

2003

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### Recommended Citation

Wilkins, Richard G.; Becker, Adam; Harris, Jeremy; and Thayer, Donlu (2003) "Why the United States Should Not Ratify the Convention on the Rights of the Child," *Saint Louis University Public Law Review*. Vol. 22 : No. 2 , Article 13.

Available at: <https://scholarship.law.slu.edu/plr/vol22/iss2/13>

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## WHY THE UNITED STATES SHOULD NOT RATIFY THE CONVENTION ON THE RIGHTS OF THE CHILD

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### INTRODUCTION

The Convention on the Rights of the Child (CRC), adopted by the United Nations General Assembly without a vote in 1989,<sup>1</sup> is the “most comprehensive single treaty” ever to appear in the field of human rights.<sup>2</sup> In the ten years following its entry into force in September 1990, the CRC has been ratified by 191 states – including every member of the United Nations (UN) except two. The fact that the two non-ratifying nations are the United States and Somalia<sup>3</sup> illustrates the paradoxes surrounding this remarkable instrument of international law, which, in spite of nearly universal ratification, continues to be the focus of intense debate.

The CRC is the first purportedly legally binding international instrument to address children’s issues comprehensively.<sup>4</sup> This fact guarantees that the CRC will command the careful attention of the world community. Both the 1924 Geneva Declaration on the Rights of the Child and the 1959 United Nations Declaration on the Rights of the Child “laudably urge the protection and personal development of children and seek to improve children’s health, nutrition, safety, and education.”<sup>5</sup> The CRC, however, seeks much wider influence; no mere declaration urging correct attitudes and benign protective

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1. Convention on the Rights of the Child, Nov. 20, 1989, art. 13, 1577 U.N.T.S. 3, 48, [hereinafter CRC].

2. HENRY J. STEINER & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 511 (2d ed., Oxford Univ. Press 2000).

3. Somalia signed the CRC on May 9, 2002, but has not yet fully ratified the convention.

4. David P. Stewart, *Ratification of the Convention on the Rights of the Child*, 5 GEO. J. ON FIGHTING POVERTY 161, 162 (1998).

5. Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L.J. 449, 450 (1996).

behavior, the CRC charts “new territory”<sup>6</sup> in the field of children’s rights, “moving beyond protection rights to choice rights for children.”<sup>7</sup> In promoting a “new concept of separate rights for children with the Government accepting [the] responsibility of protecting the child from the power of parents”<sup>8</sup> and “recogniz[ing] that children should have rights identical to adults,”<sup>9</sup> the CRC comes squarely into conflict with traditional American notions of family and family law.

Indeed, the refusal of the United States to ratify the treaty since President Clinton signed the CRC in February 1995 reflects not a “failure” as claimed by many CRC proponents,<sup>10</sup> but, rather, the continuing uncertainty as to whether ratification of the CRC will help or harm children. We fear the CRC may be bad for children because it creates expansive autonomy rights for children incapable of fully understanding – let alone wisely executing – those rights. In turn, the CRC may be bad for the country because it calls for an exercise of congressional power beyond limits prescribed by the Constitution.<sup>11</sup>

We will argue, therefore, against the ratification of the CRC by the United States on two grounds. First, we believe the CRC’s newly minted autonomy rights are neither beneficial to children nor harmonious with traditional notions of salutary family life (as expressed, incidentally, in the Preamble to the CRC

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6. U.N. DEP’T OF PUB. INFO., CONVENTION ON THE RIGHTS OF THE CHILD: WORLD CAMPAIGN FOR HUMAN RIGHTS at 3, U.N.Doc. DPI/1101, U.N. Sales No. E.91.I.51 (1991).

7. Hafen & Hafen, *supra* note 5, at 450.

8. UNITED NATIONS 1994/95 PUBLICATIONS CATALOGUE at 64, *quoted in* Hafen & Hafen, *supra* note 5, at 450.

9. Michael Jupp, *Confronting the Challenge of Realizing Human Rights Now: Rights of Children: The United Nations Convention on the Rights of the Child: An Opportunity for Advocates*, 34 HOW. L.J. 15, 21 (1991) (noting, however, that there may be some exceptions, such as during wartime) 16, T. 14, *quoted in* Hafen & Hafen, *supra* note 5, at 451.

10. Stewart, *supra* note 4, at n. 9. “Signature of a treaty does not entail a legal commitment to ratify but does obligate the signatory to refrain from taking actions which would defeat the object and purpose of the treaty.” *See* Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 332, 336 [hereinafter Vienna Convention]; *see also* THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” (Sharon Detrick ed., Martinus Nijhoff Publishers, 1992) [hereinafter CRC,TP] (detailing the role of the U.S. delegation in drafting the Convention).

11. Ratification of the CRC with Reservations would not appear to be a viable option, given the nature of the U.S. objections. *See* Vienna Convention, *supra* note 10, art. 19, 1155 U.N.T.S. at 337. “A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless: (a) the reservation is prohibited by the treaty; (b) the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or (c) in cases not falling under sub-paragraphs (a) and (b), *the reservation is incompatible with the object and purpose of the treaty* (emphasis added).” *Id.*

itself).<sup>12</sup> Second, we have concluded that the CRC's sweeping reconstruction of family life lies beyond Congress' reach.

#### I. THE MODERN FAMILY AND THE PROLIFERATION OF RIGHTS

The Preamble to the CRC echoes the 1948 call of the world community to protect the family as "the natural and fundamental group unit of society."<sup>13</sup> According to some, however, this "natural" and "fundamental" group unit is no longer defined by reference to nature. Rather, the "group unit" known as the family takes "various forms,"<sup>14</sup> defined primarily by emerging gender and human rights discourse.<sup>15</sup> This development is problematic. "As one traces the evolution of the treatment of the family in UN documents, it is apparent that [this] human rights discourse has introduced fragmentation into policies regarding the family."<sup>16</sup>

In this new vision of the family, biological and hierarchical relationships are irrelevant. The focus is not upon the family as a natural unit, but upon the free association of autonomous individuals, regardless of kinship, gender or age. It is within this context that the notion of childhood rights reflected in the

12. See CRC, *supra* note 1, pmb. paras. 6-7.

13. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Supp. No. 16, art. 16.3, U.N. Doc. A/810 (1948).

14. See Programme of Action of the United Nations International Conference on Population and Development, International Conference on Population and Development (Cairo '94), pts. 5.1, 5.9, U.N. Doc. A/CONF.171/13, (1994), available at <http://www.unfpa.org/icpd/reports&doc/icpdpoae.html>. See also Report of the Ad Hoc Committee of the Whole of the Twenty-Third Special Session of the General Assembly: Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action (Beijing +5), U.N. GAOR, 23rd Special Sess., Supp No. 3, pts. 60, 82(c), U.N. Doc. A/S-23/10/Rev. 1, (2000).

15. Maria Sophia Aguirre & Ann Wolfgram, *United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends*, 16 BYU J. PUB. L. 113 n.4. (2002). "This view is clearly reflected in some of the conventions and declarations specifically addressing women's rights and family issues that followed . . . This view was also reflected in the Programmes of Action produced by the UN conferences, which include specific chapters addressing women, children, and the family, independently of the subject matter of the conference." *Id.*

16. Aguirre & Wolfgram, *supra* note 15, at 177.

Human rights language, understood in the Lockean sense, is limited to individual rights and fails to acknowledge the hierarchical and interconnected nature of all rights. . . . The family is critical to the maintenance of civil society. . . . The home is where human beings learn how to live in society; it is where they learn friendship and love for their fellow man. . . . The family is multidimensional, material and spiritual, and as such, has the capacity to affect every sector of society. . . . International and national policy must begin to address these dimensions. . . . Civil society depends on the family for its own health and well-being; if policy makers continue to demean or reduce the family and fail to address it in its multidimensional character, civil society will necessarily suffer.

*Id.* at 177-78.

CRC arose. In such a context, children's traditional "protection" rights came to be overshadowed by "provision" rights, as well as a "totally new right" – an autonomous right of "individual personality"—or what some have called the right to "participate" in society.<sup>17</sup>

In the constitutional culture of the United States, the prevailing attitude was (and still is) that the purpose of rights is to insulate and protect people from government power. The only right that makes sense is one that places restrictions on government action against individuals. [These are "first generation" rights.] Second generation rights are, in essence, requirements that government *provide* certain benefits and services to the public (such as education, work, social security, or culture), and this was deemed incompatible with a system of ordered liberty. Government might (as a political necessity) provide such public goods, but they are not legally required to do so. . . . [In addition,] many regional institutions have been moving towards recognition of new classes of human rights. Among these are "third generation" rights to peace, development and environment.<sup>18</sup>

Children, under such burgeoning rights schemes, are now proclaimed to be the "equal" of their parents.<sup>19</sup> Nevertheless, and despite this new mandate of equality, the CRC requires parents and others to develop a child's "personality,

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17. "[T]here is no doubt whatsoever that the content of the Convention constitutes a major leap forward in standard-setting on children's issues. On a general level, we can note the introduction of 'participation' rights which had never before been incorporated in a child-focused international instrument." Nigel Cantwell, *The Origins, Development and Significance of the United Nations Convention on the Rights of the Child*, in CRC, TP, *supra* note 10, at 19, 28.

18. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 97, 102 (2000).

19. Hafen & Hafen, *supra* note 5, at 454.

Not until the early 1970s did the first 'kiddie libbers' appear, arguing for the first time that the legal rights of minors – children under age eighteen – should be regarded as "coextensive with those of adults," and that children "are autonomous individuals, entitled to the same rights and privileges before the law as adults." Some of the new child advocates urged in broadly unrealistic ways the removal of all traditional restraints that were based solely on a child's age – including the removal of minority legal status itself. Since that time, some writers have focused their arguments more precisely, advocating a shift in the presumption of childhood incapacity. These writers are urging that the law presume children capable of autonomous legal action unless the evidence in an individual case shows otherwise (citations omitted).

*Id.* at 453. Perhaps the most prominent advocate of such a shift is Hillary Rodham Clinton. See, e.g., Hillary Rodham, *Children's Rights: A Legal Perspective*, in CHILDREN'S RIGHTS: CONTEMPORARY PERSPECTIVES 21, 33 (Patricia A. Vardin & Ilene N. Brody eds., 1979). For a brief discussion of Hillary Rodham Clinton's views in this regard, see Jonathan O. Hafen, *Children's Rights and Legal Representation – The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 431-36 (1993). Others are more willing to presume that young children lack legal capacity, but they have advocated using customized, subjective determinations of personal capacity rather than traditional age-based classifications.

talents and mental and physical abilities to their fullest potential,”<sup>20</sup> while maintaining the child’s “own cultural identity, language and values.”<sup>21</sup> This is indeed a tall order and it is small wonder that, in spite of the near-universal ratification, agreement upon the value of the Convention’s objectives and implementation regime is far from universal.

In fact, “States Parties are routinely faulted by the Committee on the Rights of the Child for their failure to fully implement their obligations.”<sup>22</sup> Such failures can arise from criticisms agreeing in principle with our own, though different from them in form:

Whilst there is an international consensus of concern for children, that does not mean that there is a consensus about the policies needed to bring about an improvement in child welfare. The experience and perceptions of childhood vary fundamentally in different countries, but the Convention assumes a model of childhood that is universally applicable “based on the notion that children everywhere have the same basic needs and that these can be met with a standard set of responses”. . . The Western “protective view of childhood”, as Aron Bar-On explains, “has resulted from a combination of circumstances that are not part of the experience of most countries of the South”. This construction of childhood arose in the particular circumstances of the Northern developed countries . . . Childhood remains a luxury that is unrealisable for the majority of the population in developing countries.”<sup>23</sup>

According to these critics, because the CRC requires “the universal attainment of a modern Western childhood,”<sup>24</sup> it may embody a *sub silentio* judgment that Southern societies have violated their children. Accordingly, the plight of children in the South becomes “a sign of the moral failings of their society. The imperative of the best interests of the child gives outside agencies the legitimacy and powers to intervene. . . . In other words, the discourse on children’s rights infantilizes [and even criminalizes] the South.”<sup>25</sup>

The members of the Committee have not been oblivious to such criticisms. Accordingly, in 2001, the Committee asserted that:

Children’s rights are not detached or isolated values devoid of context, but exist within a broader ethical framework which is partly described in Article

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20. CRC, *supra* note 1, art. 29(1)(a).

21. CRC *supra* note 1, art. 29(1)(c).

22. Stewart, *supra* note 4, at n.8. (citing e.g., *Concluding Observations on the Initial Report of Bulgaria, in Report on the Fourteenth Session*, U.N. Comm. on the Rts. of the Child, 14th Sess., paras. 25- 59, U.N. Doc. CRC/C/62 (1997); *Concluding Observations on the Initial Report of Panama, in id.* paras. 98-134.

23. Vanessa Pupavac, *The Infantilization of the South and the UN Convention on the Rights of the Child*, in STEINER & ALSTON, *supra* note 2, at 517-18.

24. *Id.* at 518.

25. *Id.*

29 (1) and in the Preamble to the Convention. Many of the criticisms that have been made of the Convention are specifically answered by this provision. Thus, for example, this article underlines the importance of respect for parents, of the need to view rights within their broader ethical, moral, spiritual, cultural or social framework, and of the fact that most children's rights, far from being externally imposed, are embedded within the values of local communities.<sup>26</sup>

Nevertheless, the fact remains that not all "local communities" are equal in "ethical, moral, spiritual, cultural or social framework." Thus, the rights accorded children worldwide are not uniformly defined and protected. In the United States, the rights of children are guarded by the felt legitimacy of deeply rooted traditions of civil order, law and custom. Children in some other nations – we might mention Somalia, for instance – have not been so fortunate. Thus, where children are oppressed and endangered, the objectives and provisions of the CRC might provide a framework for improvement.<sup>27</sup> By contrast, in a framework such as the one found in the United States, the CRC is an unwelcome and unnecessary intrusion.<sup>28</sup> We now turn, then, to a consideration of why we find autonomy rights so alarming.

26. *General Comment on the Aims of Education Article 29(1)*, U.N. Comm. on the Rts. of the Child, para. 7, U.N. Doc CRC/GC/2001/1 (2001).

27. We admire, for instance, the two Optional Protocols opened for signature, and quickly signed by President Clinton, in mid 2000. See *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts*, G.A. Res., U.N. Doc. A/RES/54/263 (2000) [hereinafter CRCOPAC]. The CRCOPAC reinforces the CRC commitment to keep children under eighteen out of the armed services, avoids conflict with U.S. practice by permitting voluntary recruitment of children under eighteen when accompanied by "a description of safeguards . . . adopted to ensure that such recruitment is not forced or coerced." *Id.* art. 3(2). Such recruitment is to be "carried out with the informed consent of the person's parents or legal guardians" *Id.* art. 3(3)(b). Moreover, article 5 provides that "[n]othing in the present Protocol shall be construed as precluding provision in the law of a State Party or in international humanitarian law that are more conducive to the realization of the rights of the child." *Id.* art. 5. Equally admirable is the *Optional Protocol on the Sale of Children, Child Prostitution, and Child Pornography*. [hereinafter CRCOPSC]. Though, typically enough, the language of the instrument presents a paradox: The introduction to CRCOPSC contains a passage with which millions of laboring families, including United States farm families (at least until quite recently) might take issue, language recognizing "the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education." *Id.* para.2. See also, *id.* art. 8(1)(e) ("Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims (emphasis added).").

28. See Kevin Mark Smith, *The United Nations Convention on the Rights of the Child: The Sacrifice of American Children on the Altar of Third-World Activism*, 38 WASHBURN L.J. 111, 149 (1998) (which concludes that:

something must be done to alleviate the plight of the world's children . . . however, the CRC may cause more harm than it prevents . . . Moreover, if an already effective system

## II. THE DANGERS OF THE TRULY AUTONOMOUS CHILD

In this section we will argue that it is not prudent to embrace a document that moves toward giving children unprecedented autonomy rights. Prior to the adoption of the CRC, no legal system in the world granted autonomy rights to children.<sup>29</sup> In fact, legal systems generally limited “children’s autonomy in the short run in order to maximize their development of actual autonomy in the long run,”<sup>30</sup> an approach that “encourages development of the personal competence needed to produce an ongoing democratic society comprised of persons capable of autonomous and responsible action.”<sup>31</sup> To “short-circuit this process by legally granting – rather than actually teaching – autonomous capacity to children ignores the realities of education and child development to the point of abandoning children to a mere illusion of real autonomy.”<sup>32</sup>

Children are *not* autonomous. They are, by definition, “immature”<sup>33</sup> – socially, mentally, emotionally, and physically. Hence, societies keep children from driving automobiles, from shooting guns, drinking alcohol, smoking, voting, viewing sexually explicit movies and photographs, and entering into binding contracts. Such “deprivations” protect children (and others) from the consequences of their immaturity. Adults impose such limitations not from arrogance or cruelty, but from wisdom. “Children who are pushed into adult experience[s] do not become precociously mature. On the contrary, they cling to childhood longer, perhaps all their lives.”<sup>34</sup>

[Y]ears of serious struggling with these issues in one of the world’s cultures most friendly to ideas about personal autonomy has not persuaded most United States courts and legislatures that – short of actual neglect – state agencies (or

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of [law within the United States] is preempted by the CRC, state and local governments will be unable to respond to protect children’s rights. . . . The CRC may be the only viable solution to third-world children’s rights abuses. The United States, however, must not sacrifice the welfare of its own children to eliminate such abuses. The price is simply too high.)

*See also, id.* at 127, (stating “[t]he United States legal system . . . has already implemented protective measures which ensure that children’s rights are enforced. Adoption of the CRC is therefore unnecessary for the enforcement of the rights of American children.”)

29. Hafen & Hafen, *supra* note 5, at 459 (quoting the drafters of the CRC as creating, for children, “the ‘totally new right’ of individual personality” independent of parental control).

30. *Id.* at 491.

31. *Id.*

32. *Id.*

33. CRC, *supra* note 1, pmb. para. 9.

34. Peter Neubauer, *quoted in* MARIE WINN, CHILDREN WITHOUT CHILDHOOD ch. 13 (Pantheon Books 1983), available at <http://www.bartleby.com/66/87/41387.html> (last visited Feb. 18, 2003).



children themselves) are better equipped than the nation's parents to assume parental roles.<sup>35</sup>

From our point of view, then, the rapid and near universal ratification of the CRC more clearly represents a general consensus that children are important to the members of the world community than it reflects careful consideration of probable consequences of implementing the CRC's provisions.<sup>36</sup> While we applaud the CRC for provisions that do much to protect children from those who would exploit their vulnerability,<sup>37</sup> we cannot admire those treaty provisions – notably the “civil rights” provisions, articles 13-16 – that appear to move away from protecting children and toward granting children greater ability to make decisions traditionally reserved for adults. Moreover, any attempt to enforce such provisions in the United States must confront a tradition of legal jurisprudence that severely limits the state's ability to intrude upon the family.<sup>38</sup>

“Among the fundamental axioms of United States law is the doctrine that the parent-child relationship antedates the state just as natural individual rights antedate the state in the Constitution's political theory.”<sup>39</sup> United States laws that govern aspects of the parent-child relationship focus primarily upon

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35. Hafen & Hafen, *supra* note 5, at 491.

36. *Id.* at 489-90.

It is quite possible that many members of the international community have simply not understood either the CRC's language or its conceptual novelty. Given the complexities of language translation in an area where nuanced phrasing and subtle legal distinctions are at the heart of the arguments, this is a believable interpretation. . . . The surprisingly rapid global acceptance of the CRC since 1989 may well have been hastened by two faulty assumptions. One . . . is that the CRC simply restates principles long recognized by the United Nations. The CRC's own drafters have stated, with some pride, that this is not the case. A second flawed assumption is that the CRC simply reflects contemporary United States legal approaches to individuals [sic] rights for children, which implies that the United Nations would have been behind the times not to adopt what purported to be an enlightened American concept. . . . Since neither of these significant assumptions is correct, there is reason to wonder whether the CRC's proponents have somehow pulled it up by its own bootstraps . . . [T]he CRC's ideas about child autonomy as a legal rather than a merely developmental concept apparently originated in American minds.

*Id.*

37. See, e.g., CRCOPAC and CRCOPSC, *supra* note 27.

38. GUGGENHEIM ET AL., AN AMERICAN CIVIL LIBERTIES UNION HANDBOOK: THE RIGHTS OF FAMILIES 87-92 (Norman Dorsen ed., Southern Illinois University Press 1996) (stating further that “children have the right to be raised by their parents free from unjustified interference by state officials.” *Id.* at 87.) The ACLU handbook also notes that family rights are held in “very high esteem.” *Id.* at 88. “It might even be said that they command the highest respect of all personal rights protected by the Constitution. The Supreme Court has determined that the right of family integrity exists, despite no specific reference to it in the Constitution, among the penumbra of other rights protected by the Constitution.” *Id.*

39. Hafen & Hafen, *supra* note 5, at 449, 462.

protecting children from exploitation of their inexperience and incapacity rather than upon ensuring that children have an enforceable “right to be left alone,” free from parental interference in their choices.<sup>40</sup> For this reason, we must reject the CRC that, in spite of its restating “many time-honored themes about children,” also seeks to “alter United States laws regarding age limits, parental rights, and children’s rights to expression, media access, privacy, and religion.”<sup>41</sup>

A. *United States Legal Protection and the CRC*

For two centuries, United States laws have limited the rights given to children, not only to protect children from abusive or negligent adults, but also to protect children from themselves.<sup>42</sup> “To confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood.”<sup>43</sup> The United States, therefore, has developed strong legal commitments dedicated to protecting children from both the inexperience of youthfulness and the exploitations of others.<sup>44</sup> Children are limited, for instance, in controlling and managing real property, participating in litigation, or in making a will.<sup>45</sup> Children may also disaffirm contracts made during minority, and local legislatures may make special provisions governing obscenity.<sup>46</sup> Statutory rape laws, compulsory school attendance laws, modified standards for tort liability, and limitations on activities such as playing video games in public game parlors are also designed for the protection of children.<sup>47</sup> For good reasons, then, United States courts are not willing to recognize that children are

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40. *Id.* at 452.

41. *Id.* at 449.

42. G. Diane Dodson, *Legal Rights of Adolescents: Restrictions on Liberty, Emancipation, and Status Offenses*, in *LEGAL RIGHTS OF CHILDREN* 114, 120 (Robert M. Horowitz and Howard A. Davidson eds., 1984.) (“[a] number of legal rules are designed to protect society from the effects of youthful immaturity, as well as protect the young person him or herself”).

43. *See* Hafen & Hafen, *supra* note 5, at 461.

Choice rights . . . grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated. The very concept of minority status, reflected in statutes in every United States jurisdiction, denies underage children independent choices on such matters. This denial is not a way of discriminating against children, but is a way of protecting them, and society, from the long-term consequences of a child’s immature choices and from exploitation by those who would take advantage of a child’s unique vulnerability.

*Id.*

44. *See generally*, GUGGENHEIM ET AL., *supra* note 38.

45. *See* Dodson, *supra* note 42, at 120.

46. *Id.*

47. *Id.*

empowered with all the liberties that are afforded adults, as we shall explain in the sections that follow.

### 1. Free Speech and Free Association

The United States Supreme Court in *Ginsberg v. New York*<sup>48</sup> held that states could constitutionally prohibit the sale of obscene material to minors on the basis of its prurient interest to them, regardless of whether the material would be obscene to adults. Justice Stewart, in a concurring opinion, argued that liberty was contingent upon competence:

I think that a state may permissibly determine that, at least in some precisely delineated areas, a child – like someone in a captive audience – is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights – the right to marry, for example, or the right to vote – deprivations that would be constitutionally intolerable for adults.<sup>49</sup>

By eliminating the choice available for children of whether consume obscene materials, the Court in *Ginsberg* validated local laws that sought to protect children from the dangers of exposure to pornography.<sup>50</sup> However, the belief that pornography is harmful to children is no longer universally held. Some child “experts” believe that pornography and even unrestrained sexual behavior are good for children.<sup>51</sup> Parents and other caregivers who want to

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48. *Ginsberg v. New York*, 390 U.S. 629, 637-638 (1968).

49. *Id.* at 649-50. *But see* Gary B. Melton, *Children's Competence to Consent: A Problem in Law and Social Science*, in CHILDREN'S COMPETENCE TO CONSENT 1, 9 (Gary B. Melton et al. eds., 1983) (arguing that by the Supreme Court claiming minors to be “persons” within the meaning of the Constitution, “the Court has opened the door to consideration of the circumstances under which minors might rationally be extended the freedom or protection of constitutional rights.” However, Melton also recognizes that several Justices on the court have found little reason to find that minors are competent to make their own decisions and thus any strike change in precedent seems unlikely. *Id.* at 9).

50. *See* Corinne Sweet, *Pornography and Addiction: A Political Issue* 179, 191-192 and Edna F. Einsiedel, *The Experimental Research Evidence: Effects of Pornography on the “Average Individual”* 248, 248 in PORNOGRAPHY: WOMEN, VIOLENCE, AND CIVIL LIBERTIES: A RADICAL NEW VIEW (Catherine Itzin ed., 1993). Einsiedel documents several studies that show negative effects of pornography on the average male and female.

51. *See, e.g.*, Anne Hendershott, *The Paradox of the Postmodern Pedophile*, THE SAN DIEGO UNION-TRIBUNE, April 26, 2002 at B-9, (noting that the coming publication of JUDITH LEVINE, HARMFUL TO MINORS: THE PERILS OF PROTECTING CHILDREN FROM SEX (2002) by the University of Minnesota Press promises a “a radical, refreshing and long overdue reassessment of how we think and act about children's and teens' sexuality.” In published interviews on the University of Minnesota's web site, author Judith Levine decries the fact that there are people “pushing a conservative religious agenda that would deny minors access to sexual expression” and adds that “[w]e do have to protect children from real dangers. . . . But that doesn't mean

counter such attitudes—who want to protect children by restraining their access to potentially harmful sexual practices and pornographic materials—could be undermined by the broadly worded language of CRC article 13, granting children “the right to freedom of expression,” including the right to “seek, receive, and impart information and ideas of all kinds, regardless of frontiers . . . through any other media of the child’s choice.”<sup>52</sup>

The language of article 13 seems, therefore, to empower children with potential rights incompatible with United States Supreme Court jurisprudence. Chief Justice Burger in *Parham v. J.R.*<sup>53</sup> observed that “[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.”<sup>54</sup>

In addition to article 13’s broad grant of power, CRC article 16 demands that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence. . . .”<sup>55</sup> This article, alone and or in conjunction with article 13, could raise problems for parents and schools wishing to control children’s access to pornography—among other things—on the Internet. By preventing “unlawful interference” with a child’s “privacy,” article 16 has the potential to place the basic ability to discipline and monitor children – activities necessary for effective parenting – into serious doubt. The CRC does include article 17, which asks participating countries to include information that protects children from “injurious material,” and it opposes sexual abuse in article 19.<sup>56</sup> However, the broad references made in article 13 seem to have a tenuous relationship, at best, with any restrictive language that could be found in these other articles.<sup>57</sup>

In cases dealing with children’s rights to freedom of association, United States courts have collectively permitted laws that regulate young persons’ access to pool halls, bowling alleys, dance halls, and videogame arcades.<sup>58</sup> An Illinois court found that restrictions on video games were permissible in light of the evidence that such games could lead to “modeling of antisocial behavior and deindividuation and hence to an increased propensity for delinquent behavior.”<sup>59</sup> The United States Supreme Court in *City of Dallas v. Stenglin*<sup>60</sup>

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protecting some fantasy of their sexual innocence.” The interview is available at <http://www.upress.umn.edu/HarmfultoMinorsQandA.html>).

52. CRC, *supra* note 1, at art. 13.

53. *Parham v. J. R.*, 442 U.S. 584, 603 (1979).

54. *Id.*

55. CRC, *supra* note 1, at art. 16.

56. *Id.* art. 19; *see also* Hafen & Hafen, *supra* note 5, at 469.

57. *See* Hafen & Hafen, *supra* note 5, at 469.

58. *See* Dodson, *supra* note 42, at 131-34.

59. *Id.* at 133.

upheld a local ordinance that prevented young people between the ages of fourteen and seventeen from mixing with older persons in dance halls.<sup>61</sup> CRC article 15, on the other hand, ensures a child's right of association and peaceful assembly.<sup>62</sup>

## 2. Religion

In 1972 the Court decided *Wisconsin v. Yoder*,<sup>63</sup> ruling a law which required parents to send their children to school until age sixteen violated Amish parents' First and Fourteenth Amendment rights. The Court found for the parents' right to remove their children from school in accordance with their Amish beliefs that children are best served by leaving school upon completion of the eighth grade. Only Justice Douglas dissented: "[i]t is the student's judgment, not his parents' that is essential if . . . [students are] to be masters of their own destiny."<sup>64</sup> Ironically, this statement from Justice Douglas's dissent is the oft-cited view of child autonomy advocates.<sup>65</sup> Based on this minority view, these advocates have tenuously (although successfully) asserted "the right of the child to freedom of thought, conscience and religion."<sup>66</sup>

American law, of course, protects children who may be forced by their parents to participate in activities that could be harmful or exploitative.<sup>67</sup> But religious training in the home is a powerful tool, valued by a great many parents as a way to teach children essential principles of morality and ethics. Allowing children to decide their religious upbringing completely for themselves risks leaving them to the moral and ethical training of the schools and their peers. This is an outcome that is unacceptable to a great many American parents, incompatible with United States jurisprudence, and disharmonious with the assertions of the Preamble to the CRC itself.<sup>68</sup>

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60. *Dallas v. Stanglin*, 490 U.S. 19, 27-28 (1989).

61. *See Hafen & Hafen*, *supra* note 5, at 469-70.

62. CRC, *supra* note 1, art. 15.

63. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

64. *Id.* at 245 (Douglas, J. dissenting).

65. *Hafen & Hafen*, *supra* note 5, at 471.

66. CRC, *supra* note 1, art. 14.

67. *See Prince v. Massachusetts*, 321 U.S. 159 (1944) (upholding children labor laws, when the child, a Jehovah's Witness, was selling religious tracts under the supervision of her custodian).

68. CRC, *supra* note 1, pmb. paras. 6-7, (stating,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, Recognizing that the child, for the full and harmonious, development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . . )

### 3. Privacy

At common law, consent of the parents, either express or implied, is necessary to authorize medical treatment of a minor.<sup>69</sup> One possible reason for this rule was that parents were considered to know best when their child was injured or suffering and was in need of medical attention. Although most states have codified a common-law exception allowing doctors to treat children in emergency situations,<sup>70</sup> it is still generally recognized that children need a parent's consent before they may seek medical assistance. Besides emergency situations, United States courts have not recognized a child's right of privacy except in two limited circumstances – abortion and birth control.<sup>71</sup>

However, even in finding that children are free to make their own decisions concerning abortion, both Justices Powell and Stewart, as part of the majority in *Planned Parenthood v. Danforth*,<sup>72</sup> were concerned with whether or not to bear a child “is a grave decision, and a girl of tender years, under emotional stress, may be ill equipped to make it without mature advice and emotional support.

It seems unlikely that she will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.”<sup>73</sup>

Moreover, while the Court has taken the unusual step of granting reproductive rights to children, Professor Hafen has observed that:

[t]his difference arises primarily from the extraordinary circumstance that a pregnant minor is herself a prospective parent who would not require parental consent to place her child for adoption. Therefore, the rationale for abortion-related privacy has no serious application to a minor's other choice rights and is a genuine exception to the courts' recognition of parental authority in virtually all other environments.<sup>74</sup>

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*Id.*

69. See HOROWITZ & DAVIDSON, *supra* note 42, at 136. Horowitz explains that at common law any “unconsented touching, including touching for treatment [without parent's consent] or examination, is a battery;” the only exceptions to this rule were limited to emergency situations. *Id.* at 136-37.

70. *Id.* at 140.

71. See Hafen & Hafen, *supra* note 5, at 473 (Professor Hafen explains that in *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), the “Court's purpose was not to authorize a maturity-based “choice” right, but to protect immature adolescents against the risks of pregnancy and venereal disease.”).

72. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 89-91 (1976).

73. *Id.* at 91. Justice Stevens also joined the four-member dissent and supported a parental consent form for abortions as a means of ensuring “that the decision be made correctly and with full understanding of the consequences of either alternative.” *Id.* at 103.

74. See Hafen & Hafen, *supra* note 5, at 473.

Nevertheless, granting autonomy rights even of a “child/parent” raises an interesting observation: children need parental consent to obtain something as simple as dental braces, yet no consent is necessary for abortions.<sup>75</sup>

Unfortunately, the CRC fails to recognize the seeming absurdity of the above, and, without the concern expressed by Justices Powell and Stewart in *Danforth*, has granted broad privacy rights to adolescents and children. Article 16 states that “[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence.”<sup>76</sup> Some supporters believe that CRC article 16 grants the same right to “protections for procreation and abortion decision-making” as those that are afforded to adults.<sup>77</sup> Hence, there will continue to be heated debates at UN Conferences about granting sexual autonomy and abortion rights to children, a position that (oddly enough) is supported by the same individuals that one might expect to decry the sexual abuse of children.<sup>78</sup> These ideological battles, however, should not lose sight of the reality that most child-development experts have long believed that “adolescent sexual activity is . . . unhealthy for children – emotionally, psychologically, spiritually, and physically.”<sup>79</sup>

#### B. *The Need for Parental Authority*

In the course of the discussions over the role of the CRC and the debate over protecting children versus granting them broad autonomy rights, an important question arises: Whose needs are being served by the outcomes sought? As Professor Hafen has observed, “[s]ome of the adults who want to liberate children seem motivated not primarily by children’s actual interests but by their own interests, some ideological and some that merely serve adult convenience.”<sup>80</sup>

Perhaps it goes without saying that of paramount importance in all actions concerning children is a child’s “best interests,” a notion made explicit in the CRC.<sup>81</sup> But who, under the CRC scheme, decides what are a child’s “best interests”? Parents are to be supported by States Parties in their “rights and duties . . . to provide direction to the child in the exercise of his or her right in a manner consistent with [the child’s] evolving capacities.”<sup>82</sup> How are parents to

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75. *Id.* at 473-76.

76. CRC, *supra* note 1, art. 16.

77. Robert E. Shepherd, *Civil Rights of the Child*, CHILDREN’S RIGHTS IN AMERICA 143 (1990).

78. *See, e.g.*, Hendershott, *supra* note 51.

79. Henry J. Redd et al., *Contraception and Adolescents: A Dissent*, in 21 CHILD & FAMILY 105, 106 (Herbert Ratner ed., No. 2, 1990).

80. Hafen & Hafen, *supra* note 5, at 478.

81. CRC, *supra* note 1, at art. 3(1).

82. CRC, *supra* note 1, art. 14(2).

evaluate an “evolving capacity”? What if they make a mistake? What if a parent’s notion of “best interests” conflicts with the notions of the Committee of “ten experts” elected to “examin[e] the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention”?<sup>83</sup>

Perhaps most importantly, how and under what authority are States Parties to provide “support” for parental endeavors? Increasingly, the State, in the new transnational world, is falling under the spell of “soft law,” the influence of non-state interest groups seeking to change national and international norms, often by making end-runs around existing “hard law” (i.e., constitutional provisions, statutes, or case law).<sup>84</sup> Such behavior had an incalculable impact, in fact, upon the drafting of the CRC itself.<sup>85</sup>

Ironically enough, participants from the United States were a major influence in the Convention’s drafting, as “American children’s rights advocates took the lead in developing the CRC’s unique provisions for child autonomy”<sup>86</sup> and, in fact, “participated actively in the ten years of intense multilateral negotiations that led to the consensus adoption of the Convention”<sup>87</sup> in 1989. Such participation, coupled with the United States’ refusal to ratify the resulting document, is a source of confusion, perhaps even

83. CRC, *supra* note 1, art. 43(1, 2).

84. Aguirre & Wolfram, *supra* note 15, at 119-20.

The changing definition of family in UN documents has been significantly influenced by non-state actors interacting through transnational advocacy networks, with each other, with states, and with international organizations. These non-state actors have become significant players in international policy-making and consequently in the creation of soft law. The legal scholars Abbot and Snidal note that “soft law” is often highly influential and is often treated by interested actors as if it were hard law. Such has been the case with the documents produced by the UN conferences in the last two decades: “[A]iming for soft law bases for new norms is a preferred strategy [of civil societies at the UN] because its status in the international political system is so ambiguous . . . Thus, soft law is the preferred tool for those who want to change norms.

*Id.*; see also BEDERMAN, *supra* note 18, at 96.

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It is generally acknowledged in the international community that the NGOs had a direct and indirect impact on this Convention that is without parallel in the history of drafting international agreements. . . . The extent of the overall NGO contribution is . . . by no means always clear from the travaux préparatoires. The success of the NGO’s activities to promote support for the Convention was, for example, undoubtedly instrumental in getting many governments to take the drafting process more seriously . . . . [R]eviewing the final text of the Convention, the Ad Hoc Group was able to identify at least thirteen substantive articles or paragraphs for whose inclusion in the text the NGOs had been primarily responsible.

Cantwell, *supra* note 17, at 19.

86. Hafen & Hafen, *supra* note 5, at 449.

87. Stewart, *supra* note 4, at 162.



frustration, among international observers who believed the erroneous assertions by some American advocates “that the CRC simply restates traditionally accepted protections for children and that their positions reflect the current state of United States law.”<sup>88</sup> However, the CRC drafters’ approach, in fact,

confuses children’s needs for nutrition, education, and protection (with which the United Nations has historically, and wisely, been concerned) with children’s alleged right to make autonomous choices. Such confusion can undermine children’s most basic needs. The drafters evidently wished to use avant-garde terminology that seems to place the United Nations on the cutting edge of human rights thinking, but they have failed to see the distinction between the applications of that terminology to adults and its applications to children.<sup>89</sup>

Whatever the motives for the behavior, “[t]he new adult willingness to defer to children’s preferences has occurred in the absence of empirical evidence demonstrating that today’s children actually possess greater capacity [than children of the past] to assume the risks and responsibilities of making autonomous choices.”<sup>90</sup> Indeed there appears to be some evidence to the contrary: Children with increased autonomy typically do not make better choices.

In the area of marriage choice, for example, Professor Lynn D. Wardle has observed that age restrictions on marriage have a direct correlation to marital stability: “Age restrictions are widely considered necessary to prevent immature persons from entering marriages that are likely to fail. Marriage restrictions are believed to protect the individuals involved from the traumas of

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88. Hafen & Hafen, *supra* note 5, at 460.

89. *Id.* at 486.

90. *See id.* at 478 (also stating that

[i]t is therefore natural to wonder whose interests are being served by the resurgence of interest in liberation and autonomy for children reflected in the CRC and in today’s cultural echoes of CRC themes. Some of the adults who want to liberate children seem motivated not primarily by children’s actual interests but by their own interests, some ideological and some that merely serve adult convenience. Because the tutorial yoke between adults and children is a mutual one, adults face a beguiling conflict of interest in thinking about autonomy for children. When they disengage from the arduous task of rearing and teaching children in the purported name of increasing those children’s freedom, adults’ actual – even if not fully conscious – purpose may be to increase their own freedom by liberating themselves from the burdens of providing meaningful education and child care. Worse yet some pro-child autonomy claims may be essentially a façade intended to protect the interests of adults who profit from such claims while indirectly exploiting the actual interests of children.

*Id.* at 478-479.

divorce and to protect society from the burdens of broken families.”<sup>91</sup> In fact, some studies find that “couples who marry young are overrepresented in divorce actions, and tend to break up sooner than other marriages.”<sup>92</sup> Most at risk for divorce are men who marry between fourteen and nineteen years of age and women who marry between fourteen and seventeen.<sup>93</sup> It is the rare child who is equipped to face the weighty and lonely decisions that come with adolescent marriage.

Indeed, it may be asserted that there is a need within the international community to rediscover the virtues of parental authority. Marriage and parenthood, as understood and practiced for centuries, have marked benefits for marital partners and their offspring. A growing body of research shows that traditional heterosexual marriage has significant benefits for adults<sup>94</sup> as well as for their children. For example, children living with their biological parents have significant advantages in education,<sup>95</sup> suffer less from poverty,<sup>96</sup>

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91. LYNN D. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW IN THE UNITED STATES* 121 (Fred B. Rothman & Co. 2002).

92. *Id.*

93. *Id.*

94. *See* STEVEN L. NOCK, *MARRIAGE IN MEN’S LIVES* 3 (1998). “Married people are generally healthier; they live longer, earn more, have better mental health and better sex lives, and are happier than their unmarried counterparts. Furthermore, married individuals have lower rates of suicide, fatal accidents, acute and chronic illnesses, alcoholism, and depression than other people.” *Id.*

95. Studies consistently show that children in an intact natural family are significantly less likely to drop out of high school than children in a one-parent family. *See* Linda J. Waite, *Does Marriage Matter?* 32 *DEMOGRAPHY* 483, 494 (1995). In some studies, the likelihood of dropping out more than doubles for children in single-parent households. *Id.* at 494. Importantly, Waite notes that the statistics regarding the likelihood of dropping out of school for children of single-parent households, “take into account differences in a number of characteristics that affect educational attainment,” thus accentuating the accuracy of the statistics’ indications. *Id.* Children of non-traditional families are also more likely to have lower grades and other measures of academic achievement. *See* Paul R. Amato, *Children of Divorce in the 1990s: An Update of the Amato and Keith (1991) Meta-Analysis* 15 *J. OF FAM. PSYCHOL.*, 355, 365 (2001); *see also* William H. Jeynes, *The Effects of Several of the Most Common Family Structures on the Academic Achievement of Eighth Graders*, 30 *MARRIAGE AND FAM. REV.*, 73, 84 (2001). Finally, children of divorced parents are more likely to have lower occupational status and earnings and have increased rates of unemployment. *See generally* Catherine E. Ross & John Mirowsky, *Parental Divorce, Life-Course Disruption, and Adult Depression*, 61 *J. OF MARRIAGE AND THE FAM.* 1034, 1040, 1043 (1999).

96. Studies show that children raised outside marriage are more likely to be raised in poor economic conditions. *See* Waite, *supra* note 95, at 494. Even after controlling for race and family backgrounds, children raised outside of marriage suffer not only from economic deprivations, but also from a lack of parental attention and from high rates of residential relocation, all of which can work to disadvantage the child’s development. *See* Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women’s Economic Well-Being*, 64 *AM. SOC. REV.*, 794, 805, 810 (1999); *see also* Ross Finnie, *Women Men and the Economic Consequences of*

commit fewer crimes,<sup>97</sup> and are better adjusted socially than children living in single-parent homes or step-parent homes.<sup>98</sup>

These benefits do not flow from the beneficent impact of some governmental action or bureaucracy. Research demonstrates that these benefits flow directly from well-functioning, two-parent households.<sup>99</sup> Therefore, except in those cases where it can be shown that parents are incapable or incompetent to perform their important roles as protectors and mentors of their children, they should have full authority to make the decisions that most affect the daily lives of their children. While many international proposals that interfere with (or even eliminate) parental authority are well-intentioned, no local, national or international agency can make decisions for children that are superior to those made by a reasonably well functioning two-parent family. However well-intentioned, no international law – including the CRC – should be construed so as to deprive parents of the authority to determine, on their own, what is in the best interests of their children.

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*Divorce: Evidence from Canadian Longitudinal Data*, 30 CANADIAN REV. OF SOC. AND ANTHROP., 205 (1993) (finding that the presence of two parents potentially means more parental supervision and more parental time helping with homework).

97. Adolescents with married parents are least likely to use marijuana, cocaine, or smoke cigarettes. PATRICK FAGAN ET AL., *THE POSITIVE EFFECTS OF MARRIAGE: A BOOK OF CHARTS* 35-36, 38 (The Heritage Foundation 2002). Children with non-traditional family structures are twice as likely to use marijuana or cocaine and are 30 percent more likely to have experimented with cigarettes than children with two biological parents. *Id.*

98. “[C]hildren of divorce do not accept monitoring or supervision from live-in partners nearly as much as they do from married parents.” Sanford M. Dornbusch et al., *Single Parenthood*, 33 SOC’Y 30 (1996). Young women from single-parent households are more likely to give birth out of wedlock, and young adults are more likely both to be out of school and the labor force. See Waite, *supra* note 94, at 494. Furthermore, “children who spend part of their childhood in a single-parent family . . . report significantly lower-quality relationships with their parents as adults and have less frequent contact with them.” *Id.* at 495 (citing Diane N. Lye et al., *Childhood Living Arrangements and Adult Children’s Relations with Their Parents*, 32 DEMOGRAPHY 261, 271-72 (1995)). Children of fragmented or divorced families are also more likely to commit suicide and have higher risks of obtaining mental illnesses. See WILLIAM J. DOHERTY ET AL., *WHY MARRIAGE MATTERS: TWENTY ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 14-15 (Center for the American Experiment Coalition for Marriage, Family and Couples Education Institute for American Values 2002) (stating that high rates of family fragmentation are associated with an increased risk of suicide among both adults and adolescents. *Id.*) In the last half-century, suicide rates among teens and young adults have tripled. David M. Cutler et al., National Bureau of Economic Research, *Explaining the Rise of Youth Suicide*, Working Paper 7713 at 37, available at <http://www.nber.org/papers/w7713.pdf> (last visited Feb. 23, 2003). The single “most important of these variables is the female divorce rate. . . [the] effect is large . . . [as it] can explain as much as two-thirds of the increase of youth suicides.” *Id.*

99. See *supra* notes 94-96.

### III. WHY CONGRESS LACKS THE POWER TO RATIFY THE CONVENTION ON THE RIGHTS OF THE CHILD

To this point, we have examined the competition between the conception of “human rights” that undergirds the CRC and some long-held notions about the actual “best interests” of the world’s children. We now turn to the second of our major arguments: however well or illogically grounded in international human rights theory and practice, the United States Congress lacks the power to impress the CRC upon the constituent sovereignties collectively known as the United States of America.

Professor David Stewart, formerly Assistant Legal Adviser for Human Rights and Refugees in the Office of the Legal Adviser at the U.S. State Department, summarized the situation in 1998: “[S]ome Convention provisions arguably pose questions when compared with U.S. law and practice. Some provisions specify substantive rights that are thus far unknown as legally enforceable rights in U.S. law. Some provisions express rights protected under U.S. law, but appear to mandate steps beyond what the United States is able, or willing, to do.”<sup>100</sup> Such issues, suggests Professor Stewart, might be explored and resolved as part of the debate over United States ratification of the CRC. He further suggests a series of “innovative” approaches to implementation and enforcement of Convention provisions.<sup>101</sup>

However, under the provisions of the Constitution, Congress has power to pass federal laws binding the states only in certain limited circumstances. Such power most often has been invoked under the auspices of Article I,

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100. Stewart, *supra* note 4, at 172.

101. *Id.* at 183-84.

One hurdle to U.S. implementation of this aspect of the Convention at a meaningful level is conceptual. Traditionally, United States society has not regarded economic and social benefits as legally required or enforceable “rights” but rather as discretionary services or programs that may be amended or rescinded solely on the basis of political or budgetary considerations. The Convention has been viewed by some as calling for substantial new programs for children with significant resource implications. It is not entirely clear, for example, how the federal government could or would effectively guarantee the right of every child in the country “to the enjoyment of the highest attainable standard of health” or “to a standard of living adequate for the child’s physical, mental, spiritual, moral and social well-being,” but some steps must necessarily be taken to achieve the goals. Difficult decisions will need to be made regarding the level of resource commitments to be devoted to implementing the Convention, how and by whom they will be funded, and who will administer delivery. In some areas, this may require provision of new services. Even where programs do provide services for care, protection, and support at state levels, more than a few are underfunded, poorly staffed and overburdened. There is little question, for example, that additional steps to improve health care delivery to the least fortunate, and to reduce the infant mortality rate, would be entirely consistent with the objectives of the Convention.

*Id.*

section 8, clause 3 of the Constitution, commonly known as the “Commerce Clause.” Commerce Clause Jurisprudence has been a controversial field, at times approving the venturing of Congress into areas only obliquely related to actual interstate commerce.<sup>102</sup> Most recently, however, the Supreme Court has retreated from a broad application of the clause, and in the interest of preserving state and federal distinctions, has declined to find legitimate extension of Commerce Clause power into areas not directly related to interstate commerce.

#### A. *An Overview of Commerce Power Jurisprudence*

Congress lacks the power to ratify the CRC because the provisions of the Convention are outside the commerce power, as presently conceived. Commerce Clause jurisprudence springs from the 1824 case of *Gibbons v. Ogden*,<sup>103</sup> in which Chief Justice Marshall offered the first definition of Congress’s power to regulate “the commercial intercourse between nations, and parts of nations,”<sup>104</sup> thus describing the “Federal commerce power with a breadth never yet exceeded.”<sup>105</sup> (Significantly, *Gibbons* also articulated the notion that “state laws must yield to federal laws with which they conflict.”)<sup>106</sup>

Nevertheless, even this expansive interpretation of congressional power has limits. Those limits, were reached in the 1995 decision of *United States v. Lopez*.<sup>107</sup> In *Lopez*, the Court invalidated the Gun-Free School Zone Act, which made it a “federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’”<sup>108</sup> The Court found three distinct areas that Congress may regulate under the commerce power: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) “those activities having a substantial relation to interstate commerce.”<sup>109</sup> The *Lopez* Court scrutinized the legislation under the third category and held it to be unconstitutional because, in part, the statute was “not an essential part of a larger regulation of

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102. See Christine M. Devey, Note, *Commerce Clause, Enforcement Clause, or Neither? The Constitutionality of the Violence Against Women Act in Brzonkala v. Morrison*, 34 U. RICH. L. REV. 567, 568-73 (2000); see also Michael Bono, *Judicial Limitations on Congressional Power Under United States v. Morrison*, 2 LOY. J. PUB. INT. L. 229, 234-42 (2001), and also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58-59 (1973), and *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-62 (1964).

103. 22 U.S. 1, 215 (1824).

104. *Id.* at 189-90.

105. *Wickard v. Filburn*, 317 U.S. 111, 120 (1942) (citing *Gibbons*, 22 U.S. at 193-95).

106. NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 50 (2nd ed., 1999).

107. 514 U.S. 549 (1995).

108. *Id.* at 562 (citing 18 U.S.C. § 922(q)(1)(A) (1998 ed., Supp V)).

109. *Id.* at 558-59.

economic activity.”<sup>110</sup> The Court thus established a new standard for Commerce Clause interpretation.

This new standard, however, has deep roots. The *Lopez* analysis reiterates a long-standing constitutional limitation on congressional power. Citing James Madison, the Court noted “[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite.”<sup>111</sup> Madison’s clear assertion that the states reserved all the powers not specifically delegated to the federal government supports the *Lopez* view that commerce power has real limitations. Especially in lawmaking areas traditionally left to individual states, the federal government has no power to create law.<sup>112</sup>

The majority in *Lopez* acknowledged that the new standard might create legal uncertainty, but concluded that legal uncertainty is more palatable than ceding limitless power to Congress, thereby forfeiting the scheme of enumerated powers and separate levels of government that are fundamental to a federal system.<sup>113</sup> In such a decentralized system, each level of government, federal and state, will exercise authority over certain delimited areas.<sup>114</sup> The elimination of any restraint on commerce power would “effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”<sup>115</sup>

The line drawn in *Lopez* was reaffirmed just three years ago in *United States v. Morrison*.<sup>116</sup> In *Morrison*, the Court invalidated the Violence Against Women Act of 1994, which announced that all persons within the United States “shall have the right to be free from crimes of violence motivated by gender.”<sup>117</sup> To enforce that right, the Act provided that a woman who was a victim of such a crime could bring a civil suit against the perpetrator in federal court.<sup>118</sup> The Court held the statute unconstitutional for the same reasons as in *Lopez*.

First, the activity being regulated was essentially non-economic. In fact, the Court bluntly stated that violence against women is not “in any sense of the phrase, economic activity.”<sup>119</sup> More importantly, the Court asserted that holding the statute valid would disrupt the national and local distinction: “The

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110. *Id.* at 561.

111. THE FEDERALIST NO. 45, 292-93 (Clinton Rossiter ed., 1961) (1788).

112. *See* *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

113. *Lopez*, 514 U.S. at 566.

114. *Id.* at 564-65.

115. *Id.* at 557.

116. 529 U.S. 598 (2000).

117. 42 U.S.C. § 13981, *invalidated by Morrison*, 529 U.S. at 627.

118. *Id.*

119. *Morrison*, 529 U.S. at 613.

Constitution requires a distinction between what is truly national and what is truly local. . . . The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”<sup>120</sup> If the statute in question in *Morrison* had passed constitutional muster, Congress arguably could regulate any activity as long as the nationwide, aggregated impact of that activity has substantial effects on employment, production, transit, or consumption.<sup>121</sup> This the Court pointedly refused to do.

*B. The CRC Violates Current Commerce Clause Interpretation.*

The CRC embodies substantive policy determinations well beyond the limits of congressional power under *Lopez* and *Morrison*. If Congress lacks the power to bar handguns from the vicinity of schools or to create a federal civil remedy for violent acts against women, it certainly lacks power to enact laws that regulate intra-familial relationships. Under the *Lopez* and *Morrison* interpretation of the commerce power, Congress simply lacks authority to demand the substantive outcomes that the CRC envisions.

The CRC does not involve channels or instrumentalities of commerce. In fact, the terms of the CRC, and specifically those in articles 13, 14, and 15, have no commercial impetus whatsoever. Article 13 provides freedom of expression.<sup>122</sup> Article 14 provides freedom of thought, conscience, and religion.<sup>123</sup> Article 15 grants children freedom of association and of peaceful assembly.<sup>124</sup> These “rights” as guaranteed under the CRC are socially and politically based and do not deal with interstate commerce. The terms of the CRC are not “commercial” in nature, nor do they deal with any “economic enterprise, however broadly one might define those terms.”<sup>125</sup> The CRC thus fails all three levels of analysis under the *Lopez* test.

Moreover, the ratification of a binding international treaty by creating federal law where traditionally local governments have legislated would most assuredly disrupt the national and local distinction that the Constitution of the United States has firmly established. Traditionally, all family law matters have been reserved to the States to legislate.<sup>126</sup> Federal imposition into such matters violates the balance of state and federal powers as outlined in the Tenth Amendment. CRC article 27 specifically admonishes State Parties to provide

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120. *Id.* at 617-18.

121. *Id.* at 615.

122. CRC, *supra* note 1, art. 13.

123. *Id.* art. 14.

124. *Id.* art 15.

125. *Morrison*, 529 U.S. at 610.

126. *Id.* at 615-16.

for minors' "physical, mental, spiritual, moral and social development."<sup>127</sup> *Morrison* specifically expressed the Court's concern that, if States were relieved of their traditional legislative responsibilities, federal legislation could be applied "equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant."<sup>128</sup>

There is, notwithstanding the current strain of commerce power case law, the possibility that the Court could consider the ratification of the Convention constitutional under the now-discredited reasoning of *Missouri v. Holland*.<sup>129</sup> In *Holland*, the Court held that a treaty negotiated between the United States and Great Britain created congressional power to regulate the hunting of migratory fowl where no such power existed before. Justice Holmes reasoned that a treaty might override constitutional limits flowing from the Commerce Clause or the Tenth Amendment because the national interest of protecting migratory birds was of the "first magnitude."<sup>130</sup> It is conceivable that the Supreme Court – in reliance on *Missouri v. Holland* – could declare that children's rights are of "first magnitude" importance and, therefore, are enforceable despite and whatever the terms and limitations of the United States Constitution.

We do not believe, however, that such a result is likely. *Missouri v. Holland* created a constitutional crisis and provoked an intense and heated congressional debate over a proposed constitutional amendment (the "Bricker Amendment"), which would have expressly subjugated treaty provisions to constitutional limits.<sup>131</sup> The controversy surrounding *Missouri v. Holland* and the Senator Bricker's proposed amendment was calmed only in 1957 – almost forty years after *Holland* – by Justice Black's famous dictum in *Reid v. Covert* that "treaties must comply with the constitution."<sup>132</sup>

At this point in world history, we do not believe the Court will again walk down the path marked by *Missouri v. Holland* toward the notion that Congress can circumvent constitutional limitations (such as those announced in the recent commerce clause cases) by ratifying inconsistent treaties. Under the Court's current interpretation of the Commerce Clause, the policy judgments set out in the CRC are clearly beyond congressional reach. The aims of the

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127. CRC, *supra* note 1, art. 27.

128. *Morrison*, 539 U.S. at 615-16.

129. 252 U.S. 416 (1920).

130. *Id.* at 435.

131. GERALD GUNTHER & KATHLEEN SULLIVAN, CONSTITUTIONAL LAW 228, 229 (14th ed. 2001).

132. *Reid v. Covert*, 354 U.S. 1, 16-17 (1957) (stating that the "prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined").



CRC are laudable, but in its current form, the treaty violates the very language of the Constitution itself.

#### CONCLUSION

In this paper we have questioned the legitimacy and wisdom of the rights announced by the CRC. We join, however, in the conviction

that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community, [and recognize] that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.<sup>133</sup>

We assert that, for the protection of the family, parents and children in the United States can look to rights already discovered and domestic policies already in place for the implementation and protection of those rights. Ratifying the CRC would threaten, not enhance, the integrity of these policies.

We find most troubling the CRC's extension of autonomy rights to children. In our view, this represents, at least in part, a self-interested abrogation of the responsibility of adults to care for and protect children.

Fortunately, the Constitution of the United States stands as a conceptual and institutional barrier to the universal ratification of the CRC. In spite of the fact that the CRC exists in large part due to the efforts of certain citizens and citizen groups from the United States, these efforts are inconsistent with the commands of the Constitution. Thus, while discussion of the ratification of the CRC is academically and philosophically interesting, it is legally irrelevant.

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133. CRC, *supra* note 1, pmb. paras. 5-6.