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Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, the Constitution and the Family

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IMPLICATIONS OF THE UNITED STATES RATIFICATION OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: CIVIL RIGHTS, THE CONSTITUTION AND THE FAMILY

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I. INTRODUCTION

On November 20, 1989, the United Nations General Assembly unanimously adopted the Convention on the Rights of the Child.¹ The UNCRC entered into force on September 2, 1990, after having been ratified by the required number of nations.² Today more than 140 nations have signed and/or ratified the Convention.³ Such rapid and widespread accession to this human rights document is strong evidence of the world-wide concern for children. No one can listen to the increasing reports of child abuse or the killing or disabling of children as a result of war, or the suffering caused by disease and hunger without agreeing that children need protection. The issue is *not* whether children need assistance.⁴ The issues instead are what form that assistance should take, who will provide that help and against whom must this protection be afforded.

To date, the United States of America is one of only a few nations that has neither signed nor ratified the Convention.⁵ Amid abundant writing in favor of ratification of the UNCRC, this note stands as a voice of caution. The purpose of this writing is to examine the legal implications of incorporating the UNCRC into the body of law in this country. While the Convention is certainly aspirational, and the United States should indeed seek to improve the condition of its children in many of the areas delineated, nonetheless, in the legal arena of this country, a ratified UNCRC may lead to extremes which are destructive of the family and thus detrimental to the children we seek to protect.

¹Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. doc A/44/736 (1989), 28 I.L.M. 1448 (1989) [hereinafter Convention or UNCRC]. The Convention on the Rights of the Child is an outgrowth of the 1959 Declaration of the Rights of the Child. See Cynthia Price Cohen, *Introductory Note, United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448, 1448 (1989). In honor of the Declaration's twentieth anniversary, 1989 was declared the "International Year of the Child" and a proposal, initiated by Poland, pushed for a more legally binding covenant which became the Convention on the Rights of the Child. *Id.* For a more comprehensive discussion of the history of the UNCRC, see Cynthia Price Cohen, *The Human Rights of Children*, 12 CAP. U. L. REV. 369 (1983).

²CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW iii (Cynthia Price Cohen & Howard A. Davidson eds., 1990).

³*State Parties to the Convention on the Rights of the Child and Status of the Submission of Reports Under Article 44 of the Convention*, U.N. Committee on the Rights of the Child, 4th Sess., at 1-7, U.N. Doc. CRC/C/18 (1993) [hereinafter *Status of Reports*]. As of July 15, 1993, 144 countries had either acceded to or ratified the Convention. *Id.*

⁴While it is true that "[n]ot every family is intact, nor does every family flourish . . . [still] the state should have a bias towards the family and family authority, and towards the right of every child to flourish within the family unit." James P. Lucier, *Unconventional Rights: Children and the United Nations*, FAMILY POLICY, Aug. 1992, at 15.

⁵The United States, Iran, Iraq, and Somalia are among the remaining countries that have neither signed nor ratified. *Status of Reports*, *supra* note 3, at 4,7.

This note begins with an examination of why the UNCRC has yet to be ratified in this country. The perspective of children's rights advocates is discussed. A comparison of Romano-Germanic and common law is presented to facilitate an understanding of the major differences that affect the way the UNCRC is viewed under the two systems. The effect of a treaty, self-executing or not, in United States' courts is examined. Civil Rights Articles 13, 14, 15 and 16 in the Convention are linguistically analyzed and the United States law applicable to each Article is reviewed for its compatibility with the UNCRC. This note concludes with suggestions for two reservations⁶ to protect against extreme interpretations detrimental not only to the well-being of the family but also the child.

II. U. S. HISTORICAL RELUCTANCE TO RATIFY THE UNCRC

To some commentators the failure of the United States to join in ratification of the UNCRC is an embarrassment.⁷ Indeed, the fact that the United States has failed to ratify key human rights treaties⁸ is a source of mortification to many. There are several reasons suggested for why President George Bush failed to send the UNCRC to the Senate for advice and consent. Among the reasons cited are the lack of protection for the fetus⁹ and the prohibition against

⁶A reservation is defined as a "formal declaration by a [State Party] when signing, ratifying, or adhering to a treaty, which modifies or limits the substantive effect of one or more of the treaty provisions as between the reserving [State Party] and other [State Parties] party to the treaty. . . ." MARJORIE WHITEMAN, 14 DIGEST OF INTERNATIONAL LAW § 17, at 137-38 (1970).

⁷The failure of the Bush administration to sign the Convention on the Rights of the Child has been described as "glaring" by Senator Christopher Dodd. Paul Taylor, *Senators Press Bush to Sign U.N. Children's Rights Treaty*, WASHINGTON POST, Apr. 19, 1991, at A21. Republican Senators Robert Dole, Richard Lugar and Mark Hatfield, in a letter to President George Bush, expressed "'concern' that the United States is among a small group of non-signers that includes Iran, Iraq, Libya, Ethiopia and South Africa." *Id.*

⁸"The only multilateral human rights treaties to which the United States is a party, other than the United Nations Charter, are three conventions on slavery, the Protocol Relating to the Status of Refugees, and the Convention on the Political Rights of Women." Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L.J. 291, 296-97 (1983).

⁹Article 1 states that "[f]or the purposes of the present Convention, a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier." UNCRC, *supra* note 1, art. 1, 28 I.L.M. at 1459. As might be expected, the rights of an unborn child were hot issues during the drafting of the Convention. Cohen, *Introductory Note*, *supra* note 1, at 1450. The language was carefully constructed so that State Parties could attach their own meaning to the wording "human being". *Id.* But, reflecting the intense controversy surrounding this issue, a paragraph was added to the Preamble as a compromise which states that the child needs special safeguards before as well as after birth. *Id.* (referring to UNCRC, *supra* note 1, Preamble, 28 I.L.M. at 1458).

the death penalty for those under eighteen years of age.¹⁰ While these issues are undoubtedly important, a State Department legal advisor suggests a more basic reasoning:

[T]he administration's main reservations center on states' rights issues and a constitutional question of whether basic human rights in this country can be guaranteed by an international treaty.

"In our constitutional form of government, we view basic rights as limitations on the power of government to do things to the individual rather than requirements that the government do things for people," said the official, who asked not to be identified.¹¹

This reasoning seems to explain, not only former President Bush's reticence in regards to the UNCRC, but also this country's stance towards human rights treaties in general.

Senator Bill Bradley stated his opinion that, "The haggling over the peripheral legalisms really stems from a fear that the convention will oblige the US to actually live up to its goals."¹² The nucleus of the problem, however, may be the conceptual differences that exist regarding what a "right" entails and how that concept operates in the judicial arena in this country as opposed to nations utilizing the Romano-Germanic system of law.

III. A COMPARISON OF ROMANO-GERMANIC AND COMMON LAW

Every Article of the Convention on the Rights of the Child contains obligatory language that, to a common-law jurist, seems vague and over broad.¹³ In an interrelated world it is only natural that problems of this sort should arise when a multi-lateral treaty is drafted. There are at least two systems of law functioning here. The differences between these systems must be understood when considering the implications of the UNCRC. The obligatory language of the UNCRC shows the strong influence of the Romano-

¹⁰*Ask the Globe*, BOSTON GLOBE, July 7, 1992, § 3, at 22.

¹¹Taylor, *supra* note 7.

¹²Bill Bradley, *Why is the US Ignoring the World's Children?*, CHRISTIAN SCIENCE MONITOR, Feb. 4, 1992, at 18. While this note focuses on the civil rights provisions of the UNCRC, there are a variety of social and economic provisions incorporated into the UNCRC which might well obligate the United States to dramatically shift federal and state budgetary allocations in order to be in compliance with the UNCRC. For example, the Convention addressing the need for day-care facilities, obligates State Parties to "ensure the development of institutions, facilities and services for the care of children." UNCRC, *supra* note 1, art. 18, § 2, 28 I.L.M. at 1463. Additionally, the Convention states that "States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services." *Id.* art. 24, § 1, 28 I.L.M. at 1465.

¹³Lucier, *supra* note 4, at 7.

Germanic family of law.¹⁴ Originating in the great universities of Europe, the law was formed by scholars seeking to answer the question: what is justice?¹⁵ They sought the ideal answer; law became not a set of cumulative, practical decisions, but a lofty aspiration.¹⁶ This family conceives of law as broad principles of conduct tied intrinsically to concepts of justice and morality.¹⁷ Continually formulated by legal scholars who are focused on the principle rather than actual administration, the law is a living doctrine extracted by scholars from judicial and extra-judicial practices.¹⁸ This process of extraction and consideration leads to the articulation of a rule general enough to provide a framework for future concrete cases.¹⁹ The judge, thus, does not formulate legal rules as do judges in the common law;²⁰ nor are they required to follow precedent.²¹ The judge applies the general principles to the situation at hand in order to arrive at a just result.²²

Furthermore, the law has developed primarily as a system of *private* law; that is the regulation of the private relationships between individuals.²³ Public law, less developed, is the relationship between those who govern and those who are governed.²⁴ Romano-Germanic tradition separates the two in the belief that

¹⁴*Id.*

¹⁵*Id.* at 8.

¹⁶*Id.* at 9. The use of the phrase "best interests of the child" in Article 3 of the Convention is an example of the way that the Romano-Germanic law has found its way into, not only the UNCRC, but United States' common law as well. The wide-spread use of the concept, without any precise legal definition suggests that this is an aspirational guide to be applied to the specific dilemmas in the Romano-Germanic tradition. See *infra* note 94.

¹⁷RENE DAVID & JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 22 (3d ed. 1985). Romano-Germanic jurists do not comprehend a separation between law and equity as does the common law. The law, separate from equity, was not considered law. *Id.* at 45-46. The law of obligations, is a central part of Romano-Germanic law; an obligation being "the duty of one person . . . to do or not to do something to the benefit of another person. . . ." *Id.* at 86.

¹⁸*Id.* at 22, 95. In a similar manner the Convention provides for the use of organizations such as UNICEF to aid in implementing the treaty. UNCRC, *supra* note 1, art. 45, § (a), 28 I.L.M. at 1474. From these organizations, the Committee will receive information which will be used to help interpret and clarify the text of the Convention while assisting States Parties towards compliance. *Id.*

¹⁹DAVID & BRIERLEY, *supra* note 17, at 95.

²⁰*Id.*

²¹*Id.*

²²*Id.* at 125.

²³ *Id.* at 22.

²⁴ DAVID & BRIERLEY, *supra* note 17, at 81.

"the public interest and the interest of private individuals cannot be weighed in the same balance."²⁵

It should be apparent from this discussion that United States' common law approaches the aspiration of justice from the opposite end of the spectrum. Law is not the lofty aspiration, but the nitty-gritty means utilized in moving towards the just end. It is made up of countless decisions, building one upon the other as precedent. The "law" is also derived from the Constitution or legislative provisions in accordance with the Constitution. All three sources—Constitution, legislation, and judicial decision—comprise the "law of the land". Thus, the common law is much less abstract than Romano-Germanic law.²⁶ In the United States the judge determines the "law" in a civil case, and future cases, to the extent that the facts are sufficiently similar, are expected to apply the same rule of law (provided of course that the rule of law comports with the Constitution).

These different concepts of "Law" produce different expectations among the citizenry:

The common law citizen believes that a man's home is his castle, within which he is secure from state intervention; the civil law [Romano-Germanic] citizen concedes to the state the duty to organize a just society. For the one, justice is the prevention of state oppression; for the other, justice is the orderly distribution of social benefits, both material and intangible.²⁷

Law: the aspiration of justice—law: the uniform rule and procedure aimed at justice; justice: prevention of state oppression—justice: distribution of material and intangible social benefits; it is because of these profound differences that care must be exercised when a common law country considers implementing a treaty or convention whose provisions derive from Romano-Germanic tradition.

IV. AN ADVOCATE'S VIEW OF CHILDREN'S RIGHTS

To understand the possible implications of ratification of the UNCRC, it is important to look at the children's rights movement. While no one advocates anything but that which they conceive to be best for our children, there are two diametrically opposed viewpoints as to how that "best" should be achieved. "The difference has to do with control and where it ultimately resides—with the child or with the parent."²⁸

²⁵*Id.*

²⁶*Id.* at 24.

²⁷Lucier, *supra* note 4, at 7.

²⁸HOWARD COHEN, EQUAL RIGHTS FOR CHILDREN 20-21 (1980).

Dr. James P. Lucier, former minority staff director for the United States Foreign Relations Committee, capsulized the viewpoint of those who advocate family/parental rights:

The family, too, has rights, and these rights may be asserted against the state on behalf of the child. The child has the right to be nurtured in the intimate existence of the family, and the family has the right to do the nurturing. . . . Despite the deficiencies that may be found in all human endeavors, society and tradition have uniformly held that the enjoyment of family rights with the maximum of non-interference by the state is essential to the well-being of the people.²⁹

In contrast, Richard Farson, a noted children's rights advocate, "makes self-determination the basic right: 'Children should have the right to decide matters that effect them most directly.' Whatever is needed to make this possible—to reduce the control that adults have over the lives of children . . . would [be] specif[ied] as a child's right."³⁰ To be fair, Howard Cohen does identify Farson's Child's Bill of Rights as "radical proposals", but he states that they are the radical proposals of a "hopeless idealist".³¹

Given these statements, it is not too difficult to foresee that children would seek outside support to enforce their UNCRC "rights", not only against a government that infringed upon them, but against parents who seek to exert parental authority over the decisions and actions of their minor children. And, of course, that is precisely what some enthusiasts would advocate. Child's rights activists seek nothing less than the restructuring of "existing social

²⁹Lucier, *supra* note 4, at 11.

³⁰COHEN, *supra* note 28, at 13. Mr. Farson's list of nine "rights" advocates among other things that, "[C]hildren should be able to choose from among a variety of [alternate home environments such as] residences operated by children, child-exchange programs, twenty-four hour child-care centers, and various kinds of schools and employment opportunities." *Id.* The list also includes a child's "right to all information ordinarily available to adults—including, and perhaps especially, information that makes adults uncomfortable . . . [and the freedom] to design their own education, choosing from among many options, the kinds of learning experiences they want, including the option not to attend any kind of school." *Id.* (quoting Richard Farson, *A Child's Bill of Rights*, in *THE CHILDREN'S RIGHTS MOVEMENT* 325-28 (Beatrice and Ronald Gross, eds. 1977)).

³¹*Id.* at 14. Cohen's definition of a right is more general:

[It is] the situation in which I am entitled to do or have something. My action is not dependent upon the discretion of others. It has been decided in advance—by law or through custom—that I may engage in certain activities or have certain things without regard for the wishes, desires, or approval of others. I need not ask anyone in order to do what I am entitled to do; nor are their objections to my doing it relevant.

Id. at 19. When one has a right, that entitlement has a status that means "one may appeal to others for support if one's rights are being denied. In effect the child may call upon an outsider . . . or even the law—to enforce a right." *Id.* at 22.

relationships so that children will be treated in new and more satisfactory ways."³²

Perhaps there are some who think that child-rights activists can not possibly mean really young children, children who lack the capacity necessary to wisely exercise any given right. But in fact all children from birth to age eighteen would be "liberated" utilizing a plan of children's agents who would enable the child to exercise his/her rights.³³ The agent's role is conceived as being advisory:

[Their role] would be to supply information in terms which the child could understand, to make the consequences of the various courses of action a child might take clear to the child, and to do what is necessary to see that the right in question is actually exercised.³⁴

To most people, this would appear to be the role that parent's are and should be accorded. But, because of what advocates see as possible conflicts of interest between the parent and child, this agent, in most cases, would not be the parent.³⁵

Should the UNCRC be ratified in this country, and thereby become part of the supreme law of the land, it will undoubtedly be used in an effort to enact and judicially interpret legislation in accordance with the views of children's rights advocates.

V. INTERNATIONAL LAW IN U. S. COURTS

A. Generally

The United States Constitution states that a properly ratified treaty shall be a part of "the supreme Law of the Land."³⁶ *Kinsella v. United States ex rel. Singleton*,³⁷ stands for the proposition that a treaty is secondary to the provi-

³²*Id.* at 36.

³³*Id.* at 59-60.

³⁴COHEN, *supra* note 28, at 60.

³⁵*Id.* at 79.

³⁶U. S. CONST. art. VI, § 2. Article VI states in full:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. A strict reading of this Article would give the impression that the Constitution, congressional legislation and treaties are on a par with each other. What has emerged however, is that the Constitution is the supreme Law of the Land; congressional legislation is open to judicial review for its constitutionality. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 173-74 (1803).

³⁷361 U. S. 234 (1960).

sions of the United States Constitution.³⁸ When a treaty provision is in opposition to a federal statute, whichever is the most recent prevails.³⁹ A treaty will always control over state law.⁴⁰ In general, courts are to construe treaties "in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."⁴¹

This seems very straight forward. When considered in light of human rights treaties and the Convention on the Rights of the Child in particular however, a problem arises. If the civil rights provisions of the UNCRC are construed broadly and in light of the Romano-Germanic influence, it must be said that many children's civil rights are enforceable against individuals, notably parents, as well as the state. The United States would thus be placed in the position of either enforcing or legislating protection which is beyond the scope permitted by either explicit or interpreted stipulations of the Constitution.⁴² To

³⁸*Id.* at 249 (holding that a valid international agreement which gave a military court the right to court-martial a civilian dependent could not be enforced against a civilian because of her overriding constitutional right to a trial). Exactly what is meant by "constitutional provisions" is somewhat unclear. *Kinsella* dealt with a conflict between an explicit constitutional provision and an international agreement. This may be taken to mean that only explicit constitutional stipulations take precedence over treaties.

³⁹*Reid v. Covert*, 354 U. S. 1, 18 n.34 (1957) (citing *Whitney v. Robertson*, 124 U. S. 190, 194 (1888)).

⁴⁰*Zschemig v. Miller*, 389 U. S. 429, 440-41 (1968). Of particular interest in this regard is Article 37 of the UNCRC which states, "Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age." UNCRC, *supra* note 1, art. 37, § (a), 28 I.L.M. at 1470. The United States Supreme Court has upheld, as constitutional, state death-penalty statutes affecting persons over the age of sixteen when the crime was committed. *Stanford v. Kentucky*, 492 U. S. 361 (1989). Under the Convention, as written, such statutes would fail.

⁴¹*Asakura v. City of Seattle*, 265 U. S. 332, 342 (1924).

⁴²This note does not even consider the ramifications of federalism which has been suggested as a major impediment to ratification of human rights treaties in general. Lawrence L. Stentzel, II, *Federal-State Implications of the Convention*, in *CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW* 57 (Cynthia Price Cohen & Howard A. Davidson eds., 1990). In a 1920 decision, *Missouri v. Holland*, the Supreme Court stated that whatever is within the treaty power of the United States is not reserved to the States by the Tenth Amendment. 252 U. S. 416, 424 (1920). "Matters customarily regulated by state law domestically are nevertheless subject to the treaty power of the President and the Senate so far as international agreements are concerned." Stentzel, *supra* at 61-62. Under the Necessary and Proper Clause of the Constitution, legislation which is necessary to effectuate treaty provisions is a function of the federal government regardless of whether the action was once reserved to the state. *Missouri*, 252 U. S. at 432. This would seem to make a federal-state reservation unnecessary, at least if you were so inclined to further erode reserved states rights. That Congress is not ready to permit this erosion is evidenced by the expectation that it will attach a federal-state reservation to the Convention should it be asked for advice and consent. Stentzel, *supra* at 57; see also Elizabeth M. Calciano,

overcome this potential problem, a specific reservation, attached at time of ratification, may be required.

B. The Doctrine of Self-Executing Treaties

International treaties to which the United States is a party are subject to the doctrine of self-executing treaties.⁴³ A clause that is considered self-executing enables individuals to challenge a violation of those provisions in federal or state courts.⁴⁴ In general, a clause is determined to be self-executing if, by the wording and intent of the drafters, the clause requires no implementing legislative action to bring it into force.⁴⁵ For example: Article 13 of the UNCRC states, "The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds. . . ."⁴⁶ The wording is clear. The child is to be accorded these rights without any action required on the part of the State Party. In contrast, Article 19 states, "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse"⁴⁷ The Convention's various Articles having to do with children's economic rights can also be interpreted as non-self-executing.⁴⁸

Note, *United Nations Convention on the Rights of the Child: Will It Help Children in the United States?*, 15 HASTINGS INT'L & COMP. L. REV. 515, 520-21 (1992).

⁴³Foster v. Neilson, 27 U. S. (2 Pet.) 253, 314 (1829).

⁴⁴Burke, *supra* note 8, at 301. In addition to the direct enforcement of a ratified treaty as modified by the self-executing treaty doctrine, courts may use treaties that have not been ratified by the U. S. as enforceable "customary international law". *Id.* at 315-16 (citing *Filartiga v. Peña-Irala*, 630 F.2d 876, 881 (2d Cir. 1980), which held that torture by a public official is a violation of customary international law). Courts may also use treaties in force among other nations to aid in the interpretation of rights or protections under state or federal law. *Id.* at 322-23 (citing *Sterling v. Culp*, 625 P.2d 123, 131 n.21 (Or. 1981), which utilized the United Nations Charter, the Universal Declaration and the ICCPR to define the treatment of prisoners).

⁴⁵*Id.* at 302. One legal scholar has proposed a three-step inquiry for determining when a provision is in fact self-executing.

- a) Whether the rights and duties of individuals are involved; b) whether the United States and other parties retain discretion to determine whether and when to fulfill the obligation to give the words of the treaty domestic effect; and c) whether congressional action is required to fulfill the treaty obligation.

Id. (citing Stefan Riesenfeld, *The Doctrine of Self-Executing Treaties and GATT: A Notable German Judgment*, 65 AM. J. INT'L L. 548, 550 (1971)).

⁴⁶UNCRC, *supra* note 1, art. 13, § 1, 28 I.L.M. at 1462.

⁴⁷*Id.* art. 19, § 1, 28 I.L.M. at 1463.

⁴⁸Wording such as "States Parties shall strive to ensure . . ." indicates that legislative action is expected, the key word being strive. The need for legislative action is also clear when a Party's duty is defined by such language as "to take appropriate measures".

In all likelihood, the United States, if it chooses to ratify the UNCRC, will attach a reservation stating that the Convention is, as a whole, non-self-executing.⁴⁹ The attachment of this reservation may have some opposition, not only within the United States, but also from other States Parties. Article 51 section 2 states, "A reservation incompatible with the object and purpose of the present Convention shall not be permitted."⁵⁰ The language of two of the civil rights provisions of the UNCRC clearly indicates an intention that the child be accorded the rights subject only to expressed limitations; to require additional legislation runs counter to the objectives.⁵¹ It has been suggested, however, that the United States will justify a non-self-executing reservation by stating that it merely places the United States on equal footing with other countries that require legislation to implement treaty provisions.⁵²

VI. A GUIDE TO TREATY LANGUAGE

Prior to beginning an analysis of specific treaty provisions, it will be helpful to become acquainted with the hierarchy that exists in treaty obligatory language.⁵³ The highest level of obligation is an absolute statement of right.⁵⁴ Just below this is the positive statement of right which is qualified by limitation clauses.⁵⁵ In descending order of obligation come the obligatory words: ensure (assure), respect and recognize.⁵⁶ When a State Party is to "ensure" a right, the

Calciano, *supra* note 42, at 527. See, e.g., UNCRC *supra* note 1, art. 24, § 1, 28 I.L.M. at 1465; UNCRC, *supra* note 1, art. 27, § 3, 28 I.L.M. at 1467.

⁴⁹Calciano, *supra* note 42, at 529.

⁵⁰UNCRC, *supra* note 1, art. 51, § 2, 28 I.L.M. at 1476.

⁵¹UNCRC, *supra* note 1, art. 13, § 1 and art. 16, § 1, 28 I.L.M. at 1462.

⁵²Calciano, *supra* note 42, at 529 (suggesting that such a reservation would place the United States in the same position as Great Britain).

⁵³This discussion is an overview of the general principles of treaty obligations. A full interpretation of the specific Convention language will be done by the Committee on the Rights of the Child utilizing the "travaux preparatoire" (literally preparatory works; similar to a legislative history) as a guide of the framers intent. Cynthia Price Cohen, *A Guide to Linguistic Interpretation of the Convention on the Rights of the Child* [hereinafter *Linguistic Interpretation*], in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 33-34 (Cynthia Price Cohen & Howard A. Davidson eds., 1990). In addition, the Committee will be able to consider developing theories of child development and individual rights when attempting to interpret the text of the Convention. *Id.* at 49. The Committee may also utilize the input from non-governmental organizations who have been accorded a role in implementing the UNCRC. *Id.* For a more detailed analysis of the language of the Convention, see generally Cynthia Price Cohen, *Elasticity of Obligation and the Drafting of the Convention on the Rights of the Child*, 3 CONN. J. INT'L L. 71 (1987).

⁵⁴Cohen, *Linguistic Interpretation*, *supra* note 53, at 35.

⁵⁵*Id.* at 38.

⁵⁶*Id.* at 35.

government is required "to take positive measures, legislative and otherwise, to make sure that the right can be effectively exercised."⁵⁷ At the other end of the scale, when a State Party is to "recognize" a right, it is obligated to merely "refrain from obstructing exercise of the protected right."⁵⁸ "Respect" finds its place somewhere between the two meanings.⁵⁹ The word "shall", attached to any of the aforementioned obligatory words, raises the basic level of obligation while the word "undertakes", when coupled with an obligation, lessens that burden somewhat.⁶⁰ It is important to keep this hierarchy in mind when trying to determine which right will take precedence over another when the treaty is interpreted.

VII. PARENTAL AUTHORITY: THE UNCRC AND THE CONSTITUTION

A. Parental Rights and the UNCRC

Article 5 is the primary provision in the Convention for recognition of the parental role in child rearing:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.⁶¹

Furthermore, the UNCRC specifically couples a recognition of parental authority with Article 14: "freedom of thought, conscience and religion."⁶²

This obligation level in this Article is designated as "shall respect".⁶³ All subsequent discussions of children's rights will compare the obligation level of this Article with that of other Articles which accord various civil rights.

B. Parental Rights and the Constitution

The Constitution does not explicitly address parental rights. A "private realm of family life which the state cannot enter,"⁶⁴ has been judicially developed,

⁵⁷*Id.* at 35 (directing the reader to: Buergethal, *To Respect and Ensure: State Obligations and Permissible Derogations*, in *THE INTERNATIONAL BILL OF RIGHTS 77-78* (L. Henkin, ed. 1981)).

⁵⁸*Id.*

⁵⁹Cohen, *Linguistic Interpretation*, *supra* note 53, at 35.

⁶⁰*Id.* at 36.

⁶¹UNCRC, *supra* note 1, art. 5, 28 I.L.M. at 1459-60.

⁶²UNCRC, *supra* note 1, art. 14, § 2, 28 I.L.M. at 1462.

⁶³See discussion *supra* part VI.

however. In *Ginsberg v. New York*⁶⁵ the Court wrote that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society."⁶⁶ This "realm" includes family relationships,⁶⁷ and child rearing and education.⁶⁸

It is also clear, however, that parental authority is not without limitation; the "private realm" is not sacrosanct. The state may utilize either its *parens patriae* power⁶⁹ or its police power⁷⁰ to limit "parental freedom and authority in things affecting the child's welfare [including] to some extent, matters of conscience

⁶⁴*Prince v. Massachusetts*, 321 U. S. 158, 166 (1944). While stating that there is a private realm which the state cannot enter, the Court nonetheless decided that where the state acted to protect a child's well being, it could restrict the parent's control through child labor laws.

⁶⁵390 U. S. 629 (1968) (upholding the constitutionality of a statute which prohibited the sale of 'obscene' material to persons under the age of seventeen).

⁶⁶*Id.* at 639.

⁶⁷*Prince*, 321 U. S. at 166.

⁶⁸*Pierce v. Society of Sisters*, 268 U. S. 510, 534-35 (1925) (holding that parents could choose to send their children to private schools); *see also* *Wisconsin v. Yoder*, 406 U. S. 205 (1972) (invalidating a statute as against Amish parents which would require the parents to send their children to school through the age of sixteen); *Meyer v. Nebraska*, 262 U. S. 390, 400 (1923) (in the context of whether a state could forbid the teaching of modern foreign language, the Court stated that, "[c]orresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life").

⁶⁹*Parens patriae* is defined as:

[L]iterally "parent of the country," [it] refers traditionally to [the] role of state as sovereign and guardian of persons under legal disability, such as juveniles or the insane . . . It is the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). The United States Third Circuit Court of Appeals has stated:

[P]arents have a substantial constitutional right, as head of the family unit, to direct and control the upbringing and development of their minor children. If the parental decisions amount to abuse or neglect of the minor child then the parental right is no longer constitutionally protected, and the state, as *parens patriae*, may intervene to protect the child. Absent a showing of abuse or neglect, however, the parental right remains substantial and may be subject to governmental interference only when such interference is support by a significant governmental interest.

Halderman ex rel. Halderman v. Pennhurst State Sch. & Hosp., 707 F.2d 702, 709 (3d Cir. 1983)).

⁷⁰The dictionary defines the "police power" as, "The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals . . ." BLACK'S LAW DICTIONARY 1156 (6th ed. 1990).

and religious conviction."⁷¹ In prior Court decisions this has included, among other things, the state's ability to regulate or prohibit child labor.⁷²

The Convention provides, in all sections discussing parental authority, that the authority is to be exercised "consistent with the evolving capacities of the child."⁷³ Thus, under the UNCRC, the private realm, which the state could not enter except for compelling reasons, would now be open to scrutiny to assure that parents are permitting their children to exercise rights in accordance with the UNCRC.

This weakening of parental authority can be expected to have two serious consequences. First, "parents would be more reluctant to provide for their children the kind of early training that now appears to be necessary for responsible and moral behavior later."⁷⁴ Second, "adolescents would be less likely to take their parents' guidance seriously."⁷⁵ It is reasonable to expect that the child's well-being and his or her ability to effectively participate in society will be adversely affected by these consequences.⁷⁶ A parent is in a much better position than the state, or even an agent appointed for the child, to determine when a particular child is ready to assume new rights and corresponding responsibilities.

VIII. RIGHTS OF CHILDREN: THE CONSTITUTION AND THE UNCRC

A. Children's Rights Under the Constitution

In the same way that the Constitution is silent as to parental authority, so it also is silent as to children.⁷⁷ However, subsequent case law has certainly affected children's interests even when it did not specifically address their rights.⁷⁸

⁷¹*Prince*, 321 U. S. at 167.

⁷²*Id.* at 166 (citing *Sturges & Burn Mfg. Co. v. Beauchamp*, 231 U. S. 320 (1913)).

⁷³See UNCRC, *supra* note 1, arts. 5, 14, 28 I.L.M. at 1460, 1462.

⁷⁴LAURA M. PURDY, *IN THEIR BEST INTEREST?* 214 (1992). Ms. Purdy argues that appropriate parental authority is weakened by "severing the asymmetrical legal ties that now bind parents and children . . ." *Id.*

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1. While the actual reasons for this can not be discerned with complete accuracy, Clark suggests that "it never occurred to the Framers that children, as distinguished from adults, needed constitutional status. The assumption may well have been that common-law parental power and authority over children, reinforced by parental affection and concern, were sufficient to protect the children's interests." *Id.* at 2.

⁷⁸Cases influenced children and their rights both positively and negatively. During the period known as the Industrial Revolution, a congressional attempt to protect children through a child labor law was held to be unconstitutional in *Hammer v. Dagenhart*, 247 U. S. 251 (1918). Additionally, *Brown v. Board of Education*, 349 U. S.

In 1967 the Court took a major step toward recognizing general fundamental rights for children in a case involving a minor's procedural due process rights. The Court, in *In re Gault*, specifically stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."⁷⁹

Gault was followed in 1969 by *Tinker v. Des Moines Independent Community School District*,⁸⁰ which stated explicitly that, "Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."⁸¹

The Court has, however, indicated on several occasions that the constitutional rights of children are not equal to those of adults. The decision in *Prince v. Massachusetts* stated that the "power of the state to control the conduct of children reaches beyond the scope of its authority over adults. . . ."⁸² The reasons for this were discussed in *Bellotti v. Baird*,⁸³ stating, "[C]onstitutional principles [should] be applied with sensitivity and flexibility to the special needs of parents and children."⁸⁴ The Court indicated three reasons why children's constitutional rights should not, at all times, be equal to adults: the vulnerability of children, their inability to make critical decisions in an informed and mature way, and the parent's important role in child rearing.⁸⁵ The Court also has permitted the "special characteristics of the school environment" to act as a limitation on certain First Amendment rights of students.⁸⁶

The rights available to children under the UNCRC are more extensive than those available under our Constitution. Whereas the Constitution permits state interference with rights when appropriate, the concept of parents' constitutionally interfering with their children's rights has not been addressed in the area of basic civil rights.

294 (1955), though not a children's rights case, certainly promised great benefit to children's educational rights. Clark, *supra* note 77, at 3.

⁷⁹387 U. S. 1, 13 (1967). The action involved a juvenile who was arrested, jailed and after two hearings was committed to a state industrial school. In reviewing the procedure under which the child had been prosecuted, the U. S. Supreme Court found that he had been denied a number of procedural due process rights including a right to notice, a right to counsel, including the right to have counsel appointed, and a right to confront and cross-examine witnesses. *Id.* at 33-34, 41, 55.

⁸⁰393 U. S. 503 (1969).

⁸¹*Id.* at 511.

⁸²321 U. S. 158, 170 (1944).

⁸³443 U. S. 622 (1979).

⁸⁴*Id.* at 634.

⁸⁵*Id.*

⁸⁶*Tinker*, 393 U. S. at 506.

B. Children's Rights Under the UNCRC Article 13: Freedom of Expression

Article 13 of the UNCRC states:

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - (a) For respect of the rights or reputations of others; or
 - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.⁸⁷

1. Linguistic Consideration

It is significant to note that the Article does not begin with standard obligatory wording. Rather this Article, begins with the statement, "The child shall have the right to freedom of expression . . ." ⁸⁸ A right stated in this form carries a strong obligation. ⁸⁹ It is, however, not the highest level of obligation because Section 2 of the Article contains certain limitations to the right. ⁹⁰ The exception of section 2(a) is similar to the slander and libel exceptions recognized in this country. ⁹¹ Section 2(b) lists limitations that are meant to afford protection to the state and community. The word "public" means "proceeding from, relating to, or affecting the whole body of people or an entire community." ⁹² Understood in this manner, the limitations circumscribe expression which would affect the whole community. ⁹³ A limitation on

⁸⁷UNCRC, *supra* note 1, art. 13, §§ 1-2, 28 I.L.M. at 1462.

⁸⁸*Id.* art. 13, § 1, 28 I.L.M. 1462.

⁸⁹See discussion *supra* part VI.

⁹⁰Cohen, *Linguistic Interpretation*, *supra* note 53, at 38.

⁹¹Robert E. Shepherd, Jr., *Civil Rights of the Child*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 138 (Cynthia Price Cohen & Howard A. Davidson eds., 1990). Slander and libel are both forms of defamation. BLACK'S LAW DICTIONARY 1388 (6th ed. 1990). Slander involves the speaking of base/defamatory words prejudicial to the reputations of others. *Id.* Libel is the written counterpart. *Id.* The exceptions under Article 13(2)(a) also recognize the need for respect of other's reputations and would limit a child's expressive rights accordingly.

⁹²BLACK'S LAW DICTIONARY 1227 (6th ed. 1990).

⁹³Law in the United States outlines situations when free expression may be circumscribed to protect the public order. In *Brandenburg v. Ohio*, the Court stated that advocacy which "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," may be proscribed. 395 U. S. 444, 447 (1969). *Ordre public* is a french term which stands for "the sense of the proper disposition of all matters affecting the public weal, including the orderly relationships of citizen to citizen

expression for the protection of an individual child's moral development does not seem to be encompassed within the language of this Article.⁹⁴

2. Current U. S. Law—Freedom to Express Oneself

There are two aspects of this article which must be analyzed separately: freedom to express oneself and freedom of access to information. This section deals with the former. *Tinker v. Des Moines Independent Community School District*⁹⁵ is an important case frequently cited when deliberating a child's right to free expression. *Tinker* involved a situation where the wearing of an arm band was prohibited by school officials. Noting the need to balance a student's rights against the recognized rights of school authorities to prescribe and control conduct in the school, the Court stated that "where there is no finding and no showing that engaging in the forbidden conduct would 'materially and sub-

and citizen to state." Lucier, *supra* note 4, at 7. Note the major differences in meaning ascribed to the two concepts. It does not seem accidental that the UNCRC couples the English wording "public order" with the French "ordre public". To the citizen reared under the common law, the State's involvement in the "orderly relationships" of private individuals seems very intrusive.

⁹⁴It is important to state that whether an action is in the child's best interest will always be considered. Article 3, section 1 states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

UNCRC, *supra* note 1, art. 3, § 1, 28 I.L.M. at 1459. Exactly what is encompassed by the "best interests of the child" is not clear. Family advocates will necessarily argue that the child's best interests lie within a strong family structure. Dr. Lucier states, "The overall bias of the courts in interpreting this rule has been to presume that the best interests of the child are determined by the family." Lucier, *supra* note 4, at 3 (citing Michele D. Sullivan, *From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children*, 65 ST. JOHN'S L. REV. 1139 (1991)). The Child Rights advocates will argue that the child is better able to determine his own best interests.

Even with as broad and inconcise as it is, the "best interests" criteria has found its way into numerous court opinions and state and federal statutes. Jane Ellis, *The Best Interests of the Child*, in CHILDREN'S RIGHTS IN AMERICA: U.N. CONVENTION ON THE RIGHTS OF THE CHILD COMPARED WITH UNITED STATES LAW 4 (Cynthia Price Cohen & Howard A. Davidson eds., 1990). "It embodies an aspiration against which policy and doctrine must be measured as the law grapples with specific dilemmas . . ." *Id.* Given that the "best interests of the child" can be argued either way, it is too vague to adequately factor into this discussion.

⁹⁵393 U. S. 503 (1969). Public high school officials, aware of student plans to protest the Vietnam war by wearing black arm bands to school, instituted a policy forbidding students to wear arm bands upon threat of suspension. The wearing of arm bands for the purpose of expressing a viewpoint is a type of symbolic act that is within the First Amendment protection of free speech and is, in fact, closely analogous to 'pure speech' which the Court has repeatedly held to be entitled to comprehensive protection. *Id.* at 505.

stantially interfere with the requirements of appropriate discipline in the operation of the school,' prohibition cannot be sustained."⁹⁶

The holding in *Tinker* is consistent with the UNCRC. A young person's right to express his/her viewpoint, symbolically, is affirmed but is potentially circumscribed by the right of the state, in the entity of school authorities, to protect the public order (*ordre public*): here, school discipline. But, the limitation on freedom of expression to protect the public order as applied in a school setting is more constrained than that which would be permitted an adult in a public setting.⁹⁷

Whereas the language in *Tinker* is expansive, subsequent decisions in *Bethel School District v. Fraser*⁹⁸ and *Hazelwood School District v. Kuhlmeier*⁹⁹ indicate that other forms of student expression are more limited. In *Fraser*, the Court narrowed expressive rights when it permitted sanctions against a student for using graphic sexual innuendo in a nominating speech for a fellow student at a school assembly.¹⁰⁰ The Court stated that a school did not have to tolerate student speech that was inconsistent with the "basic educational mission" of the school.¹⁰¹

The Court in *Kuhlmeier* dealt with the question of whether a student newspaper, published as part of a journalism class, was a public forum protected by First Amendment free speech rights.¹⁰² Analysis of the environment in which the paper was published, the school board's published policy and the curriculum guide for the high school led the Court to conclude that the paper was not a public forum.¹⁰³ According to the Court, educators may exercise greater control over school-sponsored expressive activities. Specifically, as publisher of a student newspaper, a school may prevent speech that: substantially interferes with the school's work; impinges upon the rights of other students; is poorly written, prejudiced, vulgar, profane or unsuitable for immature audiences; or that might be perceived to advocate conduct (such as drug use or sexual behavior) that is not in keeping with "the shared values of a civilized social order."¹⁰⁴

⁹⁶*Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

⁹⁷See *supra* text accompanying note 93.

⁹⁸478 U. S. 675 (1986).

⁹⁹484 U. S. 260 (1988). The school principal prevented the student newspaper from publishing a story about three, anonymous students' experiences with pregnancy with references to sexual activity and birth control as well as a story on the impact of divorce in one student's family which included comments derogatory to a family member. *Id.* at 262.

¹⁰⁰*Bethel*, 478 U. S. at 680.

¹⁰¹*Id.* at 685.

¹⁰²*Kuhlmeier*, 484 U. S. at 267.

¹⁰³*Id.* at 270.

¹⁰⁴*Id.* at 271-72 (quoting *Bethel v. Fraser*, 478 U. S. 675, 683 (1986)).

In so far as *Fraser* and *Kuhlmeier* reflect exceptions to the right of free expression in order to protect the rights and reputations of others or the public order or public morals they are consistent with the UNCRC. It is questionable whether material that is simply poorly written or prejudiced would be excepted. Likewise, alleging that an expression "substantially interferes with the school's work", would not be sufficiently specific to warrant exception by the terms of this Article of the UNCRC.

The free expression of ideas within a family is basic to the mental development of the child. It is in the interchange of ideas between parent and child that the child's belief system is initially formed. However, parents must have the authority to curtail this exchange when it involves expression deemed by the parents to have an adverse effect upon the safety or moral development of the child. As described previously, Article 5,¹⁰⁵ which is often held up as the UNCRC's recognition of parental authority, indicates that State Parties shall respect the parental right to direct and guide their children in the exercise of his/her rights.¹⁰⁶ The more assertive language of Article 13 presumably means that Article 13 would prevail where there is a conflict between the child's desire to freely express herself and the parent's interest in curbing that expression. As expression encompasses much more than mere speech, it is conceivable that a young person wishing to express himself in a demonstrative way would be able to assert his right over a parent's prohibition even where that prohibition was predicated on a concern for the child's safety. When considered in light of the rights advanced by child advocates, the interpretation of the Convention that will be argued in the courts, is that the parent may act as counselor, suggesting the pros and cons and possible consequences, but the final choice would be in the hands of the child.

3. Current U. S. Law—Freedom of Access to Information

Consistent with the spirit of the First Amendment, the State may not limit the "spectrum of available knowledge"; free speech includes "not only the right to utter or to print, but . . . the right to receive . . . and [the] freedom of inquiry."¹⁰⁷ When dealing with children, however, the Court has made it clear that the State may exert greater control over a child's conduct than it could over an adult's.¹⁰⁸

¹⁰⁵UNCRC, *supra* note 1, art. 5, 28 I.L.M. at 1459-60.

¹⁰⁶The word "direct" means, "To point to; guide; order; command; instruct. To advise; suggest; request." BLACK'S LAW DICTIONARY 459 (6th ed. 1990). By this definition, a parent could order or command a child to refrain from detrimental speech.

¹⁰⁷*Griswold v. Connecticut*, 381 U. S. 479, 482 (1965) (citing *Sweezy v. New Hampshire*, 354 U. S. 234, 249-50, 261-63 (1957)). The Court noted that the specific guarantees contained in the Bill of Rights have penumbras which help to give the amendments life and substance and are necessary to make the explicit guarantees meaningful. *Id.* at 483.

¹⁰⁸*Prince v. Massachusetts*, 321 U. S. 158, 170 (1943). In *Ginsberg v. New York*, the Supreme Court noted, "The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose

One of the earliest cases dealing with a child's access to knowledge was *Meyer v. Nebraska*.¹⁰⁹ The case centered on a Nebraska statute which forbade the teaching of a modern foreign language to children who had not passed the eighth grade.¹¹⁰ The Court, taking into consideration the State's alleged interest in fostering a homogeneous people, found that such an attempt materially interfered "with the opportunities of pupils to acquire knowledge. . . ."¹¹¹

In 1968, the Supreme Court reached a decision involving the legality of selling obscene material to children under the age of seventeen.¹¹² The Court rejected appellants argument that it was an unconstitutional deprivation of protected liberty to forbid access to material to those under seventeen when it is available to those over seventeen.¹¹³ Reaching the opinion, the Court stated that the well-being of children is definitely a subject within the constitutional power of a State to regulate.¹¹⁴ Notably, the Court stated that parents, teachers, and others who are responsible for the well-being of children are entitled to the support of laws designed to aid them in the fulfillment of this responsibility.¹¹⁵

A more recent case involved a child's right to receive information through the vehicle of his/her school library.¹¹⁶ Reiterating that the First Amendment encompasses a right to receive information, the Court stated that the school environment was especially appropriate one in which to recognize the First Amendment rights of students.¹¹⁷ Furthermore, the Court restated its opinion in *Barnette*, "that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"¹¹⁸ Thus, the

different rules." 390 U. S. at 639 n.6 (citing Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 938-39 (1963)).

¹⁰⁹262 U. S. 390 (1923).

¹¹⁰*Id.* at 390.

¹¹¹*Id.* at 401. The Court also found that the statute materially interfered with the parents' right to control the education of their children. *Id.*

¹¹²*Ginsberg v. New York*, 390 U. S. 629 (1968).

¹¹³*Id.* at 636-37. The Court again made note that the State may constitutionally restrict distribution of some material to children which is otherwise available to adults. *Id.* at 636 (citing Lockhard & McClure, *Censorship of Obscenity: The Developing Constitutional Standards*, 45 MINN. L. REV. 5 (1960)).

¹¹⁴*Id.* at 639. The Court considered a psychiatrist's report which indicated that during the period of youth behavior patterns and a working sense of self are established and legalized pornography during this period may be damaging to the developing ego. *Id.* at 643 n.10.

¹¹⁵*Id.*

¹¹⁶*Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U. S. 853 (1982).

¹¹⁷*Id.* at 868.

¹¹⁸*Id.* at 870 (citing *West Virginia Bd. of Educ. v. Barnette*, 319 U. S. 624, 642 (1943)).

final determination of whether the school could constitutionally remove books from the library depended upon the school board's motivation for doing so.¹¹⁹

Where the state seeks to restrict a child's freedom of access to information, the Court requires that it demonstrate a special interest. The interest, apparently, does not have to be compelling as would be necessary if an adult's freedom were being restricted. The language of this Article seemingly permits the same type of evaluation; it states that any regulation must be necessary. Aside from libel and slander considerations, the UNCRC, however, would only permit necessary restrictions which are based on the national or public welfare. Under this interpretation, *Meyer v. Nebraska* would be found to be in accordance with the UNCRC. Fostering a homogeneous people is not necessary in the name of national security. Ginsberg's concern for the developmental well-being of the child most likely would be in accordance with the objects of the UNCRC if that concern is couched in terms of protecting public morals.

Pico runs into problems with UNCRC Article 13. The Court suggests that materials which are educationally unsuitable or "pervasively vulgar" may be kept from school library shelves. This seems to run counter to the intent of the Article. The *Pico* Court is in accord, however, when it states that materials may not be restricted based solely upon the ideas advanced.

There are many interwoven considerations involved in Article 13. Courts in the United States appear to be, for the most part, on the correct path. Of course only cases involving action by the state come before our courts for review under the Constitution. The real difficulty arises when a child is permitted to assert rights as against a parent instead of the state. It is not at all clear from the interrelationship between various Articles or any of the exceptions, that the parents' notion of what is in their child's best interest will be determinative.

C. Children's Rights Under the UNCRC Article 14: Freedom of Thought, Conscience and Religion

Article 14 of the UNCRC states:

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.¹²⁰

¹¹⁹*Id.* at 871. Decisions predicated upon whether a book was educationally suitable or whether the book was "pervasively vulgar" would not be in violation of the Constitution because there is no attempt to officially suppress ideas. *Id.*

¹²⁰UNCRC, *supra* note 1, art. 14, 28 I.L.M. 1462.

1. Linguistic Consideration

Article 14 utilizes the mid-level obligatory words "shall respect".¹²¹ Section 2 uses the exact same wording in obligating States Parties to respect the rights and duties of parents/guardians in providing direction to their children, at least so far as that direction is in keeping with the child's evolving capacities. This is in contrast to Article 13 where the parental right, as applied through Article 5, seemed to be subordinated to the child's right to express himself and seek information. The language of Article 14 was a carefully constructed compromise worked out by the drafters in cooperation with Islamic delegations who wished to provide for their belief that it is not possible for a child to choose his/her own religious faith.¹²²

Section 3 of the Article is an extension of the right to free thought, conscience and religion. A child may express his/her beliefs and religion in anyway he/she sees fit, limited only by considerations of public safety, order, health or morals or the rights or freedoms of others. The mention of the fundamental rights of others may allude to the constitutionally recognized fundamental rights of parents in child-rearing. This would then subject the child's right to the parent's right where necessary. This interpretation would seem to comport with the drafters special concern for the Islamic countries.

2. Current U. S. Law

While it is clear that cases such as *Tinker* accord a child the status of "persons" protected by constitutional rights,¹²³ the exercise of those rights in the area of freedom of religion and conscience is intertwined with the parents' right to conduct the religious upbringing of their children.¹²⁴

Wisconsin v. Yoder,¹²⁵ in permitting Amish children to leave school after the eighth grade, balanced the state's interest in compulsory education with the

¹²¹See discussion *supra* part VI.

¹²²Cohen, *Introductory Note*, *supra* note 1, at 1451.

¹²³See discussion *supra* part VIII(A).

¹²⁴Even the case of *West Virginia State Board of Education v. Barnette*, which is sometimes cited as upholding a child's freedom to express their religious convictions, was decided on the issue of freedom of expression (a flag salute is a form of utterance). 319 U. S. 624 (1943). The Court determined that possession of a particular religious view was not relevant in the case in that many citizens, without religious convictions, find the compulsory flag salute an infringement on their individual liberty. *Id.* at 634.

¹²⁵406 U. S. 205 (1972) (holding that Amish children have the right to leave school after the eighth grade contrary to a state compulsory attendance law). The Court found that requiring the Amish children to attend high school would undermine the Amish community by exposing the children to values and influences which were contrary to their religious upbringing. *Id.* at 211. A more developed discussion of *Yoder* is contained in Robert A. Burt, *Developing Constitutional Rights of, in, and for Children*, 39 LAW & CONTEMP. PROBS. 118 (Summer 1975).

parent's right to conduct the religious upbringing of their children.¹²⁶ The partial dissent of Justice William O. Douglas seems more in keeping with the spirit of the UNCRC:

If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views.¹²⁷

Particularly contrary to the intent of Article 14 is the Court's decision in *Prince v. Massachusetts*.¹²⁸ The Court stated that the state's power to control a child's conduct reached beyond the states ability to control adult conduct in the same setting.¹²⁹ In this particular case the state's child labor and welfare concerns were sufficient to prevent a child from practicing her own avowed religion on public streets.¹³⁰

As there is nothing in this decision which indicates any concern for the *public* health, safety, order or morals, it would appear that such a constraint of a child's right to manifest his/her religious convictions in this way, would not stand against the text of Article 14. Noting the propensity of man to attempt to oppress the expression of unorthodox religious views, Justice Frank Murphy, in his dissent, stated "Religious freedom is too sacred a right to be restricted or prohibited in any degree without convincing proof that a legitimate interest of the state is in grave danger."¹³¹ Justice Murphy's position would be in accord with the position of the UNCRC at least as far as the child's right to manifest his/her beliefs vis-a-vis the state is concerned.

¹²⁶*Id.* at 213-15.

¹²⁷*Id.* at 242. Justice Douglas noted that it was the child's future that was affected by the decision and, in order to give full meaning and substance to the Bill of Rights, lower courts should be required to canvass the children as to their desires. *Id.* at 245-46.

¹²⁸321 U. S. 158 (1944). A statute prohibiting minors (boys under age twelve and girls under age eighteen) from selling magazines, pamphlets and other literature on the streets was enforced against the guardian of a nine year old girl when she attempted to hand out religious tracts in the company of her guardian/Aunt. The girl, her Aunt and others offered testimony to the fact that it was the girl's personal religious conviction that she had a duty to perform this work. *Id.* at 162-63. This testimony was excluded at trial. *Id.* The exclusion of such testimonial evidence of the child's personal beliefs also seems to contravene Article 12, which provides that State Parties shall assure the right of a child who is old enough to form a view, the opportunity to express that view in all matters affecting the child and to have that viewpoint given weight in subsequent determinations in accordance with the age and maturity of the child. UNCRC, *supra* note 1, art. 12, § 1, 28 I.L.M. at 1461.

¹²⁹*Prince*, 321 U. S. at 170.

¹³⁰*Id.* at 168-69. The actual enforcement of the statute was directed against the Aunt. The law provided penalties against those who give material to children for street sale and against parents or guardians who permit their children to so sell. *Id.* at 158.

¹³¹*Id.* at 176.

To the extent that the cases show a disregard for a child's religious beliefs, or manifestations of that belief, they are not in keeping with the UNCRC. The treaty places a child's right to believe and manifest his religion on par with a parent's right to direct the child. At some point, even the parent's right will fall since it is subject to the evolving capacities of the child. To avoid the type of interference in child rearing encompassed by the Convention, any decision relative to the evolving capacities of the child should rest with the parent unless there is evidence of severe abuse of this parental function.

D. Children's Rights Under the UNCRC Article 15: Freedom of Association and Peaceful Assembly

Article 15 of the UNCRC states:

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.¹³²

1. Linguistic Consideration

The framers of Article 15 utilize the word "recognize" to designate the level of protection a minor's right to assemble should be accorded. Such a designation is considered one of the lowest forms of obligation in an international human rights agreement.¹³³ In the case of Article 15, the right may be curtailed only to the degree necessary to protect various public interests.

The level of obligation imposed under Article 5 is of a higher status than that in Article 15. The parental right would be permitted to prevail over a child's right to freely assemble at least to the extent that the parental right was exercised in such a way as to respect the evolving capacities of the child.

2. Current U. S. Law

Litigation involving the right to free assembly has centered around local curfew regulations imposed upon minors. The law is mixed in its treatment of curfew ordinances. The district court in *Bykofsky v. Borough of Middletown*,¹³⁴ finding a legitimate state interest in "protecting the moral, emotional, mental,

¹³²UNCRC, *supra* note 1, art. 15, §§ 1-2, 28 I.L.M. at 1462.

¹³³Cohen, *Linguistic Interpretation*, *supra* note 53, at 35.

¹³⁴401 F. Supp. 1242 (M.D. Pa. 1975), *aff'd without op.*, 535 F.2d 1245 (3d Cir.), *cert. denied*, 429 U. S. 964 (1976). Justice Marshall with Justice Brennan dissented from the denial of certiorari for the reason that lower courts were coming to conflicting opinions as to the issue of "whether the due process rights of juveniles are entitled to lesser protection than those of adults" in cases involving juvenile curfew laws. 429 U. S. at 965.

and physical welfare of the minor and the safety, peace, and order of the community," upheld a curfew regulation.¹³⁵

However, in *Waters v. Barry*¹³⁶ the district court struck down a curfew ordinance aimed at minors, finding a constitutional violation under the First and Fifth Amendments. In that decision the court found that the ordinance was overly broad in restricting the movement of law-abiding minors as well as those who were potential trouble makers.¹³⁷ The court further stated, "The right to walk the streets, or to meet publicly with one's friends for a noble purpose or for no purpose at all—and to do so whenever one pleases—is an integral component of life in a free and ordered society."¹³⁸

In an interesting analysis, the *Waters* court found that the curfew law, "[r]ather than furthering the parental role in child-rearing . . . frustrat[es] the parental role in the vast majority of . . . families."¹³⁹ To the contrary, the *Bykofsky* court found that the ordinance "constitute[d] a minimal interference with the parental interest in influencing and controlling the activities of their offspring."¹⁴⁰

When a court acts to limit the assembly or free movement rights of juveniles in the interest of public order or safety, it functions within the perimeters of the UNCRC. It is worthy to note that if the *Waters* opinion becomes dominant, a greater protection to juveniles' right to assemble would be afforded under United States law than under the UNCRC.¹⁴¹

¹³⁵401 F. Supp. at 1257. The ordinance affected minors up to the age of eighteen. Exceptions were permitted for the minor to exercise his/her First Amendment rights or when the child was in the company of a parent. The Court found that the supportive evidence "indicate[d] that the curfew ordinance [made] a substantial contribution to the alleviation of nocturnal juvenile criminal activity." *Id.* at 1256. The court also found that assembly for purely social reasons was not entitled to an exemption for the reason that governmental interests furthered by the ordinance outweighed the juvenile's rights. *Id.* at 1259.

¹³⁶711 F. Supp 1125 (D.D.C. 1989).

¹³⁷*Id.* at 1135.

¹³⁸*Id.* at 1134.

¹³⁹*Id.* at 1137. Presumably the court means that curfew laws unnecessarily impinge upon a parent's right to direct the upbringing of children.

¹⁴⁰*Bykofsky v. Borough of Middletown*, 401 F. Supp. 1242, 1264 (M.D. Pa. 1975).

¹⁴¹To guarantee that a child is accorded the greatest degree of freedom possible, the UNCRC, in Article 41, states, "Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in: (a) The law of a State Party; or (b) International law in force for that State." UNCRC, *supra* note 1, art. 41, 28 I.L.M. at 1472.

E. Children's Rights Under the UNCRC Article 16: Right of Privacy

Article 16 of the UNCRC states:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.¹⁴²

1. Linguistic Consideration

In a manner similar to that of Article 13, Article 16 is stated in terms having the highest level of obligation. Lacking as it does any specific limiting clauses, Article 16 is accorded the highest status among the four civil rights Articles. However, the Article does not carry an absolute right of privacy. The Article seems to recognize that some interference will be tolerated. An "unlawful" act is one which is "contrary to law; . . . presuppos[ing] that there must be an existing law. . . ."¹⁴³ Unlawful can also refer to an act which is not authorized by law.¹⁴⁴ Therefore, should a privacy interference be permitted by law, and, at least in this country, that law stands against any constitutional challenges, the UNCRC would permit it. However, since the parents' rights articulated in Article 5 carry nowhere near the status of the child's privacy rights in this Article, it can be questioned whether even lawful interferences with the child's privacy predicated solely on the parents' right to guide children, would be permissible under the Convention. This Article also seems to recognize concepts of family autonomy and sanctity of the home.¹⁴⁵ These are of equal status with the child's individual right to privacy. Presumably, once a parent is aware of information otherwise private to the child, the decision-making process within the family is protected.

2. Current U. S. Law

The United States Constitution does not contain an explicit right of privacy for adult or minor. Under the Due Process Clause of the Fourteenth Amendment however, zones of privacy have been judicially developed.¹⁴⁶ To date those rights deemed to be "fundamental" or "implicit within the concept of ordered liberty" include decision making in the areas of marriage,

¹⁴²UNCRC, *supra* note 1, art. 16, §§ 1-2, 28 I.L.M. at 1462.

¹⁴³BLACK'S LAW DICTIONARY 1536 (6th ed. 1990).

¹⁴⁴*Id.*

¹⁴⁵Shepherd, *supra* note 91, at 144.

¹⁴⁶*Roe v. Wade*, 410 U. S. 113 (1973). Most cases finding zones of privacy have done so as the Court in *Wade* did; that is under the Fourteenth Amendment. However, it should be noted that a more general privacy right has been suggested in connection with the Ninth Amendment of the Constitution.

procreation, contraception, family relationships and child rearing and education.¹⁴⁷

Children's privacy has been most often explored in relation to the contraception/abortion rights of minors.

*Planned Parenthood v. Danforth*¹⁴⁸ established that a parent does not have the right to exercise an absolute veto over a child's decision to have an abortion. Furthermore, the Supreme Court has upheld provisions which require either parental consent or a finding, via a judicial by-pass feature, that the minor is emancipated or sufficiently mature to give informed consent or, absent that level of maturity, that it is in the best interests of the minor to permit her to obtain an abortion.¹⁴⁹ Quoting *Hodgson v. Minnesota*,¹⁵⁰ the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* said that the state's parental consent statute was, "reasonably designed to further the State's important and legitimate interest 'in the welfare of its young citizens, whose immaturity, inexperience, and lack of judgment may sometimes impair their ability to exercise their rights wisely.'"¹⁵¹ In addition, some states require that notice be given to a parent before an abortion is performed on a minor.¹⁵²

When a state, by law, requires parental notification for a minor's abortion, even where the parent is not permitted a veto over the decision, the state may exceed its authority under the UNCRC. In addition, these interferences with a

¹⁴⁷*Paul v. Davis*, 424 U. S. 693, 713 (1976) (citing *Palko v. Connecticut*, 302 U. S. 319, 325 (1937)). Other zones of privacy have developed in connection with other specific constitutional guarantees particularly the first, third, fourth and fifth amendments. As an example in *Griswold v. Connecticut*, 381 U. S. 479, 483-84 (1965), the Court found that a zone of privacy protecting one's associations was created by the First Amendment.

¹⁴⁸428 U. S. 52 (1976) (striking down a state statute that required parental consent before an unmarried girl under the age of eighteen could obtain an abortion). The Court found that a blanket third-party veto against a minor's decision to have an abortion would not stand constitutional scrutiny simply on the basis that the capacity to make such a decision might be beyond the capacity of the average juvenile. *Id.* at 74. However, Justice Stewart (concurring), noted that a judicial forum for parent-child disputes would encourage consultation between parents and the child while not permitting a parental veto and would thus probably withstand constitutional inquiry. *Id.* at 91 (Stewart, J., concurring).

¹⁴⁹*Planned Parenthood v. Casey*, 112 S.Ct. 2791 (1992); *Hodgson v. Minnesota*, 497 U. S. 417 (1990); *Ohio v. Akron Center for Reproductive Health*, 497 U. S. 502 (1990); *Planned Parenthood Ass'n v. Ashcroft*, 462 U. S. 476 (1983); *Bellotti v. Baird*, 443 U. S. 622 (1979).

¹⁵⁰*Hodgson*, 497 U. S. at 444 (finding, in a 5-4 decision, that a state statute which required notification of both parents before a minor could receive an abortion was unconstitutional under *Roe v. Wade* for the reason that it did not reasonably further any legitimate state interest).

¹⁵¹*Casey*, 112 S.Ct. at 2802.

¹⁵²*H.L. v. Matheson*, 450 U. S. 398, 409-10 (1981) (upholding a notice requirement when the minor neither was found to be emancipated nor insufficiently mature to make the abortion decision on her own).

minor's privacy which are permitted in some states and not in others, may be arbitrary impediments upon the child's right. As such, under the UNCRC, they would not be permitted.

Apparently, the Convention would require a federal statute regulating parental consent. The consent process must provide for an alternative to consent when a minor's best interests include not informing the parent. Mandatory notification, even on a national level, would not be permitted. Regulations of this tone would be consistent with the Article 16: the child's privacy takes precedence over the parent's rights.

Minors have also been accorded privacy rights in connection with contraception decisions. In 1977, the Supreme Court stated, "[S]ince a State may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancy . . . the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a *fortiori* foreclosed."¹⁵³ A state's interest in trying to deter sexual activity among minors by limiting access to contraceptives is not sufficient to outweigh the minor's right to privacy.¹⁵⁴ This view is in accordance with the UNCRC. By striking down the state statute, the Court thus determines that this is not a lawful interference with a child's privacy rights. These privacy provisions for children under the UNCRC highlight, as do the rights of free expression, the autonomous nature of the rights accorded children under the Convention.

IX. CONCLUSION

The primary concern evidenced by this discussion is that children's rights will be upheld over the rights of parents, particularly in the areas of freedom of expression and privacy. It is suggested that such autonomy will be destructive of children's well-being. If concerns over the economic implications of the Convention or federal-state apprehensions do not dissuade the President and the Senate from ratification, what protections, in the form of declarations or reservations, can be put in place to quell these apprehensions?

First, a reservation that the provisions of the Convention in its entirety are understood to be self-executing will provide for legislative description of the protections to be afforded children. Any legislation, must withstand constitutional scrutiny which will bring into play the fundamental rights of child rearing accorded to parents. A reservation stating the basic nature of constitutional rights in this country and interpreting Articles 13 through 16 to be restrictions, not upon parents, but upon the power of the state would remove a good deal of the apprehension associated with these Articles. As an example,

¹⁵³Carey v. Population Servs., Int'l, 431 U. S. 678, 679 (1977). A state statute prohibited the sale or distribution of any contraceptives to minors under the age of sixteen as well as contraceptive distribution to persons sixteen or over by anyone other than licensed physicians. *Id.* at 681.

¹⁵⁴*Id.* at 693-94.

the Holy See¹⁵⁵ has attached a reservation stating, "[The Holy See] interprets the articles of the Convention in a way which safeguards the primary and inalienable rights of parents, in particular insofar as these rights concern education (articles 13 and 28), religion (article 14), association with others (article 15) and privacy (article 16)."¹⁵⁶

A major theme in politics today is family values. Everyone from President William Clinton to former Vice-President Dan Quayle are actively advocating the return to family values. For this to be more than rhetoric however, it is necessary to uphold the family in the legal arena. To permit ratification of the United Nations Convention on the Rights of the Child without explicit, significant safeguards recognizing the rights of parents and families, would be to undermine those institutions to the severe detriment of this country's children.

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¹⁵⁵"The position, authority or court of the Pope." WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 868 (Encyclopedic ed. 1977). Denotes the official arm of the Roman Catholic Church.

¹⁵⁶UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 31 DECEMBER 1992 197 (1993).

