INTRODUCTION

Ratification by the United States 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 adult interests. As the only country other than Somalia not to have endorsed the CRC,1 the U.S. would make a major statement both externally and internally by finally endorsing.

The U.S. is now limited in its ability to promote children’s rights in other countries by its failure to endorse. Endorsement would enable us to work more effectively with the U.N. Committee on the Rights of the Child (UNCRC) 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.

Endorsement would also mean that the U.S. would accept the CRC as international law for internal purposes. Even if the CRC would not be 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 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 background.

CRC ratification would encourage U.S. action to further restrict international adoption, both of children born abroad and of children born in the U.S. It would risk relegating more unparented children abroad to the harmful conditions characterizing life in institutions and on the streets, and preventing children in foster care here from finding adoptive homes abroad. It would support re-institution of the racial matching policies in the U.S. 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 (MEPA).

I believe that the U.S. 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 CRC ratification might otherwise cause children, and send
a powerful signal both externally and internally that the U.S. truly values children’s rights.

Below I sketch out some specifics related to both the positive and negative potential of CRC ratification. I focus primarily although not exclusively on issues having to do with children’s interests in being raised by nurturing parents, and protected against maltreatment, since this has been the primary focus of my child welfare work, and these interests are among those most central to children’s well being.

There are many conflicting views on how best to advance children’s interests, on whether granting children more legal rights is helpful, and on many of the specific issues I address here. I make no attempt to address these debates, or justify my position, as I have in previous publications. Here I focus instead on the significance of CRC ratification, and my related recommendations regarding ratification, given my position on the importance of expanding protection of children’s rights and interests, particularly in connection with nurturing care.

I. THE LIKELIHOOD THAT CRC RATIFICATION BY THE U.S. WOULD HAVE SIGNIFICANT IMPACT

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.

A. The CRC Would Not 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 implementing it. It has no enforcement system, save for the creation of the UNCRC 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 would depend on the passage of enabling legislation by the federal or state governments.

Given how powerfully various CRC principles differ from current law, the U.S. 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 U.S. 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.

B. The CRC Would Nonetheless Have Significant Impact

1. Impact on Other Countries

CRC ratification would enable the U.S. 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 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; Committee on the Rights of the Child 2003, General Comment No. 5). New legal mandates and agencies generally have some influence in changing policy and practice. 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). ii

CRC ratification would enable the U.S. 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).

2. **Impact on the U.S.**

CRC ratification would likely have an impact on the U.S. just as it has apparently had elsewhere. Even if not self-executing, it would be international law binding upon the U.S., requiring implementing action. iii The UNCRC has issued guidance requiring “a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention . . . ” (Committee on the Rights of the Child 2003, General Comment No. 5, ¶ 18). The U.S. takes such international law obligations more seriously than many nations, which no doubt is one reason for its reluctance to ratify.

The CRC would require the U.S. to submit extensive, detailed reports to the UNCRC, one within two years after ratification, and one every five years thereafter (CRC Art. 44; Committee on the Rights of the Child 2005). The UNCRC can comment on these
reports, provide suggestions and general recommendations (CRC Art. 45), and otherwise apply various kinds of public shaming pressure. Again, the U.S. 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 an opportunity for children’s rights organizations to provide input to the UNCRC, as in many countries NGOs have submitted alternative reports in connection with the official reports. It would provide such organizations information that they could use to push for child-oriented reforms.

CRC ratification together with the reporting process would provide ongoing pressure for the U.S. to take a range of steps toward CRC implementation, including the passage of federal and state legislation implementing aspects of the CRC, the creation or strengthening of the kinds of child ombudsmen that already exist in a number of states, and court adoption of CRC principles through interpretation of federal and state constitutional and legislative provisions and through the development of the common law. 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. So, 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 U.S. were to
ratify the CRC it should have significantly more influence than a treaty ratified only by other countries.

Federal and state legislatures in the U.S. 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 abuse and neglect by their parents 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 courts to interpretations giving higher value to children’s interests and 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 adult rights. This would in turn influence the readiness with which U.S. decisionmakers would look to the CRC for wisdom.
II. THE POSITIVE POTENTIAL FOR CHILDREN IN CRC RATIFICATION BY THE U.S.

A. New Respect for Children as Rights-Bearing Persons of Equal Value with Adults

The CRC gives children equal status with adults as rights-bearing persons. 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 with adults, as in getting 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.

This is still a radical idea, despite the widespread ratification of the CRC. As Philip Alston, a long-time leading expert on human rights, has written:

The concept of children’s rights brings together two of the most important twentieth century developments in the history of ideas. The first is the widespread, if not universal, acceptance of the idea that every individual, solely by virtue of being human, is entitled to enjoy a full range of human rights. The second is recognition of the idea that children should be treated as people in their own right and not as mere appendages of, or chattels belonging to, the adults under whose responsibility they fall. By combining these two ideas it becomes clear that children are entitled to be treated as holders of human rights and that any qualification to the range of rights that they are accorded by society has to be fully justified by reference to other human rights principles rather than to the predilections, prejudices or narrowly conceived self-interest of adults.
[W]e 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, arguing that it serves children’s interests better than would a new emphasis on valuing children’s rights equally, while also promoting other important values. 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 address 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; Bartholet 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 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 adult interests will trump.

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. So 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 U.S. 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. U.S. 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 adult interests have been addressed and given priority consideration. 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 this 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 a 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 adult rights, and subject to control both by parents and the state (Shepard 1990). Moreover, the Court has never expanded such rights concepts to areas where arguably children’s need 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 more children more punitively, shifting 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 U.S. is the only country in the world that now has a substantial number of children serving LWOP sentences. Cases pending before the Supreme Court could result in finding that LWOP sentences are unconstitutional under some or all circumstances. But if LWOP sentences survive in some form, as many think they will, this blatant inconsistency with such a specific CRC provision would put the U.S. in an embarrassing position. The U.S. 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 in the direction of strengthening child 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 level of maturity and their ability to make rational decisions for themselves, and to their best interests when decisions must be made for them.

A case like 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, with a dissenting opinion arguing that some effort should have been made to hear from the children affected as to their own 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 they would need to pursue employment outside the Amish community, and for greater recognition 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 child was beaten by his father into a coma, which left him with serious permanent disability, and 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 in the direction of equating the child’s right to protection with the father’s right to be free from intervention, and recognizing 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 a showing of unfitness by 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 living in foster limbo in cases where proof demonstrated the probability of unfitness. CRC ratification would push in the direction of weighing 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 in the direction of freeing 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’s (ICWA) provisions on removing children and terminating parental rights, as ICWA requires a showing of clear and convincing evidence for the former, and a showing 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. 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 their foster parents. The CRC would push in the direction of recognizing child 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 unconstitutional a state statute designed to provide for visitation based on children’s best interests, which was interpreted by the state trial court to give grandparents a right to visitation. The Court found that this violated parents’ rights to decide all parenting matters, including
visitation with non-parents, 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 like 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 actual child best interests would be taken more seriously.

B. New Respect for Specific Types of Rights Incorporated in the CRC: Participation, Provision, and Protection

The CRC has three concepts of rights that have radical potential for the U.S., 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.

1. Participation

Article 12 of the CRC provides: “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 UNCRC Implementation Handbook:

The Committee 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.

Thus, 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. One case illustrating the limited power courts have to recognize child interests when they conflict with parental choice is *Guardianship of Phillip Becker* (1981). Phillip was a Down’s Syndrome child whose parents 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 Philip 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 Philip 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. So, for example, children have no right to challenge state decisions to keep them in foster care, rather than terminating parental rights so 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 1993). The CRC would push for recognizing children in such a case 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 to decide what actually serves their best interests as their parents or the state. 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 which 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 like 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. Some might include children in the selection process for a child ombudsman, as has occurred in other countries. 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 Philip B court called “substituted judgment,” putting themselves in the place of the child to make the decision 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.

2. 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 pre-natal and post-natal 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 U.S. generally provides better for children in these respects than many of the poor countries of the world. But the U.S. 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 U.S. is famous for its negative rights tradition, emphasizing the individual autonomy right to be free from undue intervention by the state. While this tradition would make the U.S. resistant to the most radical implications of the CRC Provision mandates, these mandates would likely nonetheless have interesting positive potential.

The CRC reporting system would require the U.S. to report on its success or failure in affirmatively providing for children under the CRC Provision mandates. This obligation to report, and the ability of the UNCRC to question and comment on our reports, would highlight for the world U.S. failures exemplified by high child mortality rates, high child poverty rates, and related limits in health care for children and mothers, failures 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” which 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 children who are older 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 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 child constitutional rights to nurturing relationships. This would contrast with the current federal and state rule which 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 in Part 1.B.2 above, constitutional law is malleable, given that parental rights have been created out of vague due process language in federal and state constitutions, language which could equally be interpreted to provide children with comparable rights. One state court judge has already found that children have constitutional rights to nurturing parental
relationships, in a case finding unconstitutional Florida’s ban on adoption by homosexuals, which prevented foster children from being adopted by their gay foster parents (In re Gill 2008). 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 (2000).

3. 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 in Part II.B.2. This stands in significant but not total contrast to current U.S. law. The legislative law of all 50 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 makes 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 makes 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 shape the entire child protective system, while simultaneously reflecting the values of that system. State and federal law 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 in the direction of radical change in this area. The federal Congress and state legislatures would be obligated to consider the CRC as they engaged 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 be a profound positive 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).

III. THE NEGATIVE POTENTIAL FOR CHILDREN IN CRC RATIFICATION BY THE U.S.: INTERNATIONAL AND TRANSRACIAL ADOPTION

A. The Risk of Harm

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 U.S. roughly half a million children are in foster care. Adoption provides what for many of these children will be the best opportunity for the nurturing parenting they need to thrive. And international and transracial adoption have been proven to work extraordinarily well for children. Children placed in early infancy do essentially as well as children growing up in non-problematic 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 measured by social scientists. 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 find the nurturing parenting 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 their racial groups of origin, that racial minority groups and nations are entitled to hold onto their children. Many argue also that international adoption is subject to abuses like child trafficking that require restrictive regulation. I have addressed the contending claims at length in prior publications. I conclude 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 institutions as we do when we restrict adoption opportunities. (Bartholet 2010; Bartholet 2008; Bartholet 2007; Bartholet 2006; Bartholet 1991).

1. **International Adoption**

The CRC provisions related to international adoption limit it to very last resort status as an option for children. The CRC mandates a preference for in-country foster care over out-of-country adoption. It mandates a preference for other “suitable” in-country care, which some interpret to include institutional care. 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 anti-child. International adoption generally serves the interests of the unparented children of the world. There are not enough 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 like 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 — hidden, incarcerated and silenced — 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 state 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 giving States Parties freedom to ban international adoption altogether and promoting in-country options 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 making children’s rights to a nurturing family central, protecting children against the harms characteristic of institutional care, and making children’s best interests primary, and indeed “paramount” in 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 language.

The CRC has generally been interpreted by the UNCRC, UNICEF and others in ways that severely limit international adoption, often even more than the language demands (Bartholet 2008, 378–79; Dillon 2009, 479). UNCRC 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). A 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 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 UNCRC 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.” It sums up by saying that “intercountry adoption is clearly viewed as a solution of last resort,” and that:

States are thus under an obligation to take active measures to ensure that all possible efforts have been made to provide suitable care for the child in his or her country of origin. This “last resort” provision is consonant with article 20(3) requiring due regard to be paid to “the desirability of continuity in a child’s upbringing and to the child’s ethnic religious, cultural and linguistic background,” with article 7, upholding the child’s rights to know and be cared for by parents, and with article 8, the child’s right to preserve identity. (Hodgkin and Newell 2002, 299).

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 in 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 adoption (Bartholet 2010).

UNICEF and the UNCRC put out reports indicating that international adoption should not function even as a last resort. Thus reports addressing the desperate crisis faced by unparented children in various 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 (Committee on the Rights of the Child 2003, General Comment No. 3; 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 (United Nations 2009).

The UNICEF Innocenti Research Centre credits the CRC as having had significant impact in encouraging countries to further restrict international adoption, or to shut it down entirely (UNICEF Innocenti Research Centre 2004). As an example it cites Paraguay’s shutting down its once extensive international adoption program with a 1995 moratorium, and the new legislation giving priority to domestic adoption in 1997, which allegedly has succeeded in eliminating any international adoption since (UNICEF Innocenti Research Centre 2004, 111). It describes Sri Lanka and Viet Nam 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 UNCRC on various country reports demonstrate regular concern with countries that have not done enough to implement the subsidiarity provisions so as to sufficiently limit international adoption and prioritize in-country options (Committee on the Rights of the Child 1993–1998).

The CRC has also been used to undermine the advance made by the later Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (1993), which contained subsidiarity language more favorable to 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 is subsequent in time to the CRC, and far more specifically addressed to international adoption, it should under standard rules of treaty interpretation be accepted as the guiding law to the degree there is a conflict.

However, the UNCRC, 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 prepared for UNICEF 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).

Ratification by the U.S. 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 both externally and internally, and thus on children. The U.S. plays an important role in terms of other countries’ policies related to international adoption. It is the country that over the decades has regularly received by far the largest number of children adopted internationally, roughly half the world’s total. It has always demonstrated concern with its reputation as a receiving country, with a view toward not getting into trouble by looking as if it was complicit in wrongfully taking children. Accordingly, it 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 U.S. to act even more restrictively.

CRC ratification would also negatively affect U.S. policy governing children in this country 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 on Intercountry Adoption has already resulted in restricting this placement process in ways that are likely harmful for children overall. New regulations inspired by the Hague subsidiarity provisions now require that children be held in the U.S. for two months prior to adoptive placement abroad, so that in-country placement options can be explored (Bartholet 2008, 362 n. 54). CRC ratification might mean that the U.S. 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 in preference to placement abroad. This would be clearly harmful for the children affected.

2. Transracial Adoption

The CRC would promote damaging restrictions on transracial adoption within the U.S. because of the Article 20 requirements quoted above in Section IIIA1, requiring “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 the Multiethnic Placement Act (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). And this 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; Bartholet 1999, 123–40, 192–93; Bartholet 1991).

B. The Solution: A Reservation Regarding International and Transracial Adoption
The problematic CRC provisions related to international adoption and transracial adoption could and should be addressed with a Reservation, making clear that the U.S. would not be bound by Articles 20 and 21. Reservations are commonly attached to treaties both by other countries and the U.S. They are acceptable under the CRC and international law generally so long as they are not inconsistent with the overall purposes of the treaty.\(^{ix}\)

This Reservation would be entirely consistent with the overall purposes of the CRC, since the goal would be to enable the U.S. 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 in Part III.A, 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 U.S. send this message, it would be seen as politically problematic for it to do so, at least in connection with international adoption. The U.S. has, as discussed, been reluctant to look supportive of international adoption. There is no clear political gain for the U.S. in bringing more children into this country from abroad, and there is obvious political risk.

CONCLUSION
Ratification of the CRC by the U.S. holds enormous potential for children. It would enable the U.S. to speak more powerfully abroad on behalf of children. It would push the U.S. to promote children’s interests more vigorously within the U.S. 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 often they will often find only by crossing national lines. The CRC Article 20 provisions would threaten additional harm by questioning the legitimacy of the Multiethnic Placement Act’s ban on the use of race and ethnicity in foster and adoptive placement within the U.S. MEPA should instead provide an example for the world as to how to best reshape policy on international adoption, recognizing as it does the fundamental importance of children’s rights to be raised in a permanent nurturing home, regardless of race and ethnicity. Accordingly, any CRC Ratification should be accompanied by a Reservation making clear that Articles 20 and 21 would not be applicable.
REFERENCES


Committee on the Rights of the Child. General Comment No. 5. HIV/AIDS and the Rights of the Child.


Morse v. Frederick. 2009. 551 U.S. 393.


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1 The U.S. 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 impact in 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 Convention. Article 26 of the Vienna Convention provides: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith” (Vienna Convention on the Law of Treaties 1969).

4 For examples of how the CRC has operated as a powerful influence on judicial interpretation, see UNICEF 2004, 7, 15; Bastarache 2000, 144.

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

6 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 This tradition has often been cited as a reason the U.S. should not ratify the CRC (Nauck 1994).

9 CRC Article 51, ¶ 2 provides: “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.” See also Vienna Convention Article 19 (a), (c) (reservations not permitted if prohibited by the treaty or “incompatible with the object and purpose of the treaty”).