

Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective

By
ELIZABETH BARTHOLET

This article discusses the significance of the United States ratification of the CRC, concluding that even if the treaty is not self-executing, ratification would make a major difference. It would enable the United States to better promote children's rights abroad, and it would push the United States to develop its domestic law in dramatically new directions that empower children. The CRC provides children with powerful affirmative rights and imposes reciprocal duties on nation-states. It provides rights to participate, including rights to be heard and to make decisions on personal and political matters; rights to receive important benefits, including health, support, and education; rights to protection against maltreatment; and rights to nurturing parental care. All this contrasts with U.S. law's negative rights tradition, its emphasis on parental rights, limited recognition of children's rights, and related restriction of state power to protect children. U.S. ratification could have a positive impact, particularly in connection with parental relationship rights and related maltreatment issues. However, there is also a risk of negative impact, given the problematic CRC provisions on international and transracial adoption. The solution is ratification with a reservation regarding Articles 20 and 21.

Keywords: Convention on the Rights of the Child (CRC); ratification; international; transracial; intercountry; adoption

United States ratification of the Convention on the Rights of the Child (CRC) holds both positive and negative potential for children. On the positive side, the CRC represents one of the strongest legal statements to date that children have full human rights entitlements, comparable with adults, and that their interests should be valued at least equally with adults' interests. As the only country other than Somalia not to have endorsed the CRC,¹ the United States would make a major statement both externally and internally by finally ratifying the treaty.

The United States is now limited in its ability to promote children's rights in other countries by its failure to ratify. Ratification would enable us to work more effectively with the

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United Nations (UN) Committee on the Rights of the Child and others to press for important reforms for children abroad, such as the elimination of child soldiering and child slavery and the promotion of better health and education opportunities.

Ratification would also mean that the United States would accept the CRC as international law for internal purposes. Even assuming that the CRC is not self-executing and thus not automatically legally effective, it would likely have a powerful influence on the future development of U.S. law in a way that would generally advance children's rights.

On the negative side, the CRC presents real risks to unparented children because key provisions limit adoption and thus limit children's prospects for finding the nurturing homes central to their human needs. International and transracial adoption represent important options for unparented children, given the limited likelihood that they will find parents in their national or racial groups of origin and the advantages for children of adoption over foster and institutional care. However, the CRC provides strong preferences for keeping children within their national and racial groups of origin. It requires that in-country options, including foster care and other "suitable" care, be preferred over out-of-country adoption, and leaves countries free to ban international adoption altogether. It also requires that in placing children, "due regard" be paid to ethnic, religious, and cultural backgrounds.

CRC ratification would encourage U.S. action to further restrict international adoption, both of children born abroad and of children born in the United States. It would risk relegating more unparented children abroad to the harmful conditions that characterize life in institutions and on the streets and preventing children in foster care here from finding adoptive homes abroad. It would support reinstitution of the racial-matching policies in the United States that limited black children's opportunities to move from foster care to adoption and were accordingly outlawed by Congress in the mid-1990s in the Multiethnic Placement Act of 1994 (MEPA; amended 1996).

I believe that the United States should ratify the CRC, given its radical vision of children as full rights-bearing individuals. But a reservation should be attached to the ratification rejecting the CRC provisions that limit international and transracial adoption. This would protect against the major harm that CRC ratification

Elizabeth Bartholet is the Morris Wasserstein Professor of Law and faculty director of the Child Advocacy Program (CAP) at Harvard University. She teaches civil rights and family law, specializing in child welfare. Her publications include Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative (Beacon 1999); Family Bonds: Adoption, Infertility, and the New World of Child Protection (Beacon 1999); "International Adoption: The Human Rights Position" in Global Policy (2010); "The Racial Disproportionality Movement in Child Welfare" in Arizona Law Review (2009); "International Adoption: The Child's Story" in Georgia State University Law Review (2007); "International Adoption: Thoughts on the Human Rights Issues" in Buffalo Human Rights Law Review (2007); and "Where Do Black Children Belong? The Politics of Race Matching in Adoption" in University of Pennsylvania Law Review (1991).

might otherwise cause children and send a powerful signal both externally and internally that the United States truly values children's rights.

Below I discuss both the positive and negative potential of CRC ratification, focusing primarily on issues having to do with children's interests in being raised by nurturing parents and protected against maltreatment. There are conflicting views on whether granting children more legal rights is helpful in furthering their interests and whether it is otherwise justified. I have addressed these issues in prior publications referenced here. This article focuses on the *significance* of CRC ratification, and my related recommendations regarding ratification, based on my view regarding the importance of expanding protection of children's rights and interests, particularly in connection with nurturing care.

The Impact of U.S. Ratification of the CRC

An important initial question is whether U.S. ratification would make much difference. Skeptics can point to the fact that in many of the countries that have ratified, children continue to be victimized as soldiers and slaves, continue to suffer and die from diseases that could be prevented or cured, and are condemned by the millions to live in institutions and on the streets, all in violation of the CRC. But while CRC ratification is no magic pill guaranteeing transformative change, it would very likely make a profound difference abroad and in the United States.

Impact in other countries

CRC ratification would enable the United States to work more effectively to influence other countries to comply with CRC mandates. While there is little clear proof that the CRC has had a major impact on child-related policies in other countries, there is good reason to think that it has had at least some impact. Many countries have already adopted all or parts of the CRC in their national legislation or their constitutions (UNICEF Innocenti Research Centre 2004, 3–8). Many have formed new child law reform commissions, government offices, ombudsmen, and coalitions of private and public organizations to promote children's rights (Blanchfield 2009, 16–17; UN Committee on the Rights of the Child 2003b). New legal mandates and agencies generally have some influence in changing policy and practice. And while it is hard to document the discrete influence of the CRC as compared to other factors generating change, a recent study, using statistical analysis to rigorously examine the CRC's impact, concludes that it has produced significant changes with respect to child labor and child health (Simmons 2009, 20).²

CRC ratification would enable the United States to make the CRC a more powerful force for change. Failure to ratify means that we are silenced, at least relatively. If we do speak up for children, it is easy to question our credibility and ignore our voice (Todres, Wojcik, and Revaz 2006, 7).

Impact in the United States

CRC ratification would likely have an impact on the United States just as it apparently has had elsewhere. This is true despite the fact that the CRC would be self-executing. Under recent U.S. Supreme Court law, ratified treaties are presumptively not self-executing, unless the language demonstrates clearly that they are intended to be (*Medellin v. Texas* 2008). The CRC demonstrates instead that ratifying countries are to take action to implement it. It has no enforcement system, save for the creation of the UN Committee on the Rights of the Child and the requirement that States Parties submit reports to this committee, which can comment and make recommendations but take no more forceful action. Accordingly, CRC implementation depends on the passage of enabling legislation by federal or state governments. Given that various CRC principles differ powerfully from current law, the United States might attach a “reservation” or “understanding” to its ratification, clarifying that the CRC would not be self-executing. Also, given U.S. federalism, and traditional state responsibility for family matters, the United States might attach an understanding indicating that any implementation would be the responsibility of either the states or the federal government consistent with their traditional division of responsibilities.

Even if not self-executing, the CRC would be international law binding upon the United States, requiring implementing action.³ The UN Committee on the Rights of the Child has issued guidance requiring “a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention” (2003b, para. 18). The United States takes such international law obligations more seriously than many nations, which no doubt is one reason for its reluctance to ratify.

The CRC (Article 44)⁴ would require the United States to submit extensive, detailed reports to the CRC committee, one within two years after ratification, and one every five years thereafter (UN Committee on the Rights of the Child 2005). The committee can comment on these reports, provide suggestions and general recommendations (Article 45), and otherwise apply various kinds of public shaming pressure. Again, the United States might take these reporting obligations and the related potential for embarrassment more seriously than many nations. The reporting process would, for example, highlight the country’s high rates of infant mortality, child poverty, and child deaths due to abuse and neglect (Todres 2006, 31). It would highlight the country’s outlier status with respect to juvenile life without parole sentences, given Article 37’s express prohibition of such sentences. It would provide children’s rights organizations information that they could use to push for child-oriented reforms, including an opportunity for input to the UN committee. In many countries, nongovernmental organizations (NGOs) have submitted alternative reports in connection with the official reports.

CRC ratification together with the reporting process would provide ongoing pressure for the United States to take a range of steps toward CRC implementation, including passing federal and state legislation implementing aspects of the CRC, creating or strengthening the kinds of child ombudsmen that already exist in a number of states, and adopting CRC principles through judicial

interpretation of federal and state constitutional and legislative provisions and through the development of common law.⁵ The CRC would operate as a constant presence in the law, available to child rights proponents and influential on policy-makers in all these contexts.

International law has often been an important influence on lawmakers even when not part of a ratified treaty. For example, the Supreme Court relied on the CRC in finding the juvenile death penalty unconstitutional, citing the worldwide acceptance of CRC Article 37's ban on such sentences (*Roper v. Simmons* 2005). If the United States were to ratify it, the CRC should have significantly more influence than a treaty that only other countries have ratified.

Federal and state legislatures in the United States regularly consider legislative changes with powerful impacts on children. The CRC would, upon ratification, be available to child rights advocates and policy-makers in considering new social welfare legislation or new child protective legislation.

Much federal and state constitutional doctrine related to child rights and interests and state power to protect children is extremely malleable. Parents' constitutional rights were created by the courts in the absence of any clear constitutional provisions, relying on vague "due process" language. The CRC could lead courts to develop similar constitutional protection for children's rights to be parented. Justice Stevens on the U.S. Supreme Court and some adventurous state court judges are already moving in this direction, concluding that children have some constitutional rights to nurturing parental relationships (*Troxel v. Granville* 2000, 80–102; *In re Gill* 2008).

State legislative law protecting children against parental abuse and neglect is similarly malleable. It is now interpreted in ways that powerfully protect parents' rights to raise children free from state intervention, limiting state ability to protect children's interests. CRC ratification might well lead state courts to give higher value to children's interests and to accord government agencies greater scope to protect them.

Finally, ratification would demonstrate greater willingness to value children's rights and interests highly and on a level equivalent to adults' rights. This in turn would influence the readiness with which U.S. decision-makers would look to the CRC for wisdom.

The Positive Potential for Children in the United States

Children as equal rights-bearing persons

The CRC gives children equal status with adults as rights-bearing persons.⁶ The Preamble speaks of "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family." This does not mean that children must always be treated identically to adults, with, for example, the same right to vote or the same right to individual autonomy. That would be absurd, given that the group protected by the CRC includes young children and infants.

But it does mean that children have equal rights to have their interests taken into consideration.

Giving children equal rights is still a radical idea, despite the widespread ratification of the CRC. As Philip Alston, a leading expert on human rights, has written,

We should not under-estimate the extent of the changes in attitude and practice that still remain to be achieved. Just as the principle that all individuals are entitled to full and equal respect for their human rights continues to threaten deeply entrenched vested interests in many societies, so too does the very idea of children's rights threaten some long-cherished notions of unfettered parental dominance and of governmental and community abstention in matters arising within the "private" domain of the family. (Alston 1991, 1)

Current U.S. law provides children little in the way of rights. Instead, the emphasis is on parents' rights to make decisions related to their children and on states' rights to protect children's best interests, with states limited in their ability to do so by parents' rights. These limits on state power are justified based on assumptions that parents will be likely to protect children's best interests, beliefs that parental autonomy will promote healthy diversity, and concerns about the dangers of undue state intervention. Many believe strongly in the current U.S. emphasis on adults' rights, arguing that it serves children's interests better than would a new emphasis on valuing children's rights equally. They think that greater emphasis on children's rights would mean more state intervention in the family and that the state would not in the normal course do as good a job protecting children's interests as parents (Guggenheim 2005). I have addressed the debate in prior publications and conclude that it would be better for children and the larger society to recognize children as having greater rights, particularly in connection with protection against maltreatment and related rights to nurturing parenting relationships (Bartholet 1999; 2008, 336–37).

Among the specific rights granted children by the CRC are freedom of expression (Article 13); freedom of religion (Article 14); freedom of association (Article 15); and freedom from interference with their "privacy, family, home" (Article 16). The right to privacy, read into "due process," has been the source in U.S. law of important family rights for adults, rights to make procreation choices and to keep and raise their children free from undue state intervention. This CRC privacy provision could serve as the source of important new family rights for children, such as rights to maintain nurturing relationships with foster parents, prospective adoptive parents, de facto parents, and others. In addition, the CRC makes children's best interests "primary" in all matters concerning children (Article 3), and it talks in the Preamble of children as entitled to particular care. This is very important since, given children's relative powerlessness compared to adults, there is always the risk that adults' interests will trump those of children.

The CRC makes it clear that children have *affirmative* rights, not just negative rights to keep the state from interfering in their autonomy. Rights are written in language implying or specifying state duties to ensure their protection. Article 2 reads, "States Parties shall respect and ensure the rights set forth." Article 6

reads, “States Parties shall ensure to the maximum extent possible the survival and development of the child.” Article 16 gives the child “the right to the protection of the law against” interference with privacy, family, and home rights.

By contrast, current law in the United States gives children very little in the way of rights and places overwhelming emphasis on parents’ rights, justifying this often as consistent with children’s best interests. United States law *allows* the state to protect children but does not impose on states a constitutional *duty* to protect children. Under U.S. law, the state’s power to protect children is limited by parents’ constitutional rights to be free from undue state intervention. Often U.S. law forbids any consideration of children’s interests until adults’ interests have been addressed and given priority. Thus, when child protective agencies seek termination of parental rights, freeing children up for adoption, children’s best interests can generally not be considered until after a finding that parental unfitness justifies termination. The fact that children may have bonded to foster care parents, and have a strong interest in being adopted by those parents rather than returned home, or kept in foster limbo, is generally not allowed to be considered.

U.S. law has recognized that in a few discrete areas children have constitutional rights, but such law is the product of a period in history when the U.S. Supreme Court was unusually enthusiastic about creating new constitutional rights, and it is limited to very few areas, namely, speech, juvenile justice, the Fourth Amendment protection against search and seizure, and abortion (Abrams and Ramsey 2007, 25–86). The Court has cut back on these rights in recent decades, ruling that even in these areas, children’s rights are weaker than adults’ rights and are subject to control both by parents and the state (Shepherd 1990).⁷ Moreover, the Court has never expanded such rights concepts to areas where arguably children’s needs for rights is greatest, failing, for example, to recognize any right to life or to nurturing parenting. CRC ratification has enormous potential to push U.S. law in the direction of strengthening children’s rights where such rights are already recognized. The CRC would push back against the move in juvenile justice to treat children more punitively, shifting many of them to adult criminal courts, adult sentencing schemes, and adult correctional institutions. It would provide powerful support for those trying to outlaw the practice of sentencing children to life without parole (LWOP), since this is specifically prohibited by Article 37(a). The United States is the only country in the world that now has a substantial number of children serving LWOP sentences. The Supreme Court ruled in spring 2010 that such sentences were unconstitutional for juveniles who were not guilty of homicide (*Graham v. Florida* 2010), but LWOP sentences survive for homicide. This blatant inconsistency with such a specific CRC provision would put the United States in an embarrassing position. The United States could attach a related reservation, but even then ratification would impose pressure to eliminate LWOP, as the reservation itself, together with the reporting process, would focus attention on our unique insistence on subjecting juveniles to this extraordinarily harsh sentence.

The CRC would push to strengthen children’s rights to speech and religion, in the context of efforts by state actors, such as schools, to restrict such rights. It

would push in the direction of giving children greater power to stand up to their parents and assert their independent views in these areas. Policy-makers might be compelled to pay more attention to children's levels of maturity and their abilities to make rational decisions on their own behalves and to their best interests when decisions must be made for them.

A case such as *Wisconsin v. Yoder* (1972) indicates the positive potential. In *Yoder*, the Supreme Court upheld Amish parents' rights to keep their children out of high school, despite contrary compulsory education laws. There was a dissenting opinion, arguing that some effort should have been made to hear the affected children's views. The majority thought any such effort might conflict with parents' rights to control the religious upbringing of their children. The CRC would push for greater recognition both of state legislators' rights to protect children's best interests by giving them the high school education that they would need to pursue employment outside the Amish community and of children's rights to make their own religious and related educational choices.

The CRC would also push U.S. law in the direction of according children new rights in areas where they most need rights recognition, such as the provision of nurturing parenting and related protection against abuse and neglect. The problems with current law are exemplified in a number of leading Supreme Court cases, as is the potential for positive change with CRC ratification.

In *DeShaney v. Winnebago County* (1989), a father had beaten his child so badly that the child ended up in a coma, which left him with serious permanent disabilities. The mother sued on the child's behalf, alleging that the state failed in its duty to protect the child. The Court held there was no constitutional violation because the child had no right to protection, while the father had a right to be free from undue intervention. CRC ratification would push to equate the child's right to protection with the father's right to be free from intervention and to recognize some duty on the state's part to provide that protection.

In *Santosky v. Kramer* (1982), the Court ruled that a state law that allowed for termination of parental rights based on showing parental unfitness by only a "preponderance of the evidence" violated parents' constitutional rights. The Court required proof of unfitness by at least "clear and convincing evidence," focusing on parental rights and arguing that given the importance of these rights, the higher burden of proof was appropriate. The Court gave children's interests limited consideration. It failed to recognize that its standard of proof put the children at risk of being returned to unfit parents or continuing in foster limbo in cases where proof demonstrated the probability of unfitness. CRC ratification would push to weigh the risk to the child of wrongfully failing to find parental unfitness at least equally with the risk to the parent of wrongfully finding unfitness. It would push to free more children from unfit parents, enabling them to move more easily and promptly into nurturing adoptive homes. For related reasons, the CRC might also lead to questions about the legitimacy of the Indian Child Welfare Act (ICWA) provisions on removing children and terminating parental rights, as ICWA requires clear and convincing evidence for the former, and evidence beyond a reasonable doubt for the latter.

In *Smith v. Organization of Foster Families* (1977), the Court considered how to balance foster parents' rights to a continued relationship with their foster children against birth parents' rights to be reunited with their child, finding that the birth parents' rights trumped those of foster parents. It concluded that foster parents were accordingly entitled to limited process rights before foster children could be removed from their homes. The Court found it unnecessary to weigh in the balance any child rights to a continued relationship with foster parents. The CRC would push for the recognition of children's rights to such ongoing parental relationships and related rights to hearings that would illuminate whether removal from the foster home would serve the child's interests.

In *Troxel v. Granville* (2000), the Court found a state statute, designed to provide for visitation based on children's best interests, unconstitutional. The state trial court interpreted the law to give grandparents a right to visitation. The Supreme Court found that this violated parents' rights to decide all parenting matters, including visitation with nonparents, free from undue state intervention. CRC ratification would push in the direction of giving states more leeway to make such decisions based on best interests of the child considerations. This would not necessarily mean more state intervention. A court taking the CRC into account might still decide in a case similar to *Troxel* that visitation should be denied, based on the costs of court intervention in the family for children as well as parents. But the CRC would push in the direction of actually weighing children's rights and interests, and not simply focusing on parent rights and relying on the assumption that parents protect children's interests. Child *rights* would mean that children's *actual best interests* would be taken more seriously.

Specific Rights in the CRC: Participation, Provision, and Protection

The CRC has three concepts of rights that have radical potential for the United States, sometimes referred to as the three Ps: Participation, Provision, and Protection. The participation rights give children the right to participate in various kinds of decision-making. The provision rights give children the right to affirmative assistance in terms of welfare, health, education, and other social services. The protection rights give children the right to protection against maltreatment and nation-states a corresponding duty to provide such protection.

Participation

Article 12 of the CRC provides that "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. . . . [T]he child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child."

Some sense of the potential significance of these provisions is conveyed by a CRC *Implementation Handbook* prepared for UNICEF.

The committee [on the Rights of the Child] reminds States Parties of the need to give adequate consideration to

- taking appropriate measures to support the right of children to express their views;
- ensuring that schools, as well as other bodies providing services for children, establish permanent ways of consulting with children in all decisions concerning their functioning, the content of the curriculum or other activities;
- increased consideration to the creation of space, channels, structures and/or mechanisms to facilitate the expression by children of their views, in particular with regard to the formulation of public policies from local up to national level. (Hodgkin and Newell 2002, 6)

U.S. law currently provides children little in the way of participation rights, either in the public arena or in their private lives. The law gives parents the right to make almost all decisions for their children. There are exceptions, but these exceptions prove the strength of the general rule, demonstrating how powerful the presumption is that parents are entitled to decide for their children, even when this raises enormous questions as to whether the child's best interests are served.

Parents have the power to make almost all medical decisions for their children, regardless of the age or maturity of the child or the child's apparent best interests. Exceptions are made only where the child's interests are seen as overwhelmingly important, as in the abortion decision, or when the parental decision puts the child's life at risk. The *In re Guardianship of Phillip Becker* (1981) case illustrates the limited power courts have to recognize children's interests when they conflict with parental choice. Phillip had Down syndrome, and his parents had relegated him to institutions throughout his childhood. He had a heart condition, which the medical experts felt required an operation to enable him to live for any significant period and to live in any comfort. The parents refused their consent, and for years no operation was performed despite the efforts of child welfare authorities and others who found it clearly in Phillip's interests. Finally, a couple who had befriended Phillip, taking him home for regular visits, persuaded a judge to appoint them guardians so they could consent to the operation and take Phillip home permanently. This decision was made only after a long and expensive legal battle, and only because a courageous and imaginative judge made the decision that Phillip should be deemed to have the right to decide and that, given his disability, the judge should make a "substituted judgment" for him. The judge then chose what would clearly have been Phillip's decision had he been competent—he chose life for Phillip, rather than an early and painful death, and growing up with loving substitute parents, rather than life in a loveless institution. Ordinarily, however, children have no right to participate in medical decisions, even when the children are relatively mature, the decisions are very important, and parents' choices are in apparent conflict with children's interests.

The only generally recognized child participation right under U.S. law is the right to be represented in court proceedings that others have brought and that

are central to the child's welfare. Thus, many state laws provide that children have some right to representation when child custody is at issue in a divorce proceeding or in a care and protection proceeding brought by the state. But generally children have no standing rights to appear as a full party in court proceedings or to initiate such proceedings, even when enormously important interests are at stake. For example, children have no right to challenge state decisions to keep them in foster care, rather than terminating parental rights so that they can be adopted. A leading case involved a child who had languished for many years in foster care and sought adoption by his foster parents. He was denied standing to bring a proceeding, consistent with the general rule (*Kingsley v. Kingsley* 1993). The CRC would push for recognizing children as having rights to go to court to demand enforcement of the laws related to terminating parental rights and adoption.

Participation rights do have some problems and limitations. Many forms of child participation seem relatively meaningless in terms of real power or real ability to push policy in a more child-oriented direction. Efforts to give children a "voice" or a seat at the table where policy is being developed may simply be for show and not translate into any meaningful benefits for children. Also, participation rights are generally interpreted in ways that would be meaningful only for older, relatively mature children and not for the most vulnerable part of the child population—infants and very young children. Even older children will often not be in as good a position as their parents or the state to decide what actually serves their best interests. Moreover, the costs of deciding on an individual basis which children are mature enough to make which decisions justify limiting child decision-making to only certain contexts. Finally, broad participation rights are so contrary to current U.S. law that they might for that reason have less influence than CRC provisions that relate more closely to existing legal concepts.

But participation rights have some interesting upside potential. They might make a positive difference for older, relatively mature children, in many important contexts such as medical treatment. Some states might be willing to experiment with giving older children some political voting power, possibly a fractional vote for each advance in age beyond a certain minimum.⁸ Some might include children in the selection process for a child ombudsman, as has occurred elsewhere. Legislatures and courts might expand children's standing rights to initiate court proceedings demanding enforcement of laws designed to serve their interests.

Participation rights could also be interpreted in ways designed to address the concerns that many children most in need of empowerment cannot meaningfully speak for themselves and that even older children might not make the best decisions. If children should not be given actual decision-making power, then decision-makers might have an obligation to engage in what the *Phillip Becker* court called "substituted judgment," putting themselves in the place of the child to make the decision that a rational child would make. This might push courts and others to take more seriously children's actual best interests, as compared to current law, which allows courts to assume too easily that parents will promote their child's best interests and thus deference should be given to whatever parents decide.

Political participation rights could also be defined in ways designed to protect the interests of the most vulnerable children. Rather than simply giving votes, whether full or fractional, to a limited class of older children, legislative slots could be reserved for people elected specifically to represent and promote children's interests.

Provision

The CRC mandates that States Parties affirmatively provide important assistance to children in the areas of social welfare, health, and education. Article 24 provides that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health" and requires appropriate measures to diminish infant and child mortality, ensure primary health care, and ensure prenatal and postnatal health care for mothers. Article 27 recognizes the child's right to an adequate standard of living, and Article 28 recognizes the child's right to education. Because of its wealth, the United States generally provides better for children in these respects than do many of the poor countries of the world. But the United States generally does not recognize the idea that children or adults have any affirmative *right* to assistance. Certainly in terms of federal and state constitutional rights, the United States is famous for its negative rights tradition, emphasizing the individual autonomy right to be free from undue intervention by the state.⁹ While this tradition would make the United States resistant to the most radical implications of the CRC provision mandates, these mandates would nonetheless likely have interesting positive potential.

The CRC reporting system would require the United States to report its successes or failures in affirmatively providing for children under the CRC provision mandates. This obligation to report, and the ability of the UN Committee on the Rights of the Child to question and comment on these reports, would highlight, for the world, U.S. failures in areas such as high child mortality rates, high child poverty rates, and related limits in health care for children and mothers. Such failures are especially embarrassing in light of the country's relative wealth. Fear of this kind of public shaming might trigger more significant efforts to address these problems.

The CRC provision mandates might also push U.S. law in the direction of developing more in the way of children's affirmative rights to nurturing care and to parenting and other family-like relationships. The Preamble talks of children as "entitled to special care and assistance" and to "special safeguards and care, including appropriate legal protection." Article 3 requires that States Parties "ensure the child such protection and care as is necessary for his or her well-being and, to this end, take all appropriate legislative and administrative measures." Article 6 recognizes the child's inherent right to life and requires that States Parties "ensure to the maximum extent possible the survival and development of the child." Article 16 protects children against interference with "privacy, family, home." Article 19 requires States Parties to take measures to protect children against maltreatment by parents or others. Article 20 requires that children,

whose best interests require that they be removed from their parents, are “entitled to special protection and assistance” and “alternative care” that can include adoption.

These provision mandates would push U.S. law in directions that are hugely important for children. The current negative rights tradition is stunningly inappropriate for children. While it may make at least some sense to think of adults as protected by individual autonomy rights that prevent the state from undue intervention in their lives, it makes no sense to think of helpless infants and young children as protected by such rights. For related reasons, the kinds of child rights currently recognized under U.S. constitutional law are of no use to the most needy and vulnerable children. These rights protect older children against undue state intervention with their autonomy—against, for example, state limits on their speech or free association, against unreasonable searches for drugs by public school authorities, against unfair punishment for criminal activities, and against undue barriers preventing them from making the abortion choice. The most vulnerable children—infants and young children—have no need for these rights. What they most need is affirmative help in the form of nurturing parenting so that they can survive and thrive and grow up to actually enjoy autonomy rights and function without too much affirmative help.

CRC ratification could have a significant influence on U.S. law in these areas that are so central to children. It would not be a huge stretch from current law to develop legal concepts that give children more rights to affirmative nurturing. Existing state legislation already gives children the right to protection against abuse and neglect and gives state care and protection agencies duties to remove children at risk of maltreatment from their original parents, to free them for adoption based on findings of parental unfitness, and to place those freed with adoptive parents screened for parental fitness. The CRC would push in the direction of interpreting such law in ways that give less deference to parent rights to control their children free from state intervention and more deference to children’s rights to grow up with nurturing parents, whether biological or adoptive.

The CRC would also push in the direction of interpreting federal and state constitutions in ways that recognize children’s constitutional rights to nurturing relationships. This would contrast with the current federal and state rule that recognizes parents as having a constitutional right to create or retain relationships with children but gives children no comparable right to create or retain relationships with adults. As noted above, constitutional law is malleable, given that parental rights have been created out of vague due process language in federal and state constitutions, language that could equally be interpreted to provide children with comparable rights. Justice Stevens argued in the *Troxel* case discussed above that existing federal constitutional doctrine supported recognition of children’s rights to maintain ongoing nurturing relationships. One state court judge has already found that children have constitutional rights to nurturing parental relationships, in a case ruling unconstitutional Florida’s ban on adoption by homosexuals, which prevented foster children from being adopted by their gay foster parents (*In re Gill* 2008).

Protection

The CRC creates powerful rights for children to be protected against abuse and neglect by parents and reciprocal duties on the state to protect children against such harm. (See discussion of Articles 6 and 19 above.) This stands in significant, but not total, contrast to current U.S. law. The legislative law of all fifty states makes the state responsible for protecting children against abuse and neglect. But children have no generally recognized constitutional right to such protection, in contrast to the generally recognized constitutional right parents have to raise their children free from undue state intervention, as the U.S. Supreme Court famously ruled in *DeShaney*, discussed above. And states have no constitutionally mandated duty to protect children against maltreatment. This imbalance in constitutional rights affects the entire structure of child protective systems, significantly limiting state power to protect children against abuse and neglect, and state power to move children from unfit parents into nurturing adoptive homes. In *DeShaney*, the Court made clear that child protective workers should feel more at risk for removing children from arguably dangerous homes than they should for keeping children in such homes. In *Santosky*, also discussed above, the Court made it hard for the state to prove parental unfitness justifying termination of parental rights, based on its felt need to protect parents' constitutional rights, in part because the child was seen as having no comparable constitutional right to be free from abuse and neglect or to be entitled to move on to a nurturing adoptive home.

More generally, the imbalance in constitutional rights helps to shape the entire child protective system, while simultaneously reflecting the values of that system. State and federal laws make family preservation the powerful priority, often at the cost of children's interests in moving out of the original family to a substitute family that is safer and more nurturing. State legislation creates numerous protections for birth parents charged with child maltreatment, limiting the ability of state protective agencies to remove children at risk. State judges interpret child protective legislation in light of the generally understood powerful protection parents have against state intervention. Typically, state law makes it impossible even to consider the child's best interests in child protective proceedings until after a determination has been made—by the constitutionally required clear and convincing evidence standard—that parents are unfit.

The CRC would push toward a radical change in this area. Congress and state legislatures would be obligated to consider the CRC as they engage in the process of revising legislation governing child protection. Courts would have to think about the implications of the CRC as they interpret legislative and constitutional provisions that are malleable and capable of different interpretations. Existing understandings about legislative and constitutional rights of parents to hold onto their children would have to be weighed against the new rights children are given by the CRC to be protected against abuse and neglect.

In my view, this new pressure to develop law that more powerfully protects children's rights to be free from maltreatment, and their affirmative rights to

nurturing parenting, would have a profound positive effect for U.S. children. As I have written elsewhere, the current system values parents' rights and family preservation in ways that put children at undue risk (Bartholet 1999).

The Negative Potential for Children in and outside of the United States: International and Transracial Adoption

CRC ratification poses grave risks to children because of its restrictions on international and transracial adoption. Many millions of children worldwide are growing up in institutions and many more millions on the streets. In the United States, roughly half a million children are in foster care. Adoption provides for many of these children the best opportunity for the nurturing parenting that they need to thrive. And international and transracial adoption have been proven to work extraordinarily well for children. Children placed in homes during early infancy do essentially as well as children growing up in nonproblematic biological families. Children placed at older ages succeed as a group in overcoming, to a significant degree, the damage suffered from maltreatment in their original homes and from foster and institutional care. There is no evidence that placement across national, racial, or ethnic lines has any negative impact on adopted children in terms of well-being. Since there are not nearly enough homes for unparented children available in their countries and their racial groups of origin, restrictions on international and transracial adoption limit children's opportunities to escape the harmful conditions characterizing foster and institutional care and to find the nurturing parenting that they need.

These claims are subject to debate. Both international and transracial adoption are controversial, with many arguing that children are best off in their national and racial groups of origin or that racial minority groups and nations are entitled to hold onto their children. Many argue also that international adoption is subject to abuses, such as child trafficking, which require restrictive regulation. In prior publications, I have addressed the contending claims at length and concluded that international and transracial adoption serve the interests both of children and of the larger society and that adoption abuses can best be dealt with by penalizing those who violate the law, not by locking children into state care as we do when we restrict adoption opportunities (Bartholet 2010, 2008, 2007, 2006, 1991).

International adoption

The CRC provisions related to international adoption limit it to very last resort status as an option for children. The CRC mandates preferences for in-country foster care and other "suitable" in-country care, which some interpret to include institutional care, over out-of-country adoption. It allows countries to forbid international adoption altogether. Article 21's "subsidiarity" section provides that

States Parties that recognize the system of adoption may consider international adoption only “if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.” Article 20 further denigrates the international adoption choice, providing that in considering placement options, “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.”

These subsidiarity provisions demonstrate deference by those drafting the CRC to the perceived rights of nation-states to hold onto what are seen as “their” children, without regard to children’s best interests. This is understandable given the history of the CRC and the major role played by nation-states in negotiating its terms. Many point to the role children played in the development of the CRC, but obviously this was minor as is true for all legal instruments. And it is doubtful that the unparented children most affected by shutting down adoption opportunities—those living in institutions and on the streets—played any role.

These CRC provisions are profoundly antichild. International adoption generally serves the interests of the unparented children of the world. There are not enough domestic nurturing homes available through adoption or otherwise in the poor countries of the world to provide good parental care to all the unparented children in need. Many countries also have cultural biases against adoption, or policies such as China’s one-child policy, which severely limit in-country adoptive homes. The social science evidence, combined with developmental psychology and common sense, makes clear that adoption, whether domestic or international, serves children’s interests better than foster care and much better than the real-world alternatives for most of the world’s unparented children, living in institutions or on the streets. A recent book describes in powerful, graphic detail “the abuse and neglect experienced by some ten million children presently confined in residential institutions. . . . The practices in many thousands of these amount to ‘cruel, inhuman and degrading treatment’ defined by international law as equivalent to torture” (Helander 2008, 3–4).

It seems clear that the CRC subsidiarity provisions arose not out of any genuine attempt to promote children’s interests but rather in deference to nation-states’ demands. Notably, while some proposed that the CRC require States Parties “to facilitate adoption of children,” this was rejected (Vite and Boechat 2008, 23). International adoption was seen as controversial, with some countries viewing it as related to prior colonialist domination and others finding it inconsistent with Islamic beliefs. Provisions promoting in-country options and giving States Parties freedom to ban international adoption altogether were seen as important to getting broad agreement on the treaty and broad ratification.

Courts in some countries have recognized that the subsidiarity provisions are inconsistent with the CRC’s core principles, including principles that make central children’s rights to a nurturing family; protect children against the harms characteristic of institutional care; and make children’s best interests primary, and indeed “paramount” in the language of Article 21 itself. These courts have found children entitled under the CRC and related human rights documents to be

placed in international adoption if the alternative is institutionalization in the country of origin (Bartholet 2010, 94, 98). But these decisions had to struggle to overcome the Article 21 subsidiarity language.

The CRC has generally been interpreted by the UN Committee on the Rights of the Child, UNICEF, and others in ways that severely limit international adoption, often even more than the language demands (Bartholet 2008, 378–79; Dillon 2009, 479). The committee's reporting guidelines require countries to indicate the measures taken to ensure that international adoption "is only considered as an alternative means of care for the child if he or she cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin" (Hodgkin and Newell 2002, 295). The CRC *Implementation Handbook* prepared for UNICEF notes that "countries considered to have too many adoptions have been the subject of Committee concern" (Hodgkin and Newell 2002, 296). It goes on to make clear that international adoption "must only be undertaken as a last resort" and that "the rising number of intercountry adoptions has been the cause of much concern" (Hodgkin and Newell 2002, 298). It states that the UN Committee on the Rights of the Child has frequently expressed concern about child trafficking in the context of such adoption, and then states that even when such adoption is regulated to address such problems, "the Committee has remained concerned about the number of international adoptions" (Hodgkin and Newell 2002).

Those who led the charge to force Romania to close down its international adoption program as a condition of joining the European Union cited the CRC as giving the child a right to grow up in the country of origin, arguing that international adoption was accordingly an inherent violation of children's rights (Bartholet 2007, 178–81). UNICEF and others have cited the CRC when arguing that countries must impose extensive restrictions on international adoption, including moratoria in response to any adoption abuses; extensive waiting periods for children before international adoption can be considered so as to explore in-country options, which generally do not exist; and the banning of private intermediaries that often function as the lifeblood of such adoptions (Bartholet 2010).

UNICEF and the UN Committee on the Rights of the Child have published reports indicating that international adoption should not function even as a last resort. For example, various reports addressing the desperate crisis faced by unparented children in different parts of the world often list a range of options that should be developed for such children, including improved institutional care, "residential" care, foster care, "family-like" care, and sibling-headed households, without even mentioning international adoption (UN Committee on the Rights of the Child 2003a; UNICEF 2005). Similarly, the UN Guidelines for the Alternative Care of Children cite a range of such alternatives with no indication that international adoption should be considered (UN General Assembly 2009).

The UNICEF Innocenti Research Centre (2004) credits the CRC with having had significant impact in encouraging countries to further restrict international adoption or to shut it down entirely. As an example, it cites Paraguay's 1995

moratorium, which shut down its once extensive international adoption program, and its new 1997 legislation, which gave priority to domestic adoption. The latter has allegedly succeeded in eliminating any international adoption since (UNICEF Innocenti Research Centre 2004, 111). It describes Sri Lanka and Vietnam as having implemented CRC Article 21 with legislation, making international adoption a last resort, and many other countries as adopting legislation implementing the CRC subsidiarity provisions to prioritize in-country options. Additionally, comments by the UN committee on various country reports demonstrate regular concerns with countries that have not done enough to implement the subsidiarity provisions to sufficiently limit international adoption and prioritize in-country options (Holmstrom 2000).

The CRC has also been used to undermine the advance made by the later Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (1993), which contained subsidiarity language more favorable toward international adoption than the CRC's Article 21 (Bartholet, 2007, 171–73). The Hague requires “due consideration” of in-country placement before out-of-country (Article 4(b)) but makes international adoption preferable to any in-country placement except adoption and other family care, such as care in the family of origin. There is no mention of in-country foster care as preferable and no vague language preferring other “suitable care” in-country that could be interpreted to include institutional care. Since the Hague Convention is subsequent in time to the CRC, and far more specific to international adoption, it should, under standard rules of treaty interpretation, be accepted as the guiding law to the degree that there is a conflict between the two conventions.

However, the UN Committee on the Rights of the Child, UNICEF, and many other important organizations operate as if The Hague made no change to CRC law on subsidiarity and treat the CRC provisions as the governing law. Thus, for example, the CRC *Implementation Handbook* states that intercountry adoption's alleged last-resort status under the CRC “is confirmed in the 1993 Hague Convention, which establishes the ‘subsidiarity principle’ that an intercountry adoption should only take place ‘after possibilities for placement of the child within the State of origin have been given due consideration’” (Hodgkin and Newell 2002, 299).

U.S. ratification of the CRC without any reservation specific to international adoption would likely have a powerful negative impact on U.S. policy related to such adoption and thus on children. The United States plays an important role in terms of other countries' policies related to international adoption. Over the decades, the United States has regularly received by far the largest number of children adopted internationally, roughly half the world's total. The United States has always demonstrated concern with its reputation as a receiving country; it does not want to get into trouble because it is perceived to be complicit in wrongfully taking children. Accordingly, the United States has always been ready to close down programs where there is evidence that adoption law has been violated and to demand more restrictive policies. CRC ratification without any reservation would put pressure on the United States to act even more restrictively.

CRC ratification would also risk negatively affecting U.S. policy governing children in this country who are placed in adoption abroad. In recent years, two hundred or more children in our foster care system have been placed annually with adoptive parents in other countries. The recent U.S. ratification of the Hague Convention has already resulted in restricting this placement process in ways that are likely harmful for children. New regulations inspired by The Hague subsidiarity provisions now require that children be held in the United States for two months prior to adoptive placement abroad, so that in-country placement options can be explored (Bartholet 2008, 362). CRC ratification might mean that the United States would close down its international adoption program altogether, since the vast majority of children in state care here are in foster care. And U.S. authorities might well conclude that the minority in small group, or even in large institutional, care are in “suitable care,” and thus under the CRC all should be kept in-country. This would clearly be harmful for the children affected.

Transracial adoption

The CRC would promote damaging restrictions on transracial adoption within the United States because of the Article 20 requirements to give “due regard to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.” This is in conflict with current federal law, since MEPA, as amended in 1996, forbids federally funded agencies from exercising any preference in making foster or adoptive placement based on race, ethnic, or cultural factors. The CRC would support those groups that have been pushing for amendments to MEPA to permit such preferences (Grosz 2006, 218–19). Allowing such preferences would be predictably harmful to black children. As I have discussed extensively elsewhere, such adoption placement preferences delay and deny the adoptive placement that generally best serves children’s interests in permanent, nurturing homes. Even so-called mild preferences, officially making race only one factor in the decision-making process, translate on the ground into powerful preferences that delay and deny placement, which is why MEPA was amended in 1996 to forbid any use of race (Bartholet 2006; 1999, 123–40, 192–93; 1991).

The solution: A reservation regarding international and transracial adoption

The problematic CRC provisions related to international and transracial adoption could and should be addressed with a reservation, making clear that the United States would not be bound by Articles 20 and 21. Reservations are commonly attached to treaties, both by other countries and the United States. They are acceptable under the CRC specifically and international law generally, so long as they are not inconsistent with the overall purposes of the treaty.¹⁰

Such a reservation would be entirely consistent with the overall purposes of the CRC, since the goal would be to enable the United States and other countries to further children’s fundamental interests in growing up in nurturing families,

free from the constraints imposed by CRC Articles 20 and 21. As noted above, a number of court decisions have found that if the CRC subsidiarity provisions prevent institutionalized children from being placed in international adoption, when this is the only available parenting option, they should be found subsidiary to children's fundamental right to family.

Attaching such a reservation would not only solve the major problem with CRC ratification but would also send an important signal to the world that international and transracial adoption serve children's most basic rights and must, therefore, be protected.

However, precisely because it is so important that the United States send this message, it would be seen as politically problematic for it to do so, at least in connection with international adoption. The United States has, as discussed, been reluctant to be perceived as unduly supportive of international adoption. Bringing children from abroad into this country for adoption represents no clear political gain for the United States but instead obvious political risk.

Conclusion

U.S. ratification of the CRC holds enormous potential for children. It would enable the United States to speak more powerfully abroad on behalf of children. It would push the United States to promote children's interests more vigorously within the United States. But one of the ways in which the CRC has, to date, had a major impact on children is in connection with its Article 21 subsidiarity provisions related to international adoption, and that impact has been profoundly negative, denying children the nurturing homes that they will often find only by crossing international lines. Article 20's provisions threaten additional harm by questioning the legitimacy of MEPA's ban on the use of race and ethnicity in foster and adoptive placement within the United States. MEPA should instead provide an example for the world as how best to reshape policy on international adoption, recognizing the fundamental importance of children's rights to be raised in permanent, nurturing homes, regardless of race and ethnicity. Accordingly, any CRC ratification should be accompanied by a reservation providing that Articles 20 and 21 would not be applicable to the United States.

Notes

1. The United States has ratified the two optional protocols to the CRC on children in armed conflict and on the sale of children, child prostitution, and child pornography.

2. The study found strong evidence of an impact on reducing child labor and weaker evidence of increasing childhood immunization for measles, an important indicator of basic health care for children (Simmons 2009, 322–38).

3. CRC Article 4 imposes a duty to implement domestic laws giving effect to the CRC. See UN General Assembly (1989). Article 26 of the Vienna Convention provides that "every treaty in force is binding upon the parties to it and must be performed by them in good faith" (UN 2005).

4. For all references to articles within the CRC, see UN General Assembly (1989).

5. For examples of how the CRC has operated as a powerful influence on judicial interpretation, see UNICEF Innocenti Research Centre (2004, 7, 15) and Bastarache (2000, 144).

6. The UN Committee on the Rights of the Child describes “the key message of the Convention” as being “that children alongside adults are holders of human rights” (UN Committee on the Rights of the Child 2003b, § 21).

7. See, for example, cases such as *Morse v. Frederick* (2009), *Board of Education v. Earls* (2002), *Bellotti v. Baird* (1979), and *Wisconsin v. Yoder* (1972).

8. Suggestion given by Andrew Rehfeld, The Child as a Citizen Authors’ Workshop, American Academy of Arts and Sciences, Cambridge, Massachusetts, November 10, 2009.

9. This tradition has often been cited as a reason that the United States should not ratify the CRC (Nauck 1994).

10. CRC Article 51, § 2 provides that “a reservation incompatible with the object and purpose of the present Convention shall not be permitted.” See also UN (2005), Article 19 (a), (c) (reservations not permitted if prohibited by the treaty or “incompatible with the object and purpose of the treaty”).

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