RATIFY THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD, BUT DON'T EXPECT ANY MIRACLES

Martin Guggenheim*

INTRODUCTION

Shortly after my book What’s Wrong with Children’s Rights\(^1\) was published, I was pleased to receive a phone call from John Witte, Jr., inviting me to participate in this important conference. Professor Witte must have realized, of course, that it would be impossible for me to refuse an invitation to participate in a conference entitled “What’s Wrong with Rights for Children?” It is a privilege for me to be a part of this effort to explore systematically the obstacles to, and potential benefits from, the U.S. ratification of the U.N. Convention on the Rights of the Child.\(^2\)

The great majority of invitees to this conference are well known supporters of the Convention and have long urged the United States to ratify it. I suspect that I was invited as a potential opponent because I am somewhat skeptical about the benefits of conferring rights upon children. I welcome this opportunity to clarify my belief that making children rights-holders is insufficient to ensure justice for children. But, to the extent I was supposed to express opposition to U.S. ratification of the Convention, I am afraid that I will disappoint. I am pleased to join those who seek to have this country join the nations of the world and formally ratify the strongest expression of children’s rights ever formally adopted.

Before discussing my particular hopes for how the Convention could lead to some actual good for children, I will begin by indicating what, at least for me, is wrong with children’s rights.

* Fiorello LaGuardia Professor of Clinical Law, New York University School of Law. I am grateful to the Florence D’Agostino and Max E. Greenberg Research Fund at New York University School of Law for financial support.

\(^1\) MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (2005).

I. THE LIMITS OF RIGHTS DISCOURSE, PARTICULARLY IN REGARDS TO CHILDREN

Although I have plenty to say on the subject, my purpose in this article is to advance only one quality of what is wrong with rights for children—that "rights" for children in the United States tend to be so malleable that they almost lack any content. Indeed, even though the Supreme Court prominently announced nearly forty years ago that children have fundamental constitutional rights,\(^3\) many terrible things happen to children in the United States today, and the Constitution has not proven to be effective in addressing these evils. Stated even more provocatively, more than a generation after the Court explicitly stated that children have "rights," children, in a variety of ways, are worse off today than ever before.

A. The Allure of Rights

Children are inherently dependent, at least for significant periods of their childhood. Their status in almost every society is determined, monitored, and enforced by adults. Children lack political power, and the treatment they receive is, ultimately, little more than a reflection of the will of adults. Into this set of truisms comes the call for "rights" belonging to children. The hope for the use of this term is that children may obtain some trump cards with which to limit what adults do to them. In recent years, in many parts of the world, including the United States, "children's rights" has been widely advanced as the central part of an agenda to improve the plight of children.

The growth of professional interest in this subject in the United States can be measured by the frequency with which scholars talk about children's rights. From 1973 through 1989, only 113 articles were published in legal literature identified by Westlaw as containing both the phrase "children's rights" and the phrase "constitutional rights." Between 1990 and 2005, 1,048 articles have been published that contain both of these phrases.\(^4\)

This exponential growth in the interest in children's rights is partly a reflection of how many rights children are said to possess in the United States. Indeed, it is difficult to make the case that children in the United States lack rights. American children possess an abundance of rights. The largest number

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\(^3\) In re Gault, 387 U.S. 1, 19 (1967) (the adjudicatory phase of juvenile delinquency proceedings).

\(^4\) Westlaw search conducted on February 15, 2006.
and kinds of rights they possess are statutory in nature and commonly enacted by state and local legislatures. But even if we focus solely on rights recognized by the Supreme Court of the United States, children enjoy almost all of the rights that adults are guaranteed by the Constitution (albeit with qualifications that, as it turns out, sometimes swallow the rule).

As the Supreme Court famously declared, "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority."\(^5\) The list of constitutional rights possessed by American children is long and familiar. Children enjoy all of the freedoms in the First Amendment, including freedom of speech,\(^6\) press,\(^7\) religion,\(^8\) and assembly.\(^9\) They also have Fourth Amendment protections against unreasonable searches and seizures.\(^10\)

Juveniles accused in delinquency proceedings do not possess the Fifth Amendment right to indictment by a grand jury,\(^11\) but they are protected by the double jeopardy clause.\(^12\) Most importantly, perhaps, they are protected by the Fifth Amendment's right not to be compelled to be a witness against themselves\(^13\) and, more generally, are guaranteed the protection of due process of law.\(^14\) Although accused delinquents are not guaranteed the Sixth Amendment rights to a public or jury trial,\(^15\) they are afforded most of the protections secured by that amendment. In particular, they are entitled to free court-assigned counsel if they and their family are unable to afford to retain an attorney;\(^16\) they also are entitled to notice of the charges lodged against them and to confront and cross-examine adverse witnesses.\(^17\) Additionally, juveniles

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9 Hodgkins v. Peterson, 355 F.3d 1048, 1053 (7th Cir. 2004).
11 In re Kevin S., 6 Cal. Rptr. 3d 178, 188 (Cal. Ct. App. 2003).
13 In re Gault, 387 U.S. 1, 44 (1967).
14 Id. at 30–31.
16 Gault, 387 U.S. at 39.
17 Id. at 41, 56–57.
are protected by the Eighth Amendment’s prohibition of state infliction of
cruel and unusual punishment\textsuperscript{18} even though they lack the right to bail.\textsuperscript{19}

Minors also enjoy miscellaneous rights protected by the Due Process
Clause of the Fourteenth Amendment, including the right to be free from a
parental veto when choosing to terminate a pregnancy,\textsuperscript{20} and the guarantee that
their delinquency adjudication be based on proof of guilt beyond a reasonable
doubt.\textsuperscript{21}

I do not mean to suggest that one can glean very much about the true
meaning of children’s rights from this list; quite to the contrary. The Supreme
Court’s version of declaring that the devil is in the details came in its
observation in \textit{In re Gault}\textsuperscript{22}—the most important children’s rights case ever
decided by the Court—that “whatever may be their precise impact, neither the
Fourteenth Amendment nor the Bill of Rights is for adults alone.”\textsuperscript{23} Therefore,
when courts are asked to enforce or apply constitutional rights that children
supposedly already possess, they are remarkably free to decide how
comparable the adult version of rights ought to be when applied to children.
Much of the jurisprudence of children’s rights since \textit{Gault} has involved the
Supreme Court making plain just how much room exists for courts to conclude
in any given context that the “precise impact” of constitutional rights for
children is very small.

Thus, one year after \textit{Gault}, the Court upheld a state law that limited
minors’ access to sexually explicit, non-pornographic material, even while
acknowledging that such a law would have been unconstitutional if applied to
adults.\textsuperscript{24} This is consistent with the Court’s long-expressed view that “[t]he
state’s authority over children’s activities is broader than over like actions of
adults.”\textsuperscript{25} We should not be too surprised then that the Court would be willing
to restrict children’s right to access such material (even when children can be
said to have First Amendment rights in the first place). Adults desirous of
access to material considered inappropriate for children are more than willing

\textsuperscript{18} Roper v. Simmons, 543 U.S. 551, 568 (2005).
\textsuperscript{19} Schall v. Martin, 467 U.S. 253, 277 (1984) (preventive detention of juveniles does not violate the
Fourteenth Amendment); L.O.W. v. Dist. Ct. of County of Arapahoe, 623 P.2d 1253, 1261 (Colo. 1981)
(accused delinquents do not have the right to bail).
\textsuperscript{21} In re Winship, 397 U.S. 358, 368 (1970).
\textsuperscript{22} 387 U.S. 1 (1967).
\textsuperscript{23} Id. at 13.
\textsuperscript{25} Prince v. Massachusetts, 321 U.S. 158, 168 (1944).
to restrict a minor's rights to these materials in order to prevent other adults from applying too restrictive a standard of what is acceptable for even adults to view. Justice Frankfurter referred to this phenomenon as avoiding the need to "burn the house to roast the pig."\textsuperscript{26}

There are, of course, many other examples of differential application of rights for children and for adults, even when both theoretically have the same constitutional rights. Though children technically possess the same rights as adults, the protections those supposed "rights" afford prove to be dramatically different from those enjoyed by adults. Consider, for example, non-emergency nocturnal curfews applied to persons under seventeen years of age. When examining the legitimacy of such laws, one begins with the understanding that they would plainly be unconstitutional as applied to adults. Technically, both adults and children enjoy the same constitutional rights implicated by curfews, which include First Amendment rights as well as other unenumerated rights to move about freely in an open society.\textsuperscript{27}

When applying constitutional rights, courts have considerable leeway in determining whether the rights at stake in a particular case are to be considered "fundamental" or less weighty. One of several ways in which courts exercise their wide latitude in deciding cases involving children's constitutional rights is by ruling that the child's interest in the right is less weighty than an adult's interest in the same right. On other occasions, courts have placed emphasis on the state and concluded that its interests weighed more heavily than the individual's when the case was one involving children rather than adults. Thus, when courts are called upon to determine the constitutionality of patently unconstitutional curfew laws (if enforced against adults), courts are free to determine how much weight to give to the state's interest in enacting the restriction in the first place. Further, courts have equally broad authority to

\textsuperscript{26} Butler v. Michigan, 352 U.S. 380, 383 (1957); see also Sable Commc'ns. of Cal. v. FCC, 492 U.S. 115 (1989) (holding that even though indecent but not obscene material is protected by the First Amendment, such material may be restricted from the airwaves during hours when children are likely to be listening); Action for Children's Television v. FCC, 313 U.S. App. D.C. 94 (1995) (holding that Section 16(a) of the 1992 Public Telecommunications Act, which restricts hours within which indecent radio and television programs may be broadcast to protect minors, does not violate the First Amendment, although its safe harbor provision is unconstitutional).

\textsuperscript{27} E.g., Schleifer v. City of Charlottesville, 159 F.3d 843, 846 (4th Cir. 1998) (noting plaintiffs' allegations that curfew forbade them from "attending late movies; getting a 'bite to eat'; playing in a band" and so forth, if those activities occurred after curfew and were performed unaccompanied by a parent or guardian).
determine how important the particular right in question is as applied to children, particularly in light of the state’s interest in protecting children.

One of the most basic undecided questions is what level of scrutiny to apply when hearing challenges to these laws. As court observers have long known, the level of scrutiny applied by a court is a common indicator of the likely outcome of the case. Notably, this pattern has not invariably held in the context of determining the constitutionality of juvenile curfew laws. Courts have alternated between applying strict and intermediate scrutiny to these laws. Courts that have upheld juvenile curfew laws often reason that they are advancing an important state interest: protecting children from potential harm and protecting the community from youth misbehavior. As one writer aptly observes, "[t]here are only a few consistencies that can be gleaned from these cases: minors do have constitutional rights; the conduct of minors may be regulated to a greater extent than that of adults; exceptions to the ordinance are often outcome determinative; and curfew ordinances are motivated by a compelling state interest."

Another important example concerns the rule that students are protected by the Fourth Amendment’s injunction against unreasonable searches and seizures. The Supreme Court announced this rule in 1985. Like many of the provisions in the Convention on the Rights of the Child, this grand sounding rule is a cause of celebration for those who believe in the dignity of youth and who prefer laws that restrict the power of state officials to interfere too easily in the privacy of young people.

But does this rule mean that school officials may condition students’ participation in extracurricular activities on their submission to suspicionless, randomly conducted drug tests? Plainly, such searches would violate the

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29 E.g., Nunez v. City of San Diego, 114 F.3d 935, 947–48 (9th Cir. 1997) (strict scrutiny); Qutb v. Strauss, 11 F.3d 488, 493, 493 n.7 (5th Cir. 1993) (presumed strict scrutiny); Hutchins v. Dist. of Columbia, 188 F.3d 531, 547 (D.C. Cir. 1999) (en banc) (rational basis scrutiny); Ramos v. Town of Vernon, 353 F.3d 171, 186 (2d Cir. 2004) (intermediate scrutiny); Schleifer, 159 F.3d at 848–49 (intermediate scrutiny).
30 For a thorough, recent review of the case law concerning juvenile curfews, see also Note, Juvenile Curfews and the Major Confusion over Minor Rights, 118 Harv. L. Rev. 2400 (2005).
Constitution as applied to adults. Nonetheless, the Supreme Court has ruled that these searches are perfectly consistent with the proper application of the Fourth Amendment to school children.

How could this be so? Rather easily, as we shall see. The Fourth Amendment, by its terms, only forbids "unreasonable" searches and seizures, leaving the courts to determine which searches are reasonable. This means that the Justices are authorized to decide whether it is reasonable to take extraordinary measures to ensure that America's youth are not misusing drugs. Even though the Court is applying the same rule (the substantive protections contained in the Fourth Amendment), it really is empowered to decide a novel question: How to apply the Fourth Amendment when children's privacy interests are at stake?

Moreover, this novel inquiry is no longer bounded in any meaningful way by recognizable principles of the Fourth Amendment which were developed to apply to adults. This is because, in determining whether a particular state action is "reasonable," the Court is free to consider all of the factors that may be said to go into this inquiry.

One component of reasonableness is the state's purpose for its actions. With respect to suspicionless school searches, the state's separable purposes of protecting children from the harm they may inflict on themselves by misusing drugs and protecting children from the harm other children may cause them from such use are novel interests applicable to public schools which have no meaningful analogue as applied to adults. Thus, the Court, in determining reasonableness, has wide latitude to assign this weight on the scale in favor of the state.

A second component of reasonableness is the importance of the privacy interest possessed by the persons affected by the challenged state action. Here again, the Court's capacity to under-weigh children's privacy and liberty interests is practically boundless. Although technically the Due Process Clause of the Fourteenth Amendment serves to protect children against wrongful

35 "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV (emphasis added).
deprivations of liberty, the Court has ruled that a child’s liberty interest is considerably less than an adult’s because “juveniles, unlike adults, are always in some form of custody.” This means, in turn, that when the state orders that children must attend school, their custody is simply being shifted from their parents to their teachers.

Children, in other words, have privacy and liberty interests that are protectable by the Constitution. But just how much or what kind of liberty and privacy interests children possess is something courts are free to determine unmoored by recognizable inquiries undertaken when adults’ interests are threatened. Thus, because the state’s purpose in requiring that children attend school is “tutelary,” mandatory suspicionless drug testing ends up being “reasonable” within the meaning of the Fourth Amendment.

The point of this analysis is not to explain the niceties of Fourth Amendment jurisprudence; it is to demonstrate the malleability of the very concept of children’s rights. Once we allow (as we always will) the possibility of some difference between the rights of adults and of children, we build into all inquiries room to deny children the very things we mean by the use of the term “rights” as applied to adults.

What is really interesting about all of this is that the virtual Martian might well conclude more quickly than an American expert that American children are not protected by the Fourth Amendment. That conclusion would technically be wrong. Instead, the more sophisticated American rule is that the Fourth Amendment does apply to children (differently than it applies to adults), but American courts have extraordinarily wide discretion to reinterpret Fourth Amendment law to permit whatever result seems reasonable to the Court. Despite this, the Martian’s conclusion might more accurately summarize the results of American law. Nonetheless, for complicated reasons, the Supreme Court prefers to proclaim that children have rights even as it makes clear that what it means by saying children have Fourth Amendment rights will be left entirely to the Court to determine.

Does this mean that American children lack rights in any meaningful sense? This conclusion perhaps goes too far. But, certainly it means that it is insufficient to promulgate a rule that children have rights. If such rights are to

37 Id. at 265.
38 Vernonia Sch. Dist. 47J, 515 U.S. at 655.
have any clout, they must be enforced with vigor by adult officials who believe that children should have rights.

It is also important to observe that this is the way law operates even when the very institution claiming rhetorically that children have rights refuses to recognize any deep meaning of children's rights. When this process is once removed—such as when we are considering applying international law to a particular signatory state—the possibility of distortion is even greater. Does it really advance anything to claim that American students enjoy Fourth Amendment protections? Perhaps so. But it means considerably less in the real world than it sounds.

This, then, is the ultimate point about children's rights. However nice sounding the words in the Convention, American courts and legislatures will be far freer to interpret them than may be apparent. For this reason, the real struggle for justice for children comes after, not before, the Convention is signed. Unfortunately, when we expend too much energy on trying to obtain U.S. ratification of the Convention, we may be taking valuable time and effort away from building any consensus within the country about what a just society for children should mean.

II. RIGHTS HAVE NOT PREVENTED AMERICAN LAW FROM TREATING CHILDREN WORSE THAN BEFORE CHILDREN WERE GRANTED RIGHTS

This quick excursion into constitutional rights for children in the United States is meant only to suggest that even when children have certain constitutional rights, state officials may be allowed to act towards children exactly as they like without any meaningful restrictions placed on them by the rule of law.

All of this shows that giving rights to children does not necessarily protect them from state action in which they are targeted. A strong case can be made by any number of measures that, after they become recognized rights-holders, children are treated more harshly by state officials than before they held rights.
A. Increasingly Severe Punishments for Juvenile Offenders

Since the end of the 1980s, every state revised its transfer laws to facilitate the prosecution of more juveniles in adult criminal court.\(^3^9\) States have lowered the age for prosecution of children as adults and have expanded the list of crimes that permit prosecution in criminal court. Between 1992 and 1997 alone, forty-five jurisdictions enacted or expanded provisions for juvenile waiver to adult court.\(^4^0\) Compared to thirty years ago, it is now vastly easier to prosecute a juvenile in adult criminal court and to expose the young person to massively greater penalties. Prosecutors in many states now have the authority to choose between criminal and juvenile court when bringing criminal charges against minors.\(^4^1\)

This punitive shift means that today thousands of children are prosecuted as adults in adult criminal court and routinely receive sentences that would have been regarded as shockingly punitive—virtually unthinkable—a mere generation ago. Today more than forty states allow juveniles fourteen or younger to be prosecuted in adult court; at least twelve of these states set no minimum age for transfer.\(^4^2\)

Not very long ago, the recognition that children lack the experience and maturity of adults served as the justification for treating children with understanding and leniency when they engaged in misconduct. The current trend in criminal justice is to regard children as morally blameworthy and sufficiently adult-like to receive adult-like punitive sentences of incarceration. Although a recent study by the MacArthur Foundation Research Network of Adolescent Development and Juvenile Justice has found that juveniles aged fifteen or younger are likely to be impaired in their ability to function as competent defendants,\(^4^3\) forty-one states currently permit a sentence of life

\(^{4^1}\) See generally The Changing Borders of Juvenile Justice: Transfer of Adolescents to the Criminal Court (Jeffrey Fagan & Franklin E. Zimring eds., 2000).
imprisonment without the possibility of parole to be imposed on a juvenile.\(^{44}\) In Washington, for instance, offenders as young as eight years of age are eligible to receive such sentences, and Vermont permits ten-year-olds to suffer the same punishment.\(^{45}\)

A generation ago, judges first had to conclude that there was something particularly egregious about the child or the crime so that juvenile court was inappropriate; that is no longer a consideration in many cases today. A generation ago there was a strong presumption that children should be treated in juvenile court; the presumption was so strong that most children (simply by reason of being young) were ineligible under all circumstances for prosecution as an adult. For the others, judges had to hold a hearing to determine in each case whether the juvenile was "unamenable to treatment" in the juvenile system before being sent to criminal court. Today, many cases are automatically begun in criminal court based solely on the charges.

As a result of these changes, the number of juveniles prosecuted in adult court over the last generation has risen by more than eighty percent. Our changing conception of a juvenile delinquent is so dramatic that "[t]he number of juveniles held in adult jails . . . pending trial rose 366% between 1983 and 1998."\(^{46}\) No one in favor of these changes takes the position that confining juveniles in adult facilities is good for them. Researchers who compared juvenile and adult correctional facilities agree that confining juveniles to adult facilities has a terrible impact on their long-term prospects when they are released. While the juvenile facilities attempt to provide a rehabilitative, constructive, and educational function, the adult prisons do not even purport to help the inmates. This trend of incarcerating children with adults has occurred even though we know that juveniles in adult facilities are eight times more likely to commit suicide, five times more likely to be sexually assaulted, and twice as likely to be attacked by other inmates or staff.\(^{47}\)

\(^{44}\) Labelle et al., supra note 42, at 7; see also Walter A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 690–91 (1988).


B. Poverty Increases Among Children

Over the past generation—the same period during which the number of children's rights have reached an all-time high in the United States—America's children have fallen well behind all other groups categorized by age. Of all industrial nations worldwide, the United States has the highest child poverty rate. This is not simply an accident of fate. Many countries have developed a very different set of priorities and policies with respect to children and families than the United States. Britain, France, Sweden, and Canada, for example, each spend two to three times more on children and families than the United States.48

As the Children's Defense Fund regularly reminds us in its report on the state of the child in the United States, the United States ranks first in the world in many categories that reflect its status as world leader, including gross domestic product and the number of millionaires. But its record with respect to children fails to reflect this fantastic wealth and power.

The United States ranks sixteenth in the world with respect to the living standard among the poorest one-fifth of children, eleventh in the proportion of children living in poverty, and eighteenth in the income gap between rich and poor children. We are a country that has permitted the gap between the rich and poor children to grow ever larger. This is true despite our remarkable success in overcoming the worst consequences of poverty among the elderly.

Through the combination of guaranteed social security and Medicare for the elderly, the United States ranks near the top in the world in longevity and wealth of people over the age of seventy. By contrast, children are twice as likely as adults to live in poverty. More than twelve million children in the United States live below the poverty line, nearly seventeen percent of all children. Since 1969, even as the gross national product has risen fifty percent, child poverty has increased by fifty percent.49

Moreover, the United States ranks seventeenth in the world in rates of low birth weight babies and a shocking twenty-second in the world in reducing the rate of infant morality. Life in America's inner cities holds numerous, substantial health hazards for children. Data suggest that three to four million children suffer from lead poisoning, and those with lead poisoning are most

often found in families in the lowest income brackets.\textsuperscript{50} Indigent children suffer asthma at rates twice as high as children in higher-income families, requiring hospitalization for 10,000 children between the ages of four and nine.\textsuperscript{51} Asthma can adversely affect a child’s essential well-being, ability to participate in sports and other activities, academic performance, and even life expectancy.

There is also a serious shortage of adequate housing for poverty-stricken children in the United States. In 1995, there were 4.4 million more low-income renters than there were affordable housing units.\textsuperscript{52} As a result, a vast number of families settle for substandard housing; those who seek minimally adequate conditions are often forced to pay more than half their income in rent.\textsuperscript{53} It is estimated that, in 2003, children constituted thirty-nine percent of the homeless population.\textsuperscript{54} This problem is also getting more serious every year. The average period of time spent awaiting federal Section 8 housing assistance rose from twenty-six to twenty-eight months between 1996 and 1998; in the nation’s largest housing authorities, the average waiting period increased from twenty-two to thirty-three months during this same period.\textsuperscript{55}

In addition, as employers continue to use devices that avoid providing health benefits for an ever growing segment of workers, the number of children without health coverage continues to grow exponentially. More than eleven million children in the United States today have no health insurance. Between 1996 and 1998, approximately 643,000 children lost Medicaid coverage.\textsuperscript{56}

\textsuperscript{51} See THERE’S NO PLACE LIKE HOME: HOW AMERICA’S HOUSING CRISIS THREATENS OUR CHILDREN 8 (Megan Sandel et al. eds., 1999).
\textsuperscript{53} Id.
In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act dramatically changed national welfare policy by repealing the Aid to Families with Dependent Children program and creating Temporary Assistance to Needy Families (TANF). Traditionally, the number of children in a family determines the size of a family's cash grant. However, "[i]n an effort to reduce the incidence of out-of-wedlock pregnancies" and "encourage 'personal responsibility'" among welfare recipients, some states have instituted child exclusion policies that reduce or eliminate additional benefits for children conceived while their mothers are receiving assistance. As of September 2001, child exclusion policies were part of twenty-three states' welfare programs and affected approximately one-half of the nation's TANF caseload. Child exclusions differ from state to state in several ways. For example, as of September 2001, nineteen states provide no cash benefit increase when a mother on welfare gives birth, two states allow a partial increase in benefits, and two states give flat grants to families without considering the number of children within each family.

### III. The United States Should Ratify the Convention

Suffice it to say, the United States' experimentation with children's rights, now a full generation in the making, has not proven to be of much help to children. Their "rights" do not include obligations by government to enact

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61 CTR. FOR LAW AND SOC. POLICY, CAPS ON KIDS: FAMILY CAP IN THE NEW WELFARE ERA 1 (1999), available at http://www.clasp.org/DMS/Documents/1011210855.11/caps%20on%20kids.pdf. Congress, under the Personal Responsibility and Work Opportunity Reform Act, also established a "Bonus to Reward Decrease in Illegitimacy Ratio," which financially rewards states that show the greatest reduction in out-of-wedlock births while decreasing their abortion rates. See U.S. Gen. Accounting Office, supra note 58, at 7 (noting that this bonus is intended to "reward states that achieve certain goals of the law").
63 Id. at 8.
laws and policies that respect the unique qualities of children. Nonetheless, I would welcome ratification of the Convention by the United States. I do so for several reasons, not all of which are directly related to American children.

The most immediate beneficiary of ratification would be the United States. The United States’ image in the world community would improve both because it no longer would suffer the ignominy of being the only functioning country in the world that has refused to ratify the Convention and because, after finally joining the world community’s commitment to improving the plight of children, the transnational effort to monitor and enforce nation states’ compliance with the Convention would be immeasurably furthered. Simply stated, the world needs the United States if the Convention is ever to become a transforming force for improving children’s lives worldwide.

I am less convinced that ratifying the Convention would lead to many substantive changes in the United States. But, on balance, I see more to gain even within this country than we are likely to lose. Among the advantages of the Convention over current U.S. law is the Convention’s fundamental conception of children’s rights as inclusive of affirmative obligations by government to ensure children’s well-being. This is in sharp contrast with how U.S. law conceives of rights. The United States’ emphasis on “negative” rights restricts government officials from doing things to rights-holders. As we have seen, the malleability of rights for children has meant that their rights rarely meaningfully restrict government. But children do not enjoy constitutional rights to be protected from harm.64 The Convention’s emphasis on social justice and on a conception of government owing duties to its vulnerable citizens is a welcome alternative to the traditional U.S. conception of rights that allows the free market to settle who are the winners and losers.

Make no mistake about it, however, one of the impediments to U.S. ratification is precisely how differently the Convention conceives and defines rights compared with American principles. Were the United States to ratify the Convention, American advocates for social justice could more easily push their agenda to materially improve the lives of the poorest American children. These advocates would be able to claim that law, in addition to morality, now requires the wealthiest nation in the world to provide guaranteed universal health care for all children, in addition to adequate food, housing, and educational opportunities for the poorest American children. Because the

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United States is one of the few nations in the world with the economic capacity to eliminate the worst features of poverty for children, the Convention could be a powerful tool for those who believe that redistributing wealth in a land with excess wealth is required to ensure that children receive “the highest attainable standard of health and access to facilities for the treatment of illness and rehabilitation of health,”65 “the right to benefit from social security, including social insurance,”66 and “a standard of living adequate for the child’s physical, mental, spiritual, moral and social development.”67

I will briefly mention two additional immediate impacts the Convention might have on current practices in the United States. Perhaps the most immediate impact will be on the sentencing of minors. Article 37 of the Convention forbids capital punishment of juveniles.68 Until 2005, the United States stood alone as the only nation in the world which refused to join international agreements prohibiting the execution of juvenile offenders. In 1989, the Supreme Court ruled that the Constitution does not protect sixteen- and seventeen-year-olds from execution.69 In 2005, the Supreme Court, by a vote of five to four, declared capital punishment of persons under the age of eighteen unconstitutional as a violation of the Eighth Amendment’s prohibition against cruel and unusual punishment.70 At the time of this decision, nineteen states permitted the execution of juveniles.71

Between 1973 and 2004, 226 juvenile death penalties were imposed in the United States.72 Between 1992 and 2004, nineteen people were executed for crimes committed when they were under eighteen years of age.73 Had the United States ratified the Convention in 1992, these nineteen lives would have been spared because their executions would have violated U.S. law.

Another provision in Article 37 would render an important continuing practice within the United States illegal. Article 37 also prohibits sentencing

65 CRC, supra note 2, art. 24.
66 Id. art. 26.
67 Id. art. 27; see also Gary B. Melton, Is There a Place For Children in the New World Order?, 7 NOTRE DAME J.L. ETHICS & PUB. POL’Y 491, 523–25 (1993).
68 CRC, supra note 2, art. 37.
72 Id. at 3.
73 Id. at 9.
children to prison terms of life without the possibility of parole.\textsuperscript{74} As we have already seen, a majority of states expose children to sentences of life in prison without the possibility of parole.\textsuperscript{75} As a result, at least 2,225 youth offenders are serving such a sentence in the United States.\textsuperscript{76} Remarkably, the majority of these youths are first offenders. Prior to the crime for which they were sentenced to life without parole, approximately fifty-nine percent had neither criminal records nor a juvenile adjudication. Twenty-six percent were convicted of felony murder.\textsuperscript{77} Even more remarkably, this study compared the use of this punishment with punishments imposed on adults and found that

in eleven out of the seventeen years between 1985 and 2001, youth convicted of murder in the United States were \textit{more} likely to enter prison with a life without parole sentence than adult murder offenders. Even when we consider murder offenders sentenced to either life without parole or death sentences, in four of those seventeen years, youth were \textit{more} likely than adults to receive one of those two most punitive sentences.\textsuperscript{78}

Even if Article 37 were to prove a valuable tool for those seeking to lighten these draconian sentences imposed on children, it is far from clear that ratification would have a very dramatic impact on rates of incarceration. If states were prohibited from imposing a sentence of life in prison without possibility of parole, we can anticipate that sentences for minors would be for a very lengthy period of years, such as fifty or sixty. Some would regard this as a significant advancement for human rights. But others, myself included, would find little to celebrate about such a change in the law.

A society willing to banish and incarcerate its youth for their entire lifetime could easily settle for doing so for fifty or sixty years instead. But the inhumanity of the scheme is little changed or ameliorated. It is the underlying values of American society that need reevaluation and change. No Convention ratified by the United States will accomplish that.

\textsuperscript{74} CRC, supra note 2, art. 37.
\textsuperscript{76} More than ninety-seven percent of these are male; sixty percent are African-American. Sixteen percent were fifteen or younger when they committed their crimes. \textit{Human Rights Watch, The Rest of Their Lives: Life Without Parole for Child Offenders in the United States} 1 (2005), available at http://hrw.org/reports/2005/us1005/TheRestofTheirLives.pdf.
\textsuperscript{77} \textit{Id.}.
\textsuperscript{78} \textit{Id.} at 2.
I recognize, of course, that this is hardly an argument against the Convention, and I do not mean it as such. At the same time, I sometimes think that promoters of the Convention behave as if too much is at stake with regard to its ratification by the United States. The Convention is not a panacea. All of the deepest problems facing the United States, including the intractable social problems involving race, will survive ratification.

I would also welcome the opportunity to use certain provisions of the Convention to advance the interests of America’s most vulnerable children—those in foster care. The United States leads the world in forcibly removing children from their parents’ homes and placing them in state-supervised foster care placements. It also leads the world in terminating parents’ parental rights involuntarily, thereby making children eligible for adoption by a new set of parents. Some support this trend and praise recent U.S. efforts that have moved the law in this direction. Others, myself included, lament the turn American law has taken with the 1997 passage of the Adoption and Safe Families Act (ASFA).

By the early 2000s, more than 500,000 children were in foster care in the United States on any given day. The short- and long-term custodial arrangements for these children are supposed to be monitored and decided by local, specialized courts. Foster care arrangements are established by a highly specialized set of laws, with a mixed arrangement of state and federal influence.

ASFA was passed as a response to perceived failures in the operation of the 1980 Adoption Assistance and Child Welfare Act’s requirement of “reasonable efforts” to keep or promptly return children to their birth families before seeking termination of parental rights or any other form of permanent placement. Congress concluded that the 1980 legislation contributed to children remaining for too long in foster care.

ASFA radically shifted the focus from a keen desire to avoid foster care placement and to prefer returning children to their birth families to a kind of agnosticism about why children entered care or had to remain in care. Once children are in foster care for at least fifteen months, Congress required that steps be taken to terminate parental rights and to free the child for adoption, unless the child has been placed with a relative or there are compelling reasons why termination of parental rights and adoption are not in the best interests of the child.\(^8\)

As a result of this, the number of children whose parents’ rights have been involuntarily terminated has recently reached an all-time high in the United States. At the same time, the number of children for whose parents’ parental rights have been terminated without an alternative family being found to provide long-term care has also reached record numbers.

In 2002, more than 129,000 children in the United States were eligible to be adopted.\(^9\) The overwhelming percentage of these children have been freed for adoption because their parents’ rights were terminated by court order over the parents’ objection. I am hopeful that the Convention could be used to slow down America’s penchant for destroying families in the name of advancing children’s rights. The United States is the only country in the world I know of that has a national policy of seeking the permanent severance of the parent-child relationship over the objection of the parent once the child has remained in state-controlled foster care for more than fifteen months.

Article 9 of the Convention provides that a child has the right to preserve his or her identity, including name and family relations. It also establishes that a child who is separated from one or both parents has the right “to maintain personal relations and direct contact with” them “except if it is contrary to the child’s best interests.”\(^{10}\) The more specific Article 20 addresses foster care and provides that “[w]hen considering solutions, due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”\(^{11}\)

Although it is unlikely that the Convention could be used effectively to prevent the termination of parental rights through a rigorous enforcement of

\(^8\) 42 U.S.C. § 675(5)(E).


\(^10\) CRC, supra note 2, art. 9.

\(^11\) Id. art. 20.
ASFA, there is hope that the Convention could be used to require that termination orders be made conditionally and that courts must retain the authority to restore parental rights when it becomes clear that the termination order has done little more than create permanent "legal orphans." Patrick Parkinson recently reported a published study from Washington State which "examined the circumstances of all children legally free for adoption at a certain date in 1995, and then followed them up one year later." According to Parkinson:

At the time of the first data collection, workers were asked whether each child in the sample was currently placed in a home that was likely to become permanent in the next 12 months. Three-quarters of the children fell into this category. Yet a year later, only 34 [percent] of the total sample achieved adoption or guardianship. [Consistent] with other research, they found that older children, boys, and African-American children were all significantly less likely to achieve a permanent outcome than Caucasian children.

As Parkinson suggests, "[t]here is a strong argument for saying that the termination of parental rights without orders giving parental responsibility to others is in violation of the UN Convention on the Rights of the Child and other human rights provisions which provide for a right to respect for family life." It would be wonderful if the Convention proved to be a tool which could protect children who enter the dark, frightening, and anti-human-rights state of being a permanent legal orphan. The Convention's emphasis on respect for family life might prove to be an instrument which could condemn as illegal such outcomes.

89 Id.
90 Id.
IV. A SLIGHT RESERVATION TO THE CONVENTION

Although I would hope that ratification of the Convention will mean better things for children in the United States, there is at least one provision that I believe should not be in the Convention for fear that it will be taken too seriously. This provision will appear quite benign to some and positively good to many others. Nonetheless, it is a provision that would give me pause to support the Convention.

Article 3 provides: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” This is an alluring but dangerous commitment. Children are far better served by laws that restrict the exercise of government authority. Thoughtful societies seek to restrain such power by carefully enacted rules of law. When enacting these rules, a progressive society will want to take into account its potential impact on children. In this way, I support “child centered” legislation, by which I simply mean legislation enacted with an eye toward how children will fare by it. However, Article 3 is not addressed only to legislatures. It also applies to all actions taken by judges and other law enforcers. A proposal asking judges to take into account the best interests of children whenever they issue an order is deeply flawed.

Such a proposal promotes the opposite of the rule of law. It invites arbitrary, case-by-case determinations based on the individual values and prejudices of the decision-maker. It does this because the “best interests of the child” is not a legal standard, as that term is ordinarily employed. Standards have meaningful boundaries. As Hillary Rodham Clinton stated, the best interests test “is a rationalization by decision-makers justifying their judgments about a child’s future, like an empty vessel into which adult perceptions and prejudices are poured.”

One of the reasons this “standard” invites the judge to rely on his or her own values and biases is that the inquiry fails to inform the judge about even the most basic matters. For example, as Robert Mnookin asks, should best interests

92 CRC, supra note 2, art. 3.
93 Hillary Rodham, Children Under the Law, 43 HARV. EDUC. REV. 487, 513 (1973).
be viewed from a long-term or a short-term perspective[?] . . . Should the judge ask himself what decision will make the child happiest in the next year? Or at thirty? Or at seventy? Should the judge decide by thinking what decision the child as an adult looking back would have wanted made? . . . Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.94

When deciding a case based on the best interests of the child, the court is not applying law or rules at all. Instead, the judge is exercising pure discretion "as remote from being a rule of law as an instruction to the manager of a state-owned factory that he should follow the principle of maximizing output at the least cost to the state."95 However alluring and child-friendly the "best interests" test appears, in truth it is a formula for unleashing state power, without any meaningful reassurance of advancing children's interests.

There is an important difference when children's interests are used to develop public policy (and law) and when they are invoked to apply well-settled law. Courts should be expected to perform the important role of determining and applying well-settled law. Asking judges to reconsider the wisdom of well-settled law when they are about to enforce it, however, invites them to rewrite the law in accordance with their own understanding of what will best serve the children that stand to be immediately impacted by their orders. There are actually two dangers here. First, there is the risk that the child's perspective becomes the sole focus of the analysis. The interests of children plainly are important and deserve to be a prominent part of public discourse about the rules of society. But it would be a serious mistake to become so fixated on the concern for children that we lose sight of other important values held by American society.

The second, closely related danger is that decision-makers will formulate public policy based on emotions at the moment when we they are least able to see the larger picture. This undermines the rule of law and sound public policy. Such policy is best shaped when rules are created by considering what is best for all members of society (including children) and then confidently applying those rules to particular cases.

95 Id. at 255 (quoting Lon L. Fuller, Interaction Between Law and Its Social Context, at 11 (item 3 of unbound class material for Sociology of Law, Summer 1971, Univ. of Cal., Berkeley)).
DON'T EXPECT ANY MIRACLES

Article 3 creates the possibility of undermining the rule of law and of authorizing highly discretionary action by state officials, bounded only by their own sense of justice. Although this superficially appears to be child-friendly, I believe it is not. To the extent that it suggests that law is best made on a case-by-case basis, freed from the constraint of the rule, the proposal is deeply antagonistic to the rule of law.

We should always be wary of the exercise of state power by officials who are bound only by their own sense of what is the right thing to do. History is full of too many examples of officials misusing their power, of seeking to create a world in their image, of disadvantaging the weak and powerless. The rule of law exists precisely to thwart the exercise of discretion, even when it is being exercised in the name of children’s best interests.

Therefore, I believe that Article 3 should be rewritten to only require legislatures to include the best interests of the child as a primary consideration when enacting laws for society. Once those laws are enacted, however, I prefer a society that constrains state officials to respect those laws and not encourage them to ignore law in the purported service of advancing a child’s best interests.

Lest this be regarded as a dry, theoretical concern, it must be noted that this distinction has great meaning when applied to many areas of current law in the United States. Among the most prominent of these areas are foster care and child welfare law. One of the core principles of child welfare law is that state officials may not remove children from their families of origin except upon a careful demonstration that removal is necessary to avoid imminent risk of harm. In addition, even when children are in foster care, many states maintain a strong presumption that children should be returned to their families of origin as promptly as possible and may not be kept in foster care once the parents have overcome the obstacles to the children’s safe return.

A common objection to this arrangement is that the foster care system is too skewed towards parental rights and treats children too much as the property

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97 See, e.g., In re Michael B., 11 Cal. Rptr. 2d. 290 (Cal. Ct. App. 1992); see also Smith v. Org. of Foster Families, 431 U.S. 816, 861–62 (1977) (Stewart, J., concurring) (“The goal of foster care, at least in New York, is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home by giving him temporary shelter in a family setting.”).
of their parents.\textsuperscript{98} The shorthand these critics use for this arrangement is that the system operates under a "blood bias" that disserves children.\textsuperscript{99} The strongest criticism of this arrangement is that it denies courts the authority to decide cases based on the best interests of the individual child. The broad-brush presumptions in favor of birth families require courts to return children to parents even when such an outcome would not further the child’s best interests.\textsuperscript{100}

Thus, when courts are asked to decide whether to terminate parental rights, many states provide the parents with a statutory defense. If the agency assigned the responsibility of assisting parents to gain the return of their children have not diligently discharged their obligations, courts must dismiss the case and refuse to terminate parental rights.\textsuperscript{101}

Indeed, both constitutional and statutory law are clear that courts must make a myriad of decisions in each case without taking into account the best interests of the child. As the Supreme Court has stressed on several occasions, "We have little doubt that the Due Process Clause would be offended . . . . [i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest."\textsuperscript{102}

American law and policy sensibly reject applying a best interests assessment whenever judges are deciding cases that affect the lives of children.\textsuperscript{103} I am concerned that Article 3 will be used by those who are critical of a bias in current law that prefers birth families in child welfare cases and which, as a consequence, denies courts the power to enter a custodial order that best serves the child’s interests in each particular case. Were Article 3 ever read to authorize such a change in current American law, I believe it

\textsuperscript{99}See id. at 7.
\textsuperscript{100}Id.
\textsuperscript{101}See, e.g., In re Sheila G., 462 N.E.2d 1139 (N.Y. 1984); In re William, 448 A.2d 1250 (R.I. 1982).
\textsuperscript{102}Quillen v. Walcott, 434 U.S. 246, 255 (1978) (Stewart, J., concurring) (citing Smith, 431 U.S. at 862–63); see also Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982) ("Nor is it clear that the State constitutionally could terminate a parent’s rights without showing parental unfitness.").
\textsuperscript{103}See, e.g., Caban v. Mohammed, 441 U.S. 380, 391–94 (1979) (state may not extinguish established relationship between children and their unwed father by permitting their adoption by another man without proving grounds for terminating parental rights).
would adversely affect the lives of many poor and vulnerable families (including their children).

Problems will arise if Article 3 is interpreted as authorizing judges in a termination of parental rights case to eschew any inquiry into whether agencies met their commitment to the birth family by providing preventive or reunification services. Judges could simply choose to decide cases on the basis of their own sense of what would serve the best interests of the particular child before the court. Vulnerable families would be subjected to being permanently destroyed to a far greater extent than privileged families.

The Indian Child Welfare Act104 (ICWA) is an excellent example of the pull between these two ways of advancing the law. In 1978, Congress enacted ICWA precisely to make it difficult for state courts to authorize the adoption of Indian children over the tribe’s objection. This law has frustrated a number of state courts which felt constrained by law not to permit an adoption which the judges thought plainly would serve the particular child’s best interests. These judges have been struggling with the tension between creating laws that are designed to serve a society well and doing what the judges believe will best serve the child who happens to be before them in the case.

As a result, these courts have struggled to declare ICWA unconstitutional or to find exceptions within the law that few reasonable readers of the law are able to detect.105 But the proper way to make and enforce law is to take children’s interests into account when making law and then require enforcers of the law (administrators and judges alike) to faithfully carry out the legislative intention. This constrains the ability of individuals to exercise state power as they would like. The “best interests of the child” is simply not a meaningful constraint on the exercise of this power.

Moreover, and perhaps even more controversially, even legislators who properly discharge their responsibilities must be willing to take into account many factors which might be said to conflict with children’s best interests. For example, if a society wishes to preserve the culture of an indigenous people (such as Aboriginals in Australia or Native Americans in the United States), it may well make sense for legislators to prefer this result even without being able to figure out what is best for the children. Children are an important

component in any society. But they are only a component. A just society ought to make and enforce laws so that the society acts justly. This may even mean disadvantaging some children of privilege in order to advantage others. Affirmative action programs may be said to be an example of this.\textsuperscript{106}

Does Article 3 mean that affirmative action programs may not be enacted or enforced because some might conclude they do not advance the best interests of children? Probably not. But I would be unhappy to learn that the Convention was being used to advance such a claim.

CONCLUSION

Even with these reservations, I am comfortable supporting the U.S. ratification of the Convention. Although I cannot be confident that the world will be a better place after the United States ratifies the Convention, I do believe it will be easier for the world community to press for advancing children's interests after the United States adopts the Convention. This is a sufficient reason to support it.

Martha Minow has stressed:

Human rights in the international sphere depend upon the development of a community that believes in them rather than an authority—court or legislature—that will enforce them. Organizing to influence and shape such a community may line up means and ends in precisely the way most important for children. Without adults who believe in the importance and entitlements of children, no phrase, judicial order, or legislative statement will alter their conditions.\textsuperscript{107}

The strength of the movement for international human rights as it relates to children is precisely that it depends on the willingness and commitment of adults to secure them. This is a deep meaning of rights—its dependence on a commitment to recognize and honor whatever society labels as rights. To the extent the Convention contributes to this, I am a wholehearted supporter.