

FEATURE: Ratification of the Convention on the Rights of the Child

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Author: *David P. Stewart* *

LexisNexis Summary

... Yet around the world, millions of children continue to live in abject poverty, are afflicted by hunger, malnutrition, and disease, are denied basic education, and are subject to intolerable forms of neglect, abuse and exploitation. ... According to the most recent census, nearly 20% of American children live below the federal poverty line. ... The "compatibility gap" between the Convention and U.S. law is thus perceived by some to exist on two levels: on a structural or conceptual level there are fundamental differences in how to approach the government's role in protecting and promoting rights, and as to specific topics there is a more straight-forward divergence based on substantive content. ... Among developed nations, the United States has one of the highest percentages of children living in poverty. ...

Text

[*161] I. INTRODUCTION

Children's issues have emerged as a pressing political and humanitarian priority, both domestically and internationally. As President Clinton has said on a number of recent occasions, children are our future.¹ Yet around the world, millions of children continue to live in abject poverty, are afflicted by hunger, malnutrition, and disease, are denied basic education, and are subject to intolerable forms of neglect, abuse and exploitation. Even within the United States, children suffer from high mortality rates, lack of adequate medical and health care, and insufficient educational opportunities. According to the most recent census, nearly 20% of American children live below the federal poverty line.² Hunger and malnutrition know no boundaries among the young. According to UNICEF's most recent annual report, over 200 million children under the age of five are malnourished; of the nearly twelve million children who die each year, most perish from preventable causes.³ Some thirteen million American children go hungry at least part of the year, including on any given night as many as one in four children in the District of Columbia.⁴

The United Nations Convention on the Rights of the Child (Convention) is the principal instrument by which children are given special recognition and protection under international human rights law.⁵ The Convention sets forth the legal and moral standards by which States Parties can safeguard and advance children's rights. Many view it as a vi-

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David P. Stewart is the Assistant Legal Adviser for Human Rights and Refugees in the Office of the Legal Adviser at the U.S. State Department. Mr. Stewart is also an Adjunct Professor in the Georgetown University Law Center Graduate Program in International and Comparative Law. This article represents Mr. Stewart's personal views and not those of the Office of Legal Adviser, the State Department or the United States.

¹ See, e.g., Proclamation No. 6602, [58 Fed. Reg. 52,205 \(1993\)](#).

² See HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, 101ST CONG., U.S. CHILDREN AND THEIR FAMILIES: CURRENT CONDITIONS AND RECENT TRENDS 1989 at 109 (Comm. Print 1989).

³ See *Focus on Nutrition: The State of the World's Children 1998*, UNICEF ANN. RPT. 1998, 11 (visited Apr. 9, 1998) <<http://www.unicef.org/sowc98/foreword.htm>>.

⁴ See Liz Spayd, *Food Banks are Going Hungry*, WASH. POST., Apr. 17, 1994, at B1.

⁵ Convention on the Rights of the Child, *adopted* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49,

tal tool for that purpose.⁶ The Convention has now been ratified by 191 countries, making it the most widely accepted U.N. human rights treaty.⁷ Indeed, adherence is almost universal. Ratification and implementation are, of course, different; while the standards set forth in [*162] the Convention have been broadly accepted as normative goals, it cannot be said they have been effectively implemented, much less achieved in practice, by most States Parties.⁸ The United States participated actively in the ten years of intense multilateral negotiations that led to the consensus adoption of the Convention by the United Nations General Assembly in November, 1989 and signed the Convention in February, 1995.⁹ But the United States has not yet taken steps to ratify the treaty and is today one of only two U.N. Member States which are not parties to the Convention.¹⁰

To a large extent, the Convention is based upon and elaborates the basic rights first expressed in the Universal Declaration of Human Rights of 1948 which were subsequently articulated in the two fundamental human rights treaties: the International Covenant on Civil and Political Rights,¹¹ to which the United States is a party, and the International Covenant on Economic, Social and Cultural Rights,¹² which the United States has signed but not ratified. While several earlier instruments were devoted specifically to children's rights,¹³ the Convention is the first legally binding international instrument to address children's issues comprehensively.

At the international level, the Convention established the Committee on the Rights of the Child (Committee) for the purpose of monitoring "the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention."¹⁴ The Committee consists of ten members who are supposed to be independent experts of high moral standing and recognized competence in the field of children's rights.¹⁵ Members are nominated and elected by States Parties for four-year terms, half standing for election every two years.¹⁶ The first members were elected in February, 1991.¹⁷ The Committee meets three times a year for three week sessions.¹⁸

U.N. Doc. A/RES/44/736 (1989) [hereinafter Convention].

⁶ See Paula Donnolo & Kim K. Azzarelli, *Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child*, 5 J.L. & POL'Y 203, 204 (1996).

⁷ See U.S. COMM. FOR UNICEF, U.N. CONVENTION ON THE RIGHTS OF THE CHILD: FREQUENTLY ASKED QUESTIONS 1 (1997).

⁸ States Parties are routinely faulted by the Committee on the Rights of the Child for their failure to fully implement their obligations. See, e.g., *Concluding Observations on the Initial Report of Bulgaria*, in *Report on the Fourteenth Session*, U.N. Comm. on the Rts. of the Child, 14th Sess., PP25-59, U.N. Doc. CRC/C/62 (1997); *Concluding Observations on the Initial Report of Panama*, in *Id.* at PP98-134.

⁹ Signature of a treaty does not entail a legal commitment to ratify but does obligate the signatory to refrain from taking actions which would defeat the object and purpose of the treaty. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, 1155 U.N.T.S. 332, 336; see also THE U. N. CONVENTION ON THE RTS. OF THE CHILD, A GUIDE TO THE "TRAVAUX PREPARATOIRES," (Sharon Detrick ed., 1992) (detailing the role of the U.S. delegation in drafting the Convention).

¹⁰ The United States and Somalia are the only member nations that have not ratified the Convention. See U.S. COMM. FOR UNICEF, *supra* note 7, at 1.

¹¹ International Covenant on Civil and Political Rights, *opened for signing* Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978) 999 U.N.T.S. 171; David P. Stewart, *U.S. Ratification of the Covenant on Civil and Political Rights: The Significance of the Reservations, Understandings and Declarations*, 14 HUM. RTS. L. J. 77, n. 1 (1993).

¹² International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; Stewart, *supra* note 11, at 83, n. 25.

¹³ See, e.g., Declaration of the Rights of the Child (Declaration of Geneva), (Sept. 24, 1924) *microformed on* League of Nations Doc., 1919-1946, A 107. 1924 IV. (Research Pubs.); Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, at 14, U.N. Doc. A/4354 (1959); see also Cynthia Price Cohen, *The United Nations Convention on the Rights of the Child: A Feminist Landmark*, 3 WM. & MARY J. WOMEN & L. 29, 36 (1997) (comparing the Convention to previous human rights treaties); Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 CONN. J. INT'L L. 237, 264-269 (1994) (criticizing the Convention for going farther in establishing children's rights than previous child-oriented treaties).

¹⁴ Convention, *supra* note 5, at art. 43(1).

¹⁵ *Id.* at arts. 43, 45.

¹⁶ *Id.* at art. 43.

¹⁷ See *Report of the Committee on the Rights of the Child*, U.N. GAOR 47th Sess., Supp. No. 41, Annex II, at 13, U.N. Doc. A/47/41 (1993).

The Committee carries out its oversight responsibilities primarily through consideration of the periodic reports of States Parties on the specific measures they have taken to give effect to the rights specified in the Convention and on the actual progress towards enjoyment of those rights.¹⁹ On the basis of the reports and presentations by [*163] States Parties, as well as information submitted by non-governmental organizations and other interested parties,²⁰ the Committee pursues a "constructive dialogue"²¹ by making comments and suggestions to States Parties on fulfilling their obligations, usually in the form of "concluding observations" on their reports, as well as general recommendations to all States Parties regarding interpretation and application.²²

In terms of compliance, the Committee has some powers -- some venture to describe them as "teeth" -- that other human rights treaty bodies lack, especially under Article 45.²³ Nonetheless, the Convention provides relatively weak enforcement mechanisms, because the Committee cannot compel States Parties to follow its directions. While the Committee's views of the Convention carry considerable weight, they are not legally binding, and the Committee can take no direct "enforcement" measures. Unlike some other human rights treaties, the Convention contains no provisions for the submission of individual or state-to-state complaints and provides no compulsory dispute settlement procedures.

Effective implementation must occur through domestic law. In this respect it is important to emphasize that ratification of the Convention by the United States would not be merely symbolic under U.S. law. Ratification of a human rights treaty may usefully be likened to a legislative act. If it were simply a declaration of principles or values, or an expression of political will, many of the underlying issues discussed below would not arise or would, at least, be less acute. But in our system, that is not the case. Under Article VI of the U.S. Constitution, a duly ratified treaty becomes part of the "Supreme Law of the Land," equivalent in stature to a federal statute.²⁴ As such it overrides inconsistent state and local law as well as prior federal law.²⁵ Even though the Convention is, for the most part, consistent with existing state and federal law, one essential focus of the pre-ratification discussion must be to identify the differences that do exist between the Convention and relevant U.S. laws and practices, the changes we are or are not required and prepared to make in ratifying the Convention, and the specific steps we are willing to take to implement the Convention.²⁶ This is true whether or not the specific provisions of the Convention articulate enforceable "rights" or goals for progressive implementation.

Domestically, strong forces are arrayed in support of ratification, including a large number of non-governmental organizations. Unquestionably, most Americans support the goals and purposes of the treaty. Many advocates of children's rights view the Convention as a potentially powerful vehicle for requiring governments at all levels in the United

¹⁸ *Id.*

¹⁹ Convention, *supra* note 5, at art. 44. Periodic reports are required within two years of the Convention's entry into force and every five years thereafter. See *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, Paragraph 1(a), of the Convention*, U.N. Comm. on the Rts. of the Child, 1st Sess., P1, U.N. Doc. No. CRC/C/5 (1991) [hereinafter *Initial Report Guidelines*]; *General Guidelines Regarding the Form and Content of Periodic Reports to be Submitted by States Parties under Article 44, Paragraph 1(b), of the Convention*, U.N. Comm. on the Rts. of the Child, 13th Sess., P1, U.N. Doc. No. CRC/C/58 (1996) [hereinafter *Periodic Report Guidelines*].

²⁰ Convention, *supra* note 5, at art. 45(a).

²¹ *Periodic Report Guidelines*, *supra* note 19, at P4.

²² Convention, *supra* note 5, at art. 45(d). The conclusions and recommendations adopted by the Committee are accumulated periodically, see *Conclusions and Recommendations Adopted by the Committee on the Rights of the Child*, U.N. Comm. on the Rts. of the Child, U.N. Doc. No. CRC/C/19/Rev. 6 (1996); see also Cynthia Price Cohen, *Role of Non-governmental Organizations in the Drafting of the Convention on the Rights of the Child*, 12 HUM. RTS. Q. 137 (1990).

²³ For example, the Committee can seek the advice and opinions of outside experts and ask for reports from knowledgeable non-governmental organizations. See Convention, *supra* note 5, at art. 45(a). UNICEF is given a special role in its activities. See Price Cohen, *supra* note 22, at 56-57.

²⁴ See [Edye v. Robinson, 112 U.S. 580 \(1884\)](#).

²⁵ *Id.* See also [Asakura v. City of Seattle, 265 U.S. 332 \(1924\)](#). The effect of a "non-self-executing" treaty may be more limited. However, a treaty cannot override a protection provided by the Constitution. See [Reid v. Covert, 254 U.S. 1 \(1957\)](#).

²⁶ Some have argued that the outer limit for compliance is the deadline for submission of the first compliance report to the Committee on the Rights of the Child under Article 44 -- that is, within two years of ratification. As a practical matter, this means that review of the law must start before ratification. See Levesque, *supra* note 13, at 284-291.

States to improve their treatment of children, by devoting additional resources to such vital areas as health care, education and employment, increasing efforts to protect children against pornography, sexual exploitation, and trafficking, and modifying other existing laws and practices.²⁷

The Convention also has support in the U.S. Congress. In September 1990, the Senate adopted a resolution urging early signature of the treaty and its submission to the Senate for its advice and consent to ratification.²⁸ More recently, legislation [*164] has been reintroduced in the House of Representatives calling for ratification of the Convention.²⁹

The Clinton Administration has clearly expressed its strong support for the Convention's general objectives of promoting children's rights and well-being throughout the world. The Convention's standards are, in many ways, based upon those in the United States and other Western countries. Many of the Administration's most important undertakings on children's issues, including, for example, the Adoption and Safe Families Act of 1997,³⁰ the Family and Medical Leave Act of 1993,³¹ the Children's Health Initiative,³² and the President's 21st Century Community Learning Program,³³ are model initiatives consistent with the Convention's provisions. These undertakings with regard to children are surely aligned with the spirit if not the letter of the Convention. Once ratified, the Convention would provide a strong textual basis, and perhaps increased political leverage, for pursuing other such initiatives. In addition, U.S. adherence would complement and bolster on-going efforts to improve the situation in other countries where children desperately need protection.

But from a legal perspective, the essential question is the potential impact of the Convention on U.S. law and practice. Ratification will entail an obligation, under both domestic and international law, to comply with the Convention's requirements, either immediately or progressively depending on the particular provisions. Most of the areas covered by the Convention fall within the jurisdiction of state and local governments. To the extent of any inconsistency, ratification will require either changing (or undertaking to change) those laws and practices to conform to the Convention's standards, or conditioning U.S. adherence on reservations. As President Clinton has already observed, the United States will likely need to condition its adherence on a fairly detailed statement of "reservations and understandings" to ensure that the Convention does not infringe upon the role of parents and the family, impose an educational curriculum, or undermine the rights of states under our federal system of government.³⁴ It will also be necessary to reserve the right to use the existing tools in our criminal justice system and make clear that the Convention cannot serve as a basis for litigation in domestic courts.³⁵

However, the ability of the United States to condition its obligations under the Convention by reservation or interpretation is not unlimited. While reservations are in fact permissible and have been taken by a number of States Parties, international law generally prohibits reservations that are contrary to the object and purpose of the treaty in question, a prohibition that has been specifically incorporated into the Convention itself.³⁶ Moreover, the Committee is

²⁷ For a complete listing of U.S. organizations and local governments supporting ratification of the convention visit the UNICEF web site at <<<http://www.unicef.org> crc updates usendorse.html>>.

²⁸ See S. Res. 231, 101st Cong. (1990) (enacted, as part of the Treasury, Postal Service and General Government Appropriations Act of 1991).

²⁹ The Rights of the Child Act of 1997, H.R. 3017, 105th Cong. (1997), was introduced by Rep. Bernie Sanders (I-VT). 143 CONG. REC. E2301 (daily ed. Nov. 10, 1997).

³⁰ Pub. L. No. 105-89, 111 Stat. 2115 (1997) (to be codified at scattered sections of 42 U.S.C.).

³¹ Pub. L. No. 103-3 (Feb. 5, 1993), 107 Stat. 7, [29 U.S.C. § 2611](#) *et. seq.* (1997).

³² *Children's Health Initiative*, 34 WEEKLY COMP. PRES. DOC. 274 (Feb. 18, 1998).

³³ Press Release, *White House Fact Sheet on Clinton After-School Care Initiative* (Jan. 26, 1998).

³⁴ *White House Statement on U.N. Decision to Sign U.N. Convention on the Rights of the Child*, WHITE HOUSE PRESS OFF. (Feb. 10, 1995).

³⁵ For a discussion of the conditions on which the United States based its adherence to the *International Covenant on Civil and Political Rights*, another human rights treaty, see Stewart, *supra* note 11, at 77.

³⁶ Article 51(2) states: "A reservation incompatible with the object and purpose of the present Convention shall not be permitted." See also Vienna Convention on the Law of Treaties, *supra* note 9, at art. 19, 1155 U.N.T.S. at 336. The various reservations of States Parties to the Convention, and objections thereto, are contained in *Reservations, Declarations and Objections Relating to the Convention on the Rights of the Child*, U.N. Comm. on the Rts. of the Child, U.N. Doc. No. CRC/C/2/Rev. 2 (1993).

inclined to the view that no reservations at all may be taken to a number of articles.³⁷

[*165] Playing on these issues, a number of individuals, groups and organizations have expressed opposition to ratification. Some argue that ratification will unacceptably change U.S. law, facilitate unnecessary and unprecedented federal interference in state and local matters, and impose significant "unfunded mandates" on the states.³⁸ Others see the Convention as a pretext for United Nations intrusion into domestic or family matters, threatening to undermine parental authority by creating "autonomous" rights which can be asserted against parents.³⁹ In a letter dated May 1, 1997, echoing earlier statements of concern, Senator Helms, who chairs the Senate Foreign Relations Committee, reiterated his request that the Convention not be sent to the Senate for its advice and consent because, among other faults, it "forces its way into the relationship of a parent and child and should not be considered in federal legislation, let alone international treaties."⁴⁰

While the Convention has thus become politically controversial, there has yet to be a reasoned and coherent public debate on the legal issues posed by the prospect of ratification. Many children's rights advocates point to an alleged array of serious shortcomings in U.S. law and practice as the compelling justification for prompt ratification of the Convention. But it cannot be contended, realistically, that those problems either result from non-ratification or would be instantly cured by ratification. The Convention is not a panacea. No one has seriously argued that ratification would somehow magically improve the condition of children in any country, including our own. Nor would ratification ensure that the United States can and will continue to take a leadership role in promoting children's rights internationally. Moreover, the legal concerns of opponents deserve careful responses. Thus, advocates should address with some precision how ratification would change U.S. law or reform U.S. practices to achieve otherwise desirable changes, and how the Convention would in fact make domestic children's programs more effective or open opportunities for programs that are not now available. While there has been some scholarly writing in this area,⁴¹ an open and informed discussion is now essential. The purpose of this paper is to stimulate and facilitate that discussion, not to advocate one particular view or another regarding ratification.⁴² The focus of this paper is on the legal issues posed by the prospect of ratification, not the policy issues. In the end, the decision to ratify must of course rest on policy choices, but those choices must first be informed by an accurate and complete understanding of their legal context and consequences.

Part II of this Paper lays out the most important provisions of the Convention and briefly discusses possible areas of con-

The Committee has voiced objection to reservations it considers overbroad or contrary to the object and purpose of the Convention. *See, e.g., 1996 Annual Report of the United Nations Committee on the Rights of the Child*, U.N. GAOR, 51st Sess., Supp. No. 41, P19, U.N. Doc. No. A/51/41 (1996) (concluding observations on the initial report of Pakistan) [hereinafter *1996 Annual Report*].

³⁷ In particular, the Committee opposes reservations taken to Articles 2 (anti-discrimination), 3 (best interests), 4 (obligation to implement), 6 (right to life), and 12 (freedom of expression). *See, e.g., 1996 Annual Report, supra* note 36, at P183 (concluding observations on the initial report of Honduras), P256 (concluding observations on the initial report of Paraguay), P409 (concluding observations on the initial report of Jamaica).

³⁸ *See* Elizabeth M. Calciano, *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, 521-22 (1992).

³⁹ *See* Barbara J. Nauck, *Implications of the United States Ratification of the United Nations Convention on the Rights of the Child: Civil Rights, The Constitution and the Family*, [42 CLEV. ST. L. REV. 675, 686-88 \(1994\)](#).

⁴⁰ Letter from Senator Jesse Helms, Chairman Senate Committee on Foreign Relations, to Secretary of State Madeleine K. Albright, (May 1, 1997) (on file with the Department of State). *See also* S. Res. 133, 94th Cong. (1995) (asking the President not to submit the Convention to the Senate); *cf.* Statement of Sen. Helms, 141 CONG. REC. S8400 (daily ed. June 14, 1995) ("As long as I am chairman of the Senate Committee on Foreign Relations, it is going to be very difficult for this treaty even to be given a hearing.").

⁴¹ *See, e.g.,* David A. Balton, *The Convention on the Rights of the Child: Prospects for International Enforcement*, 12 HUM. RTS. Q. 120 (1990); Calciano, *supra*, note 38, at 515; Levesque, *supra* note 13, at 232; Adam Lopatka, Symposium, *Implementation of the United Nations Convention on the Rights of the Child*, [6 TRANSNAT'L L. & CONTEMP. PROBS. 251 ff.](#) (1996); Donnolo & Azzarelli, *supra* note 6, at 203; Bruce C. Hafen & Jonathan O. Hafen, *Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child*, [37 HARV. INT'L L. J. 449 \(1996\)](#); Kerri Ann Law, *Hope for the Future: Overcoming Jurisdictional Concerns to Achieve U.S. Ratification of the Convention on the Rights of the Child*, [62 FORDHAM L. REV. 1851 \(1994\)](#); Nauck, *supra* note 39, at 675; Price Cohen, *supra* note 13, at 29; CHILDREN'S RIGHTS IN AMERICA (Cynthia Price Cohen & Howard Davidson, eds., 1991).

⁴² The U.S. Committee for UNICEF has also made useful efforts to clarify the issues and focus the domestic debate. *See generally*, U.N. COMM. FOR UNICEF, *supra* note 7.

flict and consonance with U.S. law and practice. Part III explores certain conceptual differences between U.S. law and the Convention in the areas of parental and private rights, and federalism. Part III also discusses in depth two areas of perceived conflict between the Convention and U.S. law -- abortion and juvenile justice -- which pose their own unique challenges. Part IV points out some issues with regard to U.S. implementation of the Convention that may need to be addressed in the context of overall implementation [*166] of the Convention. To some extent, these are issues likely to arise during the ratification debate regardless of how one interprets the actual requirements of the Convention.

II. NATURE OF PROVISIONS

The Convention is a lengthy and complicated document, consisting of forty-two substantive articles, including some that incorporate rights not previously recognized in international law, such as the right to foster care, the right to adoption, and the right to identity,⁴³ and others not established as rights in contemporary U.S. law, such as the rights to be heard, to education, to an adequate standard of living, and to rest and leisure.⁴⁴ The heart of the Convention, however, can be found in the first four articles.

Article 1 defines a child as "every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier."⁴⁵ Article 2(1) requires each State Party to respect and ensure the full enjoyment of all the rights set forth in the Convention to each child within its jurisdiction "without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status."⁴⁶ Article 3(1) provides that "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."⁴⁷ Article 4 requires States Parties to take "all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention," including, with respect to economic, social and cultural rights, "such measures to the maximum extent of their available resources."⁴⁸

Generally, it appears that these fundamental provisions resonate happily with the basic principles of federal, state, and local law in the United States. For example, in the United States, for many if not most purposes, eighteen is the age of majority; every U.S. jurisdiction endorses the prohibition against discrimination;⁴⁹ the "best interests" principle is prevalent -- as "a" if not "the" primary consideration -- in custody cases;⁵⁰ and the rights of children recognized by the U.S. are broadly implemented, largely through commitment of financial resources by federal and state government.⁵¹ Any possible conflicts between U.S. law and practice and these four articles bear particular attention, however, both because U.S. compliance should not automatically be presumed and because, as "constitutive" provisions that precede many more specific Articles, they inform the meaning of all other substantive provisions of the Convention.⁵² The potential obstacles to implementation of Article 4 in the United States are dealt with more fully in

⁴³ Convention, *supra* note 5, at arts. 20 (foster care), 21 (adoption), 8 (identity).

⁴⁴ *Id.* at arts. 12 (right to be heard), 29 (education), 27 (standard of living), 31 (rest and leisure).

⁴⁵ *Id.* at art. 1.

⁴⁶ *Id.* at art. 2(1). It is important to note that the emphasis in this article on discrimination would not prohibit legitimate distinctions, that is, reasonable differentiations based on age and other objective criteria aimed at achieving a justifiable governmental purpose. A reservation or understanding could be required to permit appropriate distinctions between children who are not citizens or lawful immigrants or visitors from those who are.

⁴⁷ *Id.* at art. 3(1).

⁴⁸ *Id.* at art. 4.

⁴⁹ See, e.g., Herbert E. Gerson & Gregory Addison, *Handicapped Discrimination Law and the Americans with Disabilities Act*, 11 MISS. C. L. REV. 233, 237-238 (1991) (comparing Mississippi and Tennessee disability discrimination laws).

⁵⁰ See Joan Heifetz Hollinger & Alice Bussiere, *The Child's Rights in Adoption and Foster Care*, in CHILDREN'S RIGHTS IN AMERICA, *supra* note 41, at 260.

⁵¹ See Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child's Consistency With Key U.S. Federal Laws*, 5 GEO. J. ON FIGHTING POVERTY (forthcoming Summer 1998).

⁵² The Committee on the Rights of the Child has said, for example, that the "best interests" principle must be affirmatively implemented in such areas as health, education, and social security and must be read in close conjunction with the "right to be heard" provisions of Article 12. See *Concluding Observations on the Initial Report from the United Kingdom*, U.N. Comm. on the Rts. of

Part IV.

[*167] The remainder of the Convention details the specific rights that must be accorded to children. These include two types of provisions which may be broadly characterized as "civil and political rights" and "economic, social and cultural rights." The former are similar to rights articulated by U.S. law, and are thus familiar to U.S. legal practitioners, and are intended to be effective immediately.⁵³ The economic, social, and cultural rights, which put obligations on the state to take positive action with regard to children, are less familiar to most practitioners, and Article 4 obligates States Parties to undertake such measures to the maximum extent of their available resources.⁵⁴ For present purposes of discussion, however, the substance of the rights in both groups can more usefully be grouped a little differently, and somewhat arbitrarily, into four categories: (1) life, development and health rights; (2) membership rights; (3) protection rights; and (4) empowerment rights.⁵⁵

A. *Life, Development, Health*

The first category includes what have been called "survival" rights.⁵⁶ They are based on Article 6, which recognizes every child's "inherent right to life" and obligates States Parties "to ensure to the maximum extent possible the survival and development of the child."⁵⁷ For the most part, these provisions mirror the fundamental rights of every person as reflected in all major human rights instruments, including the right to be free from arbitrary killing, torture, and cruel, inhuman and degrading treatment or punishment.⁵⁸

From the U.S. perspective, two especially sensitive issues lurk within this category. One concerns the question of abortion and the rights of the unborn. The Convention cannot fairly be read to *require* legislative action to protect the fetus because the text of Article 6 is silent on this subject, despite the reference in the ninth preambular paragraph to the need of the child to "special safeguards and care, including appropriate legal protection, before as well as after birth."⁵⁹ This does not mean, however, that the issue will not arise during the ratification process. The other significant issue involves the death penalty. Article 6 must be read in conjunction with Article 37(a), which specifically prohibits imposition of capital punishment for offenses committed by persons below eighteen years of age. Neither of these issues need prevent ratification; we will return to these two volatile issues a bit later, in Part III. Meanwhile, we will turn to three other topics in this category that may pose problems for U.S. implementation.

1. *Standard of Living*

Article 27(1) requires States Parties to recognize "the right of every child to a standard of living adequate for the

the Child, 8th Sess., P11, P14, U.N. Doc. No. CRC/C/15/Add. 34 (1995). Attention must be given to application of this principle in actions based on parental consent or request, in delinquency and involuntary mental health proceedings, and deportation and other immigration law matters, and in the administration of laws of general application.

⁵³ Compare Convention, *supra* note 5, at art. 36 ("States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare) with *id.* at art. 39 ("States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim . . .").

⁵⁴ *Id.* at art. 4.

⁵⁵ For different ways of grouping the rights established in the Convention, see generally LAWRENCE J. LEBLANC, THE CONVENTION ON THE RIGHTS OF THE CHILD: UNITED NATIONS LAWMAKING ON HUMAN RIGHTS (1995); THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES," *supra* note 9; GERALDINE VAN BUEREN, THE INTERNATIONAL LAW ON THE RIGHTS OF THE CHILD (1995).

⁵⁶ See LEBLANC, *supra* note 55, at 65.

⁵⁷ Convention, *supra* note 5, at art. 6.

⁵⁸ See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signing* Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85; see also Convention Against Torture Implementation Act, Pub. L. No. 103-236, 108 Stat. 382 (1994) (codified at scattered sections of 18 U.S.C.). Note that the latter formulation is broader than the Eighth Amendment protection against cruel and unusual punishment and may therefore need to be qualified by a reservation.

⁵⁹ Convention, *supra* note 5, at preamble.

child's physical, mental, spiritual, moral and social development." ⁶⁰ Under Articles 27(2) and (3), the Convention recognizes that parents have primary responsibility for providing the conditions necessary for the child's development but requires States Parties to "take appropriate measures to assist parents and others responsible for the child to implement this right." ⁶¹ These provisions obligate governments specifically to provide, "in case of need," material assistance and support to children, particularly with regard to nutrition, clothing and housing. ⁶² Like other provisions relating to "economic, social and cultural" rights, this article contemplates affirmative, concrete action. The Committee likely will not consider it sufficient for a State Party to interpret its obligation under Art. 27 simply as refraining from action that would deprive children of the opportunity to benefit from basic material needs, including food, clothing, and shelter. ⁶³ The task here to implement this provision is to articulate what is done, and what needs to be done.

2. Health

States Parties must also strive to assure a child's right to "the highest attainable standard of health." ⁶⁴ In pursuing "full implementation" of this right under Article 24, States Parties are obliged to ensure provision, *inter alia*, of primary and preventive health care, guidance for parents and family planning education and services, appropriate pre- and post-natal health care for mothers, and special treatment and education for the disabled. ⁶⁵ Article 26 sets forth the right of every child to benefit from social security, including social insurance. ⁶⁶

These provisions could have a significant effect on our domestic policies and programs. The Convention does not call simply for *access* to health care or for maintenance of the highest attainable *standards* of health care, but rather establishes a "right to health" and to health care itself. Here again, the question concerns implementation: even if one accepts this "right" as a goal for progressive achievement, rather than an immediately effective guarantee, it must be asked whether Article 24 would be satisfied by initiatives such as the Administration's recently-announced program to extend government funded health care to up to ten million children without health insurance. ⁶⁷ It is likely that this provision will require a more comprehensive solution that addresses health care for *all* American children.

3. Education

States Parties are obliged, under Article 28, to recognize and progressively implement the right of all children to education. ⁶⁸ Primary education must be compulsory and free to all; States Parties must encourage different forms of secondary educations (general as well as vocational); and higher education must be "accessible to all on the basis of capacity." ⁶⁹ In particular, steps must be taken to encourage school attendance and reduce drop-out rates. ⁷⁰ Moreover, under Article 29, the aim of education is "development of the child's personality, talents and mental and physical abili-

⁶⁰ *Id.* at art. 27(1). This "right" represents a goal for progressive achievement, within the scope of available resources.

⁶¹ *Id.* at art. 27(2) & (3).

⁶² *Id.*

⁶³ The Committee will read this provision together with the more general provision that States Parties will take all available measures to implement these rights. *Id.* at art. 4.

⁶⁴ Article 24(1) provides:

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. at art. 24(1).

⁶⁵ *Id.* at art. 24.

⁶⁶ *Id.* at art. 26.

⁶⁷ *Children's Health Initiative*, 34 WEEKLY COMP. PRES. DOC. 274 (Feb. 18, 1998).

⁶⁸ Convention, *supra* note 5, at art. 28.

⁶⁹ *Id.*

⁷⁰ *Id.*

ties to their fullest potential.”⁷¹ Education must also foster:

development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;⁷² the preparation of the child for responsible life in free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;⁷³ and the development of respect for the natural environment.⁷⁴

There is, of course, no explicit “right to education” in the U.S. Constitution,⁷⁵ nor is one recognized in most state constitutions.⁷⁶ Although improvement of education and literacy have long been a proper concern of the federal government,⁷⁷ educational issues remain primarily within the purview of the states and local governments. Even at those levels, tensions exist regarding the proper scope of regulation of private and parochial schools and institutions of higher education. Nor is there a general assurance that curricula meet any particular requirements. Harmonizing state laws and practices to conform to the requirements of the Convention could pose difficult problems, especially with regard to curriculum issues and the controversial concept of “values” education.⁷⁸ U.S. undertakings in this area will likely need to be conditioned on an appropriate reservation or understanding.

4. Rest and Leisure

Finally, Article 31 recognizes “the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.”⁷⁹ Because such a right is currently unknown in U.S. law and practice, it will be necessary to identify provisions of existing state law and practice that may be relied on in respect of this right in order to determine what new provisions will need to be adopted to ensure compliance.

In sum, the rights in the Convention in the category of life, development, and health could require new initiatives by the United States if they are interpreted to mandate more involvement by the federal or state government in the private affairs of citizens and institutions or more funding for programs than those that government at all levels has already undertaken.

B. Membership Rights

A second category of rights may be termed “membership” rights. For some, the primary importance of the Con-

⁷¹ *Id.* at art. 29(1)(a).

⁷² *Id.* at art. 29(1)(b).

⁷³ *Id.* at art. 29(1)(c).

⁷⁴ *Id.* at art. 29(1)(d).

⁷⁵ See, e.g., [Rodriguez v. San Antonio Indep. Sch. Dist.](#), 411 U.S. 1 (1973); but see Millard Arnold, et al., *Report of the American Bar Association Working Group on the United Nations Convention on the Rights of the Child*, A.B.A. WKG. GP. ON THE U.N. CONVENTION ON THE RTS. OF THE CHILD 84 (1993) (concluding that *Rodriguez* is inconsistent with the Convention).

⁷⁶ States that recognize a right to education in their constitutions include Minnesota, MINN. CONST. art. VIII, § 1; New Jersey, N.J. CONST. art. VIII, § 4; West Virginia, W. VA. CONST. art. XII, § 1; Ohio, OHIO CONST. art. VI, § 2; and Pennsylvania, PA. CONST. art. III, § 14.

⁷⁷ The current Administration, for example, has given particular support to literacy efforts. See, e.g., Reading Excellence Act, S. 1596, 105th Cong. (1998).

⁷⁸ See Susan Kilbourne, *Tracking the Opposition to the Convention on the Rights of the Child*, J. INTERGROUP RELATIONS, Winter 1997-1998, at 24.

⁷⁹ Convention, *supra* note 5, at art. 31.

vention lies in the fact that it requires States Parties to recognize children as human beings with rights, or in other words, to accord them "legal personality." This alone should pose few if any issues under U.S. law, as children have long been recognized as persons under the law.⁸⁰ Nor would the United States find any difficulty with such provisions as Article 7, which accords children the right from birth to a name and the right to acquire a nationality, and requires States Parties to register children immediately after birth.⁸¹

But even in this category, some issues need to be addressed. As noted above, Article 2 obliges States Parties to treat *all* children within their jurisdiction without discrimination of *any* kind.⁸² This prohibition extends beyond the prohibited factors of race, color, and national or ethnic origin, which are well-known in U.S. non-discrimination law,⁸³ and even beyond sex, religion and disability, to include property, political opinion, language, and other "status."⁸⁴ The prohibition on "status" discrimination could be interpreted to have a great effect on children who are illegally present in, or attempting illegally to enter, the United States.⁸⁵ Those considering the Convention must determine as best they can whether under this provision the federal government would have to change many of its practices, for example, such as guaranteeing minors detained in Immigration and Naturalization Service custody access to counsel or the right to contact or reunite with family members.⁸⁶

The prohibition on "language" discrimination might have an effect on the current debate over bilingual education, as well. This prohibition can be read together with the right articulated in Article 8, paragraph 1, which obliges States Parties to "undertake to respect the right of the child to preserve his or her identity, including nationality, name, and family relations as recognized by law without unlawful interference."⁸⁷ This language is vague, and in need of some elaboration; but if read together with Article 2, which prohibits discrimination of any kind, Article 8 might be understood to mandate that localities educate non-English speaking children in whatever language they are most capable of learning. Because the Convention, whether implemented at the federal or state level, would most likely set a unified standard of performance on this issue, those who have sought creative solutions to this problem at the local school district level would no doubt feel frustrated if this were the result of ratification.

C. Protection Rights

In the third category of rights protected by the Convention are the classic rights of children to protection against abuse and neglect. These are variously expressed in the Convention as the right to governmental protection against all forms of physical and mental violence, injury or abuse,⁸⁸ all forms of economic exploitation and hazardous work,⁸⁹ illicit use of narcotic drugs and psychotropic substances,⁹⁰ sexual exploitation and abuse,

⁸⁰ See [Tinker v. Des Moines Indep. Community Sch. Dist.](#), 393 U.S. 503, 511 (1969) ("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 Convention, *supra* note 5, at art. 7.

⁸² See Adam Lopatka, *An Introduction to the United Nations Convention on the Rights of the Child*, 6 [TRANSNAT'L L. & CONTEMP. PROBS.](#) 251, 252 (1996).

⁸³ See, e.g., Civil Rights Act of 1964, Title VII, [42 U.S.C. § 2000e](#) *et. seq.* (1997).

⁸⁴ For example, those born out of wedlock might be protected as to their "status" under this provision. Although discrimination on this status has largely disappeared, the concept survives in the United States, and some believe it to be fundamentally inconsistent with requirements of the Convention. See Arnold et al., *supra* note 75, at 76. For an examination of programs which might be invalidated by a ban on illegitimacy-based discrimination, see James Weill, *Assuring an Adequate Standard of Living for the Child*, in *CHILDREN'S RIGHTS IN AMERICA*, *supra* note 41, at 197.

⁸⁵ For a discussion of the rights of immigrant children in Immigration and Naturalization Service custody see [Flores v. Reno](#), [507 U.S. 292](#) (1993).

⁸⁶ It should be noted that immigration "status" has been held insufficient to justify differential treatment of illegal immigrant children by states. See [Plyler v. Doe](#), [457 U.S. 202](#) (1982) (finding that the Constitution affords equal protection to the children of illegal aliens in respect of public education).

⁸⁷ Convention, *supra* note 5, at art. 8.

⁸⁸ *Id.* at art. 19.

⁸⁹ *Id.* at art. 32.

⁹¹ abduction, sale and trafficking, ⁹² and torture or other cruel, inhuman or degrading treatment or punishment. ⁹³ Under a fair reading of these provisions, criminalizing such conduct is, in and of itself, insufficient to meet a State Party's obligations in this area. The Convention makes clear that the child is entitled, as of right, to protection against these forms of abuse; ⁹⁴ effective preventive, prosecutive and remedial measures are therefore obligatory. If current U.S. law and policy is found to provide insufficient protection in this regard, then there will be a need to assess what kinds of programs, beyond criminal law enforcement, the United States would be required to undertake.

Dangerous and abusive labor conditions, covered by Article 32, are one area of alleged shortcomings in existing U.S. law. In implementing Article 32, States Parties are obliged to provide for a minimum age or ages for "admission to employment," to regulate hours and conditions of employment effectively, and to provide appropriate penalties or other sanctions to ensure effective enforcement of these provisions. ⁹⁵ In this regard, the Convention can be read to contemplate a degree of uniformity that is currently lacking in the United States. The federal Fair Labor Standards Act undoubtedly would carry the United States a very long way towards the goal of full compliance with this article, but its coverage is not comprehensive. ⁹⁶ State laws on child labor vary, in some cases permitting those as young as age fourteen to work in non-agricultural jobs. ⁹⁷ In the agricultural sector, especially on family farms, [*171] youthful workers abound. ⁹⁸ Nationally, the United States has an unusually high rate of work-related adolescent death and injury. ⁹⁹ It is therefore important to consider whether specific measures should be proposed for the United States to bring its laws and practices into closer harmony with these provisions.

The Convention addresses in some detail the responsibility of governments to provide protective supervision in matters of child custody, ¹⁰⁰ temporary protection and foster care, ¹⁰¹ and adoption. ¹⁰² Principles of family unity and reunification appear to be central to these provisions. ¹⁰³ Here, issues of federalism and the allocation of governmental responsibility as between the federal government and the constituent states are likely to be of critical importance. The general problem that notions of federalism in U.S. law and practice pose for U.S. ratification and implementation of the Convention are discussed more fully in Part III.

D. Empowerment Rights

The final grouping involves "empowerment" rights, including what some have characterized as the most inno-

⁹⁰ *Id.* at art. 33.

⁹¹ *Id.* at art. 34.

⁹² *Id.* at art. 35.

⁹³ *Id.* at art. 37.

⁹⁴ *Id.* at art. 4.

⁹⁵ *Id.* at art. 32.

⁹⁶ [29 U.S.C. §§ 201-219](#) (1988 & Supp. IV 1992); see Law, *supra* note 41, at 1864 (arguing that under-enforcement of the FLSA by the federal government has placed the United States in direct violation of the applicable provisions of the Convention).

⁹⁷ See, e.g., ARK. STAT. § 11-6-114 (1997).

⁹⁸ See generally Lori Nessel & Kevin Ryan, *Migrant Farmworkers, Homeless and Runaway Youth: Challenging the Barriers to Inclusion*, 13 LAW & INEQ. 99 (1994).

⁹⁹ See Jeremy S. Sosin, *The Price of Killing a Child: Is the Fair Labor Standards Act Strong Enough to Protect Children in Today's Workplace?*, [31 VAL. U. L. REV. 1181, 1185](#) (1997).

¹⁰⁰ Convention, *supra* note 5, at arts. 9, 10.

¹⁰¹ *Id.* at art. 20.

¹⁰² *Id.* at art. 21.

¹⁰³ In its *Concluding Observations on the Initial Report of the Lao People's Democratic Republic*, U.N. Comm. on the Rts. of the Child, 16th Sess., P45, U.N. Doc. No. CRC/C/15/Add. 78 (1997), the Committee recommended that the government take "all appropriate measures, including legal ones, to ensure that children maintain contact with both parents in case of divorce or separation, as well as to ensure the recovery of maintenance for the child."

vative and expansive provisions of the Convention.¹⁰⁴ In the U.S. system, children do in fact have many of the rights specified in the Convention, especially those of constitutional stature.¹⁰⁵ However, it remains unclear whether the treaty formulations differ significantly from the corresponding rights under existing U.S. law. One major issue in existing U.S. law -- whether children's rights are co-extensive with those of adults -- is not the only dimension to this important question.¹⁰⁶ Another question, for example, is the extent to which the Convention articulates rights based on the "choice" of the child rather than based on a determination by an adult about the needs of the child, and in so doing exceeds the scope to which children are currently accorded rights under U.S. law.¹⁰⁷ For example, the Convention unequivocally recognizes a child's "right to be heard" in any judicial and administrative proceeding affecting his or her interests directly or indirectly, while under current U.S. law children do not have a right to be heard in all such proceedings.¹⁰⁸

Some of the provisions of the Convention that deal with issues covered by the United States Constitution, however, are arguably capable of interpretations that give children more rights *vis-a-vis* their parents than they currently enjoy, and some believe they allow the states to restrict the exercise of those rights in ways that are not now permitted under U.S. law. Article 14 addresses the child's right to freedom of thought, conscience, and religion. States Parties must respect this right as well as the rights and duties of parents "to provide direction" to the child in a manner consistent with the evolving capacities of the child. But freedom to manifest one's religion or beliefs may be subject, under this article, ". . . 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."¹⁰⁹ This language can be read to give the government more power to regulate religion than it currently enjoys under First Amendment jurisprudence.¹¹⁰

Similarly, the child's freedoms of association and of peaceful assembly are guaranteed under Article 15 are expansive, specifying that the only permissible restrictions on these rights are those "necessary in a democratic society in the interest of national security or public safety, public order (order public), the protection of public

¹⁰⁴ See, e.g., VAN BUEREN, *supra* note 55, at 131-145.

¹⁰⁵ See Nauck, *supra* note 39, at 688-89, (citing [In re Gault, 387 U.S. 1 \(1967\)](#) (recognizing due process right of children in delinquency proceeding) and [Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503 \(1969\)](#) (recognizing qualified right to free expression in schools)). See also [Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 \(1976\)](#) (stating, in recognizing a limited privacy right for minors, "minors as well as adults are protected by the Constitution").

¹⁰⁶ See [Bellotti v. Baird, 443 U.S. 622 at 634 \(1979\)](#) (holding that "the constitutional rights of children cannot be equated with those of adults."). In *Bellotti*, the Supreme Court articulated three factors differentiating the constitutional rights of children from those of adults: the peculiar vulnerability of children, the inability of children to make informed, mature decisions on matters affecting their interests, and the importance of the parental role in child rearing. *Id.* In [Ginsburg v. New York, 390 U.S. 629 \(1968\)](#), the Court made clear that states may impose greater restrictions on the rights of minors than on those of adults. See also [Prince v. Massachusetts, 321 U.S. 158 \(1944\)](#).

¹⁰⁷ See Hafen & Hafen, *supra* note 41, at 460. The Hafens' criticism is not limited to this circumstance; they more generally take issue with the Convention's grant to children of "choice rights," or rights which "grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated." *Id.* They argue that granting such rights is fundamentally incompatible with the "protection" rights of children which, they argue, are the cornerstone of the U.S. approach to the rights of children. *Id.* The Convention is internally inconsistent in that it seeks to effectuate both types of rights: "to confer the full range of choice rights on a child is also to confer the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood." *Id.*

¹⁰⁸ The Convention, *supra* note 5, at art. 12(1), provides: "States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child." Art. 12(2) states: "For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law." See also LEBLANC, *supra* note 55, at 157. The reach of these requirements deserves careful consideration.

¹⁰⁹ Convention, *supra* note 5, at art. 14; see also Nauck, *supra* note 39, at 691-93, 698.

¹¹⁰ See generally [Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 \(1990\)](#) (holding that restrictions on religious exercise must be narrowly tailored).

health or morals or the protection of the rights and freedoms of others.”¹¹¹ Although this language is the same as the provision on the right to religious expression, the child’s rights under Article 15 are arguably strengthened beyond what is contemplated under Supreme Court free-assembly jurisprudence because the Court has subjected constraints on a child’s free assembly rights to a lower level of scrutiny.¹¹²

On free speech the Convention might be read in ways that may not entirely coincide with permissible restrictions under domestic law. Article 13 guarantees the right of all children to freedom of expression including the “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.”¹¹³ States Parties are obliged under Article 17 “to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health.”¹¹⁴ This language, read in combination with other substantive rights, might have dramatic affects on domestic law and practices regarding, for example, exposure of children to pornography, access to family planning information, and restrictions on “hate speech” on school and university campuses.

As indicated above, some Convention provisions arguably pose questions when compared with U.S. law and practice. Some provisions specify substantive rights that are thus far unknown as legally enforceable rights in U.S. law. Some provisions express rights protected under U.S. law, but appear to mandate steps beyond what the United States is able, or willing, to do. These issues must be explored and resolved as part of the debate over United States ratification of the Convention.

III. THE COMPATIBILITY GAP

Some advocates of ratification claim that current U.S. law and practice conflict with, or fail sufficiently to implement, the Convention’s requirements in nearly every substantive provision and at [*173] every level of government.¹¹⁵ Others argue that the United States is in compliance with the Convention already, and can and should ratify without any reservations.¹¹⁶ This Part attempts to assess the “compatibility gap” by considering some discrete areas of current debate and discussion. First, this Part discusses two major conceptual barriers to U.S. ratification of the Convention: parental and private rights, and federalism. Within the frame of these two issues, this Part moves on to discuss two specific topical areas of potential conflict between U.S. law and practice and the Convention: abortion and juvenile justice. Finally, this Part lays out the implementation and enforcement issues which may affect ratification of the Convention.

A. Structural Issues

The issues of U.S. ratification and enforcement of the Convention posed by the problems I term “structural” -- the problems of private and parental rights, and federalism -- are some of the most contentious and important. Fortunately, they are not difficult to resolve, at least in principle. It is likely that these problems will be taken care of by reservations or understandings accompanying the Senate’s advice and consent to ratification, as

¹¹¹ Convention, *supra* note 5, at art. 15.

¹¹² See e.g., [City of Dallas v. Stanglin](#), 490 U.S. 19 (1989). Although when assessing the legality of the “teenage curfews” which are increasingly used by U.S. cities -- daytime as well as nighttime -- as a way of controlling juvenile crime and enforcing school attendance, U.S. courts have recognized that many curfews are unconstitutional, see, e.g., [Nunez v. City of San Diego](#), 114 F.3d 935 (9th Cir. 1997); [Bykofsky v. Borough of Middletown](#), 401 F. Supp. 1242 (M.D. Pa. 1975), *aff’d*, 535 F.2d 1245 (3rd Cir.), *cert. denied* 429 U.S. 964 (1976); Nauck, *supra* note 39, at 698-99, these courts have not used the same strong “children’s rights” language as the Convention. See *infra* note 141, and accompanying text (discussing [Nunez v. City of San Antonio](#), 114 F.3d 935 (9th Cir. 1997)).

¹¹³ Convention, *supra* note 5, at art. 13.

¹¹⁴ *Id.* at art. 17.

¹¹⁵ This has been the position, for example, of the Children’s Defense Fund. CHILDREN’S DEFENSE FUND, AMERICA’S CHILDREN FALLING BEHIND: THE UNITED STATES AND THE CONVENTION ON THE RIGHTS OF THE CHILD 1-6 (1992).

¹¹⁶ See Levesque, *supra* note 13, at 279-80.

several commentators have proposed.¹¹⁷

I. Parental Rights/Private Action

A fundamental aspect of the U.S. approach to limited government is that private persons have a “right to be left alone.”¹¹⁸ Thus, to the extent that the Convention could be interpreted to require state intervention in the activities of parents and private organizations in dealing with children, there would be a conceptual divergence between the Convention and U.S. law and practice. These issues should be clearly addressed by an appropriate reservation or understanding clarifying that the Convention will not govern or interfere with parental rights or otherwise unacceptably intrude on the sphere of private action.

While the argument is sometimes made, amazingly, that parents should have no rights at all in connection with child-rearing,¹¹⁹ a more frequently heard contention is that, in emphasizing children’s autonomy, the Convention accords insufficient attention to the central role of parents, undermines parental authority, and invites governmental intrusion into family matters.¹²⁰ This perspective draws superficial validity from the absence of any clear statement in the treaty that parents have a right to direct their children’s upbringing, let alone a statement that parents’ rights will be preeminent in case of conflict with the rights of children, and the textual emphasis throughout the Convention on the role and responsibilities of the government, with little mention of parents. While this emphasis is to some extent understandable, in that treaties are written for governments, it nonetheless gives rise to the concern that the various enumerated rights will not be subject to, and indeed, would be legally assertable against, parental authority.

In point of fact, the Convention does, of course, acknowledge the central role of parents. The preamble describes the family as “the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.”¹²¹ Article 5 requires States Parties to respect “the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community.”¹²² [*174] In the context of freedom of thought, conscience, and religion, Article 14(2) requires States Parties to respect the rights and duties of the parents and where applicable the 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.”¹²³ Under Article 3(2), States Parties undertake to ensure the protection and care necessary to the child’s well-being “taking into account the rights and duties of his parents” and guardians.¹²⁴ This can be read in conjunction with Article 27(2), which notes that the parents or others responsible for the child have the “primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child’s development.”¹²⁵

While it is therefore difficult to argue seriously that the Convention ignores or was intended to undermine parental authority, it is also true that one major purpose of the treaty was and is to “empower” children, to overcome the idea that children are parental property or family chattels, and to recognize them as “rights bearing” individuals. This is the crux of the “right to be heard” of Article 12, and is also apparent in the areas of

¹¹⁷ See, e.g., Law, *supra* note 41, at 1871-75; Nauck, *supra* note 39, at 702; Lawrence L. Stenzel, II, *Federal-State Implications of the Convention*, in CHILDREN’S RIGHTS IN AMERICA, *supra* note 41, at 68-70; but see Arnold et al., *supra* note 75, at 13 (concluding that a federalism reservation is unnecessary because the Convention calls for progressive implementation, not absolute results); cf. Peter J. Spiro, *The States and International Human Rights*, 66 FORDHAM L. REV. 567, 568 (1997) (arguing that because federalism reservations, in particular, have rendered human rights treaties meaningless as to the United States, treaties should instead be ratified at a “subnational” [state] level, which would ensure some implementation of such treaties, by those states which agree to abide by their provisions, rather than none at all).

¹¹⁸ See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 492 (1988) (Brennan, J., dissenting).

¹¹⁹ See Hafen & Hafen, *supra* note 41, at 453-54 (describing the evolution of the “kiddie lib” movement).

¹²⁰ See Nauck, *supra* note 39, at 686-688; Levesque, *supra* note 13, at 276.

¹²¹ Convention, *supra* note 5, at preamble.

¹²² *Id.* at art. 5.

¹²³ *Id.* at art. 14(2).

¹²⁴ *Id.* at art. 3(2).

¹²⁵ *Id.* at art. 27(2).

freedom of expression,¹²⁶ freedom of thought, conscience, and religion,¹²⁷ and freedom of association and peaceful assembly.¹²⁸ Failure to comply with the "right to be heard" is the basis for the Committee's frequent criticisms of national laws and practices that exclude children from participating in decisions affecting their interests, including participation in compulsory religious instruction and sex education.¹²⁹

The "empowerment" orientation of the Convention is perceived by some as running counter to the aims of the domestic "parental rights" movement, which in recent years has had some success in advocating pro-parent positions. Especially in the educational arena, a number of states have recently enacted parental rights-type laws. For example, in Utah, the Family Education Rights and Privacy Act requires school districts to get the written consent of a student's parent or legal guardian before administering any psychological or psychiatric examination.¹³⁰ In Massachusetts, the Parents' Notice Law requires a school district to notify parents when it plans "any curriculum whose primary involvement is human sexual education or human sexuality issues" and permits parents to remove their children from such classes.¹³¹ Michigan's Public School Code recognizes the natural, fundamental right of parents and legal guardians "to determine and direct the care, teaching, and education of their children."¹³²

Similar bills or constitutional amendments are being considered in a number of states. For example, in Virginia, a parental rights amendment to the State Constitution which would have provided that "the right of parents to direct the upbringing and education of their children is a fundamental right," was narrowly defeated (21-19) in the state Senate.¹³³ A parental rights bill was introduced in the 1995 U.S. Congress and would have provided that "no Federal, State, or local government, or any official of such a government acting under color of law, shall interfere with or usurp the right of a parent to direct the upbringing of the child of the parent."¹³⁴ Advocates for the Convention must discuss how the concerns which motivate [*175] these legislative initiatives can be reconciled with the child empowerment theme of the Convention.

The challenge of reconciling current U.S. law and practice with the Convention can be illustrated by looking at the potential scope and import of Article 16, which requires States Parties to protect a child's right to privacy, including correspondence.¹³⁵ In our system children clearly have Fourth Amendment rights, although they are not the same as those enjoyed by adults.¹³⁶ A few months ago, in *In re: Tariq A-R Y*, Maryland's Court of Appeals ruled that a parent of an unemancipated minor can properly and effectively consent, over the child's objections, to a police search of his or her minor child's personal belongings if those belongings have been left in "the common area of the home."¹³⁷ During the search in question, the police found a quantity of marijuana in the pocket of a vest jacket which the sixteen-year-old boy had left in the dining room. In upholding the trial court's denial of a motion to suppress the marijuana, the Court of Appeals recognized that a parent's "right to control and direct the child's conduct in the home . . . is sometimes in tension with the minor child's

¹²⁶ *Id.* at art. 13.

¹²⁷ *Id.* at art. 14.

¹²⁸ *Id.* at art. 15.

¹²⁹ The Committee has, for example, criticized Norway because children are not able to "opt out" of compulsory religious education without parental consent, *see 1996 Annual Report, supra* note 36, at P144. Regarding England and Wales, the Committee noted that parents "have the possibility of withdrawing their children from parts of the sex education programmes in schools." *Id.* It continued: "in this as in other decisions, including expulsion from school, the child is not systematically invited to express his/her opinion and those opinions may not be given due weight, as required under article 12 of the Convention." *Id.* at P480.

¹³⁰ Utah Family Education Rights and Privacy Act, [UTAH CODE ANN. § 53A-13-301](#) (1997).

¹³¹ Massachusetts Parents Notice Law, [MASS. ANN. LAWS ch. 71, § 32A](#) (Law Co-Op. 1998).

¹³² Michigan Public School Code, [MICH. COMP. LAWS § 380.10](#) (1997).

¹³³ S.J. Res. No. 363, 1994-1995 Sess. (Va. 1995).

¹³⁴ *See* H.R. 1946, 104th Cong. (1995); S. 984, 104th Cong. (1995). Both bills were entitled the "Parental Rights and Responsibilities Act of 1995."

¹³⁵ Convention, *supra* note 5, at art. 16.

¹³⁶ *See* Nauck, *supra* note 39, at 689; *see generally* [Vernonia Sch. Dist. v. Acton](#), 515 U.S. 646 (1995).

¹³⁷ [In re Tariq A-R Y](#), 701 A.2d 691, 692 (Md. 1997).

rights under the Fourth Amendment.”¹³⁸ Nonetheless, it said, parental consent to a search of the residence will act to bind the child, at least as to admissibility of the evidence recovered.¹³⁹ Assuming that the Convention had been in effect for the United States, and taking specific account of the rights of the child to privacy and to be heard on matters affecting his interests as recognized by the Convention, the Court of Appeals might have been required to rule differently. For example, if the treaty were “self-executing” the Court might have been required to hold that under Article 16 the parent’s consent to such a search was not enough to justify the search by state authorities.

A second dimension exists to the parental rights question, namely, the extent to which the Convention might operate to alter the relative authority of the government and parents with regard to childrearing issues. The Convention has often been characterized as imposing limits on the government’s ability to infringe on children’s rights,¹⁴⁰ but others contend it would in fact require increased governmental involvement and regulation. Our system has always circumscribed the reach of governmental power in this area. Consider, for example, the recent case of *Nunez v. City of San Diego*,¹⁴¹ in which the Ninth Circuit held, among other things, that a municipal juvenile curfew ordinance intruded on the substantive due process rights of parents.¹⁴² The Court of Appeals noted that the custody, care, and nurture of a child reside in the first instance in her parents, and while government has a legitimate interest in the welfare of youthful citizens, a parent’s right to rear children without undue governmental interference is “a fundamental component of due process.”¹⁴³

If, as seems incontrovertible, parental authority has a constitutional grounding, it is worth asking further whether the requirements of the Convention would in any way conflict with the notion of limited government involvement. It is an open question whether our system in fact invests governmental agencies with sufficient authority to carry out the requirements of the Convention, for instance over the contrary wishes of parents and other responsible adults. The issue, in other words, is not simply the rights of parents versus the children for whom they are responsible, but their rights versus the government, viewed in light of the obligations that the Convention would impose on governmental authority. If a child objected to a parentally-imposed curfew, as opposed to a state-imposed curfew as in *Nunez*, the Convention could be construed to require the government to intervene on behalf of the child to prevent parents from imposing an unreasonable curfew on their child. Here again, a careful analysis would seem essential to the ratification debate.

Yet another aspect of this issue is the extent to which the Convention might properly be read to implicate actions by individuals and private entities outside of the family relationship. The fundamental non-discrimination provision in Article 2(1), for example, requires States Parties to ensure the rights recognized in the Convention for “each child within their jurisdiction without discrimination of any kind.”¹⁴⁴ Article 3(1) establishes the “best interests of the child” as a primary consideration in actions taken *inter alia* by private social welfare institutions.¹⁴⁵ The requirements of Articles 28 and 29 regarding education clearly may be read to cover private schools and institutions.¹⁴⁶ Similar questions are presented by the various provisions relating to health, health care, and child labor. Murkiest of all, perhaps, is the reach of Article 31(1), which guarantees “the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the

¹³⁸ *Id.* at 696.

¹³⁹ *Id.* at 697.

¹⁴⁰ Susan Kilbourne, *U.S. Failure to Ratify the Convention on the Rights of the Child*, [6 TRANSNAT’L L. & CONTEMP. PROBS. 437, 442 \(1996\)](#).

¹⁴¹ [114 F.3d 935 \(9th Cir. 1997\)](#).

¹⁴² *Id.* at 951.

¹⁴³ *Id.* (citing [Ginsburg v. New York, 390 U.S. 629, 639 \(1969\)](#)). The court found that the curfew was an impermissible adverse inference by the state, and as such derogated the parents’ rights. *Id.* at 951-52 (citing [Hodgson v. Minnesota, 497 U.S. 417 at 444 \(1990\)](#)).

¹⁴⁴ Convention, *supra* note 5, at art. 2(1).

¹⁴⁵ *Id.* at art. 3(1).

¹⁴⁶ *Id.* at arts. 28 & 29.

child and to participate freely in cultural life and the arts.”¹⁴⁷ Because of the important jurisdictional issue posed by the parental rights and private action problems, the United States, along with a non-self-executing declaration, might conclude that it would be prudent to limit its undertakings to those areas properly subject to “state action,” much as it did with regard to the Convention on the Elimination of All Forms of Racial Discrimination.¹⁴⁸

2. Federalism

The question of governmental authority itself has another important aspect. Despite the increasing role of the federal government in children’s issues,¹⁴⁹ many of the areas covered by the treaty remain matters primarily of state and local law, if, indeed, they are matters for government at any level.¹⁵⁰ To a much greater extent than other human rights treaties recently endorsed by the Senate, this Convention addresses areas traditionally considered to be primarily or exclusively within the province of state and local authority, such as measures for child health, development and protection, custody and visitation, adoption and foster care, and education and welfare.¹⁵¹ The Convention requires States Parties to make a commitment to provide certain services or levels of services in these areas, such as ensuring the development of institutions for the care of children¹⁵² and promoting the recovery of children who are victims of torture, neglect, exploitation or abuse.¹⁵³

Nonetheless, the federal government would, upon ratification, be ultimately responsible for compliance with these provisions. Clearly, the treaty was drafted primarily from the perspective of a central government in a “unitary” state, with plenary authority for all issues related to children’s welfare. The Committee itself shares this perspective, as reflected in its calls upon States Parties to adopt and pursue coordinated national implementation policies. Recently, for example, it criticized the Republic of Ireland for its “somewhat fragmented approach” to implementation, because the government lacked a comprehensive national policy incorporating the principles and provisions of the Convention.¹⁵⁴ In contrast, it praised the [*177] United Kingdom for adopting a single Children’s Act applicable to England and Wales even while expressing concern at the lack of an effective central coordinating mechanism to ensure implementation.¹⁵⁵ This orientation poses problems for our decentralized approach to children’s affairs.

The first option in solving this problem could be to increase federal responsibilities for children’s issues, especially those to which U.S. compliance with the treaty standards is comparatively weak. The federal government could rely on its authority under the treaty power to take over direct responsibility for various substantive areas covered by the treaty, for example by establishing a central department of children’s affairs or

¹⁴⁷ *Id.* at art. 31(1).

¹⁴⁸ In the case of the Convention on the Elimination of All Forms of Racial Discrimination, *opened for signing* Mar. 7, 1966, S. EXEC. DOC. C., 95-2 (1978), 60 U.N.T.S. 195, the United States reserved with regard to “private conduct” not subject to governmental regulation. 140 CONG. REC. S7634 (daily ed. June 24, 1994). A similar reservation has been proposed by the Administration, and endorsed by the Senate Foreign Relations Committee, with respect to the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, S. EXEC. REPT. 103-38 at 10 (1994). The ABA group addressing the Convention has recommended an understanding clarifying that Article 29 does not require regulation of private educational institutions other than what is permitted under the First Amendment. *See* Arnold et al., *supra* note 75, at 86.

¹⁴⁹ *See generally* Davidson, *supra* note 51.

¹⁵⁰ For example, only limited federal standards apply to child care facilities, children’s institutions, and child protective services. Mental health commitment of children to private institutions may in some circumstances be outside the reach of constitutional protection. *See Parham v. J.B.*, 442 U.S. 584 (1979).

¹⁵¹ *See generally* CHILDREN’S RIGHTS IN AMERICA, *supra* note 41, at chs. 9-13.

¹⁵² *See* Hollinger & Bussiere, *supra* note 50, at 280.

¹⁵³ *See* James B. Boskey, *Preventing Exploitation of the Child*, in CHILDREN’S RIGHTS IN AMERICA, *supra* note 41, at 303.

¹⁵⁴ *Concluding Observations on the Initial Report of Ireland*, U.N. Comm. on the Rts. of the Child, 17th Sess., P6, U.N. Doc. No. CRC/C/15/Add.85 (1998); *see also* *Concluding Observations on the Initial Report of Bulgaria*, *supra* note 8, at P33.

¹⁵⁵ *See* *Concluding Observations on the Initial Report of the United Kingdom*, *supra* note 52, at PP3, 24.

establishing a comprehensive child rights statute. Under the authority of *Missouri v. Holland*,¹⁵⁶ Congress could probably do so as a matter of constitutional law, even in areas to an extent not otherwise supportable under the enumerated powers. However, there would likely be very significant political opposition to “federalizing” these areas. To take one example, while prevention of child abuse and neglect has been deemed a legitimate matter of federal concern and limited activity,¹⁵⁷ many would look askance at any effort to make it primarily a federal issue. One need only consider the field of education, for example, where opposition to a national curriculum has been pronounced, to see the difficulties this approach might encounter.¹⁵⁸ Opponents of the Convention have already been successful at rallying support for their position by claiming that this option would be inevitable should the United States ratify the Convention.¹⁵⁹

A second option would be, at least in theory, for the United States to take a “federalism” reservation to conform its undertakings under the Convention to the limited reach of federal authority. This option would surely be objectionable. Such a reservation, unlike those that the United States has taken to other human rights treaties, would limit the extent to which the Convention applied to the United States at all; it would not merely be a statement of U.S. intentions with regard to implementation.¹⁶⁰ If the United States were to accept obligations under the Convention only to the extent of the central government’s existing jurisdiction and authority, and otherwise decline to be bound, one could imagine significant, and legitimate, domestic and international outcry.¹⁶¹

A third possibility is to accept the treaty obligations in their totality but to recognize and maintain the divided responsibilities of federal and state governments with regard to domestic implementation. There is precedent for such an approach in the “federalism understanding” taken by the United States in connection with both the International Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination.¹⁶² Because the Children’s Convention nowhere specifies which level of government must be responsible for implementing its particular provisions, one could hope thereby to avoid an objection in principle.¹⁶³

However, this third approach raises the vital issue of how the federal government would, if necessary, ensure compliance by a recalcitrant state or local government. How would the federal government guarantee the necessary harmonization of state and local laws and practices? What would happen in the event that, for whatever reason, the voters of a particular jurisdiction decided not to change their local law to conform, or not to fund services to the requisite level, or not to follow the Committee’s recommendations? An example may serve to illustrate the difficulty. The national bookseller Barnes & Noble was recently indicted in Montgomery, Alabama, under state law for disseminating “obscene” material containing visual reproductions of children under

¹⁵⁶ [252 U.S. 416 \(1920\)](#). For an exploration of the Court’s likely analysis of legislation enacted to implement the Convention under *Missouri* and its progeny, see Susan Kilbourne, *The United Nations Convention on the Rights of the Child: Federalism Issues for the United States*, 5 GEO. J. ON FIGHTING POVERTY (forthcoming Summer 1998).

¹⁵⁷ For an examination of the primary federal child welfare programs, see Davidson, *supra* note 51.

¹⁵⁸ Consideration must also be given to recent Supreme Court cases on the issue of federalism, which are not yet well understood in relation to the treaty power. See, e.g., [Printz v. United States, 117 S.Ct. 2365 \(1997\)](#) (holding unconstitutional the Brady Handgun Violence Prevention Act); [City of Boerne v. Flores, 117 S. Ct. 2157 \(1997\)](#) (finding Religious Freedom Restoration Act to be unconstitutional); [United States v. Lopez, 514 U.S. 549 \(1994\)](#) (holding Gun Free School Zone Act unconstitutional); [New York v. United States, 505 U.S. 144 \(1992\)](#) (invalidating federal environmental regulations which required state action).

¹⁵⁹ Douglas Phillips, *The Legal Impact of the the [sic] United Nations Convention on the Rights of the Child* (Nat’l Ass’n for Home Educ., Paeonian Springs, Va.). Also, although opponents of the Convention have claimed that ratifying the Convention would diminish U.S. sovereignty, it is important to emphasize that the federalism issue is not a “sovereignty” issue *per se*, but rather one concerning the allocation of authority within the federal system.

¹⁶⁰ See Louis Henkin, *U.S. Ratification of Human Rights Convention: The Ghost of Senator Bricker*, [89 AM. J. INT’L. L. 341, 345 \(1995\)](#).

¹⁶¹ *Id.*

¹⁶² *Id.*; see also *supra* note 148.

¹⁶³ Of course, given past Committee statements favoring a single, uniform, integrated approach, the Committee’s likely views on adequacy of implementation under such an understanding would not be favorable. See *supra* note 154 and accompanying text.

the age of seventeen involved in sexually suggestive acts.¹⁶⁴ The books in question were *Age of Innocence* by the French photographer *David* Hamilton and *Radiant Identities* by the San Francisco photographer Jock Sturges.¹⁶⁵ The Alabama prosecutor is quoted as saying, "We must protect children from those who would exploit their innocence for financial gain under the guise of so-called art."¹⁶⁶ Tennessee has brought similar charges against Barnes & Noble.¹⁶⁷ Articulation and enforcement of specific obscenity standards is largely a local function. Under one reading of Article 34 of the Convention, and assuming that it did not contravene the First or Tenth Amendments, the federal government might be required to mandate such prosecutions throughout the country on a uniform basis and Alabama and Tennessee might be required to raise the age at which they would prosecute to stop such "exploitation" from seventeen to eighteen.

An alternative to direct enforcement could be to use the federal purse to encourage compliance by states and localities.¹⁶⁸ Precedents abound in various fields of federal activity and regulation.¹⁶⁹ Yet another approach might be to encourage direct adoption of the Convention at the state and local levels.¹⁷⁰ These two approaches are among the innovative options which must be carefully explored.

B. Topical Areas of Concern

Two substantive areas where issues have arisen about the conflict between U.S. law and practice and the Convention -- abortion, and juvenile justice and capital punishment -- help illuminate the interaction between the conceptual or structural concerns discussed above and the public policy issues involved in the debate over specific Convention provisions.

I. Abortion

The Convention does not address the question of abortion directly, but it is difficult to see how it could be avoided during a Senate ratification debate. A credible effort was made during the drafting process to ensure that the Convention is "abortion neutral." Article 16 (right to privacy) and Article 24(2)(f) (right to family planning education and services) provide a basis for asserting that the right to choose is recognized, at least implicitly.¹⁷¹ Right to Life proponents are likely to press for an affirmative declaration, however, that the Convention protects the rights of the unborn, citing the explicit preambular reference to the need to provide children "special safeguards and care, including appropriate legal protection, before as well as after birth,"¹⁷² the parallel declaration made by the Holy See,¹⁷³ and the obligation under Article 6(2) to ensure "to the maximum extent possible the survival and development of the child."¹⁷⁴ One skirmish in this battle was already fought when Senator Helms proposed an amendment to the September, 1990 Senate resolution that would have interpreted the Convention to protect the rights of "unborn offspring at every [*179] stage of biological development."¹⁷⁵ The proposal was defeated sixty-three to thirty-six.¹⁷⁶

¹⁶⁴ Phillip Rawls, *Alabama Indicts Book Chain on Pornography*, WASH. POST., Feb. 19, 1998, at A8.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Harassment in the Bookstore*, WASH. POST, Mar. 1, 1998, at C6.

¹⁶⁸ See Kilbourne, *supra* note 156.

¹⁶⁹ *Id.*

¹⁷⁰ See Spiro, *supra* note 117, at 568.

¹⁷¹ Convention, *supra* note 5, at art. 16 & 24(2)(f).

¹⁷² *Id.* at preamble.

¹⁷³ *Initial Report of Holy See*, U.N. Comm. on the Rts. of the Child, P8, U.N. Doc. No. CRC/C/3/Add. 27 (1994).

¹⁷⁴ Convention, *supra* note 5, at art. 6(2).

¹⁷⁵ The resolution, S. Res. 231, 101st. Cong., (1990), was tabled, and later re-introduced as Amendment 2625 to H.R. 5241, 101st. Cong., (1990), an appropriations bill, to which Senator Helms attempted to attach a second-degree amendment on abortion, Amendment 2628. 136 CONG. REC. S12787-02 (daily ed. Sept. 11, 1990).

¹⁷⁶ 136 CONG. REC. S12807-02 (daily ed. Sept. 11, 1990).

However this debate is decided, any attempt to use the Convention to establish a national norm in this area would encounter opposition. Despite its obvious constitutional implications, abortion has been primarily an issue of state legislation throughout its history. Any attempt to pass federal legislation enforcing a national standard either prohibiting or allowing unfettered access to abortion would without a doubt raise federalism concerns. Advocates of parental rights would argue as well that any attempt to use the Convention's right to privacy provision to overrule state laws, such as those laws which have recently been upheld regarding parental notification, would infringe on the due process rights of parents.¹⁷⁷

2. Juvenile Justice/Punishment

Of particular importance is the potential impact of the Convention on the juvenile justice system. This question must be assessed in light of the rising public concern over increasing rates of youth crime, which finds reflection in two unmistakable trends: first, the movement within the Congress towards federalizing juvenile justice,¹⁷⁸ and second, the trend towards increasing the penalties for the most serious juvenile offenses,¹⁷⁹ highlighted by recent incidents such as the tragic events in Jonesboro, Arkansas.¹⁸⁰

A number of Convention provisions touch generally on the administration of the criminal justice system as it applies to minors. For example, Article 37(a) prohibits "cruel, inhuman or degrading treatment or punishment," Article 39 obligates parties to provide rehabilitative care, and children are given the right in Article 40(1) to be treated under the penal law "in a manner consistent with the promotion of the child's sense of dignity and worth."¹⁸¹ On a substantive level these standards may be difficult for the United States to implement carefully. The Committee on the Rights of the Child has put great emphasis on juvenile justice and has pointedly called upon States Parties to adhere not only to the Convention, but to related international standards, including the Beijing Rules, the Riyadh Guidelines, and the U.N. Rules for the Protection of Juveniles Deprived of their Liberty.¹⁸² Of special concern in the United States will be conditions of pretrial detention, separation of juvenile and adult offenders, and the circumstances of juvenile commitment to mental hospitals. However, despite U.S. Justice Department activity in the field of juvenile justice and delinquency prevention,¹⁸³ it is clear that forcing these standards on the states, to the extent that they exceed constitutional requirements, would raise serious federalism issues.

Capital punishment promises to be a particularly contentious subject. While infrequently imposed on and even less often carried out against youthful offenders, capital punishment is today permissible for the most serious of-

¹⁷⁷ See *supra* note 140, and accompanying text (discussing *Nunez v. City of San Diego*). The optimal solution, therefore, might well be an understanding endorsing the "neutrality" of the Convention on this potentially divisive issue.

¹⁷⁸ See Ronald Goldstock, et al., *Justice that Makes Sense*, CHAMPION, Dec. 1997, at 6.

¹⁷⁹ The theme for this trend, in general, has been "adult time for adult crime." In recent years, most states have amended their laws to make it easier to prosecute the most serious juvenile offenders as adults. See Proposed Comprehensive Plan for FY 1998, [63 Fed. Reg. 6338 \(1998\)](#) (Feb. 6, 1998) (proposal by Dep't of Justice, Office of Juvenile Justice and Delinquency Programs).

¹⁸⁰ Rick Bragg, *Bloodshed in a Schoolyard: The Overview*, N.Y. TIMES, Mar. 25, 1998, at A1.

¹⁸¹ Convention, *supra* note 5, at arts. 37(a), 39, 40(1). These provisions, which prohibit degrading treatment and require consideration of the child's dignity and self-worth, seem to go considerably farther than the Eighth Amendment's prohibition of "cruel and unusual punishment." U.S. CONST. amend. VIII.

¹⁸² See, e.g., *Concluding Observations on the Initial Report of the Lao People's Democratic Republic*, *supra* note 103, at PP29, 53; *Concluding Observations on the Initial Report of Indonesia*, in *1996 Annual Report*, *supra* note 36, at P219. See also *United Nations Guidelines for the Prevention of Juvenile Delinquency* ("The Riyadh Guidelines"), U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. No. A/RES/45/112 (1990); *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ("The Beijing Rules"), U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. No. A/RES/40/33, (1985); *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty*, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. No. A/RES/45/113 (1990). These rules are not widely known or applied, at least formally, in the United States.

¹⁸³ See Proposed Comprehensive Plan for FY1998, [63 Fed. Reg. 6338 \(1998\)](#) (Feb. 6, 1998) (proposal by Dep't of Justice, Office of Juvenile Justice and Delinquency Programs).

fenses committed by juveniles aged sixteen or seventeen in the United States.¹⁸⁴ In *Stanford v. Kentucky*,¹⁸⁵ the Supreme Court held that the Eighth Amendment does not prohibit imposition of the death penalty in all such cases.¹⁸⁶ Currently, about half of the states permit capital punishment for those convicted of certain forms of murder as juveniles; four states specify seventeen as the minimum age by statute (Georgia, New Hampshire, North Carolina and Texas) and twenty others specify age sixteen.¹⁸⁷ On February 27, 1998, a seventeen-year-old was sentenced to death by electrocution in Lake County, Florida, following his conviction for a particularly vicious, premeditated double murder.¹⁸⁸ The condemned individual, Roderick Justin Ferrell, a self-described vampire, was sixteen at the time of the murders, to which he confessed.¹⁸⁹

Article 37(a) of the Convention specifically prohibits imposition of the death penalty for crimes committed prior to age eighteen.¹⁹⁰ This presents an obvious quandary. Unless the Clinton Administration and the Congress are prepared to renounce capital punishment for juvenile offenders entirely and to enforce that decision against the states, then a reservation to Article 37(a) will be required. However, some would undoubtedly argue that any such reservation would be manifestly contrary to the object and purpose of the Convention and therefore impermissible under Article 51(2) as well as general international law.¹⁹¹ A number of countries have objected to the U.S. reservation on the juvenile death penalty under the International Covenant on Civil and Political Rights, where the prohibition on the juvenile death penalty was arguably less relevant to the object and purpose of the treaty.¹⁹² The only State Party to have taken a specific reservation to the juvenile capital punishment provision of Article 37 is Singapore, and that reservation has drawn objections from a number of countries.¹⁹³

The practice of sentencing a juvenile offender to life imprisonment without possibility of parole may pose a similar problem. Some would say that such a sentence is cruel and unusual, grossly disproportionate, and in defiance of what Justice Stevens has called the "special mitigating force of youth."¹⁹⁴ Nonetheless, even in states without capital punishment, the possibility exists that a youthful murderer can receive such a sentence. In Kentucky, where not long ago a high school student went on a shooting spree killing and injuring a number of his fellow students,¹⁹⁵ the statutes provide that a youthful capital offender can be sentenced to life imprisonment with-

¹⁸⁴ See VICTOR STREIB, *THE JUVENILE DEATH PENALTY TODAY* (1996). Since 1976, only nine persons convicted of crimes committed while they were juveniles have been executed, all for crimes committed at age seventeen. The juvenile death sentencing rate and the juvenile death row population remain at 1% and 2% respectively.

¹⁸⁵ [492 U.S. 361 \(1989\)](#).

¹⁸⁶ *Id.* at 371.

¹⁸⁷ See Law, *supra* note 41, at 1854, n.32-33; see also Victor L. Streib, *American Death Penalty for Juveniles: An International Embarrassment*, 5 GEO. J. ON FIGHTING POVERTY (forthcoming Summer 1998).

¹⁸⁸ See Donald P. Baker, *17-Year-Old Sentenced to Die in Fla.*, WASH. POST, February 28, 1998, at A3.

¹⁸⁹ *Id.* In Florida, according to the same report, three of the 373 inmates on death row were convicted and sentenced for crimes committed as juveniles. Nationally, at the end of 1997, sixty-seven of the roughly 3400 death row inmates committed crimes as juveniles. *Id.*

¹⁹⁰ Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offenses committed by persons below eighteen years of age." Convention, *supra* note 5, at art. 37(a).

¹⁹¹ *Id.* at art. 51(2); Vienna Convention on the Law of Treaties, *supra* note 9, at § 2, art. 19(c), 1155 U.N.T.S. at 336; see also VAN BUEREN, *supra* note 55, at 187-91 (discussing the debate over whether the prohibition on the juvenile death penalty is a norm of *jus cogens* for purposes of customary international law).

¹⁹² VAN BUEREN, *supra* note 55, at 190.

¹⁹³ This is not to say, of course, that an appropriately worded reservation could not be crafted or would be impermissible. For the full text of the Singapore reservation, see MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL at 212, U.N. Doc. No. ST/LEG/SER.E/15, U.N. Sales No. E.97.V.5 (1997). The objections are found *id.* at 214 (Belgium) and *id.* at 217 (Norway). Malaysia's broad reservation to Art. 37 might also apply to this issue. *Id.* at 210. Interestingly, a number of countries (including, *inter alia*, Canada, New Zealand, and Japan) have reserved to the "separate facilities" obligation of Article 37(c). *Id.* at 206, 211, 209.

¹⁹⁴ [Thompson v. Oklahoma, 487 U.S. 815, 833-834 \(1988\)](#).

¹⁹⁵ *Closed Hearing for Kentucky Shooting Suspect*, WASH. POST., Dec. 11, 1997, at A4.

out benefit of parole for twenty-five years.¹⁹⁶ The application of that statute to the [*181] individual in question has yet to be decided. In Washington State, two boys convicted of aggravated first degree murder did receive such a sentence, and it survived challenge under the Eighth Amendment in the Ninth Circuit.¹⁹⁷ The demand for stiff punishments for juveniles was seen in the recent case where two young boys, age eleven and thirteen, ambushed their school-mates outside an Arkansas middle school, killing four children and one teacher.¹⁹⁸ Local officials called for the Justice Department to prosecute the boys so that they could receive a stiffer penalty than under state law, although the state legislature had rejected stiffer penalties for children as young as thirteen only recently.¹⁹⁹ The Convention prohibits imposition of life imprisonment for children;²⁰⁰ given the difficulty of reconciling current U.S. law and practice, a reservation will likely be required.

Another question concerns corporal punishment. Existing law in all states (except Minnesota) permits parents to use corporal punishment on their own children, and nearly half of the states permit schools to administer reasonable corporal punishment to students, even though it is apparently used infrequently.²⁰¹ While the Convention does not explicitly prohibit such a sanction, Articles 19(1), 28(2), and 37(a) (which require States Parties to take measures to protect children from violence, and to ensure that school discipline is consistent with the child's dignity and that children are not subject to cruel or unusual punishment) provide a clear textual basis for implying that result.²⁰² The experts on the Committee on the Rights of the Child unquestionably hold that view.²⁰³ A number of States Parties have abolished corporal punishment as part of their Convention implementation.²⁰⁴ In May, 1996, for example, the Italian Supreme Court rendered a decision outlawing all corporal punishment relying in part on Article 19(1).²⁰⁵ Again, the legal issues discussed above -- parental rights and federalism -- are implicated. A reservation or understanding may be required.

The "compatibility gap" between the Convention and U.S. law is thus perceived by some to exist on two levels: on a structural or conceptual level there are fundamental differences in how to approach the government's role in protecting and promoting rights, and as to specific topics there is a more straight-forward divergence based on substantive content. Key conceptual issues for many are whether the federal or state governments would be required to regulate matters that are now matters of parental, or private organizations' control, and if

¹⁹⁶ [KY. REV. STAT. ANN. § 640.040 \(1\)](#) (Banks-Baldwin 1998).

¹⁹⁷ See [Harris v. Wright, 93 F.3d 581, 584 \(9th Cir. 1996\)](#) (declining, in sentencing two juveniles to life without parole, to treat the sentence of life without parole with the special scrutiny given to the death penalty); see also [Ridgley v. Alaska, 739 P.2d 1299, 1303 \(Ak. App. 1987\)](#) (holding that ninety-nine year terms for juveniles were justified by the severity of the crime); [Naovarath v. Nevada, 779 P.2d 944, 948 \(Nev. 1989\)](#) (finding sentence of life without possibility of parole cruel and unusual punishment for thirteen-year-old murderer of sexual assailant); [Washington v. Furman, 858 P.2d 1092, 1101 \(Wash. 1993\)](#) (reversing death penalty for seventeen-year-old but imposing sentence of life without possibility of parole). Maryland permits consideration of the youthful age of the offender as a mitigating factor in cases of first degree murder for which the death penalty or life without parole are possible sentences. See MD. ANN. CODE Art. 27, § 413(g)(5) (1957); see also [N.J. STAT. § 2C:11-3\(c\)\(5\)\(c\)](#) (allowing consideration of the age of the defendant as a mitigating factor).

¹⁹⁸ Roberto Suro, *Justice Dept. Checks U.S. Laws for Stiffer Juvenile Sentences; Jonesboro Suspects Can't be Tried as Adults Under State Code*, WASH. POST., March 27, 1998, at A2.

¹⁹⁹ *Id.*; Linda J. Collier, *Adult Crime, Adult Time: Outdated Juvenile Laws Thwart Justice*, WASH. POST., Mar. 29, 1998, at C1; Sue Anne Pressley, *Jonesboro Begins to Bury It's Dead; International Attention Adds Another Shock to School Shootings*, WASH. POST., Mar. 28, 1998, at A1; *Executing Children*, WASH. POST., Apr. 14, 1998, at A14 (discussing proposal by Texas State Representative Jim Pitts to allow eleven-year-olds to be eligible for the death penalty).

²⁰⁰ Convention, *supra* note 5, at art. 37.

²⁰¹ See Maria Glod, *Loudon Case Tests Faith in Corporal Punishment*, WASH. POST, March 1, 1998 at B5 ("The District of Columbia and 27 states, including Maryland and Virginia, have banned physical punishment in public schools."). Federal law remains permissive. See [Ingraham v. Wright, 430 U.S. 651 \(1977\)](#) (no constitutional prohibition against corporal punishment in public schools).

²⁰² Convention, *supra* note 5, at art. 19(1), 28(2) & 37(a); see also, Susan H. Bitensky, *Educating the Child for a Productive Life: Articles 28 and 29*, in CHILDREN'S RIGHTS IN AMERICA, *supra* note 41, at 167.

²⁰³ See *Concluding Observations on the Report of Canada*, U.N. Comm. On the Rts. Of the Child, 9th Sess., P25, U.N. Doc. No. CRC/C/15/Add. 37 (1995).

²⁰⁴ VAN BUEREN, *supra* note 55, at 88.

²⁰⁵ *1996 Annual Report*, *supra* note 36, at P662.

so whether the U.S. Congress could legislate in areas traditionally controlled by the states. Because of the deep feelings in the United States on these issues, and the constitutional provisions or principles involved, it seems certain that a [*182] variety of reservations and understandings will be required on these issues.

Some of the most important topics on which the Convention may diverge from U.S. law are in the areas of juvenile justice, including the juvenile death penalty. Any attempt to enforce the Convention through federal legislation would raise the conceptual issues discussed above; in addition, because of the divergence between U.S. law and the treaty, reservations to the Convention on these subjects have the potential to generate serious international criticism.

IV. IMPLEMENTATION AND ENFORCEMENT

Several additional issues must be addressed regarding how the United States would implement and enforce the Convention. As noted above, significant questions for effective implementation of the Convention are posed by the concept of parental and private rights, and federalism. Second, many Convention provisions, as noted in Part II, seem to require active state involvement to enforce substantive rights.

A. New Approaches to Implementation in the Federal System

Past Committee criticism of fragmented implementation systems indicates that the United States, however it addresses the federalism question, can expect criticism of its implementation strategies unless it adopts a new and nationally integrated approach. In varying degrees, the Committee has been critical of States Parties for their failure to adopt a comprehensive national policy²⁰⁶ towards implementation, as well as for the lack of a central coordinating body -- or "systematic mechanism" -- such as a National Committee or Ombudsman to ensure that the Convention's provisions are pursued. The Committee expects governments to take concrete steps to harmonize national legislation with the Convention's provisions, to coordinate implementation among the various governmental agencies and departments, to gather the relevant data, to promote public awareness, and to provide training and education for officials who deal with children's matters.²⁰⁷ The Committee has indicated that a decentralized governmental system may not provide a sufficient response to this expectation. In the case of Iceland, for example, the Committee stressed the importance of overall "coordination of sectoral policies of the different governmental agencies and departments dealing with child issues" and continued:

In view of the large autonomy of the local authorities in the field, among others, of child protection and welfare, the Committee also notes with concern the absence of a mechanism to coordinate the decisions taken and the activities undertaken in this field between the central and local authorities between the local authorities themselves.²⁰⁸

The Committee has had the same response in the case of countries with federal systems.

Serious consideration should therefore be given to some form of institutional mechanism to oversee and guide implementation of the Convention in U.S. law and practice. Within the proper constraints of our federal system, this mechanism could devise ways to promote the progressive implementation of the Convention, especially regarding the economic, social, and cultural rights articulated in the Convention, on which the Committee has placed specific emphasis.²¹⁰

B. Mode of Implementation

²⁰⁶ Such ideal policies are sometimes characterized as an "integrated strategy" or a "global approach." See *infra* note 208, and accompanying text.

²⁰⁷ Jaap E. Doeck, *The Current Status of the United Nations Convention on the Rights of the Child*, in THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PREPARATOIRES," *supra* note 9, at 636-39.

²⁰⁸ *Concluding Observations on the Initial Report of Iceland*, in *Report on Eleventh Session*, U.N. Comm. on the Rts. of the Child, 11th Sess., P137, U.N. Doc. No. CRC/C/50 (1996).

²¹⁰ See LEBLANC, *supra* note 55, at 268.

A second concern is whether the Convention should be denominated as a "self-executing" treaty,²¹¹ and if it is not (as seems likely), what form [*183] of implementing legislation should be adopted. Nothing in the Convention requires that it be made directly applicable in the domestic law of a State Party or provide a basis for suits by private individuals against the government. In fact, it appears that most States Parties, including the common law countries, do not implement the treaty in this fashion.²¹² However, many children's rights advocates want to use its provisions as a litigating tool.²¹³ They argue that denomination of the Convention as non-self-executing will render the Convention essentially meaningless to U.S. law.²¹⁴ The "self-executing" approach, which has a special appeal for lawyers but that laymen tend not to share, may ascribe inordinate importance to judicial remedies and ignores the other important avenues for advancing implementation, such as the passage of conforming legislation. Nonetheless, following the dominant practice of declaring human rights treaties to be "non-self-executing" is likely to be controversial among advocates of children's rights.

Even if the Convention cannot be used directly as a basis for litigation, its provisions will have to be respected, followed, and applied in some meaningful fashion.²¹⁵ States are obligated to take "all appropriate measures" to implement the rights it recognizes.²¹⁶ Regardless of the form it takes, implementation will necessarily entail difficult decisions concerning resources. In requiring States Parties to guarantee such services and benefits as health care, education, an adequate standard of living, and social security, Article 4 of the Convention specifically commits States Parties to undertake measures to implement such rights through "all appropriate legislative, administrative, and other measures . . . to the maximum extent of their available resources."²¹⁷ The Committee has placed special emphasis on this provision even in the case of countries with comparatively few resources.²¹⁸ Surely, for the United States, that commitment should and necessarily must entail extensive measures at the national level. Among developed nations, the United States has one of the highest percentages of children living in poverty.²¹⁹ Thus far, however, it seems that little attention has been paid to assessing the costs of good faith implementation of the Convention.²²⁰

One hurdle to U.S. implementation of this aspect of the Convention at a meaningful level is conceptual. Traditionally, United States society has not regarded economic and social benefits as legally required or enforceable "rights" but rather as discretionary services or programs that may be amended or rescinded solely on the ba-

²¹¹ The distinction between "self-executing" and "non-self-executing" treaties has its origins in early Supreme Court jurisprudence. In general, a treaty is "non-self-executing" if citizens are unable to invoke it directly as binding authority in court. See [Foster & Elam v. Nelson](#), 27 U.S. (2 Pet.) 253 (1829); [U.S. v. Percheman](#), 32 U.S. (7 Pet.) 51 (1833). For its part, the Committee on the Rights of the Child has "welcomed" the fact that the Convention has been denominated as self-executing under the domestic laws of some States Parties. See *Concluding Observations on the Initial Report of Chile*, in 1996 Annual Report, *supra* note 36, at P123; *Concluding Observations on the Initial Report of Italy*, *Id.* at P662.

²¹² There is in fact some basis in U.S. law for presuming that multilateral treaties should be presumed not to be self-executing. [U.S. v. Postal](#), 589 F.2d 862 (5th Cir. 1979), cert. denied 444 U.S. 832 (1979). Some commentators have suggested that the Convention is, at least in part, by terms non-self-executing. See Arnold et. al., *supra* note 75, at 34.

²¹³ See Calciano, *supra* note 38, at 527.

²¹⁴ See Donnolo & Azzarelli, *supra* note 6, at 212.

²¹⁵ The Australian High Court recently addressed this issue in *Minister for Immigration and Ethnic Affairs v. Teoh* (1995) 183 C.L.R. 273. Even though treaties are not directly incorporated into the domestic law of Australia until they have been legislatively implemented, the Court held that the act of ratification is a "positive statement by the Executive Government" that it will act in accordance with the treaty and can give rise to a "legitimate expectation . . . that administrative decision-makers will act in conformity with it." *Id.* at 291.

²¹⁶ Convention, *supra* note 5, at art. 4.

²¹⁷ *Id.* at art. 4.

²¹⁸ Thus, in considering the initial report of the Lao People's Democratic Republic, the Committee acknowledged that it was "among the least developed countries" but nonetheless expressed concern that insufficient attention had been paid to Article 4 regarding "budgetary allocations to the maximum extent of available resources." *Concluding Observations on the Initial Report of the Lao People's Republic*, *supra* note 103, at PP7, 9, 32.

²¹⁹ See Calciano, *supra* note 38, at 525.

²²⁰ Calciano has suggested simply that because the United States "possesses approximately the same resources as the other industrialized countries. . . the United States poverty rate and infant mortality rate should at least be within the same range as theirs," *id.*, and that failure by the U.S. to bring these rates to within this range would be a *per se* violation of the Convention. *Id.*

sis of political or budgetary considerations.²²¹ The Convention has been viewed by some as calling for substantial [*184] new programs for children with significant resource implications.²²² It is not entirely clear, for example, how the federal government could or would effectively guarantee the right of every child in the country "to the enjoyment of the highest attainable standard of health"²²³ or "to a standard of living adequate for the child's physical, mental, spiritual, moral and social well-being,"²²⁴ but some steps must necessarily be taken to achieve the goals. Difficult decisions will need to be made regarding the level of resource commitments to be devoted to implementing the Convention, how and by whom they will be funded, and who will administer delivery. In some areas, this may require provision of new services. Even where programs do provide services for care, protection, and support at state levels, more than a few are underfunded, poorly staffed and overburdened. There is little question, for example, that additional steps to improve health care delivery to the least fortunate, and to reduce the infant mortality rate, would be entirely consistent with the objectives of the Convention.

Consider, in this context, the current debate within the state legislatures of Virginia and Maryland over funding of medical insurance for children of the "working poor."²²⁵ Some legislators have argued that the private market is the best mechanism for dealing with this problem. Even in light of the President's recently announced child care initiative, under one view the United States would not be compliant with the requirement in Article 18(3) to ensure that *all* children of working parents have the right to benefit from child-care services and facilities.²²⁶

V. CONCLUSION

A clear understanding of the requirements of the Convention in light of existing law and practice in the United States is an inescapable prerequisite to dealing with the real dimensions of the issues posed by ratification. Only a thorough analysis can lay a proper groundwork for ratification, including preparation of any necessary implementing legislation. Not only is such an analysis needed to tell the legislators whether, where, why, and how the law may need to be changed, it will also provide the basis for crafting necessary reservations, understandings, and declarations, and -- equally important -- avoiding those which are not absolutely necessary. After such an analysis, the debate over the risks and benefits of ratification will continue to be an exercise in hypothesis and hyperbole. At the same time, this analysis will provide a blueprint for working towards achieving conformity of law and practice in advance of ratification, and as a focus for action once the Convention has been ratified.

Some have identified important Convention provisions that appear to conflict with U.S. law and practice -- either because they articulate rights unknown in U.S. law, or because they arguably allow or mandate state interference with personal liberties and parental prerogatives. These concerns must be met and addressed carefully. It will presumably be necessary to condition U.S. adherence on a number of reservations, understandings, and declarations. It may also be appropriate to consider adopting new legislation to assist in effectively implementing the Convention.

There is much to be said in favor of an innovative approach to U.S. implementation. If progressive implementation is viewed as a touchstone of the Convention, then the United States must find new ways of implementing the Convention within the federal system. In this regard, the United States will have to address whether and how to commit more resources to implementing the Convention than it has to children's issues already.

Only after a thorough examination of all of these issues will the debate over the ratification be able to proceed on a fully informed basis. This Article challenges all those concerned with children's welfare to take an active role in promoting an informed national conversation on the Convention on the Rights of the Child.

²²¹ See, e.g., [Rodriguez v. San Antonio Indep. Sch. Dist.](#), 411 U.S. 1 (1973).

²²² See Law, *supra* note 41, at 4-5.

²²³ Convention, *supra* note 5, at art. 24(1) & 27(1).

²²⁴ *Id.* at art. 27(1).

²²⁵ See, e.g., Spencer S. Hsu, *Virginia and Maryland Join States Wrestling Over Children's Health Insurance*, WASH. POST, Feb. 9, 1998, at D1.

²²⁶ Convention, *supra* note 5, at art. 18(3).

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