker, Goldberg & Tarule, 1986; Sampson, 1993).

A number of questions remain unsettled for us as a result of our work and it is these that underpin today's presentation. How do we as researchers (re)present the experience of children? Do our interpretations limit or enable the 'otherness' of children's experience? How do we pursue research methodologies that privilege children's voices and yet resist a 'too neat' analysis of what we hear? How well do we recognise, respect and report the ambiguity or the 'to and fro' of children's different states of 'being'?

In essence, this paper takes the signifier 'children's participation' and provokes it to refrain from settling meanings. We take as a point of departure the idea that there are many complex contributing conditions that make it possible for the object of children's participation to be problematised, theorised and rendered amenable to administration through various apparatus, including the Family Court in Australia. Such an approach draws upon poststructural theorising as it attempts to make transparent the inevitable tensions of knowledge as partial, as interested, and as performative of relations of power (Britzman, 1995; Foucault, 1980).

Poststructuralist theories are useful for this discussion because they bring to the fore concerns about what it is that structures meanings, practices and bodies, about why certain practices concerning children become intelligible, valorised or deemed as traditions while other practices become discounted, impossible, or even unimaginable.

In recognising that the approach taken in this paper may be somewhat contentious in some circles, it may be timely to consider Foucault's own words in relation to the possibilities and limitations of such an approach:

Whenever I have tried to carry out a piece of theoretical work, it has been on the basis of my own experience, always in relation to processes I saw taking place around me. It is because I thought I could recognise in the things I saw, in the institutions with which I dealt, in my relations with others, cracks, silent shocks, malfunctionings . . . that I undertook a particular piece of work, a few fragments of an autobiography.  
(Foucault 1988, p.156)

Our perception that there may be some 'cracks' in emerging discourses of children around participation within family law prompted our further inquiry. This perception has been shaped and challenged particularly through our dialogue with

children, conversations made possible through ten years of work writing and implementing an education intervention for children whose parents have separated or divorced (Graham, 1996; 2004), through undertaking a small scale research project exploring children's involvement in decision making in family law (Fitzgerald & Graham, 2003) and through a study currently underway which is exploring children's experiences of supervised contact (Fitzgerald, in progress). In all three contexts, these conversations have prompted a deepening of our recognition and respect for the ways in which children can simultaneously accommodate and resist the very discourses that shape their lives.

## **Participation as Discourse**

There is now an extensive body of literature on children's participation that has significantly enhanced the ways we think about children's lives including the central importance of involving them in decision-making (Cashmore, 2003; Smith, Taylor & Tapp, 2001, 2003; Smart, Neale & Wade, 2001). Whilst the discourse of participation is increasingly evident in a range of policy and program initiatives in Australia, there remain significant concerns about the extent to which participation rights are being realised (see for example, the *Non-Government Report on the Implementation of the United Nations Convention on the Rights of the Child*, 2005). A focus on participation as discourse is critically important if we are to ensure it doesn't mask a range of programs and activities, including research that perpetuates the marginalisation of children whilst purporting to do the opposite. Understood this way, participation is treated as an object of knowledge, a meta-narrative, that is itself ordered and constructed by other discourses which determine what is 'seeable' and 'sayable' in relation to children's experience. As Ball (1990, p. 2) asserts:

Discourses are about what can be said and thought, but also about who can speak, when, and with what authority. Discourses embody meaning and social relationships, they constitute both subjectivity and power relations.

Discourses about children's participation abound. These discourses reflect views and ideologies in relation to rights and welfare, agency and dependency, autonomy and vulnerability, capacity and harm, risk and resilience, to name a few. This being the case, it seems important to reflect critically on whether it is possible to ever completely capture children's experience within the possibilities and limitations of these discourses. It is also important to focus on the potential of dialogue with children and whether, as researchers and practitioners, we can adopt a stance within this dialogue that transcends the discursive boundaries that close out the complex and unique of their existence.

In the following section we turn to examine the ways discursive boundaries of rights and welfare discourses order children's participation in the context of family law in Australia.

## **Welfare & Rights Discourses in the Australian Family Law Context**

In the Anglo- Australian context, discourses of welfare and rights have a long history in family law (Taylor, 1998; Neale & Smart, 1999, van Krieken, 2005).

While discourses of the 'welfare' or the 'best interests' of the child date back to the assertion of the *parens patriae* jurisdiction in 1696 and the construction of the prerogative right of the crown to act as guardian of those subjects unable to look after themselves: infants, idiots and lunatics (van Krieken, 2005), discourses of rights have historically been articulated in terms of fathers and then mothers rights to the custody of children (Taylor, 1998). Whilst competing discourses have thus provided a comprehensive history of the shifting balances in power between men and women, they have been notable for the absence of a focus on the children themselves. Imbued, then in historical discourses surrounding the 'best interests' principle has been a characterisation of the child as subject, as lacking capacity to participate on the grounds of immaturity, irrationality and incompetence and as participating in the legal system only as part of a wider family identity (Smith, 1997; Prout & James, 1997).

It is not until the emergence of new understandings associated with the sociology of childhood and the United Nations Convention on the Rights of the Child (UNCROC) that the principle begins to claim an existence *independent* of the competition between fathers' and mother's rights (van Krieken, 2005) and the notion of children as having rights begins to gain currency in Australia. However, centuries of particular understandings of family life and the appropriation of the best interests test as a crucial vehicle for balancing power between men and women are not easily overthrown (van Krieken, 2005) and family law legislation, in particular the *Family Law Act 1975* (Cth), continues to reflect a concern with the care and protection of children rather than a willingness to allow them an independent voice in proceedings which concern where they should live, with whom they should have contact and in whom parental responsibility for them should be vested (Smith, 1997). Although the welfare of the child is the ultimate concern of the Family Court, especially given the high percentage of allegations of abuse and violence that come before it (Family Court of Australia Submission, 2003), we agree with Smart et al that the 'genuine desire to improve the lives of children is quite a separate phenomenon to the powerfully symbolic and politically useful' rhetoric of welfare discourses that seek to describe children as vulnerable and in need of protection (2001, p. 22).

In Australia, welfare discourses focused on the harmful effects of divorce on children have to some extent colonized understandings of children's rights in that the legislation, whilst providing that children have rights, adopts only the provision rights of UNCROC, that is, the right to know and be cared for by both parents and the right to have contact with both parents on a regular basis. By failing to fully implement a child's right to be heard as expressed in Article 12 of UNCROC, the legislation affords children limited opportunity to express their wishes in all family law proceedings that concern them and continues to position children at the margins of participation. This is despite research both in Australia and overseas supporting the idea that involving children in decisions that affect them and taking their views seriously has far reaching benefits for all stakeholders (Cashmore, 2003; Smith et al 2003; Smart et al 2001; Butler, Scanlon, Robinson, Douglas & Murch, 2002). These benefits include 'the likelihood of better decisions and outcomes, and of greater acceptance and compliance by children, the basic right of children as people with opinions and feelings of their own to be treated with respect, and the demonstrable fact that adults and even parents do not always act in the best interests of children' (Cashmore, 2003). Children attach immense importance to being

listened to, and to participating in the decision-making processes that profoundly affect them, those children who report to have had some involvement in their residence and contact arrangements also report higher degrees of satisfaction with the arrangements subsequently made (Butler et al, 2002). Yet, children consistently report their exclusion from discussions about their parents separation and divorce and the changes that it brings to their lives. Smart, Wade & Neale (1999, p.366) have observed that:

one of the ironies of this exclusion of children from open discussions about divorce and changes in family life is that they are a fount of knowledge and information themselves on what it is like, on how to cope, on how to intervene (even in limited ways) and what it all feels like. They may have a very different perspective on the process when compared to parents, and they may even have solutions to some typical problems thrown up by parenting across households.

As researchers, we have concerns that the extensive body of research that supports children's capacity to act positively in family law matters that concern them (Robinson, Butler, Scanlan, Douglas & Murch, 2004; Smith et al, 2001, 2003; Cashmore, 2003), has yet to make a significant impact in terms of Australian family law policy and legislation. Considerable government funds continue to be allocated for the conduct of major national inquiries (e.g. Every Picture Tells A Story) and the commissioning of reports and discussion papers (e.g. A New Approach to the Family Law System) with the declared aim of making 'the family law system better for all the children and young people who find themselves, through no fault of their own, in a situation where their parents cannot live together any more and must separate'. And yet, children and young people are afforded little opportunity to participate in either the consultations or in their evaluation preceding the announcement of reforms. An example is evident in the conduct of the House of Representatives Standing Committee on Family and Community Affairs, whereby, despite receiving and hearing submissions from over 2000 people, it was only at its final meeting that the Committee met with fourteen children and young adults. In failing to consult with children in an ongoing and meaningful way, the Committee fails to provide children and young people with the opportunities it reports do not exist in the family law system or in the behaviour of separating parents:

2.20 The emphasis on the best interests of the child as the paramount consideration is widely supported in principle but most individuals who have come before the committee focused on their own needs. A real child focus is not yet a reality in the system or in the behaviour of separating families. Opportunities for children's voices to be heard in the context of decisions that affect them are limited, both in the community and family setting and court context...

(Every Picture Tells a Story, p.25)

Children and young people therefore continue to be denied the opportunity to more accurately and compassionately inform family law policy that reflects their concerns (Grover, 2004).

In Australia at least, the best interest standard remains a crucial vehicle for contesting the balance of power between fathers and mothers, and we suggest that it works to keep children one degree removed from the legal position of both their parents and the Crown (van Krieken, 2005). The resulting disempowerment of children, captured by Lord Denning some sixty years ago, continues to have relevance today:

We are of the opinion [that the present procedure] is but poorly fitted for the purpose [of safeguarding the welfare of children]. The principle defect is that the children are rarely, if ever, separately represented before the Court, and the Judge is never in possession of the report of an independent person as to their welfare, unless it has been obtained by one of the parents. The result is that the welfare of children is subordinated to the interests of the parents. (Denning, 1946, p 17),

## **Locating Children's Experience: Discourses of Harm & Capacity**

The discussion above reveals that narratives of harm have renewed emphasis that family policy serves to protect the children, the 'innocent victims of divorce' (Smart et al, 2001, p 22). Key in providing legitimacy to such discourses has been a plethora of research on the effects of separation, divorce and remarriage on children; including whether divorce does or does not harm children (see for example, Wallerstein & Kelly, 1980; Ochiltree & Amato, 1985; Dunlop & Burns, 1988; Amato, 1993; Emery, 1994; Funder, 1996; Amato & Booth, 1997; Hetherington, 1999; Pryor & Rodgers, 2001). Implicit in such research has been the child as an object of concern although it is now widely argued that we should 'refashion the child of divorced parents as a person rather than as an object of concern (Smart et al, 1999, p366). 'Refashioning' the Australian child as a rights holder, however, remains fraught and has led to a questioning of how best to represent the agency and capacity of children, without denying the well recognised emotional responses often triggered by separation and divorce such as sadness, anxiety, anger, resentment, confusion, guilt and loyalty tensions (McIntosh, 2002; Worden, 1996; Bagshaw, 1998; Graham, 2004). Such responses have been conceptualised in terms of grief responses (Worden 1996; Graham, 1996; 2004), although these are neither inevitable nor universal. Importantly, 'grief' in this context is not construed as a pathological condition that positions children as victims or dependent but as a state of being that provides them with both the space to acknowledge their hurt or distress as well as to resist powerlessness and passivity in the face of their changing and often stressful family circumstances (Graham, 2004). In constructing their experience in this way, we open up the possibility that children themselves are implicated in the project of their own wellbeing, that is, they can engage their own knowing to act on themselves in relation to divorce and the changes it brings in their lives (Kaganas & Diduck, 2004).

Children's emotional responses should not in and of themselves render the child at risk of harm, nor should they be silenced in endeavours to promote children's agency. Instead, we can acknowledge the interplay between dependency and agency by giving more attention to the productive potential of children's grief. Many children have a quite extraordinary capacity for coping, problem solving, decision making and goal setting (McIntosh, 2002) although clearly they do best in developing competence with these in the context of a supportive social environment (Smith, 2002). Given timely and appropriate support, children are capable of reconstructing their experience in ways that enhance agency (a sense of being *enabled* and so acting upon what they *can* influence) as distinct from dependency (being *constrained* by acting upon decisions, processes or family dynamics they *can't* or *don't wish* to influence).

A key issue emerging from the above discussion is whether as adults we can accommodate the idea that 'children's participation' requires a capacity on our part to uncouple ourselves from the often polarising discourses embedded in rights and welfare narratives which potentially act as paradigmatic self enclosures that limit what we hear. Instead we are challenged to live with the ambiguity of children's experience as they 'find their way about' (Giddens, 1993, p.151) within and between such discourses.

## **The Ambiguity and Contradiction of Children's Voices: A Pilot Study**

In a recent pilot study (Fitzgerald & Graham, 2003), we interviewed eight children from northern New South Wales, about their participation in decision-making in relation to residence and contact arrangements after their parents had separated. From the outset the children provided thoughtful, articulate views on their understanding of legal processes and of their role in those processes. However, we recognised in the early stages of the research that our understanding of children's participation was at times located across competing and contradictory discourses.

A common theme expressed by the participants was a clear statement of an ideal whereby adults acknowledge and listen to children:

*...if you are listened to, because then you can decide who your friends are, what school you go to, and it just makes you happier, makes your life easier.*

Vin

*...when I am listened to, I don't have to say it ten thousand times and I have just to say it once and they will talk to me... I guess I know what is going on and stuff.*

Avril

*I would say that they would have to actually talk about it with the children, and all that sort of stuff... try and find out the best, find out what the child wants or something like that... ask them (children) about it. How would you feel if we moved away or something like that...*

Christy

*Just know that children aren't just children. That they have opinions, that they are not stupid they know what goes on and they are capable of being able to recognize what they want, and if they get stuck every second week with a parent that they don't necessarily like then it is going to foster horrible feelings and its just going to get worse. They need to realize that children should be heard.*

Anna

However, when the focus of discussion turned to children's actual experiences, children's constructions of 'participation' appeared to be located within and across quite different discursive positions, suggesting a 'to' and 'fro' between wanting to be involved and expressing hurt in relation to the processes occurring around them:

*I was kept out of it, not because they didn't want me to have a say but because it was too much, I didn't want to be a part of it.*

Anna



*I am just happy being in the background*

Vin

This 'to and fro' was well articulated by Johnny:

*If the kids could listen to what's happening, like actually happening, straight facts not just curvy ones that are not really true, but also scared sometime, like it's not really good to hear them, but it gives an understanding and you know what is happening.*

Appeals by children to be treated by adults with respect and as capable of engaging with what was happening in their families, co-existed alongside statements that revealed their vulnerability and experience of their parents' separation as a difficult time of change and loss:

*It's harder on the kids than it is on the adults because if the kids are attached to one parent it is much harder.*

Johnny

*The hardest part about it is the last thing you think is shock.....a lot of it is denial as well .....It is only as it gets less painful, less raw that you start thinking about the long term.*

Anna

*When things are bad its really bad on the kids like yelling and I kinda just.....*

Vin

*The only thing I wished was that it would.....get properly.*

Christy

*Stay together.....yep stay together.*

Harry

*To keep them (children) with their parents.*

Maxy

*Do something with the kids and make it better for them.....like making them actually enjoy the life they are having right now.*

Harry

The limited agency of the children was also reflected in a lack of consultation and information afforded them throughout their parent's separation:

*I was not really asked.....I think you should understand that children don't get much choice about it. They don't get much choice.*

Christy

*It would be good if maybe, I just felt most of the time that I wanted to, like if there were recordings of the court hearings and stuff.....that I could actually listen to them, cause I was being told various things by both parents, and I am like what the?.....Its really difficult and confusing.*

Johnny

*I didn't understand divorce at all.....and I didn't understand what the implications were, or what the Courts were about or anything. And even now I don't know much about it. It would be good to have some sort of information package or something, just something that you could read about, like directed at kids, not just adults, and explain what it is and what your rights are.....I think if more was made known to people going through it (children) they would think about it then rather than later.....it is too hard to change.*

Anna

From the children's narratives, it was clear that the children spoke in tentative voices as they moved between accommodating the dynamics of their parent's divorce and simultaneously attempting to adapt to their changed circumstances. Implicit in this observation is how to interpret this dynamic in an authentic way; to interpret or render this tentative voice such that it elevates discourses of *harm* and *risk* potentially marginalises the child's agency and silences the narratives relating to their *capacity*, although to interpret or render the children's appeals to be heard as calls for autonomy potentially fail to acknowledge the voices of hurt and sadness. If the key personal resources for resilient children are social competence, problem-solving skills, autonomy and sense of purpose (Masten et al, 1990), then marginalizing children's participation on the basis that their tentative voices translate as being a burden and therefore harmful, will seriously limit the opportunities to recognise and position children within discourses of capacity. This supports the view that 'emotional narratives...entangle or trap children in ways that do not promote resilience and may actively work against their development' Gorrell Barnes (1999, p.427).

On the other hand however, images of the children emerging from the research are considerably at odds with discourses of risk and harm that both marginalize their voice and their participation, and do not entirely accord with images of the child as autonomous, competent and always able to act in their own best interests, a child of the type Kaganas & Diduck (2004) refer to as the post-liberal child or the 'good' child of divorce or separation, 'a well-adjusted, adequately educated child who eschews antisocial activity' (p.968). The accounts of the children seem to occupy quite complex and competing spaces somewhere in between, spaces in which the children spoke in indirect ways, and where their voices were 'deliberately or unwittingly opaque' (Brown and Gilligan's (1992, p.23). Accompanying such expressions of voice are the children's experiences of the risks of both outspoken resistance and the corrosive suffering of silent resistance (Brown et al, 1992). Our claim in presenting this work is not that the children in this pilot represent all children, but rather that what we learned from the children in this study seemed worthy of the attention of others. In our attempts to progress the participation agenda, we need to remain mindful of what Britzman (1995, p.234) describes as 'being not yet', to be open to new ways of thinking, based on an ethic that refuses the kind of subjectification, normalisation and neat analyses conventionally pursued through research endeavours.

## **Children's Participation: Working Productively with the 'To and Fro'**

The children in our study welcome the limits imposed on their decision making, whilst simultaneously wanting recognition of their identity and capacities to act in the processes occurring around them. The idea of the child as human subject is a central theme in this paper, particularly in regard to the way in which the tension between constraint and limitlessness is played out. To be a subject can be understood in the sense of being subject *to* something, such as the power of a sovereign (Foucault, 1982). Being subject carries a connotation of being dominated, repressed, constrained or silenced - subjugated by some force or limits. Children's participation may be seen to act in this way, particularly when we hear their tentative voice within discourses of harm. In another sense though, the child subject

is attributed with agency and is therefore empowered to act on the object of participation. This is particularly evident when we hear in children's voices the capacity to both accommodate and resist the discourses that identify them as being either 'competent' or 'at risk'. According to Foucault's middle course, the subject is neither wholly subjected nor entirely self-defining and self-regulating.

A key element at work in this discussion is the concept of power and the ways in which it influences the positioning of children in both policy and practice. This is consistent with Hill, Davis, Prout & Tisdall's view that 'almost all discourse about 'young people's participation' refers back at least implicitly to notions of power; less often, however, does that involve explicit identification, clarification and deconstruction of what is meant by power and how power operates' (2004, p.89). We contend that the power at work in the children's lives as described in this paper is not one that is necessarily repressive (adult's power over children) but rather productive (children's power over themselves). Like Hill et al's (2004) analysis, our own has taken up Foucault's conceptualisation of power as making an important contribution to understanding the 'to and fro' of children's experience of participation:

*Power must be analysed as something which circulates, or rather as something which only functions in the form of a chain. It is never localised here or there, never in anybody's hands, never appropriated as a commodity or piece of wealth. Power is employed and exercised through a net-like organisation. And not only do individuals circulate between its threads; they are always in the position of simultaneously undergoing and exercising power.*

Clearly, if a new culture of elevating and facilitating children's participation in family law processes is to find expression and legitimacy in law, the child as represented in law must take into account the dialectic relationship between vulnerability and capacity, between dependency and autonomy and risk and resilience. We hope the narrative emerging from this paper provides an opportunity to think the unthought on children's participation and to trace how children as subjects and identities can at times transcend the very discourses that incite them. Such an approach will remain useful insofar as it highlights the diversity of powers and knowledges at work in constructing and facilitating children's experience of participation in family law.

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