INTERNATIONAL CHILDREN'S RIGHTS GROW UP: IMPLICATIONS FOR AMERICAN JURISPRUDENCE AND DOMESTIC POLICY

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INTRODUCTION

Despite its long heritage, the children's rights movement[1] has not done much to clarify what the United States is to make of them.[2] "Children's rights" has become a catch-all phrase, embracing different aspects of a controversy revolving around the proper role of children's voices, parents' authority, and State's responsibilities in matters concerning children.[3]

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1. The children's rights movement dates back to the mid-eighteen fifties. *Cf.*, M.D.A. FREEMAN, THE RIGHTS AND WRONGS OF CHILDREN 18 (1983) (noting that the phrase "children's rights" first appeared in the title of an article in 1852 and that the first book on children's rights was published in 1892). Despite this heritage, distinguished commentators continue to view the notion that children have rights as revolutionary, *cf.*, Michael Wald, *Children's Rights: A Framework for Analysis*, 12 U.C. DAVIS L. REV. 255, 256 (1979); ROBERT M. HOROWITZ, CHILDREN'S RIGHTS: A LOOK BACKWARD AND A GLANCE AHEAD, LEGAL RIGHTS OF CHILDREN 1, 2-5 (Robert M. Horowitz & Howard A. Davidson eds., 1984) [hereinafter HOROWITZ, CHILDREN'S RIGHTS] (briefly reviewing the historical rights of children and concluding the same).

2. In an oft-quoted sentence, Hillary Rodham (Clinton) described "children's rights" as "a slogan in search of a definition." Hillary Rodham, *Children Under Law*, 43 HARVARD EDUC. REV. 487 (1973); Hillary Rodham, *Children's Rights: A Legal Perspective, in* CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21 (Patricia A. Vardin & Ilene L. Brody, eds., 1979) (noting same).

3. This notion was the staple of many of the early articles dealing with the birth of the current children's rights movement. *See* Robert L. Geiser, *The Rights of Children*, 28 HASTINGS L.J. 1027, 1049-50 (1977) (detailing the children's right movement's viewpoints); Connie K. Beck et al., *Rights of Children: A Trust Model*, 46 FORDHAM L. REV. 669 (1978) (providing a model to examine the roles of parents and states in exercising children's rights); Wald, *supra* note 1 (providing another model).

As the "Children's Rights" movement now stands, there are at least five approaches simultaneously being advocated; see RICHARD FARSON, BIRTHRIGHTS 27 (1974) (arguing for the elimination of both state and parental control of children); JOHN CALDWELL HOLT, ESCAPE FROM CHILDHOOD (1974) (similar argument); HENRY H. FOSTER, A BILL OF RIGHTS FOR CHILDREN 10 (1974) (proposing that minors should be treated like adults before the law).

The second approach has aimed at assuring a developmentally appropriate balance between protection and choice rights. *See generally* Diana Baumrind, *Reciprocal Rights and Responsibilities in Parent-Child Relations*, 34 JOURNAL OF SOC. ISSUES 179 (1978); David A.J. Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 20-23 (1980); MARGARET K. ROSENHEIM, 3 THE CHILD AND THE LAW, REVIEW OF CHILD DEVELOPMENT RESEARCH 509 (Bettze M. Caldwell & Henry N. Riccuti, eds., 1973).

A third and related approach has aimed at denying only those rights that have been

Observers have rightly commented that, as the law now stands, the high regard given for each of these interests has set them on a "collision course with each other."[4]

The Supreme Court has not done much to clarify the interests involved. Although it has recognized that children are persons,[5] the current tendency of the Court has been to move toward increasingly respecting the rights of parents, or those acting *parens patriae,* rather than taking children's own

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empirically proven to be beyond their capacity. *See* Rodham, *supra* note 2; BOB FRANKLIN, INTRODUCTION, THE RIGHTS OF CHILDREN 1, 7 (Bob Franklin ed., 1986) (proposing that different qualifying ages for different activities are needed); HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 152-53 (1980).

A fourth approach has advocated leaving the matter to parental authority. SAMUEL M. DAVIS & MORTIMER D. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 208-09 (1987) (concluding that children should be entitled to the same constitutional rights as adults, except where some paramount state interest applicable only to children is at stake; and when parent-child interests conflict, "parents should be able to make most decisions for children in the interest of preserving family unity and parental authority"); JEAN BETKE ELSHTAIN, THE FAMILY, DEMOCRATIC POLITICS AND THE QUESTION OF AUTHORITY, CHILDREN, PARENTS AND POLITICS 55, 64-65 (Geoffrey Scarre ed., 1989) (arguing for the need to recognize and foster parental authority); John E. Coons, et al., *Puzzling Over Children's Rights,* 1991 B.Y.U. L. REV. 307, 349 (1991) (concluding that "the hope for children's liberation—now and in adulthood—rests upon the power of parents to act with authority. . .").

A fifth and recent approach has been advocated by several family jurisprudence scholars. They propose a relational approach. Colleen Sheppard, *Children's Right to Equality: Protection Versus Paternalism,* 1 ANNALS HEALTH L. 197 (1992) (arguing that traditional notions of equality must be expanded to include relational equality and human interdependency); Barabara Bennett Woodhouse, *Individualism and Communitarianism in Contemporary Legal Systems: Tensions and Accommodations,* 1993 B.Y.U. L. REV. 497 (1993) (emphasizing children's necessary connection to others as central to understanding children's rights). *See generally* Martha Minow, *Rights for The Next Generation: A Feminist Approach to Children's Rights,* 9 HARV. WOMEN'S L.J. 1 (1986); Katherine Hunte Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle,* 42 DEPAUL L. REV. 983 (1993); Martha Minow, *The Free Exercise of Families,* 1991 U. OF ILL. L. REV. 925, 940 (arguing for an expansive view of "family" and for a compelling state interest prior to interference); MARY A. GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 48, 125 (1991) (describing the "missing dimension of sociality" in the American image of individualism).

An increasing number of commentaries have examined children's rights in international agreements. Although stating that children's interests should come first, they have not elaborated the role of states and parents in protecting and nurturing those interests. *See, e.g.,* Gary B. Melton, *Socialization in the Global Community: Respect for the Dignity of Children,* 46 AM. PSYCHOLOGIST 66 (1991); Gary B. Melton, *Is There a Place for Children in the New World Order?* 7 NOTRE DAME J. OF LAW, ETHICS & PUB. POL. 491 (1993); Stuart N. Hart, *From Property to Person Status: Historical perspective on children's rights,* 46 AMERICAN PSYCHOLOGIST 53 (1991) [hereinafter Hart, *From Property to Person*]; Brian L. Wilcox & Hedwin Naimark, *The Rights of the Child: Progress Toward Human Dignity,* 46 AM. PSYCHOLOGIST 49 (1991).

4. Gary B. Melton, *Law and Random Events: The State of Child Mental Health Policy,* 10 INT'L J. OF L. & PSYCHIATRY 81, 86 (1987). In addition to noting the divergent goals of policies, several have attributed the current "crisis" of family life to the hybrid tendencies born of tensions between individuals, families and states.

5. The Constitution says nothing about the broad category of "children." *Cf.* Homer H. Clark, Jr., *Children and the Constitution,* 1992 U. ILL. L. REV. 1, 2-4 (1992) (noting same and detailing why this may be). The Supreme Court, however, has recognize that children are "'persons' under our Constitution." Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 511 (1969).

interests and concerns seriously.[6] The Court continues to play down children's personhood and to waiver about the nature and origins of their rights.[7] The result has been that the extent to which children in the United States have basic rights remains an unsettled matter.[8]

The United States' record with respect to the rights of its children sharply diverges from the movement emerging in international law. The historical record reveals a spiraling trend toward conferring upon children full personhood, the result of which has transformed the way we view children and their basic human rights.[9] That is, in international texts, children have been given basic civil, political, economic, and social rights which were traditionally reserved for adults. In addition to those rights, children have been given familial rights, which essentially place emphasis on children's rather than parents' interests. The current heir to this trend is the United Nations Convention on the Rights of the Child ("Convention").[10]

Given the apparent divergence between U.S. and international law in their approach to assuring children's rights, it is somewhat intriguing to find that several commentators and organizations have embraced the Convention, concluded that the approaches do not differ, and campaigned for U.S. ratification.[11] The impact of this call to arms has been impressive. The

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6. Much of this trend has been couched in terms of familial rights. In the United States, familial rights has meant respecting parental rights, which only circuitously takes into account children's interests. This claim is far from novel. *See infra* notes 46-48 and accompanying text.

7. *See infra* note 285 and accompanying text.

8. Several commentators have noted that the Court has failed to develop a consistent theory of children's rights. *See* DAVIS & SCHWARTZ, *supra* note 3, at 51-77. In addition, it has been proposed that the Court has failed to reexamine the traditional roles of children, parents, and the state and in particular has failed to reexamine the basis for traditional rules limiting the rights and opportunities for children, see Wald, *supra* note 1, at 270-81 (detailing a thoughtful method of examining children's rights and arguing for the rethinking the roles of parents and state in decision making for children); DAVIS & SCHWARTZ, *supra* note 3, at 201-09 (same).

9. Focus will be placed on the changes occurring in United Nations. The rapid changes of the legal status of children in other countries is beyond the purview of this analysis. For those interested in children's rights in other countries, see Colleen Sheppard, *Children's Right to Equality: Protection Versus Paternalism*, 1 ANNALS HEALTH L. 197 (1992) (examining children's rights under the Canadian Charter); Nicholas Bala & Martha Bailey, *Recognizing the Interests of Children*, 31 J. FAM. L. 283 (1992-93) (analyzing the implications of the Convention of Children's Rights in Canada); Michael D.A. Freeman, *England: Rethinking Family Rights and Responsibilities*, 30 J. FAM. L. 298 (1991-1992) (detailing the development of England's new approach to children's rights and parental responsibilities); Jacqueline Rubellin-Devichi, *France: The Child First and Foremost and Other Family Law Development*, 29 J. FAM. L. 359 (1990-91) (detailing recent developments in France); INTERNATIONAL DOCUMENTS ON CHILDREN (Geraldine Van Bueren ed., 1993) (offering a collection of documents which include children's rights).

10. Convention on the Rights of the Child, U.N.Doc. A/Res/44/23 (1989) [hereinafter Convention]. For an examination of the substantive protections, *see infra* note 124 and accompanying text.

11. Hugh Downs, *Perspective on Children*, L.A. TIMES, Feb. 10, 1991, at M5, C2 (detailing reasons U.S. should ratify); Paul Lewis, *World Summit for Children: World's Leaders Gather at U.N. for Summit Meeting on Children*, N.Y. TIMES, Sept. 30, 1990, at 1, p. 1; Gloria Negri, *Boston Summit Spotlights Rights of Child*, BOSTON GLOBE, Sept. 28, 1990, at 9 (documenting support for Convention).

Clinton administration plans to seek ratification of the Convention by 1995.[12]

Given that the United States has officially voiced support for the Convention, that the Convention "needs to be one of the very next ones" to be signed and ratified,[13] it has become imperative that we begin to consider the future of children's rights and become aware of the jurisprudential and policy challenges the Convention poses for the U.S. That is the task at hand.

This article aims to detail the rights of children emerging from international human rights documents and the United States' approach to children's basic human rights.[14] This article does not purport to analyze all relevant jurisprudence, nor does it consider all provisions of the Convention and their particular implications.[15] The aim is to sketch a preliminary exploration to show the need for a deeper and broader inquiry,[16] including public discourse on the nature and implications of children's rights.[17]

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12. Interview with Gary B. Melton, Director, Consortium on Children, Families and the Law. Note, however, that Professor Melton was referring to the Clinton Administration's original intention and to the hope held by the children's rights advocates that President Clinton would act soon after his inauguration. He did not do so. The general sentiment among policy makers is that the President is no longer "expected to sign the treaty in the near future" but that "ratification is a near certainty." *See* Susan P. Limber & Brian L. Wilcox, *UN Convention on the rights of the Child: The Application of the UN Convention on the Rights of the Child to the United States,* Paper presented at the Second International Interdisciplinary Study Group on ideologies of Children's Rights: The Right to a Family Environment, Charleston, South Carolina, May 14-18, 1994, 1, 12 (on file with the Journal). *See also infra* note 13.

13. Secretary of State Warren Christopher, *cited in Children: Clinton Aide Assures "High Priority" for U.N. Treaty*, Inter Press Service, Jan. 13, 1993, *available in* LEXIS, Nexis WORLD Library, ALLWLD file.

14. This article adopts an empiricist approach to define "human rights," which defines human rights mainly according to international instruments (mainly treaties, customary international law, and declarations). This approach adopts the notion that rights exist only to the extent they are recognized as such by public law and policy. *See* DAVID P. FORSYTHE, THE INTERNATIONALIZATION OF HUMAN RIGHTS (1991) (adopting a similar approach).

15. For a thoughtful, but decidedly noncritical, analysis of rights set forth in the Convention, see CHILDREN'S RIGHTS IN AMERICA: UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia Price Cohen & Howard A. Davidson eds., 1990) (containing a series of essays comparing sections of the UN Convention with current U.S. law).

16. Current discourse about children's rights tends to be limited to children's basic needs, *see, e.g.*, H. R. Cong. Res. 15 (the most recent bill encouraging ratification of the Convention and focusing on poverty, mortality, health, abuse and neglect). Commentators have also limited their inquiry, *see, e.g.*, Karen A. McSweeney, *The Potential for Enforcement of the United Nations Convention on the Rights of the Child: The Need to Improve the Information Base,* 16 B.C. INT'L & COMP. L. REV. 467 (1993) (focusing on the need to improve basic living conditions); Sanford J. Fox & Dion Young, *International Protection of Children's Right to Health: The Medical Screening of Newborns*, 11 B.C. THIRD WORLD L.J. 1 (1991) (focusing on the right to health); Jennifer D. Tinkler, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child,* 12 B.C. THIRD WORLD L.J., 469 (1992) (examining implications for the United States' juvenile justice system); Cynthia Price Cohen, *Juvenile Justice Provisions of the Draft Convention on the Rights of the Child,* 7 J. OF HUM. RIGHTS 1 (1989) (same).

17. This is a central aim of the Convention which has adopted the premise that knowledge of human rights standards will promote their observance. Much of the Convention's effort is aimed at educating government officials and children. The priority given to education is reflected in the first Article of PART II which details the Convention's enforcement mechanism;

This article proceeds in six parts. Part I details the invention of children's personhood. It is argued that the dominant focus has been, and continues to be, on child-parent relations. Although this may seem obvious, it has several implications in terms of the extent to which American society is, and will be, willing to recognize and foster children's rights.

Part II builds on the notion that, in the United States, children's rights are linked to the belief that children are part of relationships, rather than independent persons. The result of this dependency status is that their rights are viewed as deriving from their parents, and others who hold them "in custody,"[18] rather than stemming from their own personhood. To validate this claim, this section briefly sketches children's juridical personality as recognized by the Supreme Court.

Part III examines international law and delineates the evolving nature of children's rights. An historical approach reveals that, unlike the trend in the United States, there has been a switch from children's rights viewed as deriving from parents and the state to the current notion in international law that children are fully endowed persons possessing basic human rights.

Part IV explores the potential impact of the Convention's approach on U.S. jurisprudence and its children's policy. It is proposed that, given the United State's traditional approach to treaty implementation, the highly touted Convention would not offer much protection to American children. However, it is suggested that the Convention, if taken seriously, could lead to the transformation of American domestic policy by requiring a new mode by which children's rights are to be recognized, protected and affirmed.

Part V examines specific implications which would result from a careful implementation of the treaty. It is proposed that the Convention would demand a reimaging of children's rights, it would necessitate rethinking the role of courts, legislatures and parents in children's lives.

Part VI concludes the analysis. It is noted that, given the attention currently being paid to the Convention, it appears that the notion of children's rights in the U.S. is at a crucial juncture. Unlike prevailing interpretations of the impact of the Convention on U.S. law, it is proposed that it offers an essentially radical approach to children's rights and that, if adopted in its entirety, its ratification would lead to a transformation of the way we view children, families and the law.

I. CHILDHOOD IN HISTORICAL PERSPECTIVE

This section considers what is meant by childhood by tracing the evolution of children's personhood. This is an important exercise for several reasons. For instance, the demand that children should be seen as persons

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see Art. 42 ("State parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike") and Art. 44 §6 ("State Parties shall make their reports widely available to the public in their own countries").

18. *See infra* notes 47 and accompanying text.

in their own right has been a fundamental assertion of the children's rights movement.[19] A corollary of this proposition is that, when confronting issues relating to children, courts and legislatures tend to reflect prevailing social perceptions.[20] Lastly, an examination of history will provide a broader view of the spectrum of alternatives and possibilities relative treatment of children's rights.

Historians generally recognize that the social concept of childhood[21] appeared by the 16th century[22] and that the balance between child, parent, and state heavily weighed in favor of parents. Although there is some dispute about how affectionately attached and caring parents were toward their children,[23] parents clearly were accorded almost unlimited power over their children; they were allowed to ignore, abandon, and even sell their children into slavery.[24]

Several commentators have offered explanations for this virtually

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19. C.A. WRINGE, CHILDREN'S RIGHTS 11 (1981) (noting same and offering citations). Hugh Downs, *Perspective on Children*, L.A. TIMES, Feb. 10, 1991, M5, C2 (1991) (arguing that the U.S., when compared with other industrialized nations, has yet to take its children seriously).

20. Perceptions of the incidence of children's violence is an often cited example. For example, several have noted the increasing punitiveness of the juvenile justice system. *See, e.g.*, Ira M. Schwartz et al., *Business as Usual: Juvenile Justice During the 1980's*, 5 NOTRE DAME J.L. ETHICS & PUB POL'Y 377 (1991) (noting the perception that youth crime is worsening and the increasing use of incarceration for young offenders); Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The Changing Ideology of Youth Corrections*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323 (1991) (noting the increasing punitiveness in policies toward children); Catherine M. Bove, Comment, *The Child-Adult: Michigan Waiver Law*, 1991, DET. C.L. REV. 1071 (1991) (detailing Michigan's response to juvenile crime).

21. Definable as infancy to seven years of age. PHILIPPE ARIES, CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE 329 (1962).

22. Commentators, both in law and social sciences, begin the history of children's personhood from the early 1600's. HOROWITZ, *supra* note 1, at 2-7. These commentators rely on the Phillipe Aries' classical study: Centuries of Childhood: A Social History of Family Life (1962), which reports that, in early medieval society, "the awareness of the particular nature of childhood . . . which distinguishes the child from the adult . . . was lacking." *Id.* at 128. *But see* LLOYD DEMAUSE, THE HISTORY OF CHILDHOOD 51-54 (1974) (arguing that the conception of childhood reaches back to the fourth century A.D.). *See generally* BARABARA K. GREENLEAF, CHILDREN THROUGH THE AGES: A HISTORY OF CHILDHOOD (1978) (summarizing research on history of childhood).

23. The most-often cited argument is that childhood was a nightmare; *but see* LINDA POLLOCK, FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500-1900, 271 (1983) (concluding that parents accepted responsibility for the protection and socialization of their children); DAVID HERLIHY, MEDIEVAL HOUSEHOLDS (1985) (similar conclusion). Some historians interpret the divergent findings to mean that both have validity; *see, e.g.*, LUDMILLA JORDANOVA, CHILDREN IN HISTORY: CONCEPTS OF NATURE AND SOCIETY, CHILDREN, PARENTS AND POLITICS 1, 9 (Geoffrey Scare ed., 1989) (proposing that each approach has valid claims); REX STAINTON ROGERS & WENDY STAINTON ROGERS, STORIES OF CHILDHOOD: SHIFTING AGENDAS OF CHILD CONCERN 65-69 (1992) (finding same and concluding that there is no evidence that children were subjected to any more neglect and cruelty, relatively, than other weaker members of society).

24. *See* LLOYD DEMAUSE, *The evolution of childhood*, *in* THE HISTORY OF CHILDHOOD 1 (Lloyd demause ed. 1974); *see also* Harriet Fradd, *Children as an Exploited Class*, 21 J. OF PSYCHOHISTORY 37, 38-39 (1993).

unfettered parental power.[25] A most plausible, and most offered, explanation is that children were essentially without identity, that they were fundamentally on par with animals and slaves. Social scientists propose that children's essential non-identity status allowed parents to treat them as exchangeable and replaceable property,[26] a status which literally took centuries to change.

It was not until the early 18th century that childhood started to be socially reconstructed, when parents began to be seen as responsible to maintain and educate their children.[27] The view that children were property, however, continued to be firmly entrenched well into the 19th century. By that period, however, children were seen as valuable property.[28] They had also become a vulnerable class in need of protection, a class inclined toward neither good nor evil, but essentially malleable.[29] The malleability of children was a critical feature which contributed to the dramatic social reconstruction of the image of children.

The impact of the image of children as essentially malleable had its most direct effect in the growth of efforts aimed at securing help for children. Indeed, it led to the birth of what has become popularly known as the *child-saving* era which aimed at assuring the health and welfare of children.[30] The influence of this era was reflected and felt most in reforms aimed at protecting children, such as child labor laws, compulsory education, and the

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25. ANNA M. PAPPAS, *Introduction*, LAW AND THE STATUS OF THE CHILD, xxvii (Anna M. Pappas ed., 1983). Historians have proposed several explanations for abandonment and neglect: childbearing and childrearing were dangerous and unsatisfying due to the lack of birth-control knowledge, high incidence of maternal and infant mortality, diminished food supplies, and reduced interaction because of swaddling. *See* Hart, *From Property to Person*, *supra* note 3, at 54; Anthropologists have also supported this claim. NANCY SCHEPER-HUGHES, CULTURE, SCARCITY, AND MATERNAL THINKING: MOTHER LOVE AND CHILD DEATH IN NORTHEAST BRAZIL. CHILD SURVIVAL (Nancy Scheper-Hughes ed. 1987).

26. The property model asserts not that children are property but that our culture makes assumptions about children which are analogous to those it adopts in thinking about property. Barbara Bennett Woodhouse, *'Who owns the Child?': Meyer and Pierce and the Child as Property*, 33 WM. & MARY L.R. 995, 1042-50 (1992) (tracing the historical roots of children as "property"); *See generally* Hart, *From Property to Person*, *supra* note 3.

27. Hart, *From Person to Property*, *supra* note 3, at 53.

28. This change in status is attributed to the slow changes in the expectations and the general amelioration of conditions which had led to difficulties in childrearing. It is further maintained that adults developed empathy for the state of childhood, as bonds of caring grew between parent an child. The end result was that children were becoming seen as valuable and vulnerable property. *See* DEMAUSE, *supra* note 24.

29. Hart, *From Property to Person, supra* note 3, at 53.

30. The birth of the child protection system dates to 1874, to a case involving the physical abuse of a foster child. Since there were no child protection laws to deal with the abusive situation, a "charitable lady" enlisted the assistance of the Society for the Prevention of Cruelty to Animals, which was able to intervene on the young girl's behalf by arguing that the child was a member of the animal kingdom. The SPCA won. *See* Geiser, *supra* note 3, at 1028-1030.

juvenile justice system.[31]

An important feature of the child-saving era was the prevailing societal belief that they were securing help not just for children, but for society itself. Massive immigration and growing industrialization and urbanization had created undesirable conditions which threatened society.[32] The *child-savers* re-imaged children as redeemers. This energizing conviction was reflected in the "widely spread belief that children were the essential human resources whose mature form would determine the future of society."[33]

In the first half of the 20th century another truly fundamental change in the image of childhood occurred: the "invention" of adolescence.[34] The most notable aspect of this change was that the adolescent period was merged into the familiar category of childhood, despite "adolescents" having previously enjoyed a status equal to adults, a status which had brought considerable personal freedoms which adolescents would no longer enjoy.[35] Part of the modern reconception of childhood, then, resulted in adolescents becoming children under parental control and choice, and subject to adults' paternal attention.[36] This new status meant that adolescents, like children, were assumed to be vulnerable, malleable and in need of adult guidance, control and training. Although restrictive of adolescents, the enforced

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31. *See* Hart, *From Property to Person*, *supra* note 3, at 53-54. HOROWITZ, *supra* note 1, at 1-9. *See generally* Janet E. Ainsworth, *Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court*, 69 N.C. L. REV. 1083 (1991); Murray Levine, et al., *Juvenile Justice and Family Mental Health Law in Sociohistorical Context*, 10 INT'L J. L. & PSYCHIATRY 91 (1987) (detailing the history of attempts to treat delinquent, abused, and handicapped youngsters).

32. Immigration and industrialization created large groups of adolescents in poverty. The child saving efforts were directed at this group, because they were seen as in greater danger of mistreatment, which social thinkers had linked to the production of antisocial behavior threatening society; see Ruby Takanishi, *Childhood as a social issue: Historical roots of contemporary child advocacy movements*, 34 J. SOCIAL ISSUES 8 (1978).

33. Stuart N. Hart, *The History of Children's Psychological Rights*, 58 VIEWPOINTS IN TEACHING & LEARNING 1, 4 (1982).

34. Stanley Hall is credited with the popularization of the term "adolescence," STANLEY HALL, ADOLESCENCE (1904). Several commentators have documented its early 20th century emergence. *See, e.g.*, JOHN DEMOS, PAST, PRESENT, AND PERSONAL: THE FAMILY AND THE LIFE COURSE IN AMERICAN HISTORY 13 (1986); JOSEPH KETT, RITES OF PASSAGE: ADOLESCENCE IN AMERICAN: 1790 TO THE PRESENT 111-264 (1977); ROGERS & ROGERS, *supra* note 23, at 147-53 (briefly detailing the historical emergence of adolescence); Raymond Marks, *Detours on the Road to Maturity: A View of the Legal Conception of Growing Up and Letting Go*, LAW & CONTEMP. PROBS. 79, 80-92 (1975) (tracing the historical development of adolescence and how law has shaped, constrained and reflected its development).

35. Prior to this period, the "adolescent" performed adult economic roles, allowed to leave home and assume responsibility for his own life. *See* Marks, *supra* note 34, at 78 (arguing same and listing authorities).

36. Marks, *supra* note 34, at 86-88; Arlene Skolnick, *Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROBS. 52, 61-64 (1975) (describing historical forces leading to the invention of adolescence). A most notable influence was the replacement of children's economic value during industrialization. *See generally* David Stern et al., *How Children Used to Work*, 39 LAW & CONTEMP. PROBS. 93 (1975) (tracing the diminishing economic value of children); ROBERT H. BREMMER, CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 103 (1970) (detailing the economic contribution of children to the agrarian family).

prolongation of childhood status into the adolescent period was instrumental in leading to the recognition of younger children's personhood.

By the second half of the 20th century, the child's existing rather than potential person status was secured.[37] This reconfiguration of the early decades of the life-cycle was heir to several social forces. Prominent among these was the continued changes in family structure and relations; the notion of child-oriented family life had fully emerged. Forces external to the family, though, were as instrumental in influencing its care of children. For example, there was a resurgence in child protection efforts.[38] Further, there was an increasing need for children to choose and fend for themselves,[39] and a slew of research efforts aimed at demonstrating that children had the capacity to do so.[40]

Despite the increasing recognition and affirmation of children's personhood, the state's duty to protect and foster children's healthy development, children's capacity to determine their own lives, and parent's obligations toward their children continue to be far from settled. Although children's interests continue to be balanced against the interests of parents' or others acting parens patriae, the possibilities regarding whose interests will prevail has been invigorated and refreshed by the emergence of a New World Order,[41] which coincided with the greatest gathering of heads of state who

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37. Children were declared "persons" under law in Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 511 (1969). They were also assured due process in juvenile courts, and, under some conditions, were declared competent and worthy of limited freedoms. *See* HOROWITZ, *supra* note 1, at 1-9.

38. The efforts were largely the result of the "discovery" of child abuse and neglect, see C. Kempe, et al., *The Battered Child Syndrome* 11 J. AM. MED. ASS'N 17 (1962) (classic article identified as first to discover child abuse and providing the catalyst for the current child protection movement). *See generally* THE BATTERED CHILD (Ray E. Helfer & Ruth S. Kempe, eds., 1987).

39. The changing family conditions, such as the break-down of marital relations and to what some have termed "superficial" adult-child relations which give children more opportunities to choose for themselves without the benefit of sufficient support and direction from responsible adults. *See generally* F.D. Horowitz, *Children and Their Development: Knowledge Base, Research Agenda, and Social Policy Application* (Special Issue) 44 AMERICAN PSYCHOLOGIST (1989); JUDITH S. WALLERSTEIN & SANDRA BLAKELEE, SECOND CHANCES: MEN, WOMEN AND CHILDREN AFTER DIVORCE (1989); Hart, *From Property to Person, supra* note 3, at 54.

40. NEIL POSTMAN, THE DISAPPEARANCE OF CHILDHOOD (1990) (children adopt adult values, attitudes and interests at earlier ages); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445, 463-64 (1984) (detailing current research on children's capacity); Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court*, 68 NEB. L. REV. 146, 153-58 (1989) (same); *see generally* GARY B. MELTON, REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH (1987).

41. The phrase "New World Order" first made its formal appearance in the U.S. in President George Bush's nomination speech as Republican candidate, in 1988. *See* K.P. SAKSENS: REFORMING THE UNTIED NATIONS: THE CHALLENGE OF RELEVANCE 178 (1993). However, since its appearance few have included the need to include children; Melton, *Children in the New World Order*, *supra* note 3 (detailing examples of the place of children in the NWO.) The notion that we have entered a new world order remains essentially limited to discussions of international peace, safety and the impact of democratization, see Anthony Clark Arend, *Symposium: The United Nations and the New World Order*, 81 GEO. L.J. 491, 491-95 (1993) (noting same and detailing its emergence in relation to the future of the United Nations).

met to show support for children's international human rights.[42]

II. TRENDS IN RECOGNIZING CHILDREN'S RIGHTS IN U.S. COURTS

Although several commentators have reviewed the development of children's rights in American jurisprudence,[43] it is useful to revisit this body of literature and landmark cases in order to delineate some overriding themes. This section examines the recognition of children's rights relative to other parties, particularly parents and others acting parens patriae.

Two broad generalizations may be made about children's rights *vis a vis* other's interests, despite the Supreme Court's failure to articulate a consistent, cohesive policy toward childhood. First, there remains considerable support for the proposition that children were, and continue to be, seen as "creatures"[44] belonging to the parent; the result of this proposition is that when children's interests are balanced against their parents', children tend to lose. Second, mental health, juvenile justice, school and other state officials have unfettered discretion when dealing with children's interests.[45] This section examines these two trends.

It has become *de rigueur* to note that the move to accord children more rights has not overcome the judicial support for the traditional family system.[46] When balanced against the family, the Court has been and continues to be reluctant both to interfere in the family domain and to recognize that children even have rights.[47] For courts, the important factors

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42. The 1990 World Summit for Children was the largest gathering ever of heads of state, which met in New York in 1990. *See* Paul Lewis, *World Summit for Children: World's Leaders Gather at U.N. for Summit Meeting on Children*, N.Y. TIMES, Sept. 30, 1990, sec. 1, at 1; Paul Lewis, *World Leaders Endorse Plan to Improve Lives of Children*, N.Y. TIMES, Oct. 1, 1990, A1, A12. For details of the plan of action adopted by the World Summit for Children, see *World Declaration on the Survival, Protection and Development of Children and Plan of Action For Implementing the World Declaration on the Survival, Protection and development of Children in the 1990's*, E/CN.4/1991/59 (1990) [hereinafter World Declaration]; *see also* JAMES P. GRANT, THE STATE OF THE WORLD'S CHILDREN 1992, 61 (1992) (listing goals).

43. For a concise examination of children's cases litigated before the Supreme Court, see Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-1992*, 27 FAM. L.Q. 307 (1993).

44. *See infra* note 57 and accompanying text.

45. *See infra* note 65 and accompanying text, children in school or in other state facilities have few rights. For an analysis of legal rights of children in institutions, and a general discussion of the legal status of minors, see REPRESENTING THE CHILD CLIENT §§ 2.00-3.00 (Mark I. Soler, et al., eds., 1988).

46. The tenacity of our prevalent conception of the family as an idealized nuclear family and its dominance in social and legal thought has restricted legal reform. For an analysis of this proposition in the legal arena, see FINEMAN, THE NEUTERED MOTHER 662-64 (1992). For an analysis of this proposition in contemporary culture and social policy, see Margaret L. Andersen, *Feminism and the American Family Ideal*, 22 J. COMP. FAM. STUD. 235 (1991); *see also* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569 (1992) (examining notions of family autonomy and privacy and how they have resulted in leaving maltreated children unprotected).

47. The major exception, of course, is the family in crisis. For further elaboration of this point, see Woodhouse, *supra* note 3, at 497 nn. 11-12.

in protecting children are preservation of the sanctity of the family and maintenance of strong parental rights, with children's interests presumed coterminous with their parent's. It is the somewhat mythical assumption that most people know what is best for their children which have made courts reluctant to interfere in the family domain.[48]

The notion that when we speak of "family rights" we inevitably mean parental rights is far from novel.[49] Indeed, it is rooted in the earliest "children's cases," which continue to stand for the proposition that children are creatures belonging to the State and parents. Given their continued significance, it is important to review briefly these pronouncements.

The early children's cases dealing with parents' rights, against the State, to raise their children as they saw fit involved a series of conflicts around children's education. In 1923, the Supreme Court, in *Meyer v. Nebraska*,[50] established a fundamental right of parental authority, declaring that the right of parents "to establish a home and bring up children," is protected by the due process clause of the Fourteenth Amendment.[51] The rights of parents was established against State control of their children. Furthermore, although the Court also recognized the legitimate power of the State to compel school attendance and to establish minimum curricular requirements,[52] it refused to extend this power to instances in which parents have other compelling concerns.[53]

The rights of parents to control their children's lives was reaffirmed in *Pierce v. Society of Sisters*.[54] In *Pierce*, Oregon parents wished to educate their children outside the public school system. Although the Court again recognized the legitimate power of States to regulate schools and to require school attendance,[55] it found that State's power was limited by the "liberty of parents and guardians to direct the upbringing and education of children under their control."[56] The Court found children to be "creatures"

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48. Note that this bias in favor of parents should not be taken to mean that the tension between the rights of the family and the rights of the child always comes down on the side of the parents. For an examination of diverse approaches to state intervention in child welfare decisions, see Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745 (1987); *see also* McMullen, *supra* note 46, at 584-85 (citing instances in which parental interests prevail despite life-threatening risks and concluding that the law tends to assume that parents act from good motives with respect to their children).

49. *See, e.g.*, Woodhouse, *supra* note 26, at 995 (providing an extensive historical analysis of these cases and concluding that they constitutionalized a narrow, tradition-bound vision of the child as essentially private property and that the distorted family law and national policy).

50. Meyer v. Nebraska, 262 U.S. 390 (1923).

51. *Id.* at 399.

52. *Id.* at 398-99, 402.

53. *Id.* at 401-02.

54. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

55. The Court reiterated its view taken in *Meyer v. Nebraska*: "No question is raised concerning the power of the state . . . to require that all children of proper age attend some school." 268 U.S. 510, 534 (1925).

56. *Id.* at 534-35.

belonging to parents and the State: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[57] The rights of the child against the State, then, were rooted in the indirect right of parents to control and raise their children. Children did not have independent constitutional rights.[58]

The significance of children not being given constitutional rights was made most evident in the celebrated case of *Wisconsin v. Yoder*.[59] In Yoder, parents again asserted their right to control children's education by preventing their children from attending high school. Despite the argument that it was not the best choice for the children involved, the Court refused to override parental choice:

> The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.[60]

Like the cases before it, *Yoder* stood for parental rights. Children were used as conduits for parental interests; and the children's interests were simply not considered. Parents had authority to speak for and through the child.[61]

It would be a mistake to conclude that parental rights remain unfettered. At times parental rights do become secondary, especially to State interests. This was the result in *Prince v. Massachusetts*.[62] *Prince* involved the constitutionality of a statute used to convict a member of the Jehovah's Witness church who had their children hand out religious pamphlets on the streets. The custodian appealed on two grounds: as undue interference by the State with her parental right to control the activities of her children and unduly inhibiting her exercise of religion.[63] The Court found that "[a]gainst these sacred private interests, basic in a democracy, stand the interest of society to protect the welfare of children, and the State's authority to that

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57. *Id.* at 535.

58. *Id.* at 524.

59. 406 U.S. 205 (1972).

60. *Id.* at 232.

61. Not only are children's voices not heard, they are also used as instruments, as conduits for parents' religious expression, cultural identity, and aspirations. This is explicit in *Meyer*'s "right to control." *Meyer*, 262 U.S. at 400, and *Pierce*'s "high duty" of the parent to direct his child's destiny. *Pierce*, 268 U.S. at 535. *See* Woodhouse, *supra* note 26, at 1114 (arguing same). *See also* Gerald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's rights*, 16 NOVA L. REV. 711, 730-31 (1992) (reviewing the current approach to children's rights and concluding that "[l]egal battles over children's rights are probably more accurately conceptualized as adults advocating their own civil liberty viewpoints using children as surrogates").

62. 321 U.S. 158 (1944).

63. *Id.* at 165.

end."[64]

The *Prince* Court took a protectionist approach to children. The State, not the child, had an interest in securing "healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."[65] To further this aim, a state could, in this instance, enforce child labor laws as against the family's First Amendment constitutional interests.[66] *Prince*, then, established that the rights of children were secondary to parental rights, but also particularly secondary to those of the State.

Prince, then, established that parental authority was not without limits. It signaled the beginning of the idea that a State can exercise authority over parents' control of their children's upbringing. Thus it began the Court's move toward protection of societal interests as defined and asserted by the State.[67]

However, the State's power did not go unfettered. Its move into the family domain simply helped define the limits of parental authority rather than revoking it.[68] The *Prince* Court noted that: "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligation the state can neither supply nor hinder."[69] Prince, then, stands for the proposition that the State's "parental authority" over children only supersedes parental authority when parents have failed to protect their child. This proposition recently has been reaffirmed by the Supreme Court which reiterated that it is now "made plain beyond the need for multiple citation" that the parental right deserves deference "absent a powerful countervailing interest."[70]

The Court continues to maintain that State intervention directed toward the family should focus on rehabilitation and recognize that "parents retain

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64. *Id.*

65. *Id.* at 168.

66. "The family itself is not beyond regulation in the public interest, as against a claim of religious liberty." *Id.* at 166.

67. The ability of states to intervene in the name of protecting minors from their own improvidence and from harmful influences, even perhaps against their own wishes or those of their parents was firmly established in obscenity and sexual performances cases. *See* Ginsberg v. New York, 390 U.S. 629 (1968) (upholding statute limiting exposure of minors to sexual materials by finding that a state had a significant interest in its own right, and as a proxy for parents, in the well-being of its children and that the state had greater authority to regulate the conduct of children than it has in the case of adults); New York v. Ferber, 458 U.S. 747 (1982) (upholding prohibition against promotion of sexual performances by children under age sixteen based on states interest in the well-being of its children).

68. The trend, however, is not to disrupt parental rights. Even child neglect and abuse laws do not entirely revoke parental authority; they merely set boundaries. These laws are not aimed at increasing children's autonomy, they merely protect it from serious injury. *Cf.* John E. Coons, et al., *Puzzling Over Children's Rights,* 1991 B.Y.U. L. REV. 307, 343-49 (noting same). Intervention in family life to protect children has the effect of reaffirming the importance of parenthood; it acts as a moral expression of the childrearing standards of the community and permits the judicial system to move against those parents who fail to live up to community standards. *See* Geiser, *supra* note 3, at 1030 (noting same).

69. *Prince*, 321 U.S. at 166.

70. Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981).

a vital interest in preventing the irretrievable destruction of their family life."[71] Put differently, although the best interests of the child may be afforded priority when balancing child, parent, and State interests, the Supreme Court has clearly stated that parents have primacy in child-rearing and that parents' liberty interest in the care, custody, and management of their children is of fundamental importance.[72]

The notion that children are to be controlled by their parents is not something easily shaken. Its impact is seen in two precedent-setting cases: *In Re Gault*[73] and *Tinker v. Des Moines Independent Community School District*.[74] A brief look at these two decisions points to the conclusion that commentators had prematurely claimed that these cases had reversed the trend and led to the full recognition of children.

The failure to fully recognize children's rights is strikingly evident in the celebrated case of *In re Gault*.[75] Gault is best known as the landmark children's rights case in which the Court declared that "under our Constitution, the condition of being a boy does not justify a kangaroo court."[76] Despite the recognition and the awarding of extensive due process protection to juvenile delinquents,[77] the Court saw it appropriate to address parent-child relationships. It noted that "[i]f his parents default in effectively performing their custodial functions—that is, if the child is delinquent—the state may intervene. *In so doing, it does not deprive the child of any rights because he has none.*"[78]

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71. Santosky v. Kramer, 455 U.S. 745 (1982) [emphasis added]. Indeed, the Supreme Court has upheld the sanctity of the family and the parental right to govern it in a series of important cases. These cases have not dealt with the conflict between parents and children, but rather have turned upon governmental powers to interfere in "the private realm of family life." Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 862-63 (1977). *See also* Hodgson v. Minnesota, 110 S. Ct. 2926, 2946 (1990).

72. For example, in Hodgson v. Minnesota, 110 S. Ct. 2926, 2946 (1990) (finding a "parent's interest in shaping a child's values and lifestyle" can be outweighed only by a court or "the combined force of one parent's interest and a minor's privacy interest").

73. 387 U.S. 1 (1967).

74. 393 U.S. 503 (1969).

75. *In Re Gault*, 387 U.S. 1 (1967). The Supreme Court first forthrightly examined the rights of children against the state in Brown v. Board of Education, 347 U.S. 483 (1954). The Court ascribed to children the right to equal protection of the laws by finding as follows:

> We can come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal protection of education opportunities? We believe that it does.

Brown, 347 U.S. at 493. *Brown*, however, is not often seen as a children's case. *See* Clark, *supra* note 5, at 3. (noting same).

76. *Id.* at 28. Note here that the characterization was appropriate. Gault involved a fifteen-year-old boy whom the state had committed to a state industrial school until age twenty-one as a juvenile delinquent because the boy had made a lewd telephone call. *Id.* at 4, 7.

77. The Court noted that "neither the 14th Amendment nor the Bill of Rights is for adults alone." *Id.* at 5-8.

78. *In Re Gault*, 387 U.S. 1 (1967) (emphasis added).

The notion that delinquent children have no rights is rather remarkable, especially given the heavy emphasis placed on it by courts and commentators.[79] A most remarkable aspect of *In re Gault,* then, is that, by finding that a parent who fails in his duties has children with no rights, the role of parents in determining the recognition of children's rights has been reaffirmed. Although it would be imprudent to exaggerate the import of this language, it accurately reflects the notion that children's rights are essentially derivative of parents or parent substitutes.[80] In other words, in this case, the Court saw the child only in relation to his parents and not as an individual having separate constitutional status and rights.[81]

The notion that children are to be controlled by people who are acting *parens patriae* is also far from being shaken, even when children's fundamental rights are involved. This has become evident as the Supreme Court has revised the other landmark case which has been interpreted as guaranteeing children constitutional rights and definitively establishing the personhood of children, *Tinker v. Des Moines*.[82] In *Tinker*, the Court declared unconstitutional a school rule preventing children from expressing their political views at school by wearing black armbands. Justice Fortas' often cited opinion included the dictum that "Students in school as well as out of school are 'persons' under our Constitution."[83]

Although the *Tinker* opinion is often cited as proof of children's full

79. The current trend, however, is to note that Gault has not had much of an impact on juvenile justice. *See, e.g.,* Gary B. Melton, *Taking Gault Seriously: Toward a New Juvenile Court,* 68 NEB. L. REV. 146 (1989); Barry C. Feld, *The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes,* 68 B.U. L. REV. 821 (1988); William S. Geimer, *Juvenileness: A Single-edged Constitutional Sword,* 22 GA. L. REV. 949 (1988); Schwartz, *supra* note 20, at 377; Barry Feld, *The Punitive Juvenile Court and the Quality of Procedural Justice: Disjunctions Between Rhetoric and Reality,* 36 CRIME & DELINQ. 443 (1990).

80. Note that much of the uproar leading the case up to the Supreme Court was that the boy had been taken into custody without any attempt to notify his parents; and the boy had been committed on the basis of information not made available him or his parents. Clark, *supra* note 5, at 5-8.

81. The notion that children are not truly persons in their own right continues to resurface. In 1984, for example, the Court decided that a State can authorize detention for juveniles who pose a serious risk of committing a crime, because "juveniles, unlike adults, are always in some form of custody." Schall v. Martin, 467 U.S. 253, 265 (1984). "Children, by definition, are not assumed to have the capacity to take care of themselves. They are assumed to be under the control of their parents, and if parental control falters, the State must play its role as parens patriae" *Id.* at 265. For a discussion of the import of this approach, see MARTHA MINOW, THE PUBLIC DUTIES OF FAMILIES AND CHILDREN, FROM CHILDREN TO CITIZENS 3, 9-19 (Francis X. Hartmann ed., 1987). In 1993, the Court again emphasized that children were always in "some form of custody," and allowed the Immigration and Naturalization Service (INS) to detain children for several months while their deportation status was under review. Reno v. Flores, 113 S. Ct. 1439 (1993).

82. 393 U.S. 503 (1969).

83. *Tinker*, 393 U.S. at 511.

constitutional status,[84] history tells a different story. That is, the "'persons' under our Constitution" dictum was not as precedent-setting as some had hoped. In fact, the *Tinker* decision was very narrow: the opinion could easily be viewed as a parental rights or family rights case because the views of the children mirrored those of their parents.[85] In addition, the Court has recently re-examined the constitutional rights of students and considerably narrowed students' rights.[86] Much like the good-faith parental standard, the Court also has adopted a differential approach to determinations of the rights of children by school administrators.[87]

To summarize briefly the status of children's rights in the U.S., it seems fair to say what has emerged in the Court's treatment of children is a good faith parental or state official standard. In accordance with this standard, discretion is left to the family and others acting *parens patriae* and, barring the extreme of abuse and neglect, no one is in the position to second guess such discretion.

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84. Also note that, despite continued commentary to the contrary, Tinker actually was *not* the first Supreme Court decision to find that students had constitutionally cognizable rights; see West Virginia State Bd. of Educ. v. Banette, 319 U.S. 624, 637 (1943) (involving the successful challenge to a state statute requiring students to salute the flag on grounds that there was a need for "scrupulous protection of Constitutional freedoms of the individual").

85. It remains unclear how protective of children's rights the Court would be if the views of children were contrary to their parents' wishes. For example, the dictum did not apply to the entire Constitution. The Court had began its opinion with a very straightforward statement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506 (arguably limiting it to these freedoms); *see also Tinker*, 393 U.S. 514-75 (1969) (Stuart, J., concurring opinion) (questioning the full application of freedom of expression to children). *Cf.* DAVIS & SCHWARTZ, *supra* note 3, at 58.

86. This has been the trend since the mid-nineteen eighties; see New Jersey v. T.L.O., 469 U.S. 325 (1985) (proper search and seizure of contents of girl's purse based on suspicion of smoking in rest room); Bethel School Dist. v. Fraser, 478 U.S. 675 (1986) (proper expulsion of student using sexually suggestive metaphors in a his nomination speech for student government); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (administrator's properly control contents of school-sponsored newspaper). For a discussion of these cases, see Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FL. ST. U. L. REV. 35, 36 (1993) (presenting the cases as the "Court's de facto sanctioning of a broad range of discretionary searches, censorship, and silencing of students").

87. The Court has adopted a reasonable administrator standard. The standard was set in T.L.O. where the Court used a twofold inquiry: "whether the . . . action was justified at its inception. . ." and whether the search was conducted in a manner which "was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341. *See* Leviton, *supra* note 86, at 44-53 (examining the impact of the T.L.O. decision); Richard L. Roe, *Valuing Student Speech: The Work of Schools as Conceptual Development*, 79 CAL. L. REV. 1271, 1275 (1991) (concluding that the effect of T.L.O. has been leaving "[l]ittle real protection for student expression not approved by school officials."); William S. Geimer, *Juvenileness: A Single-edged Constitutional Sword*, 22 GA. L. REV. 949, 961 (1988) (concluding that T.L.O. was so "remarkable in he scope of its assault on juvenile privacy, raising the question of why the further amendment was not simply why the fourth amendment was not simply held to be inapplicable in the school setting); Martin R. Gardner, *Student Privacy in the Wake of T.L.O.: An Appeal for an Individualized Suspicion Requirement for Valid Searches and Seizures in the Schools*, 22 GA. L. REV. 897, 925-47 (1988) (examining the inherent dangers of requiring only a generalized suspicion and concluding that the Court's "reasonable grounds" standard provides few constraints upon educational officials).

III. THE INTERNATIONALIZATION OF CHILDREN'S RIGHTS

At the outset, it was suggested that internationalization of children's rights has offered the United States an opportunity to recognize children's rights and confer upon children full-personhood status. To understand the implications of this assertion, it is necessary to retrace important steps leading to the current international statement on children's rights. Of the over eighty international legal documents concerning the special status of children which have evolved over the past sixty years,[88] this section focuses on those directly influencing the current international statement of children's rights: the United Nations Convention of the Rights of the Child.[89]

A. Early Documents

1. The Declaration of Geneva

Children's rights first attracted international attention after the First World War. The earliest document was adopted by the Fifth Assembly of the League of Nations in 1924: the Declaration of Geneva.[90] Although far from being the liberating document human rights treaties have become, the Declaration was a clear recognition of children's rights.[91] Reflecting the concern with rights of children afflicted by the devastation of the "Great War" and its aftermath, the Declaration emphasized protecting children's basic material needs.[92]

Despite its limited focus, the document was a remarkable statement of what "must" be done to foster children's "normal development."[93] The child was to receive special protection. For example, it was to be the first

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88. Howard Davidson, *The New United Nations Convention on the Rights of the Child,* 11 CHILDREN'S LEGAL RTS. J. 8, 8 (1990).

89. This section will further focus on the United Nations; for it is the only worldwide organization dealing with human rights. *See* RUBIN CHATTERJIE, THE UNITED NATIONS, FOREIGN POLICY AND HUMAN RIGHTS 227, 227-36 (R.J. Vincent ed., 1986) (noting same and detailing the UN's human rights machinery). For an examination of the history of the United Nations, see AMOS YODER, THE EVOLUTION OF THE UNITED NATIONS SYSTEM 8-38 (1993) (detailing the growth of the League of Nations and birth of the United Nations).

90. LEAGUE OF NATIONS O.J. Spec. Supp. 21 (1924) [hereinafter, Geneva Declaration]. It was not, however, the first statement detailing children's rights, see Walter H. Bennett, Jr., *A Critique of the Emerging Convention on the Rights of the Child,* 20 CORNELL INT'L L.J. 1, 16, n.92 (1987) (noting that international conventions began to indirectly protect children's rights in the late nineteenth and early twentieth centuries).

91. Lung-chu Chen, THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A POLICY-ORIENTED OVERVIEW, 7 J. HUM. RIGHTS 16 (1989) [hereinafter, Chen, A Policy-oriented Overview] (arguing same).

92. This was the dominant approach of that period. For example, the White House Conference Children's Charter of 1930 was devoted totally to children's protection and nurturance rights. *See* WILLIAM S. MYERS & WALTER H. NEWTON, THE HOOVER ADMINISTRATION: A DOCUMENTARY NARRATIVE (1936).

93. Geneva Declaration, princ. I.

to receive relief in times of distress,[94] fed when hungry,[95] helped when sick,[96] reclaimed when delinquent,[97] sheltered when orphaned[98] and protected against exploitation.[99] In addition, the child was given affirmative rights, including the right to be "put in a position to earn a livelihood,"[100] and to be "brought up so that it will devote its talents to the service of its fellow men."[101]

Although truly revolutionary, the Declaration was a weak statement with two conspicuous limitations. First, the term "right" never actually appeared in the text.[102] Second, the Declaration was a purely aspirational document. The Declaration provided no means of enforcement,[103] although it placed the duty to protect on "men and women of all nations."[104]

The import of the two limitations cannot be overestimated; they would later symbolize other children's rights documents and foreshadow the eventual nature of children's rights. For example, where the burden of responsibility to ensure children's rights rested would become an important feature of dilemmas concerning children's rights. In addition, the inevitable link between children's rights and their need for protection would also come to be a major concern of future documents dealing with children's rights.

2. The 1959 Declaration of the Rights of the Child

In 1959 the United Nations adopted the Declaration of the Rights of the Child.[105] Although the Declaration did not succeed in treaty form,[106] it was

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94. *Id.* princ. III.

95. *Id.* princ. II.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* princ. IV.

101. *Id.* princ. V.

102. The omission is significant, for it is a good indication of how liberating the Declaration was meant to be. That is, there is no mention of rights which have become the staple of human rights documents, e.g., freedom of speech, religion, or similar civil, cultural or political rights.

103. Bennett, *supra* note 90, at 17.

104. *Id.*

105. *Declaration of the Rights of the Child,* G.A. Res 1386, U.N. GAOR Supp. No. 16 at 19, U.N. Doc A/4354 (1959) [hereinafter 1959 Declaration].

106. The Polish government presented it for adoption in 1978 in hopes that it would be adopted for the year of the child, 1979. It was rejected, however, mainly because it had no implementing mechanism. Instead of accepting the Declaration, the General Assembly directed the United Nations Commission on Human Rights to formulate a Convention on the Rights of the Child. It did so as part of commemorating 1979 as the International Year of the Child. *See* G.A. Res. 31/169, 31 U.N. GAOR Supp. (No. 39) at 74, U.N. Doc A/31/39 (1976). Ten years later, during another International Year of the Child, the Working Group completed its task, and its work was adopted in March of 1989. *See Question of A Convention on the Rights of the Child: Report of the Working Group on a Draft Convention on the Rights of the Child,* 45 U.N. ESCOR (Agenda Item 13), U.N. Doc E/CN.4/1989/48 (1989) [hereinafter Report of the

an important elaboration of the Geneva Convention and predecessor of the current Convention on the Rights of the Child.[107]

Like its predecessor, the Convention consists of aspirational principles, of values concerning children and what they need to ensure that they "may have a happy childhood and enjoy for his own good and for the good of society [the] rights and freedoms. . ."[108] In addition to taking an aspirational stance, the text elaborates upon several "rights" enumerated in the previous Declaration and takes a protectionist stance. For example, it proclaims that the child will be (1) entitled to healthy and secure development[109] and education,[110] (2) protected against all forms of neglect, cruelty and exploitation,[111] (3) protected against labor which would prejudice his health or interfere with his physical, mental or moral development,[112] (4) protected against discrimination,[113] and (5) the first to receive protection and relief.[114]

Despite obvious similarities, the 1959 Declaration differs from its predecessor in significant ways. The Declaration actually makes use of the term "rights." For example, under the new Declaration, "[t]he child shall have the right to adequate nutrition, housing, recreation and medical services."[115] The Declaration further extends the list of rights to include some guarantees which are arguably civil and political.[116]

The Declaration further states that laws shall be enacted so that "[t]he child shall enjoy special protection . . . to enable him to develop, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity."[117] It further states that "[i]n the enactment of laws for this purpose, the best interests of the child shall be the

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Working Group]. For a comprehensive examination of working documents leading to the development of every article, see THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES" (Sharon Detrick ed., 1992).

107. Bennett, *supra* note 90, at 17. Historians note that the United Nations Declaration of the Rights of the Child in 1959 had its roots in the Geneva Declaration of 1924, the Charter of the United Nations, and the UN Universal Declaration of Human Rights of 1948, see PAPPAS, *supra* note 25, at xxvii-lv.

108. 1959 Declaration, pmbl.

109. 1959 Declaration, princs. 2 and 4.

110. 1959 Declaration, princ. 7.

111. 1959 Declaration, princ. 9.

112. 1959 Declaration, princ. 9.

113. 1959 Declaration, princ. 10.

114. 1959 Declaration, princ. 8.

115. 1959 Declaration, princ. 4. *See also* princ. 7 ("The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavor to promote the enjoyment of this right").

116. 1959 Declaration, princ. 3 ("The child shall be entitled from his birth to a name and a nationality").

117. 1959 Declaration, princ. 2. Also note that the Preamble "calls upon parents, upon men and women as individuals, and upon voluntary organizations, local authorities and national Governments to recognize these rights and strive for their observance by legislative and other measures. . ."

paramount consideration."[118] These pronouncements are rather significant: they declare that nations will pass laws and that these laws will place priority on the child.

In addition to enumerating more rights, the Declaration, for the first time, refers to parent-child relationships and to the role of parents in children's rights. The first use of the term "parents" appears in the Preamble. In the Preamble, the General Assembly calls upon parents, upon men and women as individuals, upon voluntary organizations, and upon governments to recognize the rights in the Declaration.[119] Another intra-familial reference speaks of the enjoyment of social security, with protection given both to the mother and child to reach the goal of growing and developing in health.[120] The Declaration emphasizes the child's need for love and understanding by stating that "wherever possible," the child should "grow up in the care and under the responsibility of his parents" and "should not be separated from its mother."[121] Lastly, it states that children are entitled to receive education which "will promote the general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility" adding that "responsibility lies in the first place with the parents [and] the best interests of the child shall be the guiding principle."[122]

To summarize, the 1959 Declaration of the Rights of the Child exhibited some movement toward further clarification of children's rights as exemplified in the trend toward liberation and self-determination, toward ensuring conditions of their freedom and dignity by the enactment of laws. There was also a move toward clarifying the fundamental role of parents; parents are to be the ones primarily responsible for the child's upbringing.

B. Convention on The Rights of the Child

The two predecessor's of the current international statement on children's rights pointed toward two trends: protecting children and having parents primarily responsible for children's upbringing. For reasons which commentators have deemed inexplicable, the instrument which finally emerged from these two documents, incorporating ten years of intensive deliberations among members of working-groups, took a radically different stance. First, the nature of rights which emerged were greatly expanded.[123] Second, Nation States took it upon themselves not only to enact domestic laws to protect children, but also to ensure that parents were

118. *Id.*
119. 1959 Declaration, pmbl.
120. 1959 Declaration, princ. 4.
121. 1959 Declaration, princ. 6.
122. 1959 Declaration, princ. 7.
123. *See infra* note 124 and accompanying text.

fulfilling their obligations and respecting the entire gamut of their children's basic human rights. This section expands on these two radical approaches to ensuring children's rights.

1. Overview of the Substance of the Convention

The Convention is best understood in light of its aim: giving priority to children in the adoption of State measures and in the allocation of State resources.[124] This aim is well reflected in its adoption of three guiding principles: (1) children need special legal protection beyond that provided to adults; (2) the ideal environment for a child's survival and development is generally within a protective and caring family setting; and (3) governments and private citizens, including parents, should respect and act in the best interests of children.[125]

The principles are delineated further into the following categories which expansively define children's substantive rights under international law: health rights (including adequate standard of living,[126] social security,[127] basic survival,[128] and health care[129]); political and civil rights (including right to life,[130] freedom of thought, conscience and religion,[131] association,[132] expression,[133] nationality,[134] prohibition against State discrimination[135] and illicit abduction,[136] minority rights,[137] education,[138] access to information,[139] protection from harm and exploitation[140]); legal process rights (including civil[141] and criminal procedural rights,[142] prohibition against certain punishments,[143] and periodic review of placements[144]); humanitarian rights

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124. Russell Lawrence Barsh, *The Convention on the Rights of the Child: A Re-assessment of The Final Text*, 7 J. HUM. RTS. 142, 143 (1989) [hereinafter Barsh, *A Re-assessment of the Final Text*].

125. *See* Report of the Working Group, *supra* note 106, at 22-26.

126. Convention, art. 27.

127. Convention, art. 26.

128. Convention, art. 6.

129. Convention, arts. 24 & 25.

130. Convention, art. 6.

131. Convention, art. 14.

132. Convention, art. 15.

133. Convention, art. 13.

134. Convention, arts. 7 & 8.

135. Convention, arts. 2 & 23.

136. Convention, art. 11.

137. Convention, arts. 30 & 31.

138. Convention, arts. 28 & 29.

139. Convention, art. 17.

140. Convention, arts. 19, 32-36, & 39.

141. Convention, arts. 12 & 16.

142. Convention, arts. 37 & 40.

143. Convention, art. 37.

(protection during armed conflict[145] and refugee rights[146]); and family rights (parental obligations[147] and the right to know and be cared for by parents,[148] maintain contact with parents,[149] and the basic right to a family environment[150]).

2. Overview of Domestic Obligations Under the Convention

The Convention sets forth an ambitious statement of rights which Nations accept as affirmative obligations owed to its children.[151] The Convention adopts a model that aims at regulating the relationship between child and State, with parental and familial involvement which, although respected,[152] essentially assumes secondary importance.

This approach is truly revolutionary: it limits reliance on parental assurance of children's rights.[153] The result of this move is that the Convention gives children a person status independent of their parents. That is, by placing the burden on the State to take affirmative steps toward ensuring the fulfillment of children's rights, the Convention assumes responsibility and invokes the State as the ensurer and protector of rights.

Several burdens placed on parents and other legal guardians remain generally consistent with the general notion that the family is the "fundamental group of society and the natural environment for the growth and well-

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144. Convention, art. 9.

145. Convention, art. 38.

146. Convention, art. 22.

147. Convention, arts. 5 & 18.

148. Convention, art. 7.

149. Convention, arts. 9 & 10.

150. Convention, pmbl. & arts. 20-22.

151. Unlike more traditional areas of international law which aim at influencing and regulating behaviors among countries, human rights documents like the Convention aim at influencing domestic law. International human rights documents embody an implicit moral ideal and recognize the role of nation-states to work to realize the ideal in their obligations to their own citizens. *Cf.*, Louis Henkin, *International Human Rights and Rights in the United States, in* II HUMAN RIGHTS IN INTERNATIONAL LAW 25, 25 (Theodore Meron ed., 1984) (In our international system of nation-states, human rights are to be enjoyed in national societies as rights under national law.)

152. Convention, arts. 5, 8 & 9. This reflects an increasing international trend toward focusing on the family. The 1994 United Nations' International Year of the Family, for example, highlights well the role of the family and proclaims that

> The family constitutes the basic unit of society and therefore warrants special attention. Hence, the widest possible protection and assistance should be accorded to families so that they may fully assume their responsibilities within the community . . . programmes should support families in the discharge of their functions, rather than provide substitutes for such functions.

See 1994 INTERNATIONAL YEAR OF THE FAMILY: BUILDING THE SMALLEST DEMOCRACY AT THE HEART OF SOCIETY (1991). *See also*, Melton, Children in the New World Order, *supra* note 3, at 529-32.

153. It is the opposite approach taken by U.S. law.

being of all its members"[154] and "should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."[155] Although precedence is given to the family in terms of promoting its responsibility to assure the protection of children's rights, the majority of provisions are written so that, instead of parents or families, States are supposed to "recognize," "ensure," "undertake," "promote," "assure," "respect," "encourage," "pursue," and "take appropriate measures" to ensure rights.[156]

More specifically stated, thirty-eight of the forty-one substantive articles in the Convention are devoted to enumerating enforceable rights. Of these, twenty three have been drafted to place the duty on the State, with no mention of the child's family or parents.[157] In half of the remaining articles, parents are simply mentioned as receiving assistance to carry out the rights guaranteed to the child.[158] The other articles either support the family relationship with the child for the child's benefit[159] or limit parental rights or responsibilities by (1) protecting the child from abuse[160] or parental

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154. Convention, pmbl.

155. *Id.*

156. For a thorough linguistic analysis of the Convention, see Cynthia P. Cohen, *A Guide to Linguistic Interpretation of the Convention on the Rights of the Child, in* AMERICAN BAR ASSOCIATION CENTER ON CHILDREN AND THE LAW, CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW (Cynthia P. Cohen & Howard A. Davidson eds., 1990) [hereinafter CHILDREN'S RIGHTS IN AMERICA].

157. Convention, art. 2 (protection against discrimination); art. 6 (right to life and ensuring the survival and development of the child); art. 7 (right to name, nationality, and know and be cared for by parents); art. 8 (right to preserve identity, including nationality, name and family relations); art. 13 (right to freedom of expression, including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . through any other media of the child's choice"); art. 15 (freedom of association and peaceful assembly); art. 16 (privacy, family, home or correspondence); art. 17 (access to information and materials from a diversity of national and international sources); art. 19 (protection from abuse while in care of parents or other charged with their care); art. 20 (ensuring alternative care for child deprived of family environment); art. 21 (adoption); art. 22 (refugee rights); art. 24 (right to health facilities and treatment); art. 25 (periodic review of placements); art. 28 (education); art. 30 (rights of ethnic, religious or linguistic minorities or person of indigenous origin); art. 31 (right to rest and leisure); art. 32 (right to protection from economic exploitation); art. 33 (protect from illicit use of drugs); art. 34 (protection from sexual exploitation and sexual abuse); art. 35 (prevention of abduction, sale of or traffic in children); art. 36 (protect against all forms of exploitation prejudicial to any aspects of child's welfare); art. 37 (no unlawful deprivation of liberty, capital punishment and life imprisonment for crimes committed by persons below age of 18, right to legal representation); art. 38 (rights in armed conflict and armed forces); and art. 39 (promote physical and psychological recovery and social re-integration of child victims).

158. Convention, art. 3 (ensure child protection and take into account parental rights); art. 23 (special care to disabled children appropriate to the general and financial circumstances of parents); art. 26 (social security taking into account circumstances of persons responsible for child's maintenance); art. 27 (parents, who have primary responsibility for child's adequate standard of living will be assisted by the state); art. 29 (education directed to development of child's fullest potential and respect for child's parents); and art. 40 (rights when accused of crime, some of which may not be exercised without legal guardian present).

159. Convention, art. 9 (family reunification); art. 10 (inter-country family reunification); and art. 18 (state recognition of parent responsibility for child).

160. Convention, art. 19 (provide necessary support for abused child and those who take care of child, including, for example, prevention and treatment).

kidnapping,[161] (2) recognizing the child's "evolving capacities,"[162] and (3) ensuring the child's "best interests."[163]

The Convention, then, as the current statement on international children's rights, has adopted a rather radical stance. Although the Convention has been criticized,[164] commentators, especially those seeking

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161. Convention, art. 11 (dealing with illicit transfer and non-return of children abroad).

162. Convention, arts. 5, 12 & 14.

163. Convention, art. 3 (in all actions concerning the child, the best interests of the child shall be the primary consideration and take into account rights of parents or others legally responsible for them). This article embodies the central theme of the Convention. It mandates that "the best interests of the child" be a primary consideration in any actions concerning children.

Commentators do not agree about the impact of the "best interests" approach. Some have argued that the standard does not offer enough protection, that it is only "a primary consideration" rather than "the" primary consideration. *Report of the Working Group on the Question of a Convention on the Rights of the Child*, 45 U.N. ESCOR (Agenda Item 13) at 22-23, U.N. Doc E/CN.4/ 1989/48 (1989). Some have argued that the rights of others should not be taken into account when considering children's rights, see *id.* at 22-23. Another potential problem has been that which may rise from Article 18, which recognizes that the primary responsibility for the upbringing and development of the child rests with parents and further states that the best interest of the child will be their basic concern. This is a rather difficult standard to guide the conduct of parents. Others have taken a more positive approach and have argued that the article actually offers additional protection to the child. In addition to the principles pronounced in the treaty, it is argued that states must also apply a best interests standard, and that this offers an additional shield of protection because the treaty only offers minimal standards. *See* Jennifer D. Tinkler, *The Juvenile Justice System in the United States and the United Nations Convention on the Rights of the Child,* 12 B.C. THIRD WORLD L.J. 469 nn.45-47 (1992). Note that the controversy reflects the nebulousness of the "best interests of the child" standard. It is not defined anywhere in the Convention, which could lead to arbitrary interpretations by whichever individual or body has power over the child. Donna Gomien, *Whose Right (And Whose Duty) Is It? An Analysis of the Substance and Implementation of the Convention on the Rights of the Child*, 7 J. HUM. RTS. 161, 162-64 (1989) For an examination of the standard, see JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD (1973); BEFORE THE BEST INTERESTS OF THE CHILD (1979); IN THE BEST INTERESTS OF THE CHILD (1986).

164. A basic controversy has been the definition of childhood. Some are concerned about when childhood begins, see Cynthia P. Cohen, *Introductory Note to United Nations: Convention on the Rights of the Child,* 28 I.L.M. 1448, 1450 (1989); Thomas A. Johnson, *Remarks, United Nations Convention on the Rights of the Child, in* AMERICAN SOC'Y INT'L LAW, PROCEEDINGS OF THE 83RD ANNUAL MEETING 155, 179 (1989); Philip Alston, THE UNBORN CHILD AND ABORTION UNDER THE DRAFT CONVENTION ON THE RIGHTS OF THE CHILD, 12 HUM. RTS. Q. 156 (1989) (detailing controversy over protection of the fetus). Others are concerned about when childhood ends, *see, e.g.*, Timothy Porterfield & Gregory H. Stanton, *The Age of Majority: Article 1.* 7 J. HUM. RTS. 30, 32-34 (1989) (examining the inherent problems with flexible definitions of childhood and arguing that the convention should not allow states to classify a child as an adult unless the child has attained the age of fourteen years); *see generally* Cynthia Price Cohen & Per Miljeteig-Olssen, *Status Report: United Nations Convention on the Rights of the Child,* 8 J. HUM. RTS. 367, 379-81 (1991).

Some have proposed that the Convention is essentially redundant. For example, at least 16 of the Conventions's thirty-nine substantive Articles paralleled provisions of the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N.Doc. A/6316 (1966) [hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR]. *See* Report of the Working Group, 1989, *supra* note 163, at 46-48 (noting that some countries "[c]ould not accept any provision giving the child a freedom to choose and change his or her religion or belief."); David A. Balton, *The Convention on the Rights of the Child: Prospects for International Enforcement,* 12 HUM. RTS. Q. 120, 124-25 (1990) (examining the possible derogation of the freedom of thought, conscience and religion);

U.S. ratification, continue to play down its fundamentally radical approach to ensuring children's rights.[165] In the sections that follow, we examine why this may be and propose that the Convention is simply not being taken seriously.

IV. INTERNATIONAL LAW AND THE CONVENTION'S CONSEQUENCES

Since the United States has a tradition of "dualism" which assigns distinct roles to domestic and international law,[166] an examination of the possible consequences of ratification of the Convention necessarily includes an analysis of both domestic and international consequences. This section begins with an examination of international consequences and asserts that they are likely to be minimal. The section continues by examining potential domestic consequences and concludes that, given the United State's historical approach to international treaties, ratification would not immediately to alter children's rights.

A. International Consequences

Although human rights have played a significant role in U.S. foreign policy,[167] the U.S. historically has been reluctant to have international

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Colleen C. Maher, *The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare,* 9 B.C. THIRD WORLD L.J. 297, nn. 144-77 (1989) (arguing that the Convention dramatically reduces existing limitations on the use of child combatants).

165. It should be noted that finding no differences between international documents and domestic law has become a recurring theme in the implementation of international human rights treaties, see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy,* 84 AM. J. INT'L L. 365, 366 (1990) (noting that commentators examining the implementation of treaties which would call for "positive" economic, social and cultural rights tend to portray those rights as familiar "negative" civil and political rights). *Id.* at 366, 378-79 (criticizing supporters of treaty implementation for suggesting that ratification would impose minimal obligations).

166. Dualism, and its counterpart, monism, refer to contrasting perspectives on the relationship between international and domestic law. In the dualist perspective, the two systems are radically separate, and the effect of a rule of law in one system is unrelated to its effects in the other. Thus, international law becomes domestically relevant only to the extent that it is recognized or incorporated into domestic law. From the monist perspective, international law is normatively superior to domestic law, without exceptions. *See* Jonathan Turley, *Dualistic Values in the Age of International Legisprudence,* 44 HASTINGS L.J. 185, (1993) (examining the United States' dualistic approach to international law); LOUIS HENKIN, ET AL., INTERNATIONAL LAW CASES AND MATERIALS 140 (2d ed. 1987).

167. The U.S. has assumed a leadership role in promoting the worldwide acceptance and implementation of human rights norms. The U.S. was a major force in forming the United Nations and drafting the human rights provisions of the U.N. Charter. *See* LOUIS B. SOHN & THOMAS BURGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 506-09 (1973); Dean Rusk, *Reflections on International Covenants,* 9 HOFSTRA L. REV. 515, 515 (1981).

agreements influence its own domestic policy.[168] A major concern arises, then, in terms of whether other Nation States may use the Convention as a lever to influence the United States' approach to children.

It has become a matter of hornbook law that all States are under an international obligation to honor their treaty commitments in good faith.[169] To the extent that the Convention creates legal duties, the United States upon ratifying is obliged to fulfill these obligations. Failure to do so leaves other Nation States aggrieved and opens channels designed to induce compliance with the requirements of the Convention.[170]

Despite the availability of several channels to challenge violations, the Convention is a weak agreement which imposes no formal enforcement mechanisms on Nation States. Indeed, the most prominent feature of the Convention is its departure from the position that the Nation States are to be responsible to ensure that treaty provisions are upheld and that violators are accountable for their actions.[171] Simply put, the Convention assumes that parties intend to honor children's rights. As a result, it focuses on education,[172] facilitation, and cooperation[173] rather than confrontation. For example, the Convention does not contain State-to-State complaint and individual petition systems which are characteristic of other international

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168. This is reflected not only the failure to ratify major human rights documents, it is also reflected in the limited use it makes of those it has ratified. *See, e.g.*, Lloyd N. Cutler, *The Internationalization of Human Rights*, 1990 U. ILL. L. REV. 575, 587 (noting that "no authoritative American court has applied these international rules of human rights to condemn the conduct of the United States or any of its state and local entities . . ."). *See also* DAVID P. FORSYTHE, THE POLITICS OF INTERNATIONAL LAW 141-55 (1990) (detailing cases in which U.S. acts questionably ignored international law and how foreign parties could not over-come domestic mind-sets and concluding that what comes to be U.S. policy is most attributable to national rather than international influences).

169. In addition, political branches are generally unwilling to be perceived as violating international law; see Stuart S. Malawer, *Reagan's Law and Foreign Policy 1981-1987: The "Reagan Corollary" of International Law*, 29 HARV. INT'L L.J. 85 (1988); Thomas C. Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3 (1991).

170. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 9 (1987) (remedies for violations of international law); The Concept and Present Status of the International Protection of Human Rights (B.G. Ramacharan, ed, 1989) (detailing strategies for protecting human rights).

171. Gomien, *supra* note 163, at 162-64 (demonstrating how the Convention vests extremely broad discretion in the States when compared with other human rights instruments). It is clear, however, that human rights treaties are generally not well defined documents which purposefully do not clearly define who is obligated to ensure the enforcement and implementation of rights declared; *Cf.* James W. Nickel, *How Human Rights Generate Duties to Protect and Provide*, 15 HUM. RTS. Q. 77, 77 (1993) (noting same).

172. The United Nations has adopted the premise that knowledge of human rights standards will promote their observance; much of its effort is aimed at educating government officials and children. The priority given to education is reflected in the first Article of PART II which details the Convention's enforcement mechanism; see art. 42 ("State parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike."); and art. 44 § 6 ("State Parties shall make their reports widely available to the public in their own countries.")

173. *See* Cohen, *supra* note 156, at 33, 48.

human rights instruments.[174] Instead, to monitor the progress made by States, it establishes a Committee on the Rights of the Child.[175] This committee will receive reports from States Parties[176] and solicit expert advice and reports from specialized agencies.[177] Further, the Convention lacks a complaint mechanism for children to claim violations: there is no right to individual petition.[178] In addition to not offering a proper means to petition and claim violations and offer a voice to children,[179] the Convention, unlike several other human rights treaties, offers no remedies.[180]

Since the Convention fails to establish any concrete means of enforcement at the international level,[181] it may be concluded that the Convention is a fundamentally weak document which places focus on individual Nation States enforcing the Convention themselves, rather than using the more traditional approach of having Nation States guard each other.[182] It further

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174. *See* Chen, *supra* note 91, at 25 (citing references to documents providing greater implementation); *see also* Cutler, *supra* note 168, at 575, § III (noting that the European Commission of Human Rights and the European Court of Human Rights both allow for access by other member states and nationals of a member state to avail themselves of their adjudicatory powers).

175. Convention, art. 43 (detailing the election of officers).

176. Convention, art. 44 (detailing the nature of reports).

177. Convention, art. 45 (detailing the Conventions focus on international co-operation by interacting with specialized agencies). *See* Gomien, *supra* note 163, at 171. Further note that N.G.O.'s contributed enormously to the actual articles of the Convention; see Cynthia Price Cohen, *The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child,* 12 HUM. RTS Q. 137 (1990); Laurie S. Wiseberg, *Protecting Human Rights Activists and NGOs: What More Can Be Done?* 13 HUM. RTS. Q. 525 (1991).

178. Gomien, *supra* note 163, at 173.

179. The closest the Convention comes to offering children voices is in art. 12(1) (giving views of child due weight in proceedings) & art. 12 (2) (providing the opportunity for the child to be heard). This failure to have individual complaint procedures is reflected throughout human rights treaties; *see, e.g.,* Gates Garrity-Rokus & Raymond H. Brescia, *Procedural Justice and International Human Rights: Toward Procedural Jurisprudence for Human Rights Tribunal,* 18 YALE. J. INT'L L. 559, 592-93 (1993) (noting the failure of the European and Inter-American systems to permit individuals to bring their own cases before the Court).

180. For example, *Universal Declaration of Human Rights,* adopted Dec. 10, 1948. G.A. Res. 217, U.N. Doc A/810, at 71 (1948) [hereinafter Universal Declaration], art. 8; *The International Covenant on Civil and Political Rights,* G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) arts. 3 & 14(1); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature,* Mar. 7, 1966, 660 U.N.T.S. 195, art. 6; *Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment,* G.A. Res. 39/46, 39 U.N. GAOR Supp. No. 3, at 45, 49, U.N. Doc. A/39/708 (1984), arts. 2(1), 13, 14; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, arts. 5(5), 6, 13 & 50; African Charter on Human Peoples's Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 9, 60, 63 (1983), arts. 7 & 26.1.

181. *Cf.* David A. Balton, *The Convention on the Rights of the Child: Prospects for International Enforcement,* 12 HUM. RTS. Q. 120, 128 (1990) (concluding same).

182. This has lead to considerable criticisms regarding the Convention's potential effectiveness. *See* D.J. Harris, *A Fresh Impetus for the European Social Charter,* 41 INT'L & COMP. L.Q. 659, 671 (1992) ("A monitoring system that depends entirely upon national reports is unavoidably deficient; without in any way questioning the good faith of governments when presenting their reports, it is inevitable that they will see the position from a particular point of view."); *See generally* Karen A. McSweeney, *The Potential for Enforcement of the United*

may be concluded that the approach converges well with the United States' historical reluctance to come under the jurisdiction and scrutiny of foreign tribunals[183] and that the Convention's enforcement mechanisms pose no fundamental hindrance to U.S. ratification.[184]

B. Domestic Consequences

Although it may be concluded that the Convention is unlikely to impose international obligations on the U.S., there still remains the possibility that the Convention could be applied in U.S. courts. Understanding such applications necessitates briefly reviewing how international conventions are used in United States courts—as treaties, customary law, and guiding principles. This section briefly examines each method in light of the domestic obligations set forth in the Convention and concludes that the Convention's impact is likely to be negligible.

1. The Use of Treaties in U.S. Courts

The proposal that U.S. courts are bound directly by human rights principles in treaties is relatively unpromising as a means of integrating principles into domestic law. The U.S. is only directly bound by treaties which it has ratified and signed.[185] Although ratified[186] treaties become the law of the land,[187] whether or not particular treaty provisions actually rule depends on a host of factors. Primary among these considerations is the

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Nations Convention on the Rights of the Child: The Need to Improve the Information Base, 16 B.C. INT'L & COMP. L. REV. 467 (1993) (detailing the enforcement mechanisms of the Convention and offering alternatives).

183. This remains despite propositions that it do so. *See* Richard B. Bilder, *The United States and the World Court in the Post- "Cold War" Era,* 40 CATH. U. L. REV. 251, 257-63 (1991) (advocating U.S. support of the International Court of Justice; Robert E. Lutz, *Perspective on the World Court, the United States, and International Dispute Resolution in a Changing World,* 25 INT'L LAW. 675 (1991) (detailing strategies for reforming the world court and changing the United States' approach to it).

184. Once ratified, however, it is likely that non-governmental organizations will have a considerable lever to influence domestic policy; see Cutler, *supra* note 168, at 583-585 (noting the creation of citizens groups to enforce human rights as a significant development in the internationalization of human rights); *see also* Michael Jupp, *The United Nations Convention on the Rights of the Child: An Opportunity for Advocates,* 34 HOWARD L.J. 15 (1991).

185. It may be argued that the U.S. may have an obligation with respect to international instruments that it has signed but not ratified; see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 336, *reprinted in* 8 I.L.M. 679, 686 (1969) (art. 18 state that "A state is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty . . . or (b) expressed its consent to be bound by the treaty . . ."). Although the U.S. has signed, but not ratified, the Vienna Convention, the Department of State recognizes it as customary international law and therefore binding.

186. A treaty is an international agreement which is ratified pursuant to each party's own constitutional or statutory provisions. The U.S. ratifies a treaty by signature of the President with the advice and consent of the Senate. U.S. CONST. art. II. § 2 cl. 2.

187. Ratified treaties become the supreme law of the land pursuant to the U.S. Constitution, U.S. CONST. art. VI, cl. 2.

judicial doctrine of "self-execution," which stipulates that a treaty will bind domestic courts only if Congress has passed legislation for the specific purpose of implementing the treaty provisions domestically.[188] Even if the treaty and particular provisions are self-executing, to be enforceable law, provisions must not be limited by a reservation; nor must they conflict with existing statutory law,[189] nor be unconstitutional.[190]

In addition to direct enforcement of treaties, international conventions

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188. Chief Justice John Marshall announced the "self-executing" treaty doctrine in Foster v. Neilson, 27 U.S. (2 Pet.) 253, 314 (1829). He wrote:

> Our constitution declares a treaty to be law of the land. It is consequently, to be regarded in Courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court.

Human rights treaties are regarded as lacking direct legal force in domestic courts. The leading case involved the United Nations Charter's human rights provisions, Sei Fujii v. State, 242 P.2d 617, 619-22 (1952). The court found as follows:

> The provisions in the charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they ar framed as a promise of future action by the member nations . . .
>
> The human and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration . . . we are satisfied, however, that the charter provisions relied on by the plaintiff were not intended to supersede existing domestic legislation

For a recent discussion of *Sei Fuji,* see Richard B. Lillich, *International Human Rights Law in U.S. Courts,* 2 J. TRANSNAT'L L. & POL'Y 1, nn.16-22 (1933) [hereinafter Lillich, *International Human Rights Law*].

Other human rights treaties have found a similar fate. *See, e.g.,* Dreyfus v. Von finck, 534 F.2d 24, 30 (2d Cir. 1976) (Hague Conventions are not self-executing), *cert. denied,* 429 U.S. 835 (1976); Handel v. Artukovic, 601 F. Supp. 1421, 1425 (C.D. Cal. 1985) (neither Geneva nor Hague Convention is self-executing); United States v. Terrazas-Carrasco, 861 F.2d 93, 96-97 (5th Cir. 1988) (UDHR does not create cause of action); Dickens v. Lewis, 750 F.2d 1251, 1253-54 (5th Cir. 1984) (no cause of action created by U.N. Charter, UDHR, or ICCPR).

A treaty that is not self-executing is unavailing to the litigants relying on it in court, and therefore is not the law of the land. Numerous lower courts have held that a treaty is self-executing: only if it creates a private right of action. Haitian Refugee Center v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991) (treaty must "directly accord[] enforceable rights to persons"), *cert. denied,* 112 S. Ct. 1245 (1992).

Lastly, note that this has been accepted as settled doctrine. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 131 (1987) (U.S. courts are bound to give effect to international law, except that a "non-self-executing" agreement will be given effect only after necessary implementing legislation has been adopted).

189. It is a matter of hornbook law that, if the treaty's provisions conflict with federal law, then the most recent provision prevails, Reid v. Covert, 354 U.S. 1, 18 (1957); Whitney v. Robertson, 124 U.S. 190, 194 (1888). If it conflicts with state law, then the treaty prevails. Zschernig v. Miller, 389 U.S. 429, 440-41 (1968); Missouri v. Holland, 252 U.S. 416, 433-35 (1920).

190. The federal constitution remains supreme law. *See* Boos v. Barry, 485 U.S. 312 (1988) (holding unconstitutional a statute protecting foreign diplomats in conformity with international treaties).

also are used in U.S. courts when they have become part of customary international law.[191] The precedental authority of customary international law is usually traced to the case of *The Paquete Habana*,[192] in which the Supreme Court announced that customary international law was "part of our law."[193]

Despite the Supreme Court's determination, and despite several scholarly attempts to broaden the use of customary international law,[194] U.S. courts have only made limited use of customary international law.[195] despite this reticence, the early 1980's witnessed some renewed interest in revitalizing customary international law, particularly in human rights contexts.[196] In 1988, however, the Supreme Court essentially sounded the death knell to the

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191. The Restatement (Third) on Foreign relations defines customary international law as "a general and consistent practice of States followed by them from a sense of legal obligation." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987). The Restatement drafters also noted that "there is no precise formula to indicate how widespread a practice must be." *Id.* § 102 cmt. b.

192. *The Paquete Habana,* 175 U.S. 677, 700 (1900).

193. *The Paquete Habana,* 175 U.S. 677, 700 (1900). In a now famous passage, the Court further held that customary international law "must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions or right depending upon it are duly presented for their determination." *Id.*

It is important to note, however, that even though it recognized the authority of customary international law, the Court defined it as a lesser legal source in comparison to constitutional, statutory, or treaty obligations. *The Paquete Habana,* 175 U.S. at 700 (noting that customary law would apply, "[f]or this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision. . ."). *Id.* at 708, 710-11.

194. *See* Lillich, *International Human Rights Law, supra* note 197, at nn.64-93 (1933) (offering an optimistic outlook about the potential effect of customary international human rights law). Professor Louis Henkin also has offered a powerful defense for monistic values.

> International law is law of the land, for the executive branch as well as the courts. . . . Two hundred years ago the framers of the Constitution were, I believe, comfortable with a monist approach to international law. If we are to maintain the respect that our nation has historically accorded to that law, we must press no further the move toward extreme dualism . . . indeed, we must reverse it.

Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and Its Progeny,* 100 HARV. L. REV. 853, 886 (1987).

195. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process and Proposed Synthesis,* 41 HASTINGS L.J. 805, 814-823 (noting same and concluding that although the use of customary law to domesticate international human rights law is theoretically sound, it has been invoked only rarely and is unlikely to produce practical results in the immediate future).

196. The first case to use customary law to protect individual liberties was the often-cited *Filartiga v. Pena-Irala*, a Second Circuit case holding that torture violated customary international law. 630 F.2d 876, 888-889 (2d Cir. 1980) (referring, *inter alia*, to the Universal Declaration of Human Rights, the UN's 1975 Declaration on Torture, and regional human rights treaties in arriving at its determination that torture violated "the law of nations within the meaning of the Alien Tort Claims Act). The second was Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), *aff'd on other grounds sub nom.* Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 88-90 (10th Cir. 1981) (considering "international law principles of fairness" to find that a Cuban who had been arbitrarily detained had a justiciable claim).

use of customary international law in U.S. Courts.[197] In *Stanford v. Kentucky*, the Court declared that the standards of other countries and in international human rights instruments are essentially irrelevant. As long as there exists an American consensus, courts should not look to other nations' practices.[198]

Courts also have been willing to invoke international documents as offering not binding law but rather guiding principles.[199] Yet despite several commentators' optimism for this approach,[200] international law is rarely determinative.[201] Few courts venture into the ambiguous realm of customary

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197. At least at the federal level. State courts remain free to turn to international law. *See* Stephan Rosenbaum, *Lawyers Pro Bono Publico: Using International Human Rights Law on Behalf of the Poor, in* NEW DIRECTIONS IN HUMAN RIGHTS 109, 137 (Ellen L. Lutz et al., eds., 1989); *see also* Richard B. Lillich, *The Role of Domestic Courts in Promoting International Human Rights Norms*, 24 N.Y.L. SCH. L. REV. 153 (1978) (proposing that U.S. courts give greater weight to international human rights documents); *see generally* Lillich, *International Human Rights Law*, *supra* note 197.

198. The Court found as follows:

> We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant. While "the practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," . . . they cannot serve to establish the first Eighth Amendment prerequisite, that the practice is accepted among our people.

Stanford v. Kentucky, 109 S. Ct. 2969, 2975 n.1. Note that this approach remains even though the challenged practices have been rejected by various states in the U.S. and other countries and international human rights instruments. *See, id.* at 2985-86 & n.10 (Brennan, J., dissenting) concluding that, "[w]ithin the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved").

199. The Court historically has used international law to inform many of its opinions, especially death penalty cases. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977) (finding the "climate of international opinion concerning the acceptability of particular punishment" as relevant); Enmund v. Florida, 458 U.S. 782, 796 n.22 (1982) (international opinion was "an additional consideration"); Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (finding that executions of anyone below sixteen years of age was consistent with "the leading members of the Western European Community.").

200. *See* Strossen, *supra* note 195, at 805, 805-806 (noting that holding international norms directly binding on federal and state courts has met with widespread resistance and proposing that international human rights standards should be used as guiding principles to inform legal processes); *see also* Lillich, *International Human Rights Law*, *supra* note 197, at nn.94-108 (arguing that such "indirect incorporation" of international human rights law continues to be a most promising approach).

201. *Cf.*, Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective*, 14 MICH. J. INT'L L. 1, 89 (1992) (providing an in depth analysis of human rights law in American courts and concluding that courts generally avoid the application of international human rights norms and that, when they are used, results are premised on some alternative source of values). *See also* HURST HANNUM & RICHARD B. LILLICH, MATERIALS ON INTERNATIONAL HUMAN RIGHTS AND U.S. CONSTITUTIONAL LAW 2 (1985) (concluding that "[c]andor requires the admission that international human rights norms have not had a major, direct effect on recent decisions of the U.S. Supreme Court.").

international law.[202] When they do invoke international law as a guiding principle, its use is, again, uncertain. For example, the Court recently rejected the argument that the juvenile death penalty was unconstitutional and rejected the relevance of the sentencing practices of other countries[203] even though it had found it relevant one year before.[204]

2. The Use of the Convention as a Treaty in U.S. Courts

As we have seen, whether the Convention would impact on U.S. law even if it were ratified remains, at best, questionable. The requirement that provisions be self-executing is a major limitation. Most of the rights and entitlement covered by the Convention are not self-executing.[205] Furthermore, the articles which are arguably self-executing are already covered by treaties to which the United States is a party.[206]

Even if particular provisions or the treaty itself were self-executing, the hurdle of possible reservations remains.[207] Some commentators have suggested that there may be a federal-state reservation in which the federal government takes it upon itself to implement the Convention to the extent

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202. Some commentators have noted a growing trend on the part of state courts to extend individual rights through interpretations based solely on state law and constitutions rather then relying on federal constitutional provisions. Thus, state courts are equally likely to use international human rights law as a means of informing or interpreting state constitutional provisions. The trend emerged in the early 1980's. *See generally Symposium on International Human Rights Law in State Courts,* 18 INT'L LAW. 60 (1984).

203. Stanford v. Kentucky, 492 U.S. 361, 369 n. 1 (1989) (Scalia, J). finding that, while

> [t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely an historical accident, but rather so 'implicit in our concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well, they cannot serve to establish the first Eighth prerequisite, that the practice is accepted among our people.

For a discussion of this case and the role of international law in juvenile death penalty cases, see Lauren B. Kallins, *The Juvenile Death Penalty: Is the United States in Contravention of International Law,* 17 MD. J. INT'L L. & TRADE 77 (1993).

204. Thompson v. Oklahoma, 487 U.S. 815, 831 n.34 (1988) (interpreting the cruel and unusual punishment under the Eight Amendment by examining international law and the laws of other nations for guidance in defining the evolving standard of cruel and unusual punishment to prohibit the execution of a person who was under the age of sixteen at the time of his offense).

205. *Cf.*, Melton, *Children in the New World Order, supra* note 3, at 517 (noting that the Convention is not fully self-executing and that, although an American declaration on this point may be likely, it probably is unnecessary).

206. Basic concepts have already been ratified through the Declaration of Rights of Man. That treaty, we should note, has not had much impact on U.S. courts.

207. The Convention itself does not allow for reservations, it specifically states that "[a] reservation incompatible with the object and purpose of the present convention shall not be permitted." Convention, art. 51 § 2. Whether reservations are "incompatible" depends on other Nation States' reactions and interpretations, see Nicholas Bala & Martha Bailey, *Canada: Recognizing the Interests of Children,* 31 J. FAM. L. 283, 285 (1992-1993) (noting the reservations Canada has placed on the Convention).

that it exercises legislative and judicial jurisdiction over the matters covered by its provisions.[208] Another favored reservation would be a blanket provision which would make the treaty non-self-executing.[209] This is not an unlikely possibility since it would simply put the U.S. on an equal footing to other countries which have ratified the Convention but require legislation to carry treaties into effect.[210]

Although the concerns about ratification of the Convention vary widely, several commentators have arrived at the conclusion that there are more similarities than differences between the substantive rights and general principles of the Convention and U.S. law.[211] This proposition should not be unexpected to anyone familiar with the Convention. The Convention's enumerated rights were intended to be minimal[212] and the U.S. played a key role in the delineation of rights.[213] In addition, for areas in which the U.S. falls below minimal standards, the actual obligations are expressed in terms

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208. *See generally* Lawrence L. Stentzel, II, *Federal-State Implications of the Convention, in* CHILDREN'S RIGHTS IN AMERICA, *supra* note 156, at 57-83 (analyzing the issue of state-federal reservation and recommending a reservation which would be less broad than the usual U.S. reservation). This would affect the provisions that address areas that are in control by the states.

209. Even if provisions are self-executing, their impact on U.S. courts remains uncertain. *See* Lillich, *International Human Rights Law, supra* note 188, at nn. 24 & 25 (concluding that even though self-executing clauses exist, they are unlikely to be given direct effect in U.S. courts).

210. One prominent example of countries which require implementing legislation for all its treaties is Great Britain. *See* Elizabeth M. Calciano, *United Nations Convention on the Rights of the Child: Will it Help Children in the United States?* 15 HASTINGS INT'L & COMP. L. REV. 515 (1992). This point is rather significant, for it is one of the major reasons that, although those countries adopt major human rights treaties, they figure as insignificantly in their court findings as they do in the U.S., which has ratified only a handful of international agreements. *Cf.*, Anne Bayefsky & Joan Fitzpatrick, *International Human Rights Law in United States Courts: A Comparative Perspective,* 14 MICH. J. INT'L L. 1, 89 (1992) (concluding that international human rights norms have counted for very little in U.K. jurisprudence).

211. *See* Daniel L. Skoler, *The U.N. Children's Convention: International Triumph, National Challenge*, 15 SPG FAM. ADVOC. 38 (1993) (noting rousing endorsements for the Convention and noting no impediments to ratification since the Convention's text contemplates and tolerates the reality that full compliance may be gained gradually through conforming legislation); Homer H. Clark, Jr., *Children and the Constitution,* 1992 U. ILL. L. REV. 1, 41 (1992) (examining the Supreme Court's approach to children's rights and concluding that "it is doubtful that the United Nations Convention would represent much of an improvement"). For a comprehensive comparison of the Convention and current U.S. law, see CHILDREN'S RIGHTS IN AMERICA, *supra* note 156, at 380 (concluding that the majority of authors agree that U.S. law is in compliance with the Convention).

212. CHILDREN'S RIGHTS IN AMERICA, *supra* note 156, at iii.

213. Although originally proposed by Poland and having an authoritarian slant (focusing on economic social rights and assuming a monolithic, centralized, and authoritarian government without a private sector), the Western Group, principally Canada and the U.S. took over negotiations, the result of which was a switch. After the first few years, there was really little Eastern European input. Thomas A. Johnson, *Remarks on the United Nations Convention on the Rights of the Child,* 83 AM. SOC'Y INT'L L. PROC. 155, 169 (1989); *see also* Cohen & Miljeteig-Olssen, *supra* note 164, at 367, 378 (noting how the U.S. was a major participant throughout the drafting process).

of ambiguous obligations.[214]

Our brief detour examining the uses of international law in U.S. courts reveals that the impact of the Convention remains questionable and that, even if ratified, its use would be limited. Given its limited use, then, why has the U.S. not welcomed it into its domestic policy and jurisprudence?[215] The answer is simple: if taken seriously, the Convention could transform American jurisprudence and domestic policy.

V. IMPLICATIONS FOR LEGISLATURES, COURTS AND FAMILIES

Given the proposals which have been made regarding the ratification of the Convention, it is likely to have minimal impact on current U.S. law and policy toward children. Despite this near certainty, if the Convention were given its intended effect, it could essentially transform several aspects of the manner which the United States treats its children.[216] In this section, we examine the claim that taking the Convention seriously could entail making fundamental changes in the manner in which the U.S. approaches children, families, and the law.[217]

Given the extensive list of rights afforded protection under the Conven-

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214. The Convention, for example, is unlikely to create an obligation to ensure economic and health care rights. The only obligation is to take appropriate steps. *See* James Weill, *Assuring an Adequate Standard of Living for the Child, in* CHILDREN'S RIGHTS IN AMERICA, *supra* note 156, at 197-217 (noting that the U.S. succeeded in softening the duty to implement economic rights, making it more a goal or objective to be sought progressively rather than a legal right requiring immediate implementation); Kay A. Johnson & Moly McNulty, *Assuring Adequate Health and Rehabilitative Care for the Child, in* CHILDREN'S RIGHTS IN AMERICA, *supra* note 156, at 219-37 (same); Calciano, *supra* note 210, at 515.

215. President Bush did not seek the advice and consent of the Senate. On September 11, 1990, the Senate adopted a resolution urging the President to sign the Convention. Bradley Amendment No. 2626, 101st Cong., 2d Sess., 136 Cong. Rec. S12,785-86, S12, 808-11 (daily ed. Sept. 11, 1990). On September 17, 1990 the House of Representatives adopted a similar resolution urging the President to sign the Convention and seek the advice and consent of the Senate for its ratification. H. Res. 312, 101st Cong., 2d Sess., 136 Cong.Rec. H7685 (daily ed. Sept. 17, 1990). For a detailed analysis of President Bush's failure to sign the Convention, see Lawrence L. Stenzel, II, *Prospects for the United States Ratification of the Convention on the Rights of the Child,* 48 WASH. & LEE L. REV. 1285 (1991).

216. Juvenile justice and children's right to health and economic rights have been cited as examples. It is clear, however, that the Convention would influence several other substantive and procedural aspects of the way the U.S. treats its children. *See infra* note 134 and accompanying text.

217. Although several commentators have examined the Convention and found few disparities between it and the United States, there are essentially no detailed commentaries examining the impact the Convention would have if it were taken seriously. *Cf.*, Melton, *Children in the New World Order, supra* note 3, at 491, 519 (noting that both advocates and politicians focus on compliance in the narrow sense). One notable exception is Professor Gary Melton's prolific work in the area, focusing on mental health issues, see Gary B. Melton, *Socialization in the Global Community: Respect for the Dignity of Children,* 46 AMERICAN PSYCHOLOGIST 66, 68-70 (1991) (detailing the implications for mental health policy); Gary B. Melton, *Preserving the Dignity of Children Around the World: The UN Convention on the Rights of the Child*, 15 CHILD ABUSE AND NEGLECT 343 (1991) (same) [hereinafter Melton, *Preserving the Dignity*].

tion,[218] this discussion limits itself to areas which have heretofore been neglected in discourse relating to the implementation of the Convention: the roles to be played by families, courts, and legislatures. This section also is limited to revisiting a series of substantive areas in which the Supreme Court has provided a constitutional minimum.[219] Focus is placed on summarizing the Court's current approach and delineating how the Convention may demand a refocus on children's rights and interests.

A. Implications for Courts and Obligations Facing Legislatures

Although much has been written about the questionable distinction between "positive" and "negative" rights,[220] it is the most pervasive strategy used to examine constitutional law.[221] This section uses these two broad categories as a means to examine children's rights and the obligations of courts and legislatures.

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218. The hallmark of the Convention is its comprehensiveness. *Cf.*, Gomien, *supra* note 163, at 162 (finding that the Convention stands as the only international treaty protecting the entire spectrum of human rights).

219. The reason for this limitation is simple. To the extent that the Convention is a constitutional document, it provides its own constitutional minimum. *See* Melton, *Preserving the Dignity*, *supra* note 217, at 343.

220. *See* David P. Curie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986) (noting that the U.S. constitutional jurisprudence recognizes more negative rights from government action than positive rights to governmental aid); *see also* Phillip Alston & Gerard Quinn, *The Nature and Scope of States Parties: Obligations Under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 159-60 (1987) (detailing traditional distinctions between civil and political rights and economic, social and cultural rights); Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 U.C.L.A. L. REV. 1195 (1987) (arguing for recognition of positive rights in U.S. courts). Commentators focusing on international human rights have disputed claims that one form of right is superior to the other. *Cf.* Melanie Beth Oliviero, *Human Needs and Human Rights: Which Are more Fundamental?* 40 EMORY L.J. 911, 915-16 (1991) (addressing the issue of fundamental rights from the perspective of Third World countries); Michael W. Giles, *Comments on Human Needs and Rights: Which are more Fundamental?*, 40 EMORY L.J. 939, 942 (1991). Few, however, dispute the link between both, see Russel Lawrence Barsh, *Current Developments: A Special Session of the UN General Assembly Rethinks the Economic Rights and Duties of States*, 85 AM. J. INT'L L. 192, 199 (1991) (noting the recent linkage of rights with economic development).

221. Louis Henkin, *Introduction, Constitutionalism and Rights: The Influence of the United States Constitution Abroad*, 1, 2-12 (1990) (detailing the United States' ideas of rights); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990) (criticizing judicial failure to recognize more positive constitutional rights).

For example, and in terms of the Convention, the U.S. would have fewer problems with protecting the "negative" rights of personal liberty, e.g., right to be free from torture, execution, and detention without trial. Nor would it have problems protecting such rights as religious and political freedoms. The so-called entitlement or "positive rights," such as economic, social and cultural rights, would be more difficult to protect, for they are generally not considered rights at all. This is clearly so with two major "rights" under the Convention: education and welfare. See, e.g., San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29-39 (1973) (no fundamental right to education); Dandridge v. Williams, 397 U.S. 471, 484 (1970) (finding that welfare is not a fundamental right).

1. Negative Obligations

The main role of the Court is to specify what federal and state legislatures must, at the bare minimum, do. This role runs deep in United States legal tradition. Influenced by eighteenth century discourse concerning the individual's right to life, liberty, and property,[222] the Supreme Court has developed an individualistic, rights-based legal philosophy that constitutionally protects citizens' private lives.[223]

The general tendency has been to define these prima facie rights quite narrowly. This tendency dovetails with the Court's approach to reviewing challenges to derogations of rights, or interests, with rather undemanding judicial review standards. The practical consequence of this approach is that, as an asserted right becomes seen as a mere "interest," essentially any governmental measure restricting its exercise need survive only a low level of judicial scrutiny to be held constitutional. If the Convention were taken seriously, this "mere interest-minimal review" approach could be radically transformed.

The potential transformation of judicial review can be seen in a recent children's rights case litigated before the Supreme Court. This is the case of *Reno v. Flores*[224] which involved the rights accorded to alien children arrested at border-crossings. In *Flores,* "alien" children challenged INS' blanket detention procedure which prohibited their release to third party adults, unless there were "unusual and extraordinary cases."[225] The

222. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART 142 (1985) (noting that individualism, pursuit of individual rights, and individual autonomy "lies at the very core of American culture").

223. For example, the Supreme Court has interpreted the U.S. Constitution to insulate certain fundamental rights from state control. The earliest private protections involved parental rights to their children, see Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the right to bring up children is protected by 14th Amendment); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding that the right of parents to direct upbringing and education of children is protected). *See also* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 204-05 (1977) (arguing that "taking rights seriously" means protecting certain individual rights from community control); MARY ANN GLENDON, RIGHTS TALK 48 (1991) (arguing that possessing rights in the U.S. means insulating individuals from community scrutiny and upholding the individual as "self-determining, unencumbered, individual, a being connected to others only by choice").

224. Reno v. Flores, 113 S. Ct 1439 (1993). For thoughtful analyses of Reno v. Flores, see Erin Eileen Gorman, Reno v. Flores: *The INS' Automatic Detention Policy For Alien Children,* 7 GEO. IMMIGR. L.J. 435 (1993) [hereinafter Gorman, *Alien Children*]; Thomas A. Bockhorst, *The Constitutionality of the INS Pre-hearing Detention of Alien Children,* 62 U. CIN. L. REV. 217 (1993).

225. This was the regulation in force at the time. The regulation did not allow release to adult relatives such as grandparents, siblings, aunts, etc. As a result of this case, the statute has been amended to include blood relatives. However, the "unusual and extraordinary circumstances" requirement remains. 8 C.F.R. § 242.24(b)(1)(1993). The result, then, is that non-relatives, such as church organizations, can not release detained children and that children may be detained for months without a hearing. *See* Flores v. Meese, 942 F.2d 1352, 1355 (9th Cir. 1991) (INS admitting that there are virtually no cases in which children are released to third parties); Dirk Johnson, *Choice for Young Illegal Aliens: Long Detentions or Deportation,* NEW YORK TIMES, Nov. 3, 1992, at A1, C5 (noting that children without family ties in the U.S. may spend months in detention during deportation proceedings).

practical result of the INS policy was that children without family ties in the U.S. faced spending months in detention while awaiting deportation proceedings.[226]

To examine our point, it suffices to examine only one of the children's claims. The children argued that being detained because they are suspected for being deportable was a violation of their fundamental right to freedom from physical restraint. That fundamental right, they further argued, made INS procedures unconstitutional under "substantive due process" grounds since the INS cannot prove that it is pursuing an important interest in a manner narrowly tailored to minimize the restraint on liberty.[227] INS responded that the detained children's liberty interests were limited because of their status as aliens and children.[228]

The Supreme Court agreed with the government. It reiterated what has now become the familiar phrase when examining children's interests: "juveniles, unlike adults, are always in some form of custody," either of the parent, a legal guardian or the state.[229] The Court found no right to be placed in non-custodial settings; and therefore applied a "rational review" standard and found that the minors did not meet the burden of establishing "that no set of circumstances exists under which the [regulation] would be valid."[230]

The Court explicitly rejected the children's proposition that a "best interests of the child" standard be used to evaluate the INS procedure in detaining children.[231] As long as the detention conditions were "good enough," there was no requirement for an individualized hearing to determine whether private placement would be better than institutional

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226. Evidence presented at the trial level indicated that the INS had detained children for as long as two years under the challenged detention policy, Flores v. Meese, 934 F.2d 991, 1014 (9th Cir. 1990) (Fletcher, J., dissenting).

227. *Id.* at 1447. The children had also claimed that the regulation denied them procedural due process because it does not require individualized determinations, with regard to each child who must remain in INS custody, whether the child's best interest lie in remaining in custody or being released to another responsible adult. *Id.* at 1449-50. The Court noted that it was simply the substantive due process claim recast in procedural due process terms and rejected it for the same reasons. *Id.* at 1442. It is important to note that the Court, in Gault had previously determined that the "Constitution protects the rights of children to due process of law in conjunction with any deprivation of liberty." This was noted in the district court, Flores v. Meese, 942 F.2d at 1361 (citing *In re Gault,* 387 U.S. 1 (1967)) (holding that children in delinquency proceedings are entitled to procedural due process protections when institutional confinement is a possibility). The case, however, was the basis of Justice O'Connor's concurring opinion, who wrote separately to emphasize that "children have a constitutionally protected interest in freedom from institutional confinement . . . [which] lies within the core of the Due Process Clause." *Id.* at 1454. She found, however, that the procedures survived heightened scrutiny, since the government was acting with legitimate purposes. *Id.* at 1456.

228. Petition for a Writ of Certiorari to the United States Supreme Court, Barr v. Flores, 112 S. Ct. 1261 (1992). The lower court had concluded that the INS was "incorrect when it assert[ed] that plaintiffs have no fundamental liberty interests at stake." Flores v. Meese, 942 F.2d. at 1362 .

229. *Id.* at 1447 (citing Shall v. Martin 467 U.S., at 265).

230. *Id.* at 1446 (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)).

231. *Id.* at 1448-49.

confinement.[232] The majority reasoned that there is a major difference between "the best interests of the child," and "the welfare of the child."[233] It specifically noted that the former is not the sole constitutional criterion by which to judge this issue. The Court concluded that, "where [children's] interests conflict in varying degrees with the interests of others," minimal standards alone must be met.[234]

In addition to an article which would be directly on point,[235] the Courts current approach to children being detained when seeking asylum would be an affront to several of the Conventions Articles.[236] Taking the Convention seriously, then, would mean rethinking how the Court evaluates children's claims.

Changing the Court's "mere interest-minimal review" approach to children's rights has rather extensive ramifications. For example, it has been a critical component of denying children's right to social association. In *Dallas v. Stanglin*[237] the Court was asked to review a city ordinance regulating teenager's associational rights which had the effect of prohibiting young teenagers from associating with older teenagers and adults at a dance hall while allowing them to interact in another part of the building, a roller-rink.[238]

The Court began its analysis by finding that the form of "social association" involved in the case, interaction at a dance hall, was not a fundamental right. The Court did so by narrowing the right to "freedom of association" to include only specific types of association: intimate human relationship and associations for the purpose of engaging in activities expressly protected by the first amendment—namely speech, assembly, petition for redress of grievances, and the exercise of religion.[239]

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232. *Id.* at 1449. This was the basis of Justice Stevens' dissenting opinion. He would have found the regulation unconstitutional as a blanket detention policy that requires holding children for unspecified periods of time without individual hearings. *Id.* at 1456-71.

233. *Id.* at 1448.

234. *Id.* For example, the Court noted that there is no constitutional requirement for children to receive "the best schooling or the best health care available." *Id.* at 1448.

235. Article 22 (relating to children considering refugee status and ensuring enjoyment of rights set forth in the Convention).

236. Art. 3 (best interests of the child is a primary consideration); art. 9 (right not to be separated from parents against child's will); art. 10 (right to maintain relationship with parents); art. 16 (right to privacy); art. 20 (right to alternative care when deprived of family environment); art. 25 (right to review of treatment when in placement); art. 37 (right against cruel, inhumane or degrading treatment or punishment); art. 39 (right to social-integration when victimized).

237. Dallas v. Stanglin, 109 S. Ct. 1591 (1989).

238. *Stanglin*, 109 S. Ct. at 1594.

239. *Stanglin*, 109 S. Ct. at 1594 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 617-18 (1984)). Note that this interpretation of the right to association narrowed the expansive definition of the right to association the Court had previously suggested. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("right to freely associate is not limited to 'political' assemblies in the customary sense, but includes associations that 'pertain to the *social*, legal and economic benefit' of citizens") (emphasis added).

Having found only a mere-interest, the Court continued to review the challenged restrictions on such association pursuant to a "rational basis" or minimal scrutiny test.[240] The Court noted that this "rational-basis scrutiny" was "the most relaxed and tolerant form of judicial scrutiny" and that "only the invidious discrimination, the wholly arbitrary act" would not survive such a lenient level of review.[241] The Court concluded that the city could properly use such measures to protect youth against themselves, that "limiting dance hall contacts between juvenile and adults would make less likely illicit or undesirable juvenile involvement with alcohol, illegal drugs and promiscuous sex."[242]

Although it may legitimately be argued that the right to dance does not rank highly on the list of fundamental rights, when we deal with life and death issues, the "mere interest-minimal review" undoubtedly becomes more problematic. Yet, when it comes to imposing the death penalty, the Court has adopted this approach.

The Court's decision in *Stanford v. Kentucky*,[243] illustrates its failure to put regulations denying fundamental rights under "strict scrutiny." Stanford rejected a challenge to the imposition of the death penalty on individuals who were juveniles when they committed the crimes in question. In repudiating the contention that the juvenile death penalty should be invalidated unless it could be shown to advance a legitimate penological goal, the Court went much further than eschewing the requirement that the state's chosen means be necessary to promote its asserted ends.[244] Rather, the Court refused to enforce a requirement that the state demonstrate any degree of means-to-end connection whatsoever.[245] The Court went on record as follows:

> If . . . evidence could conclusively establish the entire lack of deterrent effect and moral responsibility . . . the Equal Protection Clause . . . would invalidate these laws for lack of rational basis. . . . But . .. it is not demonstrable that no 16-year-old is 'adequately responsible' or significantly deterred. It is rational, *even if mistaken*, to think the contrary. (emphasis added).

Although the court did not expressly acknowledge that it was applying a

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240. The Court had found that "[t]he dispositive question in this case is the level of judicial 'scrutiny' to be applied to the city's ordinance. . ." *Stanglin,* 109 S. Ct. at 1594 ("[i]t need only be shown that [challenged laws] bear 'some reasonable relationship to a legitimate state purpose.'") (quoting San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973)); *see also id.* at 1596 ("only the invidious discrimination, the wholly arbitrary act . . . cannot stand" under rational basis scrutiny) (quoting New Orleans v. Duke, 427 U.S. 297, 303-304 (1976)).

241. 109 S. Ct. 1591, 1956 (quoting New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976)).

242. *Stanglin,* 109 S. Ct. at 1594. This approach appears quite frequently, *see, e.g.*, Elizabeth Qutb, et. al. v. Annette Strauss, 8 F.3d 260 (5th Cir. 1993) (upholding constitutionality of a nocturnal juvenile curfew based, in part, on purpose of protecting juveniles from harm).

243. 109 S. Ct. 2969 (1989)

244. This would be the accepted approach under strict scrutiny.

245. *Id.* at 2979.

"rational basis" test, it clearly did. That is, evidence concerning the inefficacy of the juvenile death penalty in promoting penological goals would be relevant only if the evidence established conclusively that there was absolutely no means-to-end connection.

In summary, then, despite commentaries to the contrary, the Convention could have an impact on rights which the United States has traditionally viewed as protected by its most basic conception of rights: that rights are protections from governmental intrusions. In addition, we have seen how the Convention offers a more expansive notion of what negative rights are, the result of which would necessarily lead to a rethinking of the role of the courts in reviewing legislative efforts.

2. Affirmative Obligations

The international law of human rights, particularly the Convention, strives to set forth positive international law as the essential human rights and to prescribe standards for the guarantee of these rights by Nation-States. This is a rather radical departure from the current legal standard interpreted by the Supreme Court: the Constitution imposes no affirmative duty on the government to safeguard any children's rights—even the paramount right to life itself—from interference.[246] This section examines the implications of this stance, particularly in terms of its implications for children.

In *DeShaney v. Winnebago County Department of Social Services*,[247] the Court was asked whether a young boy could maintain a cause of action against a state agency for failing to protect him from his abusive father, even though a number of individuals had repeatedly reported past instances of the father's abusiveness to the agency.[248] The Court ruled that the purpose of the due process clause "was to protect the people from the State, not to ensure that the State protected them from each other."[249] The Court concluded by reaffirming its position that the fifth and fourteenth amendment due process clauses "generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual."[250] Simply put, the Court found that the state was not to be held responsible because, although the agency had released the child to the father, the boy

246. Hugh Downs, *Perspective on Children*, L.A. TIMES, Feb. 10, 1991, at M5, C2 (characterizing the current crisis in child neglect as "passive—[stemming] not from action but from inaction. The Convention gives us the opportunity to make the welfare of our children a point of law").

247. 109 S. Ct. 998, 1003 (1989).

248. *Id.* at 1007.

249. *Id.* at 1003.

250. *Id.* at 1003.

was not in the state's custody at the time of the injury.[251] Thus, although the Court was sympathetic to the young boy's case, it found that "[t]he most that can be said about the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them."[252]

Although one may dispute the genuineness of the Court's characterization of the government as having taken no affirmative action to thwart individual rights,[253] the result remains and the approach has become settled doctrine.[254] The principle is rather straightforward. The Constitution limits the power of states, not private parties. The Constitution simply does not protect citizens against injury by private persons.

Although *DeShaney* had suggested that the State could have taken upon itself an affirmative duty to act if the child had been in its custody, the Court

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251. *Id.* at 1002. *DeShaney* specifically held that "the State does not become the permanent guarantor of an individual's safety by having once offered him shelter." *Id.*

252. *Id.* at 1004.

253. This was the dissent's position. Writing for the dissent, Justice Brennan pointed out that the child had been made more vulnerable to deprivation of fundamental rights as a result of the challenged government policy than he would have been absent governmental programs. *Id.* at 1012. The dissenters pointed out that government had undertaken various affirmative actions that arguably made the abused child worse off than he would have been absent governmental measures. At the very least, the state's creation of a system of dealing with child abuse imposed on it a corresponding duty to carry out its responsibilities under this system in a non-negligent fashion. The Court reasoned that, by centralizing all responsibility for investigating reported instances of child abuse, and securing judicial remedies, the Department of Social Services had developed a

> child-protection program [which] effectively confined [the abused son] within the walls of [his father's] violent home until such time as DSS took action to remove him. Conceivably, then, [abused] children . . . are made worse off by the existence of this program when the persons and entities charged with carrying it out fail to do their jobs.

Id. at 1011 (Brennan, J., dissenting). *See also id.*, at 1012 ("My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it.").

254. For further examinations of *DeShaney*, see Kristen L. Davenport, Note, *Due Process-Claims of Abused Children Against State Protective Agencies-The State's Responsibility After DeShaney v. Winnebago County Department of Social Services*, 19 FLA. ST. U. L. REV. 243 (1991); Mark Levine, *The Need for the "Special Relationship" Doctrine in the Child Protection Context:* DeShaney v. Winnebago, 56 BROOK. L. REV. 329 (1990); Dennis A. Bjorklund, *Crossing DeShaney: Can the Gap Be Closed Between Child Abuse in the Home and the State's Duty to Protect?*, 75 IOWA L. REV. 791 (1990); Garrett M. Smith, Note, DeShaney v. Winnebago County: *The Narrowing Scope of Constitutional Torts*, 49 MD. L. REV. 484 (1990); Breaden Marshall Douthett, *The Death of Constitutional Duty: The Court Reacts to the Expansion of Section 1983 Liability in* DeShaney v. Winnebago County Department of Social Services, 52 OHIO ST. L.J. 643 (1991); Thomas A. Eaton & Michael Wells, *Governmental Inaction As A Constitutional Tort: DeShaney and its Aftermath*, 66 WASH. L. REV. 107 (1991); Laura Oren, *Deshaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process: Deshaney in Context*, 68 N.C. L. REV. 659 (1990); Benjamin Zipursky, *Deshaney and the Jurisprudence of Compassion*, 65 N.Y.U. L. REV. 1101 (1990); Comment: *In Search of Affirmative Duties Toward Children Under A Post DeShaney Constitution*, 139 U. PA. L. REV. 227 (1990).

has now set a standard which has effectively further narrowed a State's affirmative duty to protect its children. It now appears that the converse of the "no custody - no duty" *DeShaney* rule[255] may not hold. This was the result in *Suter v. Artist M.*[256]

Suter involved the issue of whether children who were being supervised by a child welfare agency could compel state administration officials to provide federally mandated services. The Court flatly denied the children's claim. It did so on the grounds that children under state administrative official's supervision, as well as children in foster care, lack adequate standing to bring suit to enforce the applicable statutory provisions.[257]

The Convention, if taken seriously, would offer children affirmative rights, which necessarily would lead to a re-evaluation of the *DeShaney* and *Suter* principles. For example, the Convention establishes that the state should respect and act in the best interests of children.[258] Likewise, the Convention aims at giving priority to children in the adoption of State measures and in the allocation of State resources,[259] the result of which would be to provide, for example, federally mandated services. The Convention further provides that States shall take all appropriate measures to protect the child from all forms of abuse[260] and to promote social-reintegration to victims in a manner which fosters health, self-respect and dignity.[261] One possible result of this broad language would be that the children in the cases above would be provided relief.

Given the United State's current stance of generally not according children affirmative rights, ratification of the Convention should be somewhat problematic. Although the Convention may not require the United States to realize fully and immediately the affirmative rights enumerated, it seems clear that affirmative rights would become part of U.S. jurisprudence.[262] It

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255. DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998, 2006 (1989) (adopting a "no custody - no duty" interpretation of the contours of substantive due process liberties, the result of which is that due process only protects children from deprivations of liberty by state actors).

256. 112 S. Ct. 1360 (1992).

257. For further discussions of the impact on these cases on the state's duty to protect children, *see generally* Note, Suter v. Artist M. *and Statutory Remedies Under Section 1983: Alteration without Justification*, N.C. L. REV. 1171 (1993); Arlene E. Fried, *The Foster Child's Avenue of Redress: Questions Left Unanswered,* 26 COLUM. J. L. & SOC. PROBS. 465 (1993); Terrence J. Dee, *Foster Parent Liability Under Section 1983: Foster Parents' Liability as State Actors for Abuse to Foster Children*, 69 WASH. U. L. Q. 1201 (1991); Kevin M. Ryan, *The Tide of Foster Care Runaways: A Due Process Perspective*, 42 CATH. U. L. REV. 27 (1993)

258. Art. 3. *See also* Report of the Working Group, *supra* note 170, at 22-26.

259. Barsh, *supra* note 124, at 142, 143.

260. Art. 19.

261. Art. 39.

262. Although economic and social rights are often seen as "goals" or rights of "progressive realization," they are nevertheless rights. *See* Louis Henkin, *International Human Rights as Rights, in* HUMAN RIGHTS, 257, 274 (J. Roland Pennock & John W. Chapman, eds., 1981) (arguing that undertakings to realize economic, social and cultural rights "progressively" as not essentially illusory and that the obligations were made in order to establish the idea that they

would seem, then, that the Convention should undoubtedly require rethinking the status of children and the states' affirmative obligations. Yet, observers have concluded that no differences exist between the U.S. and the Conventions approach to children.[263]

B. Implications for Families

The Convention makes extensive reference to families, to their protection and children's rights to families.[264] As we have seen, the Convention takes a novel approach to protecting these interests: it bestows these interests on the child, rather than the parent, family or the state.[265] This is a rather radical approach; its implications are the subject of this section.

This section begins with an examination of the extent to which the Court is willing to protect children's rights to their families and children's rights to a particular parental relationship. The section continues by examining the rights of children within families by evaluating the extent to which the Supreme Court is willing to intervene to protect children's liberty interests against parental and state powers aimed at controlling children who are under parental custody.

1. Protecting Rights to Relationships

The Court's most recent statement on the extent to which it will protect the existence of parent-child relations is found in the plurality opinion of *Michael H. v. Gerald D.*[266] In that case, the plurality ruled that a natural father did not have any constitutionally protected interest in maintaining his previously initiated relationship with his child when the child's mother had been married to and cohabiting with another man at the time the child was conceived and born. The Court held that the fourteenth amendment's due process clause did not protect this type of father-child relationship.[267]

The *Michael H.* Court stressed the protection of "the unitary family"

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were rights and to increase the likelihood of their enjoyment); Louis Henkin, *International Human Rights and Rights in the United States, in* HUMAN RIGHTS IN INTERNATIONAL LAW 25, 43 (T. Meron ed., 1984) (arguing that the Covenant on Economic, Social and Cultural Rights "uses the language of right, not merely of hope; of undertaking and commitment by governments, not merely of aspiration and goal"); *see also* Philip Alston & Gerard Quinn, *The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Right,* 9 HUM. RTS. Q. 156 (1987) (providing a comprehensive articulation of the basis for economic and social rights). Other commentators have argued that positive rights found in human rights documents commit governments to move directly towards rights realizations.

263. *See supra* note 165 and accompanying text.

264. *See supra* note 153 and accompanying text.

265. *See supra* note 156 and accompanying text.

266. 109 S. Ct. 2333, 2341-46 (1989) (Brennan J. dissenting).

267. *Id.* at 2353.

which it defined largely in terms of traditional relationships.[268] An important consideration for our purposes is that the child's claim was given very short shrift. She had argued that the statute in question, which provided for an irrebuttable presumption that her mother's husband was her father, was unconstitutional because she had been denied substantive due process either when the statute prevented her from maintaining a filial relationship with both her natural father and legal parent, or when it prevented her from having a relationship with her natural father.[269] The Court responded that neither claim had any support in the history and traditions of the United States.[270] The conclusion was rather simple: neither natural parents nor their children have a constitutionally cognizable right to maintain relationships with each other.

What seems clear from *Michael H.* is that considerations for the child's interests had little or nothing to do with the Court's resolution of the case.[271] The extent to which the Court will recognize the entire panoply of families—including conditions which the Court has called "extraordinary"[272]—remains questionable.[273] For example, as equally "extraordinary" is the rise in the number of children living with gay and lesbian parents.[274] In those cases, the general pattern which has emerged has been to define "parent" in strictly biological terms; the result of which has been that children are denied the right to maintain relationships with people whom

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268. *See id.* at 2353 (Brennan J. dissenting). The Court further stressed the traditional common law "aversion to declaring children illegitimate, . . . thereby depriving them of rights of inheritance and succession." *Id.* at 2343.

269. *Michael H.*, 109 S. Ct. at 2353-54.

270. *Id.* at 2348-50.

271. The only evidence the court had of the child's interests actually swayed in the opposite direction of the Court's findings. During the girls first three years of life, she had lived with her natural father for about one year and had called him "daddy." *Id.* at 2337. The court-appointed psychologist had recommended that Michael be permitted to have some visitation rights. *Id.* at 2338.

272. "The facts of this case are, we must hope, extraordinary." *Id.* at 2337; *see also id.* at 2357 (Brennan, J., dissenting) (criticizing the plurality for "ignor[ing] the kind of society in which our Constitution exists").

273. *See* Martha Minow, *Redefining Families: Who's In and Who's Out?*, 62 COLO. L. REV. 269, 273-74 nn.18-21 (1991) (noting that what was "extraordinary" is the eight percent of households that fit the traditional pattern of the breadwinner husband and full-time home-making mother with one of four children under the age of eighteen). It seems important to note that, heretofore, the Court had noted the possibility that the Constitution may protect "nontraditional families." In Smith v. Organization of Foster Families, 431 U.S. 816 (1977) the Supreme Court upheld procedures for removal of children from foster homes but noted that "biological relationships are not [the] exclusive determination of the existence of a family . . . the importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children." 431 U.S. at 843-844.

274. Estimates suggest that as many as 10 million children have a lesbian mother or gay father. *See* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 461 n.2 (1990).

they have come to see as parents.[275]

2. Protecting Rights in Relationships

As we have seen, courts and legislatures have been reluctant to intervene in parent child relations, since "parents' right to direct children's upbringing is a right against state interference with family matters."[276] Despite the general principle of non-interference in family relationships, states do routinely intrude into the family domain.[277] The intrusion is often justified on the need to protect parental interests and to protect children from themselves on the theory that the parents know better than their children what is best for them.[278] What has emerged in recent years is the trend that, even

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275. Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Cal. App. 1 Dist. 1991) (limiting Uniform Parentage Act's definition of "parent" to natural or adoptive parents and rejecting a non-biological mother's claim that she stood *in loco parentis* to the child, that she was the *de facto* parent of the child, that she was a parent by estoppel, or that she was the functional parent of the child); Sporleder v. Hermes, 471 N.W.2d 202 (Wis. 1991) (rejecting non-biological mother's claim that visitation between her and the child would not interfere with the relationship between custodial parent and child); Kulla v. McNulty, 472 N.W.2d 175 (Minn. Ct. App. 1991) (holding a non-biological mother to not have standing to petition for visitation because the existence of a parent-like relationship is not sufficient to constitute a "compelling" circumstance; and holding that a co-parenting agreement made between the two women as not enforceable, and that the doctrine of equitable estoppel could not be used to create rights); Alison D. v. Virginia M., 569 N.Y.S.2d 586 (1991) (summarily refusing a nonbiological lesbian "mother" standing to sue for visitation because a non-biological "mother" is not a "parent" within the meaning of applicable New York statute; and refusing to address the petitioner's contention that she stood in a parental relationship to the child); *but see* A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992) (holding that nonbiological mother at least has a colorable claim of standing to seek enforcement of an oral settlement agreement between her and biological mother, and adopting a best interests of the child standard).

276. Hodgson v. Minnesota, 110 S. Ct. 2926, 2956 (1990) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)), Wisconsin v. Yoder, 406 U.S. 205, 232, (1972); and Pierce v. Society of Sisters, 268 U.S. 510, 534-535 (1925). *Cf.*, John E. Coons, et al., *Puzzling Over Children's Rights,* 1991 B.Y.U. L. REV. 307, 343 (noting that "[i]ndeed, the state is a minor legal actor in the lives of children. With few exceptions, the parent mandates, forbids, or permits the specific experiences of the child.") The exception, of course, is the family in crisis.

277. For example, parental consent is needed to enlist in the armed services, obtain a passport, participate as a subject in most forms of medical research. *See Hodgson,* 110 S. Ct. at 2947.

278. The Court has long held that it was children's lack of capacity which allowed for the assertion of parental authority in decision making: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions. . . . Parents can and must make those judgments." Parham v. J.R., 442 U.S. 584, 603 (1979). This approach has been the subject of considerable controversy. *See, e.g.*, Gary B. Melton, *Developmental Psychology and the Law: The State of the Art,* 22 J. FAM. L. 445, 448-50 (1984) (examining the problem of children's competence in legal theory and noting that "incompetence is likely to be the stated basis for denying rights to children"); Bruce C. Hafen, *Children's Liberation and the New Egalitarianism: Some Reservations About Abandoning Youth to Their "Rights,"* 1976 B.Y.U. L. REV. 605, 612-613 (arguing since children are not competent, they should be protected against their own decisions); Katherine Hunt Federle, *On the Road to Reconceiving Rights for Children: A Postfeminist Analysis of the Capacity Principle,* 42 DEPAUL L. REV. 983 (1993) (arguing that the competency principle currently guiding the children' rights movement should be abandoned); Ferdinand Schoeman, *Childhood Competence and Autonomy,* 12 J. LEGAL STUDIES 267, 267-68 (1983) (arguing that notions of children's rights should supplement prevailing notions of childhood judgmental capacities by the protection of relationships); Martha Minow, *Rights for*

when children have a clear liberty interest[279] the Court remains faithful to parental interests.[280] This is most noticeable in the controversial cases involving teen abortion.

The Supreme Court's most recent pronouncement on protecting children's liberty interests to abortion while the minor is still under the control of the family can be found in *Hodgson v. Minnesota*.[281] Hodgson presented the question of whether the state may require notification of both parents that their minor child intends to have an abortion. In a five-to-four opinion, the Court held that the two-parent notification provision, considered in isolation, was violative of the Constitution on the grounds that it did not reasonably further a legitimate state interest.[282]

The state had asserted its interest as the need to support parental authority and assure the minor's decision of whether to abort was knowing, intelligent and deliberate.[283] The Court found that, to the extent that these interests were legitimate, they could be served by notifying one parent.[284] The Court's upholding of the one-parent notification rule had the result of finding that although minors have individual rights to privacy, they nevertheless do not have the authority to exercise it.

Hodgson also contains a second opinion. The second five-to-four opinion held that the two-parent notice requirement, when supplemented by the provision allowing the child to bypass notification by obtaining a court's authorization for abortion, was constitutional. That opinion rested largely on previous cases which had championed parental rights.[285] Indeed, it proposed not only the traditional respect for parental rights, it would take it considerably further. The opinion noted that "the law does not give to children many rights given to adults, and provides, in general, that children can exercise the rights they do have only through and with parental consent."[286] As this

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the Next Generation: A Feminist Approach to Children's Rights, 9 HARV. WOMEN'S L.J. 1, 2 (1986) (proposing that children's rights advocates should refrain from comparing abilities of children and adults and instead address their mutual needs and connections); Garald P. Koocher, *Different Lenses: Psycho-Legal Perspectives on Children's Rights*, 16 NOVA L. REV. 711, 714-731 (1992) (examining children's competency as core issue to respecting children's rights).

279. That is, one's which have been recognized for adults.

280. This trend places emphasis "in the sovereignty of the normal parent whose affection and self-interest combine to make the child's autonomy a principal goal of the family." John E. Coons, et al., *Puzzling Over Children's Rights*, 1991 B.Y.U. L. REV. 307, 340-49 (1991) (examining children's liberation efforts and the problems inherent to each approach).

281. 497 S. Ct. 2926 (1990). The decision upholding parental notification with judicial bypass was recently reaffirmed in Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

282. *Hodgson*, 110 S. Ct. at 2942.

283. *Id.* at 2945.

284. *Id.* at 2945.

285. The cases were Bellotti v. Baird, 443 U.S. 622, 625 (1979) (partly upholding the statutory requirement that an unmarried woman under the age of eighteen to obtain the consent of her parents to an abortion or judge); and L. v. Matheson, 450 U.S. 398 (1981) (upholding a statute requiring physicians to notify, if possible, the parents of a dependent, unmarried, minor girl before performing an abortion).

286. *Hodgson*, 110 S. Ct. at 2962.

group of Justices would have it, a child's constitutional claim, based on its own liberty interests, must be asserted only vicariously through parents. Parental rights would even be respected to the extent that it would be contrary to the child's interests. The opinion concluded as follows:

> It is true that for all too many young women the prospect of two parents, perhaps even one parent, sustaining her with support that is compassionate and committed is an illusion. Statistics on drug and alcohol abuse by parents and documentation of child neglect and maltreatment are but fragments of the evidence showing the tragic reality that becomes day-to-day life for thousands of minors. But the Court errs in serious degree when it commands its own solution to the cruel consequence of individual misconduct, parental failure, and social ills. The legislative authority is entitled to attempt to meet these wrongs by taking reasonable measures to recognize and promote the primacy of the constitutional primacy of the family tie, a concept which this Court now seems intent on declaring a constitutional irrelevance.[287]

Simply put, these Justices would protect the family at the expense of children. Even though parents are unable or unwilling to protect their children, even if they are neglectful and mistreating, their children would have no legal recourse since children's constitutional claims are only to be asserted vicariously through parents.[288]

As can be gleaned from the above cases, taking the Convention seriously could revolutionize family jurisprudence. Its potential impact simply cannot be overstated. Underlying the Convention is the belief that children's personhood should be respected.[289] This includes the right to know and be cared for by their parents.[290] In addition, under the Convention, children views should be heard[291] and their liberties, including privacy, should not be taken capriciously.[292]

Thus, despite commentaries that the Convention essentially mimics U.S. law, it would seem that taking the Convention seriously would entail impinging on parental rights. Although the Convention explicitly states that parental rights will be respected,[293] asserting that their children have State-guaranteed rights necessarily weakens the parental role. Under the

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287. *Id.* at 2972.

288. The parental rights approach was further made clear by three of the Justices who joined in the opinion. Their position was that the two-parent notice requirement was constitutional, even without the necessity for a judicial bypass. They based their decision on the grounds that the state had an interest in protecting the right of each parent to participate in the upbringing of his or her child. *Hodgson,* 110 S. Ct. at 2069-71.

289. *See* Melton, *Socialization in the Global Community, supra* note 217, at 66-67 (arguing that the Convention is conceptually coherent and integrated through a focus on respecting the dignity of children).

290. Art. 7.

291. Art. 12 § 1

292. Art. 16.

293. The Convention recognizes parents' "primary responsibility for the upbringing of the child." Convention, art. 18 § 1.

Convention, the United States' minimalist intervention approach would be replaced by a need for greater State supervision and the inevitable pressure to intervene in family matters. In sum, taking the Convention seriously essentially entails reimaging the role of parents and the family in children's lives.

CONCLUSION

A comparative analysis of the growth, and current statement, of children's rights, both under international human rights law and U.S. constitutional law, reveals a striking divergence. Recent Supreme Court decisions reveal two important trends. The first is a narrow notion children's rights, based on the entrenched belief that children "are always in some form of custody."[294] In addition to moving away from protecting children's rights, the Supreme Court continues to move away from possible international influences. While the Supreme Court is retrenching, there is a growing international commitment to children. The international trend recognizes that children have rights and that all Nation States must ensure that those rights are respected, regardless of whether children are in state or parental "custody."

This analysis has examined the impact the internationalization of children's rights, culminating in the Convention on the Rights of the Child, is likely to have on American domestic policy and jurisprudence. The analysis revealed, in accordance with most commentaries, that, given the United State's current black letter law, if the Convention were ratified, it is most likely to have little, if any, effect. However, unlike previous commentaries, the potential impact of the Convention on the United States' approach to children was examined. It was concluded that, if it were taken seriously, it would transform the way we view families and children.

The argument may be stated as follows: for children to be taken seriously, there needs to be a revision of the current view of the family as a private institution serving merely private, parental ends. This would reflect a general theoretical and substantive move in the protection of children's rights which would involve States directly in the protection of children's rights and which recognizes those rights as no longer derivative of their parents'. However this could only occur if the Convention is held to its full promise and if the U.S. embraces an essentially radical approach to children's rights. Even though it may be unlikely that the Convention will be invoked to support such challenges, the fact that the Convention opens the door for a debate of such issues must be considered as we move toward ratification of the Convention.

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294. Reno v. Flores, 113 S. Ct 1439 (1993) (citing Schall v. Martin, 467 U.S. 253, 265 (1984)).