

DO CHILDREN HAVE RIGHTS? INTERNATIONAL AND  
DOMESTIC APPROACHES TO THE PROTECTION OF  
CHILDREN

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To have the privilege, as lawyers, of considering children is not only an honor and a joy, but a profound responsibility to the future of civilization. To answer the challenging question of “Do children have rights?” requires a three-step approach to reach an appropriate response. This essay will first consider the historical and legal context for the Convention on the Rights of the Child, then the legal standard of the best interests of the child, and finally analyze each in the context of international law to come to a conclusion on the question presented.

When any rule of law is in question, the first response must be to examine the codifications on that subject matter. In the context of rights of children there are two sets of codes to consider: the Convention on the Rights of the Child,<sup>1</sup> and the state code of fifty state jurisdictions on the best interests of the child.<sup>2</sup> Every piece of law beyond these code sections are scholarly ideas, emerging trends, or analysis of Supreme Court of the United State jurisprudence over the ages.<sup>3</sup>

Any effort to begin to answer the question of whether children have rights must begin with a discussion of the Convention on the Rights of the Child (CRC). Designed to protect the best interests of children around the world, this document is held to be the primary instrument known for securing human rights for children internationally.<sup>4</sup> Arising out of American jurisprudence designed to protect the best interests of a child (rather than those of adults),<sup>5</sup> it seemed the hopes of children around the world were answered by this treaty. Indeed, it was wonderful to have a

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<sup>1</sup> Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>2</sup> See, e.g., *Child Custody Laws & Forms: 50-State Survey*, JUSTIA, <https://www.justia.com/family/child-custody-and-support/child-custody-forms-50-state-resources/> (last updated Oct. 2022).

<sup>3</sup> See Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. FAM. STUD. 337, 373 (2008) [hereinafter *Tracing the Foundations*].

<sup>4</sup> See generally *id.* at 351; see also Lynne Marie Kohm, *A Brief Assessment of the 25-Year Effect of the Convention on the Rights of the Child*, 23 CARDOZO J. INT'L & COMPAR. L. 323–24 (2015) [hereinafter *A Brief Assessment*].

<sup>5</sup> Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, 22 N.Y. INT'L L. REV. 57, 59–60 (2009).

“standard for the treatment of children in nations where there had previously been a legal void for their protection.”<sup>6</sup> It fostered a great deal of new research on behalf of children.<sup>7</sup> Child morbidity rates fell,<sup>8</sup> and educational opportunities were on the rise.<sup>9</sup> Indeed, scholars on the subject seemed to assert that the CRC was a result of a widely shared belief that children were especially vulnerable and in need of special attention and treatment from the international community.<sup>10</sup> Considered among the most efficacious and popular pieces because of its effect on the plight of children and its near-universal ratification, the United Nations Convention on the Rights of the Child is “the most widely ratified human rights treaty in history, with 191 participatory nations.”<sup>11</sup> It is thus considered the most successful document in UN history.<sup>12</sup> It is designed to

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<sup>6</sup> *A Brief Assessment*, *supra* note 4, at 324, n. 5.

<sup>7</sup> For example, in my own research alone I have participated at several points with an international group of child law scholars working to advance children’s concerns with a collaborated project that resulted in Lynne Marie Kohm, *Teen Courts: Empowerment through Child Participation*, in INT’L PERSPS. AND EMPIRICAL FINDINGS ON CHILD PARTICIPATION 283 (Tali Gal & Benedetta Duramy eds., 2015), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2605456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605456). See also Lynne Marie Kohm & Alison R. Haefner, *Empowering Love and Respect for Child Offenders Through Therapeutic Jurisprudence: The Teen Courts Example*, 4 SOCIO. & ANTHROPOLOGY 212, 212–213 (2016).

<sup>8</sup> See Christopher A. Tait et al., *Did the UN Convention on the Rights of the Child Reduce Child Mortality Around the World? An Interrupted Time Series Analysis*, BMC PUB. HEALTH, May 18, 2020, at 8 (“Child mortality rates would likely have declined even in the absence of CRC ratification, but CRC is associated with a larger decline.”).

<sup>9</sup> Jody Heymann, *Children’s Right to Education: Where Does the World Stand?*, RIGHT TO EDUC. (Nov. 20, 2014), <https://www.right-to-education.org/blog/children-s-right-education-where-does-world-stand> (offering the improvements and areas for greater improvement in education for children).

<sup>10</sup> *Child Rights and Why They Matter*, UNICEF, <https://www.unicef.org/child-rights-convention/child-rights-why-they-matter> (last visited Nov. 15, 2025).

<sup>11</sup> Jisha S. Vachachira, *Report 2002: Implementation of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 18 N.Y.L. SCH. J. HUM. RTS. 543, 544 (2002) (noting that only Somalia and the United States have failed to ratify the treaty); see also Jill Marie Gerschutz & Margaret P. Karns, *Transforming Visions into Reality: The Convention on the Rights of the Child*, in CHILDREN’S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 31, 31 (Mark Ensalaco & Linda C. Majka eds., 2005) (indicating that the endorsement and ratification of the Convention on the Rights of the Child was rapid and near universal). See generally John Quigley, *U.S. Ratification of the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 401, 402 (2003) (asserting that the Convention on the Rights of the Child was a result of a widely shared belief that children were especially vulnerable and in need of special attention and treatment from the international community).

<sup>12</sup> Laine Rutkow & Joshua T. Lozman, *Suffer the Children? A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 162 (2006) (describing the Convention on the Rights of the Child as the most successful treaty because of its effect on the plight of children and near-universal ratification). See generally Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 166, 169–70 (1998) (citing the Convention on the Rights of the Child

set “out the rights that must be realized for children to develop their full potential.”<sup>13</sup> That near-universal ratification of the Convention reflects a global commitment to the principles of children's rights. It has been signed and ratified by 191 of the U.N. Member State nations – all except for the United States of America.<sup>14</sup>

Over the next several years, however, it began to become somewhat clear that while some aspects of children's lives were improving, such as child mortality rates and educational opportunity, other aspects of children's lives continued to be harmed, and even aggravated, despite this new and wonderful international treaty.<sup>15</sup> If one looked closely enough it might appear that there was no longer a battle for children's best interests, but rather the fight became a clash over how some adults could take advantage of the vulnerability of those who were now seemingly vested with rights, without veritable legal capacity, or member state accountability – the state versus the child, or the child versus the parent.<sup>16</sup>

A peak of this concern occurred on July 11, 2007, when the European Committee on Crime Problems (CDPC) met regarding the Draft Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse to examine the problem of sexual exploitation and abuse of children in Europe.<sup>17</sup> Their report stated: “Compliance with the CRC and its Protocols is monitored by the Committee on the Rights of the Child, which has come to the conclusion that children in Europe are not sufficiently protected against sexual exploitation and abuse.”<sup>18</sup> Despite

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as a treaty that recognizes and protects the civic, political, economic, social, and cultural rights of the world's children, while also opining that the Convention on the Rights of the Child has had effects beyond that of a normal treaty because it has increased support worldwide for the concept of human rights); JANE FONTIN, CHILDREN'S RIGHTS AND THE DEVELOPING LAW 36–37 (2d ed. 2003) (asserting that if countries fully complied with the Convention on the Rights of the Child, the aim of protecting children's rights would be achieved).

<sup>13</sup> *Child Rights and Why They Matter*, *supra* note 10 (stating that the rights set forth in the convention are intended to allow children to reach their full potential).

<sup>14</sup> *Status of Ratification Interactive Dashboard: Convention on the Rights of the Child*, U.N. OFF. HIGH COMM'R (Feb. 21, 2023), <https://indicators.ohchr.org/>.

<sup>15</sup> *A Brief Assessment*, *supra* note 4, at 326–27. Goldsmith and Posner assert a robust role for international law while maintaining what they term “a self-consciously skeptical tone about international law.” Jack Goldsmith & Eric A. Posner, *The Limits of International Law Fifteen Years Later*, 22 CHI. J. INT'L L. 110, 119 (2021).

<sup>16</sup> *See generally A Brief Assessment*, *supra* note 4 (discussing the continued harm to children and the lack of action or accountability after the CRC).

<sup>17</sup> *See* Committee of Ministers, *Council of Europe Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse*, 1002d Meeting (July 12, 2007) [hereinafter Committee of Ministers] (declaring that sexual abuse and exploitation are among the worst forms of violence against children).

<sup>18</sup> *See Explanatory Report to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse*, CETS No. 201 (2007), <https://rm.coe.int/16800d3832>. (naming trafficking of children, child pornography, the lack

the fact that the CRC has been heralded as the most effective human rights document in history,<sup>19</sup> the European Committee clearly recognized upon review of the evidence that the CRC had been ineffective in protecting European children.<sup>20</sup> My research has looked only at six areas where children are not protected by the CRC.<sup>21</sup> Rather the plight of children have worsened since the CRC, and evidence of that in just six categories makes a very strong case against the CRC.

Child labor is a growing concern:

The latest global estimates indicate that the number of children in child labour has risen to 160 million worldwide – an increase of 8.4 million children in the last four years. 63 million girls and 97 million boys were in child labour globally at the beginning of 2020, accounting for almost 1 in 10 children worldwide.<sup>22</sup>

How can this be under the CRC?

Child sacrifice is also a very real problem. In the early 21st century several African countries, and particularly Uganda, has experienced a revival of the ancient practice of child sacrifice.<sup>23</sup> A BBC investigation found that ritual killings of children are more common than originally thought, with indicators that politicians and politically connected wealthy businessmen are involved in sacrificing children which has become a ritual commercial enterprise.<sup>24</sup> Regent University's Center for Global Justice (CGJ) student interns have firsthand experience in protecting against child sacrifice, as in a recent case where a child's facial parts were cut off, charges against witch doctors initially were dropped, but after the CGJ students' review the case was revisited and the perpetrators were convicted.<sup>25</sup> But Uganda is a CRC signatory so how can this be happening?

Child sexual exploitation and trafficking continues to be a growing concern for children around the world. Children make up 27% of all

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of a minimum age of consent, and an inadequacy of protection against child abuse on the Internet as the most pressing problems in the member states).

<sup>19</sup> See Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) (recognizing in the Preamble that all people, including children, are entitled to fundamental human rights and dignity).

<sup>20</sup> See Committee of Ministers, *supra* note 17.

<sup>21</sup> See generally *Tracing the Foundations*, *supra* note 3; *A Brief Assessment*, *supra* note 4.

<sup>22</sup> *Child Labor: Global Estimates 2020, Trends and the Road Forward*, UNICEF (June 9, 2021), <https://data.unicef.org/resources/child-labour-2020-global-estimates-trends-and-the-road-forward/>.

<sup>23</sup> Chris Rogers, *Where Child Sacrifice Is a Business*, BBC NEWS (Oct. 11 2011), [https://www.bbc.co.uk/news/world-africa-15255357#story\\_continues\\_1](https://www.bbc.co.uk/news/world-africa-15255357#story_continues_1).

<sup>24</sup> *Id.*

<sup>25</sup> *Justice for Alan in Ugandan Child Sacrifice Case*, CTR. GLOB. JUST. (Sept. 26, 2022), <https://globaljustice.regent.edu/2022/09/justice-for-alan-in-ugandan-child-sacrifice-case/>.

human trafficking victims worldwide, for sexual exploitation, prostitution, and organized crime.<sup>26</sup> How can this be in light of Articles 19 & 34 of the CRC which prohibit the practice against children? Regent Law CGJ Fellow Lauryn Eason helped identify two girls who were criminally charged as instead being human trafficking victims, and her efforts on their behalf resulted in their release from custody.<sup>27</sup> But why did their rights under the CRC not protect them?

Child marriage is another area of concern for children's rights even in cultural context. Tragically, about 40 million girls worldwide are currently married or in a union – an estimated 150 million girls will be married in the next decade.<sup>28</sup> How can this be in light of the CRC which outright prohibits child marriage?

Child soldiers remain a concern for children's welfare. UNICEF estimated that some 300,000 children are involved in more than thirty conflicts worldwide.<sup>29</sup> How can this be in light of the CRC and the optional protocols against it?

Female Genital Mutilation (FGM) is not declining in any legal way. A cruel and horrific form of physical sexual violence, still the custom in many CRC signatory nations, “it's estimated that 200 million girls and women alive today have undergone some form of FGM, according to the United Nations (UN).”<sup>30</sup>

All this is happening despite children's rights seemingly secured by the UN's CRC.

In light of this summarized understanding of the CRC, the debate over children's rights must be also understood according to the second set of codified law – the 50 state codes of each U.S. state jurisdiction which directs outcomes to achieve the best interests of the child. In the United States today every state has its own codification of the legal standard of the best interest of the child and may even lay out factors for a family court judge to follow in his or her efforts to determine what outcome is in a child's best interests.<sup>31</sup>

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<sup>26</sup> *The Fight Against Child Trafficking*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/charity-stories/child-trafficking-awareness> (last visited Sept. 20, 2025).

<sup>27</sup> Lauryn Eason, *The Prison Project in Uganda*, CTR. GLOB. JUST. (Mar. 21, 2024), <https://globaljustice.regent.edu/2024/03/the-prison-project-serving-clients-as-a-legal-extern-in-uganda/>.

<sup>28</sup> *Child Marriage: The Devastating End of Childhood*, SAVE THE CHILDREN, <https://www.savethechildren.org/us/charity-stories/child-marriage-a-violation-of-child-rights> (last visited Sept. 20, 2025).

<sup>29</sup> *Factsheet: Child Soldiers*, UNICEF (2003), <https://web.archive.org/web/20041104-061549/http://www.unicef.org/protection/files/childsoldiers.pdf>; see also *Child Soldiers: The Tragic End of Childhood For Boys and Girls in Conflict*, SAVE THE CHILD. (2025), <https://www.savethechildren.org/us/charity-stories/child-soldiers>.

<sup>30</sup> Eva Ontiveros, *What is FGM, Where Does It Happen, and Why?*, BBC NEWS (Feb. 6, 2019), <https://www.bbc.com/news/world-47131052>.

<sup>31</sup> *Tracing the Foundations*, *supra* note 3, at 3.

The best interests standard is simultaneously the best standard because it considers the child as an individual on the most local level, but it is also the worst standard because it relies so heavily on judicial discretion.<sup>32</sup> If the U.S. were to ratify the CRC, however, that treaty would supersede the laws and rules of every state in the nation of the U.S., effectively sweeping them away to be replaced by the articles of the CRC.<sup>33</sup> This seems to be one of the key reasons why the U.S. has yet to ratify and incorporate the CRC. Rather, American jurisprudence directs that parents have the right to direct the upbringing of their children and are therefore, barring a showing of abuse, neglect, or abandonment, in the best position to act in ways that best protect the rights and liberty interests of their children.<sup>34</sup> The U.S. position is that parents bear these obligations for care and support and protection of children better and with more care than the state.<sup>35</sup> Professor Emeritus Stephen Gilles, who has written extensively on constitutional law, especially issues of substantive due process such as parental and reproductive rights.<sup>36</sup> Professor James Dwyer, a renowned legal expert on child welfare policy<sup>37</sup> who has recently considered international immigration policies toward the protection of children, agrees.<sup>38</sup> American jurisprudence directs that parents have the rights and corresponding duties to direct the upbringing of their children and are therefore, barring a showing of abuse, neglect, or abandonment, in the best position to act in ways that best protect the liberty interests of their children.<sup>39</sup> The U.S. position secured

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<sup>32</sup> *Id.* at 33.

<sup>33</sup> Sherilyn C. Baxter, “*The Suggestions on the Rights of the Child*”: *Why the United Nations’ Convention on the Rights of the Child is a Twenty-Five Year Failure*, 2 J. GLOB. JUST. PUB. POL’Y 89, 117–19 (2015).

<sup>34</sup> See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (upholding a parent’s right to direct his or her child’s education); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (upholding a parent’s right to direct their children to a private education). For an excellent and comprehensive summary of this rights and duties balance, see also David Wagner, *The Family and American Constitutional Law*, 1 LIBERTY LIFE FAM. 145 (1994).

<sup>35</sup> See, e.g., Lawrence M. Berger & Sarah A. Font, *The Role of the Family and Family-Centered Programs and Policies*, 25 FUTURE CHILD 155 (2015).

<sup>36</sup> See, e.g., Stephen G. Gilles, *What Does Dobbs Mean for the Constitutional Right to a Life-or-Health-Preserving Abortion?* 92 MISS. L.J. 271,272, 283 (2023); Stephen G. Gilles, *Federal Free-Exercise Challenges to Restrictive Abortion Laws*, 37 REGENT U.L. REV. 246, 253, 256 (2025).

<sup>37</sup> See, e.g., JAMES G. DWYER, LIBERAL CHILD WELFARE POLICY AND ITS DESTRUCTION OF BLACK LIVES (Taylor & Francis eds. 2018); JAMES G. DWYER & SHAWN F. PETERS, HOMESCHOOLING: THE HISTORY AND PHILOSOPHY OF A CONTROVERSIAL PRACTICE (2019). Professor Dwyer and I debated children’s rights or best interests back in 2006 also at Regent University. He commented to me that not much has changed over these 20 years.

<sup>38</sup> JAMES G. DWYER, INTERNATIONAL MIGRATION OF CHILDREN FOR A BETTER LIFE: HUMAN RIGHTS, STATE POWER, AND NATIONS’ DUTIES (2025).

<sup>39</sup> *In re Gault*, 387 U.S. 1, 27–29, 55, 57 (1967) (holding that the Fourteenth Amendment’s Due Process Clause applies to juvenile defendants, guaranteeing them rights to notice of charges, the right to counsel, and the right to confront and cross-examine

by federal court interpretation of the U.S. Constitution is that parents bear these obligations for care and support and protection of children better than the state, and with more care. Economists call this family protection parental altruism.<sup>40</sup> Christians call this love.<sup>41</sup>

So while a collectivist notion prefers the CRC, the primacy of the doctrine of parents' rights upholding the duty of providing for the best interests of their children is characteristic of a constitutional republic.<sup>42</sup> It is also rooted in ordered liberty, and the lengthy history and traditions of the United States, and the nation's founding basing parental authority in Judeo-Christian Scripture, as older than the Bill of Rights, and "unalienable."<sup>43</sup>

In the midst of the current struggles facing families and children in an age of individualism, parents' rights versus children's rights have begun to appear as deeply troubling to three of our colleagues, Naomi Cahn, Mary Ziegler, and Maxine Eichner.<sup>44</sup> These feminist scholars argue that those who protect parental rights are using a "parental-rights rhetoric for strategic purposes."<sup>45</sup> They seem to allege that parents want to manipulate children. Others may seem to assert that the state wants to manipulate children. Which is it? Or can children protect their own rights?

Most can likely agree that as the United States's High Court in *Prince v. Massachusetts* related in 1944, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies."<sup>46</sup> But there is grave disagreement between those who wish to protect childhood and its innocence and those who wish to advance rights for children, even if they have no legal capacity to protect their own interests.<sup>47</sup> Professors Cahn, Ziegler, and Eichner make the serious accusation against "parental-rights

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witnesses); *Parham v. J.R.*, 442 U.S. 584, 602–04 (1979) (holding that parents act as stewards of their children's due process rights in commitment proceedings).

<sup>40</sup> See generally GARY BECKER, *A TREATISE ON THE FAMILY* (Harv. Univ. Press 1981) (using economic theory to analyze family dynamics in altruism to understand family decisions).

<sup>41</sup> See generally C.S. LEWIS, *THE FOUR LOVES* (Harper 1960) (discussing 'storge' as family love, the natural bond of fondness and care between parents and children).

<sup>42</sup> See Sarah Parshall Perry, *Protecting Primary Parental Authority from Institutional Challenges*, HERITAGE FOUND. 2 (Dec. 2, 2024), <https://www.heritage.org/sites/default/files/2024-12/LM365.pdf>.

<sup>43</sup> *Troxel v. Granville*, 530 U.S. 57, 91–92 (2000) (Scalia, J., dissenting).

<sup>44</sup> Mary Ziegler, Maxine Eichner, and Naomi Cahn, *The New Law and Politics of Parental Rights*, 123 MICH. L. REV. 671, 727 (2025).

<sup>45</sup> *Id.*

<sup>46</sup> *Prince v. Massachusetts*, 321 U.S. 158, 168–69 (1944) (holding that a parent's right to direct the upbringing of their children is protected constitutionally but is not without limits).

<sup>47</sup> See, e.g., *Schall v. Martin*, 467 U.S. 253, 265–68 (1984) (upholding a New York law that sanctioned preventative detention for accused juveniles, limiting equal protection and due process rights for children due to their legal incapacity).

politics” of “strategic misdirection” enforcing what they call a strategy of “retrenchment by diversion.”<sup>48</sup> Indeed, they charge that parents seeking to protect their children’s best interests are instead thwarting a “civil rights movement” with “evolving strategies used to resist new rights claims...”<sup>49</sup> essentially for children. However, most in the parental rights space are sincerely seeking to protect innocence as common sense parenting with wisdom toward trusting a child’s decision-making in the context of parental guidance, personal growth, and growing maturity into adulthood. They proffer that this process of respectful parenting keeps the child as the focus for the child’s own best interests, as global family law professors Hafen suggest that a rights framework abandons children to their autonomy.<sup>50</sup>

Indeed, American jurisprudence has held from nearly the very beginning of the nation that there are inalienable rights that no government can take away, and that among those, according to a string of cases from our Supreme Court, are the rights of parents to direct the upbringing of their own children. Corresponding duties to act in the best interests of those children are also required, parting ways with previous world history where parents used children for their own purpose. Indeed, leading child advocate and NYU Professor Martin Guggenheim has spent nearly a lifetime discussing what is wrong with children’s rights.<sup>51</sup>

With the founding of the United States came a different way of viewing children and that was manifested in the legal standard used across the country in every court to this day – the best interests of the child.<sup>52</sup> This, rather than children’s rights, is the polestar jurisprudence that has guided American families for nearly a quarter of a millennium.<sup>53</sup> So it would appear that children’s rights in the United States is actually a large bit of disinformation.

What is needed is some clarity in this conflict of disinformation regarding the nature of international law, its history, and its rights framework. English jurist and utilitarian social reformer Jeremy Bentham originally coined the term “international law” in 1789,<sup>54</sup> replacing the older law of nations.<sup>55</sup> And in his treatise on the subject German jurist Lassa Oppenheim defined international law as “a law

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<sup>48</sup> Ziegler et al., *supra* note 44, at 728.

<sup>49</sup> *Id.*

<sup>50</sup> Bruce C. Hafen & Jason C. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, 37 HARV. INT’L L.J. 449, 491 (1996).

<sup>51</sup> MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS (Harv. Univ. Press 2005).

<sup>52</sup> See *Tracing the Foundations*, *supra* note 3, at 2–3.

<sup>53</sup> *Id.* at 35–36.

<sup>54</sup> JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 151 (1789).

<sup>55</sup> *Id.*

between sovereign and equal states based on the common consent of these states.”<sup>56</sup> This definition has been largely adopted by international legal scholars.<sup>57</sup> International law differs from state-based domestic legal systems in that it operates largely through consent of the member states, but it is striking that there is no universally accepted authority to enforce that international law or treaty upon those member states.

For this reason and others, international law has not been without its sceptics, though they are few and largely noticeably quiet voices. Harvard Professor Jack Goldsmith and University of Chicago Law Professor Eric A. Posner, and their work *The Limits of International Law*, have some interesting observations.<sup>58</sup> They say that “the dominant idealistic view of international law ... is today in shambles....”<sup>59</sup> (You have heard of international human rights, but one rarely hears of international human duties, making a bit of a mockery of the rule of law in the international system.) Goldsmith and Posner posit that international law scholarship “was an improbable combination of idealism and doctrinalism,” as the “idealism was reflected in the conviction that international law was powerful, expanding, and liberal in orientation.”<sup>60</sup> A tension is created, however, between idealism and the associated state practice in reality.<sup>61</sup> “Meanwhile, numerous violations of international law...and more frequently, circumventions [of that international law] ... reveal the narrowness of the actual commitments” to that international law.<sup>62</sup> Here’s a good summary:

International law can be, and often is, effective and stable because once cooperation begins, it is in the rational self-interest of states to maintain it. But international law can be, and often is, violated, as the relative power of states changes, the preferences of states change, and new problems arise. Often violations are avoided as states anticipate them and renegotiate their obligations; at other times, they occur, sometimes on massive scale. International law may be normatively desirable for the simple reason that it facilitates mutual gains across states. But it need not be: states frequently act in predatory

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<sup>56</sup> Yasuaki Ōnuma, *When Was the Law of International Society Born – An Inquiry of the History of International Law from an Intercivilizational Perspective*, 2 J. HIST. INT’L L. 1, 4 (2000).

<sup>57</sup> *Id.*

<sup>58</sup> JACK GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3, 4 (2005) [hereinafter *THE LIMITS OF INTERNATIONAL LAW*].

<sup>59</sup> Goldsmith & Posner, *supra* note 15, at 1.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2–5 (offering their view of the history of international law in the last few decades).

<sup>62</sup> *Id.* at 1–2.

fashion, and can use international law to entrench normatively undesirable outcomes.<sup>63</sup>

Therefore, in the realm of international law it is necessary to take seriously the diversity of populations and interests across member states, and that “states have no moral obligation to comply with international law on the basis of global rather than state welfare.”<sup>64</sup> This is essentially incompatible with commitments to liberal democracy.<sup>65</sup> That idealism may even smack of colonialism. “[M]any international law scholars[, however], have blamed the backlash against international law on populism,” while there is certainly evidence for that view, neo-liberal elements of international law have contributed to this backlash,<sup>66</sup> all while many people in western countries have lost confidence in their own government, and thus in global government.<sup>67</sup> This distrust of their own governments carries over to international institutions such as the World Trade Organization (WTO), the World Health Organization (WHO), and the United Nations, a very rational response.<sup>68</sup> Moreover, it is a fact that international law can be expected to change, even regress, as state interests change, and even as non-state actors who are not bound by international law influence the international landscape – a very serious reality.<sup>69</sup>

“In fact, international law moves unpredictably or in cycles, with periods of enthusiasm and advance followed by periods of decay and retrenchment.”<sup>70</sup> Beware this may arise from non-binding political commitments that lack legal obligation,<sup>71</sup> and may be gradual, but is very real. And children’s lives around the planet are proof that an international treaty has not been their salvation.

In contrast to international law, children in the United States share constitutional rights that are largely protected by their parents, as in general children have the same constitutional rights – or liberty interests – as adults, and do not check them at the school house door, or the doctor’s

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<sup>63</sup> *Id.* at 4.

<sup>64</sup> *Id.*

<sup>65</sup> Goldsmith & Posner, *supra* note 15, at 4.

<sup>66</sup> *Id.* at 11.

<sup>67</sup> *Id.*; see also Claudia Deane, *Americans’ Deepening Mistrust of Institutions*, PEW (Oct. 17, 2024), <https://www.pewtrusts.org/en/trend/archive/fall-2024/americans-deepening-mistrust-of-institutions>.

<sup>68</sup> See John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SEC. 5, 32–34 (1994–95); see also David Uren, *Global institutions struggling to contain tensions*, THE STRATEGIST (Feb. 15, 2024), <https://www.aspistrategist.org.au/global-institutions-struggling-to-contain-tensions/>.

<sup>69</sup> THE LIMITS OF INTERNATIONAL LAW, *supra* note 58, at 4.

<sup>70</sup> *Id.* at 9–10.

<sup>71</sup> *Id.* at 12; see also Baxter, *supra* note 33, at 91, 124 (discussing the lack of accountability of member states).

office, but rather their parents protect and exercise those rights.<sup>72</sup> Notable limitations and nuances of that jurisprudence exist as well, particularly when the exercise of an asserted right could expose the vulnerability of children, expose their inability to make mature decisions, or involve the importance of the parental role in child rearing. In such cases, limitations on the freedom and decision-making of minor children are appropriate.<sup>73</sup> Yet evolving cultural norms often see children as “part of a village collective” or even “community property,”<sup>74</sup> rather than under parental best interest protection.

Finally, in the international law application, it is somewhat apparent that children’s rights create the inability of even parents to protect their own children from family separation demanded by the state.<sup>75</sup> When the framework for a child’s liberty interests is one of rights, rather than best interests, the child is at a grave disadvantage. In all cases of *Child v. State*, the child will always lose.

So, do children have rights? This essay has set forth that legal encounters of *Child v. Parent v. State*, and the challenges and opportunities arising therefrom, coaxed by private rights vs. public interest, and the dearth of guarantees for the lives of actual children – all indicate that a rights framework is failing them.

Lawyers have not only the privilege, but the profound duty and responsibility to protect children, and thus the future of civilization. To answer the challenging question of “Do children have rights?” this article has used a three step approach to reach an appropriate response, first considering the historical and legal context for the Convention on the Rights of the Child, then examining the legal standard of the best interests of the child, and finally analyzing each in the context of international law to come to the clear conclusion that characterizing children’s interests as rights has failed children. Rather, children’s liberty interests are optimally guarded and nurtured under the obligation of

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<sup>72</sup> See *Parham*, 442 U.S. at 604.

<sup>73</sup> Perry, *supra* note 42, at 4–5.

<sup>74</sup> See *id.* In 2013 political scientist Melissa Harris-Perry noted in an MSNBC interview that “we have to break through our kind of private idea that kids belong to their parents or kids belong to their families and recognize that kids belong to whole communities.” *Id.* at 2. In 2022 President Joe Biden remarked at a Teacher of the Year ceremony that minor students are “all our children” – a collectivist notion. *Id.*

<sup>75</sup> Georgia Du Plessis discussed during Panel 2 of the Symposium a case in Germany of children removed from their family by the state, similar to what occurred in the matter of *Wunderlich v. Germany*, a case that went to the highest level of the European Court of Human Rights (ECHR). See Timothy Cokes, *German Family Still in Custody, Homeschooling Limbo*, BAPTIST PRESS (July 12, 2019), <https://www.baptistpress.com/resource-library/news/german-family-still-in-custody-homeschooling-limbo/>.

parents who love them and protect their best interests until those children gain the legal capacity to represent themselves.