

# NOTES

## A CHILD'S VOICE VS. A PARENT'S CONTROL: RESOLVING A TENSION BETWEEN THE CONVENTION ON THE RIGHTS OF THE CHILD AND U.S. LAW

*Soo Jee Lee\**

*The United States is the single remaining United Nations (UN) member state that has not ratified the UN Convention on the Rights of the Child (CRC), the most important international human rights treaty governing children's rights. This Note focuses on a key objection to U.S. ratification of the CRC: the fear that its emphasis on children's rights threatens parents' rights under U.S. law. This Note uses Article 12 of the CRC, which recognizes the right of children to be heard in decisions involving their lives, as a proxy to examine how much of an actual threat the CRC poses to the constitutional right of parents to raise their children. In so doing, this Note compares Article 12 with three of the areas of U.S. law in which the rights of parents to control their children arguably most conflict with their children's right to be heard: family law proceedings, medical decisionmaking, and psychiatric commitment. The Note concludes that the conflict between parental rights and children's rights is ultimately reconcilable, and that in fact the CRC presents not a threat but an opportunity for fresh reexamination and reconciliation.*

### INTRODUCTION

Children are vulnerable members of society. That children are *vulnerable* and therefore deserve special protection makes intuitive sense; but that children are *members of society*—that is, individuals with rights of their own—comes as an afterthought, if at all. The United Nations Convention on the Rights of the Child (CRC)<sup>1</sup> is an ambitious international human rights treaty that strives to balance the two contrasting points of view by giving fresh attention to the latter.<sup>2</sup> Shifting away from a traditionalist conception of children as purely passive objects of the authority of parents and governments, the CRC paints a modern, com-

---

\* J.D. Candidate 2017, Columbia Law School.

1. United Nations Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

2. See, e.g., Cynthia Price Cohen, The Developing Jurisprudence of the Rights of the Child, 6 St. Thomas L. Rev. 1, 18–20 (1993) (explaining why and how the CRC is comprehensive).

plex vision of children as in need of protection but also as individuals with rights.<sup>3</sup>

The CRC is both a legal and a normative document. As a legally binding document, the CRC has been ratified by every United Nations member state (UN) but for a notable exception: the United States.<sup>4</sup> Consequently, the United States is the target of intensifying pressure from parties at home and abroad to ratify the CRC,<sup>5</sup> particularly following a report it submitted to the UN Committee on the Rights of the Child (Committee)<sup>6</sup> on U.S. compliance with the Optional Protocols (OPs) to the CRC.<sup>7</sup>

---

3. See *id.* at 9–10, 96 (detailing the history of children’s rights as evolving from children treated as chattel to eventually the idea, under the CRC, that “child rights = *care and protection + individual personality rights*” (internal quotation marks omitted)).

4. Somalia ratified the CRC in October 2015, leaving the United States as the lone UN member state not bound to the human rights treaty. See, e.g., Hailing Somalia’s Ratification, UN Renews Call for Universalization of Child Rights Treaty, UN News Ctr. (Oct. 2, 2015), <http://www.un.org/apps/news/story.asp?NewsID=52129#.WA-IZDsmRg0> [<http://perma.cc/7WQY-QLQ7>] [hereinafter Hailing Somalia].

5. See, e.g., Jo Becker, The US Club of 1 on Children’s Rights, Human Rights Watch: Dispatches (Oct. 1, 2015), <https://www.hrw.org/news/2015/10/01/dispatches-us-club-1-childrens-rights> (on file with the *Columbia Law Review*) (calling for U.S. commitment to the CRC following Somalia’s ratification); Kul Chandra Gautam, Opinion: American Exceptionalism on Child Rights, Inter Press Serv. (Oct. 5, 2015), <http://www.ipsnews.net/2015/10/opinion-american-exceptionalism-on-child-rights> [<http://perma.cc/4N8Z-D5PL>] (arguing, as a former officer UNICEF, for U.S. ratification of the CRC); Hailing Somalia, *supra* note 4 (reporting then–UN Secretary-General Ban Ki-Moon’s call for the United States to “help the world reach the objective of universal ratification”).

6. The Committee is the UN treaty body that monitors implementation of the CRC and its related Optional Protocols. Committee on the Rights of the Child, Office of the United Nations High Comm’r on Human Rights, <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> [<http://perma.cc/7RB4-AF9A>] (last visited Oct. 25, 2016). Confusingly, the Committee is also often referred to as the “CRC.” See, e.g., *id.*

7. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, opened for signature May 25, 2000, T.I.A.S. No. 13094, 2173 U.N.T.S. 222 (entered into force Feb. 12, 2002); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, opened for signature May 25, 2000, T.I.A.S. No. 13095, 2171 U.N.T.S. 227 (entered into force Jan. 18, 2002) [hereinafter OP Sale of Children].

States that have ratified the CRC or any of its OPs must periodically report to the Committee on their compliance. See, e.g., OP Sale of Children, *supra*, art. 12. The latest U.S. report was submitted on January 22, 2016. See Combined Third and Fourth Periodic Report of the United States of America on the Optional Protocols to the Convention on the Rights of the Child, U.S. Dep’t of State (Jan. 22, 2016), <http://www.state.gov/j/drl/rls/252299.htm> [<http://perma.cc/2B5N-G3PL>] (last updated Feb. 8, 2016). For details on the reporting process and the general functions of the Committee, see Cohen, *supra* note 2, at 24–45. See generally Martha F. Davis, Johanna Kalb & Risa E. Kaufman, Human Rights Advocacy in the United States 496–97 (2014) (explaining the UN human rights treaty body reporting system). The Committee’s response to the U.S. report is still pending, but the Committee has consistently pushed for U.S. ratification of the CRC during the reporting process. See, e.g., Comm. on the Rights of the Child, Concluding Observations on the Second Periodic Report of the United States of America Submitted

While the United States is a signatory to the CRC, and the U.S. government has in recent years signaled its intent to seek ratification of the CRC,<sup>8</sup> efforts at ratification have stalled in Congress.<sup>9</sup> This failure to ratify the CRC<sup>10</sup> seems incongruous with the United States' leading role in drafting the CRC<sup>11</sup> and in promoting human rights abroad.<sup>12</sup> Part of the reluctance to ratify is grounded in an enduring American hostility to

Under Article 12 of the Optional Protocol to the Convention on the Sale of Children, Child Prostitution and Child Pornography, ¶ 4, U.N. Doc. CRC/C/OPSC/USA/CO/2 (July 2, 2013) (urging acceleration of U.S. CRC ratification efforts). Advocates often use the Committee reports as an opportunity to press for U.S. ratification. See, e.g., Davis, Kalb & Kaufman, *supra*, at 497 (“The treaty review[] [process] offer[s] openings for advocates to engage directly with [U.S.] government officials.”).

8. See, e.g., Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Opening Remarks of Legal Adviser Harold Hongju Koh the United Nations' Committee on the Rights of the Child Concerning the Optional Protocols to the Convention on the Rights of the Child [sic] 5–9 (Jan. 16, 2013), <http://www.state.gov/documents/organization/226348.pdf> [<http://perma.cc/ZAT5-2SCJ>] [hereinafter Koh, Opening Remarks] (conveying the Obama Administration's intent to review paths to ratification); see also Gautam, *supra* note 5 (noting then-President Obama expressed support for the CRC). This Note seeks to help begin the process of tackling the complex legal questions posed by the CRC were it to be ratified and thereby adopted into U.S. law.

In case of ratification, the ratifying state legally binds itself to each provision of the treaty; but having signed but not ratified the CRC, a signatory such as the United States is only legally obliged to not contravene the “object and purpose” of the CRC. See, e.g., USCIS, Asylum Officer Basic Training Course: Guidelines for Children's Asylum Claims 8–9 (rev. ed. Sept. 1, 2009) [hereinafter USCIS, Children's Asylum Guidelines], <http://www.uscis.gov/sites/default/files/USCIS/Humanitarian/Refugees%20%26%20Asylum/Asylum/AOBTTC%20Lesson%20Plans/Guidelines-for-Childrens-Asylum-Claims-31aug10.pdf> [<http://perma.cc/5FNN-79VV>] (summarizing international human rights treaties with “provisions specifically relating to children,” including the CRC, that “can provide helpful guidance and context on human rights norms”).

9. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 *Harv. Hum. Rts. J.* 161, 170–73 (2006) (describing past U.S. efforts at domestic ratification).

10. U.S. ratification of a UN treaty involves two steps: The first step is domestic ratification, see U.S. Const. art. II, § 2 (Treaty Clause); Davis, Kalb & Kaufman, *supra* note 7, at 124 (“Once a treaty is ratified . . . it is the ‘supreme Law of the Land’ . . .” (citation omitted) (quoting U.S. Const. art. VI, cl. 2)); the second step is depositing the “instrument of ratification” with the UN Secretary-General. Cf. Hailing Somalia, *supra* note 4 (“Somalia deposited its instrument of ratification at UN Headquarters[,] . . . formalizing the process of ratification . . .”).

11. See Cris R. Revaz, *An Introduction to the U.N. Convention on the Rights of the Child*, in *The U.N. Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S. Ratification* 9, 13–14 (Jonathan Todres et al. eds., 2006) [hereinafter *Analysis of U.S. Ratification*].

12. See, e.g., Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, *Wash. Post: PostPartisan* (Nov. 21, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty> [<http://perma.cc/7SZW-YK74>] (criticizing the United States for its hypocrisy in promoting human rights abroad without ratifying the CRC for itself).

international law.<sup>13</sup> Much of the reluctance, however, hinges upon the CRC itself and its implications.<sup>14</sup> After all, the CRC is also a normative, aspirational document, one that seeks to define a universal conception of the rights and position of children in the world, just as U.S. domestic law is grappling with an increasingly complex—and often perplexing—role of children in the law. The time is therefore ripe for a serious inquiry into whether and how the United States might ratify the CRC.

This Note seeks to help resolve whether U.S. law is at odds with the CRC by tackling a specific but representational issue: the relationship between the participation rights of children under the CRC and the child-rearing rights of parents under U.S. law. U.S. law treasures the right of parents to control the upbringing of their children;<sup>15</sup> and because the CRC potentially abrogates the power of parents to make decisions on their children's behalf, the participation rights in Article 12 of the CRC<sup>16</sup> seem to be one of the treaty's most potent threats to U.S. law.<sup>17</sup> Yet the United States cannot exempt itself from the legal mandates of the Article if it ratifies the CRC.<sup>18</sup> Therefore, in order to address whether the United

---

13. See, e.g., Elizabeth Bartholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child's Rights Perspective*, 633 *Annals Am. Acad. Pol. & Soc. Sci.* 80, 83 (2011) (positing the United States has not ratified precisely because it takes obligations seriously); Koh, *Opening Remarks*, *supra* note 8, at 7 (explaining the U.S. goal of seeking “compliance *before* ratification,” in contrast to other states that “take an attitude of ‘ratification before compliance’ with regard to international treaties”); *infra* notes 60–63 and accompanying text (explaining U.S. hostility to international law).

14. See *infra* notes 67–70 and accompanying text (noting concerns arising from the CRC's family focus).

15. See *infra* notes 74–78 and accompanying text (summarizing parental rights in U.S. law).

16. See CRC, *supra* note 1, art. 12.

17. See *infra* notes 74–81 and accompanying text (describing Article 12's seeming conflict with U.S. parental rights law).

18. The United States can limit the scope of its obligations to the treaties that it ratifies through Reservations, Understandings, and Declarations (RUDs) attached to a treaty; however, under international law, countries may not exempt themselves from obligations through RUDs that contravene the “spirit of the treaty.” See, e.g., Davis, Kalb & Kaufman, *supra* note 7, at 131–38 (noting U.S. history of imposing limitations on ratified treaties through the use of RUDs and providing excerpted examples); International Law: Cases and Materials 137–50 (Lori Fisler Damrosch & Sean D. Murphy eds., 6th ed. 2014) [hereinafter *International Law*] (discussing U.S. reservations). Since Article 12 is fundamental to the CRC, RUDs restricting Article 12 likely violate the spirit of the CRC and are therefore invalid. E.g., Aisling Parkes, *Children and International Human Rights Law: The Right of the Child to Be Heard* 65 (2014) (conjecturing a U.S. Reservation on Article 12 would not be valid); see *infra* note 27 and accompanying text (identifying Article 12 as a critical part of the CRC); see also Cohen, *supra* note 2, at 47 (describing RUDs for human rights treaties and their limits); cf. Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States*, 5 *Geo. J. on Fighting Poverty* 327, 333–34 (1998) [hereinafter *Kilbourne, Federalism Issues*] (noting effectiveness of RUDs that seek to protect U.S. federalism is questionable, as they might defeat the object and purpose of the treaty).

States may feel comfortable and ready to ratify the CRC, one must explore the full implications of Article 12 and its alleged conflicts with U.S. law.

Commentary on U.S. ratification of the CRC generally fails to examine the legal implications of Article 12 for U.S. parental rights.<sup>19</sup> This Note helps to bridge this gap. Part I explains the meaning of Article 12 and concerns about ratification, focusing on parental rights. Part II then examines relevant laws in the United States on family law proceedings, medical decisionmaking, and psychiatric commitment, comparing the three areas to the laws of other common law states that have ratified the CRC, in order to obtain greater clarity about the tension between children's participation rights and parental authority. Finally, Part III provides suggestions on how to bring U.S. law into greater conformity with the CRC. Ultimately, this Note concludes that the conflict between parental rights and Article 12 is reconcilable and that, in fact, it presents a welcome opportunity for reform.

#### I. ARTICLE 12 AND ITS RELEVANCE TO U.S. LAW

This Note grapples with the legal implications to the United States were it to adopt Article 12 specifically. To sketch a better picture of Article 12 as law, section I.A contextualizes Article 12 by providing its most relevant background, namely the drafting history and the official UN interpretation of the CRC. Section I.B then briefly describes traditional perceptions of the CRC in comparison to current U.S. law, including the tension between a child's right to participate and a parent's right to decide for the child. As this Part shows, U.S. jurisprudence on parental rights is, at least in a broad sense, in some tension with a central feature of the CRC—Article 12.<sup>20</sup>

##### A. *Article 12 in Context*

The CRC is one of a handful of critical international human rights treaties.<sup>21</sup> Following ten years of extensive negotiations aimed at produ-

---

19. Instead, the commentary on parental rights and its conflict with the CRC remains generic and political in nature. See, e.g., Susan Kilbourne, *Opposition to U.S. Ratification of the United Nations Convention on the Rights of the Child: Responses to Parental Rights Arguments*, 4 *Loy. Poverty L.J.* 55, 55, 59, 109 (1998) [hereinafter Kilbourne, *Parental Rights*] (painting parental rights opposition in general and political terms).

20. See *supra* note 13 (discussing the U.S. compliance-before-ratification approach); *supra* note 18 and accompanying text (explaining why the United States cannot exclude Article 12 from its obligations in ratifying the CRC).

21. The most commonly cited UN "core" human rights treaties are: International Convention on the Elimination of All Forms of Racial Discrimination; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment

cing a universal document that would best reflect a consensus of diverse legal systems and cultures,<sup>22</sup> the CRC opened for signature on November 29, 1989, and became the most popularly and rapidly embraced human rights treaty to date.<sup>23</sup> At least part of its popularity is attributable to the CRC's conscious inclusiveness. Its language is broad and speaks in principles, allowing for variation in implementation, rather than imposing a code of rules.<sup>24</sup> In addition, the treaty system encourages voluntary *implementation* rather than coercive *enforcement*; given its weak enforcement mechanisms,<sup>25</sup> the CRC "focuses on education, facilitation, and cooperation" of the parties rather than enforcement.<sup>26</sup>

The participation right of children is one of the core principles of the CRC.<sup>27</sup> Citizen participation, of course, is a key value of a demo-

---

or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities. See, e.g., Office of the United Nations High Comm'r for Human Rights, *The Core International Human Rights Treaties*, at iii-iv (2006), <http://www.ohchr.org/Documents/Publications/CoreTreatiesen.pdf> [<http://perma.cc/3ND5-RRNP>] (listing core human rights treaties); International Law, *supra* note 18, at 940-41 (same); Rutkow & Lozman, *supra* note 9, at 166 (same).

22. Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child 17* (1999) ("The working group operated on the basis of consensus . . . so that as many States as possible would eventually ratify the CRC."); Parkes, *supra* note 18, at 6 (recognizing the CRC as the product of extensive negotiations among different legal systems and cultural traditions).

23. Jean Koh Peters, *How Children Are Heard in Child Protective Proceedings, in the United States and Around the World in 2005: Survey Findings, Initial Observations, and Areas for Further Study*, 6 Nev. L.J. 966, 970 (2006) ("[The CRC] broke records by gaining the greatest number of signatories on the day it opened . . . , by proceeding to garner more ratifications . . . and then by being implemented more quickly than any other human rights treaty."); see *supra* note 4 and accompanying text (noting all UN member states except the United States have ratified the CRC); see also Parkes, *supra* note 18, at 56 (describing a UNICEF study of states parties that found most had incorporated CRC into domestic law).

24. See Cohen, *supra* note 2, at 24-25, 95 (describing the CRC as a "constitutive instrument, laying out norms that are susceptible to a range of interpretations," with intentional vagueness in its language).

25. See Roger J.R. Levesque, *The Internationalization of Children's Human Rights: Too Radical for American Adolescents?*, 9 Conn. J. Int'l L. 237, 272 (1994) ("Compared to the other human rights treaties, the Convention offers the weakest form of protection."). For example, the Committee has no state-to-state complaint mechanism, significantly curtailing opportunities for CRC-based litigation on the international level. See *id.* at 272-73. The UN later adopted a third OP establishing an individual complaints mechanism under the CRC, allowing individuals to bring a complaint or claim to the Committee. See *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, opened for signature Dec. 19, 2011, 1577 U.N.T.S. I-27531 (entered into force Apr. 14, 2014) (setting out procedures for submitting individual "communications" to claim violations of rights under the CRC).

26. See Levesque, *supra* note 25, at 272-73 (footnotes omitted).

27. See, e.g., Parkes, *supra* note 18, at 5 (declaring Article 12 the most important CRC article). The CRC embodies three basic principles, or the "three P's": "provision" rights entitle children to affirmative assistance, such as welfare and education; "protection"

crazy,<sup>28</sup> and the CRC paves new ground by viewing children as “agents who share the power to shape their own lives” and encouraging them to exercise their own rights as members of society.<sup>29</sup> This new vision of youth marks a “paradigmatic shift” from the traditional attitudes toward children and the paternalistic “best interests” focus that consider minors as passive subjects of parental or state authority.<sup>30</sup> Instead, the CRC empowers children to be rights-bearing individuals, reflecting a key theme of the treaty, and in fact its assertion of the participation right of children is perhaps the CRC’s greatest innovation.

The CRC grants each child<sup>31</sup> the right to participate in all decision-making processes that affect his or her life,<sup>32</sup> so that the child might obtain a more equal role in relationships with adults and a greater opportunity to think and act independently.<sup>33</sup> Article 12 sets out this right:

---

rights safeguard children against maltreatment; and “participation” rights grant children limited autonomy over their lives. E.g., Bartholet, *supra* note 13, at 88.

Another common approach is to divide the CRC into four principles: nondiscrimination, the best interests of the child, the right to life and development, and “[t]he right of all children to be heard and taken seriously.” Comm. on the Rights of the Child, General Comment No. 12, *The Right of the Child to Be Heard*, ¶ 2, U.N. Doc. CRC/C/GC/12 (July 20, 2009) [hereinafter Committee, General Comment 12]; Lynne Marie Kohm, *Suffer the Little Children: How the United Nations Convention on the Rights of the Child Has Not Supported Children*, N.Y. Int’l L. Rev., Summer 2009, at 57, 59; see also Laura Lundy, “Voice” Is Not Enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child, 6 *Brit. Educ. Res. J.* 927, 933 (2007) (arguing Article 12 must be considered with other CRC provisions, especially Articles 2, 3, 5, 13, and 19); Rebeca Rios-Kohn, *The Convention on the Rights of the Child: Progress and Challenges*, 5 *Geo. J. on Fighting Poverty* 139, 143 (1998) (naming CRC Articles 2, 3, 6, and 12 as corresponding to the four principles). In either case, the participation right of children is one of the CRC’s main underlying principles.

28. E.g., Lieve Catrijse & Isabelle Delens-Ravier, *Reflections on the Concept of Participation*, in *Participation Rights of Children* 27, 31–35 (Fiona Ang et al. eds., 2006) (describing participation as “the founding element of the democratic system” and explaining how the concept applies to the “world of children”).

29. E.g., Lotem Perry-Hazan, *Freedom of Speech in Schools and the Right to Participation: When the First Amendment Encounters the Convention on the Rights of the Child*, 2015 *BYU Educ. & L.J.* 421, 422; see also Cohen, *supra* note 2, at 7 (noting the CRC diverged from equating child rights with “care and protection” to “care and protection [and] individual personality rights” (emphasis omitted)).

30. Melissa L. Breger, *Against the Dilution of a Child’s Voice in Court*, 20 *Ind. Int’l & Comp. L. Rev.* 175, 178 (2010) (noting the CRC represents a “paradigmatic shift from looking at the child as a passive object based on her needs to looking at the child as an active subject and bearer of her own rights” (internal quotation marks omitted) (quoting Maria Grahn-Farley, *Foreword: Crossing Borders*, 30 *Cap. U. L. Rev.* 658, 659–61 (2002))); see also Parkes, *supra* note 18, at 57 (attributing attitudinal reluctance to recognize children’s rights as a major impediment to CRC implementation, especially Article 12).

31. The CRC defines a “child” as a human being under age eighteen or the age of majority if earlier. CRC, *supra* note 1, art. 1.

32. Peters, *supra* note 23, at 971.

33. Catrijse & Delens-Ravier, *supra* note 28, at 27.

(1) 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.

(2) 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.<sup>34</sup>

While there are various ways to interpret the text of Article 12, it at least clearly delineates both substantive and procedural rights: Article 12(1) demonstrates a broad substantive right, and Article 12(2) follows with specific procedural requirements.<sup>35</sup> Article 12 is expansive, imposing a duty upon states parties to ensure the right of children to freely express their views, whether publicly or privately,<sup>36</sup> and to ensure that their views are actually “given due weight” in decisions affecting them.<sup>37</sup> It is also important to note that under Article 12, children have a right to the information necessary to formulate their views and to choose to *not* express their views.<sup>38</sup>

---

34. CRC, *supra* note 1, art. 12. As demonstrated in the text of Article 12, UN member states who have ratified the CRC are called “states parties.” See *id.*

35. See Parkes, *supra* note 18, at 31 (describing Article 12 as a “visionary provision that has a very practical meaning” and “operates as both a substantive right as well as a procedural right”). Interpretations of Article 12 vary, but they do tend to focus on its procedural implications in law. See, e.g., Breger, *supra* note 30, at 176–77 (focusing on the role of the child’s attorney given Article 12); Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. Chi. L. Sch. Roundtable 67, 78 (1995) (predicting ratification would “help ensure that children are adequately represented in a much broader range of proceedings”); Peters, *supra* note 23, at 967–69 (introducing a study of child representation in proceedings around the world).

36. Drafting history indicates that drafters rejected an enumeration of specific settings in which children may express their views in favor of the more expansive, all-inclusive approach of Article 12(2). Fiona Ang et al., *Participation Rights in the UN Convention on the Rights of the Child*, in *Participation Rights of Children*, *supra* note 28, at 9, 16 [hereinafter Ang et al., *Participation Rights*].

37. For a detailed breakdown of the text of Article 12, see Committee, General Comment 12, *supra* note 27, ¶¶ 15–39; Parkes, *supra* note 18, at 31–39. Given the many dimensions of a “participation right,” one might even see it as in fact a bundle of rights, with Article 12 encompassing the rights to free expression, influence over a decision, and an opportunity to be heard in proceedings. See Ang et al., *Participation Rights*, *supra* note 36, at 9–10, 14 (reasoning that CRC’s “right to participation” is a “cluster of rights”).

38. See, e.g., Ang et al., *Participation Rights*, *supra* note 36, at 15 (“Children should not suffer any pressure, constraint or influence that might prevent a free expression of opinions or lead to the manipulation of [their] feelings.”); Parkes, *supra* note 18, at 34–35 (interpreting “freely” in Article 12 as requiring access to necessary information but imposing no pressure to express views).



The CRC does not, however, delineate an unlimited participation right—and decisionmaking powers—of children. The treaty recognizes a right to free expression only for children who are capable of forming independent views, and even then, the weight given to their views depends upon the age and maturity of each child.<sup>39</sup> Even when a child is able to express his or her views, they are not necessarily dispositive—Article 12 merely asks that children's views, if expressed, act as a *factor* in decisions regarding the children.<sup>40</sup>

As previously noted, the CRC encompasses different principles, and in some cases the principles are in inherent tension with one another. For example, Article 12 stands in opposition to another central principle of the CRC: the best interests of a child. The CRC arose out of a reaction to the suffering of children following World War II and the newfound recognition of the protection that children need, as expressed in the UN General Assembly Declaration of the Rights of the Child in 1959.<sup>41</sup> Reflecting this background, the CRC is committed to the protection of the “best interests” of each child, a principle best reflected in its Article 3(1).<sup>42</sup> The best interests standard has been embraced internationally,<sup>43</sup> including in the United States, where the government may exercise its “*parens patriae*” power to protect children.<sup>44</sup>

The best interests principle and the participation right of children are two fundamental pillars of the CRC, “guid[ing] the interpretation for all other provisions.”<sup>45</sup> Yet the two are also in tension with each other: “best interests” of children are determined by parties other than the children themselves, such as their parents, a guardian, or a government entity; in contrast, by allowing a child to have a voice in decisions over his or her own welfare, Article 12 emphasizes the child's autonomy against adult authority. Taken to their logical extremes, Article 3 sees children as vulnerable objects in need of protection from parents or other authority

---

39. See, e.g., Parkes, *supra* note 18, at 32, 36–37 (acknowledging Article 12's limits). However, age alone cannot be used as a cutoff point in giving weight to a child's views—other factors of “maturity” must be determined on a case-by-case basis. Committee, General Comment 12, *supra* note 27, ¶ 29; Parkes, *supra* note 18, at 32, 36.

40. See Parkes, *supra* note 18, at 75.

41. See Detrick, *supra* note 22, at 13–15 (reporting on the origin of the CRC).

42. Article 3(1) reads: “In all actions concerning children . . . the best interests of the child shall be a primary consideration.” CRC, *supra* note 1, art. 3(1).

43. USCIS, Children's Asylum Guidelines, *supra* note 8, at 8 (“The internationally recognized ‘best interests of the child’ principle is a useful measure for determining appropriate [child] interview procedures . . .”).

44. E.g., Susan D. Hawkins, Note, Protecting the Rights and Interests of Competent Minors in Litigated Medical Treatment Disputes, 64 *Fordham L. Rev.* 2075, 2083–84 (1996) (“The state invokes its *parens patriae* power to protect those members of society who are unable to protect themselves. Children are an obvious category of persons often in need of such protection.” (footnote omitted)).

45. See Rios-Kohn, *supra* note 27, at 143.

figures, while Article 12 views children as autonomous beings with the right to make their own decisions, whether or not it be in their best interests.<sup>46</sup> Thus, the CRC seems at odds with itself in some respects.

B. *The General Understanding About Article 12 Compatibility with U.S. Law*

Before examining what Article 12 would entail for specific areas of U.S. law, it is necessary to first understand the general expectations of CRC ratification. Opinions vary widely on what bringing U.S. law into compliance specifically with Article 12 would involve; commentators debate whether Article 12 would in fact improve the lives of children and whether it poses a credible threat to such treasured doctrines in U.S. law as parental rights and federalism.

1. *Reasons to Ratify: The Benefits of the CRC.* — Ratification proponents argue that U.S. ratification of the CRC would bring significant benefits, ranging from substantive improvements in children's lives to fresh reexamination of flagging areas of law.

First and foremost, advocates argue that adopting the CRC into domestic law would improve the lives of children by promoting their rights and thus empowering them under the law.<sup>47</sup> Article 12 would provide greater representation for children in a wide range of proceedings,<sup>48</sup>

---

46. See Rebecca M. Stahl, Note, "Don't Forget About Me": Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 *Ariz. J. Int'l & Comp. L.* 803, 803, 805 (2007) (noting the dichotomous views of children in modern law and under the CRC). The U.S. government's guide for assessing child asylum claims cites to both Article 3 and Article 12 of the CRC to suggest that both the best interests standard and the viewpoints of the children should be considered in the process. See USCIS, *Children's Asylum Guidelines*, *supra* note 8, at 8–9.

Some critics of the CRC argue that the rights-focused approach of the CRC, a shift away from a purely best-interests-focused approach, has failed to protect either the rights or the best interests of children. See Kohm, *supra* note 27, at 60–61. After all, a child's preferences may not always coincide with what is in his or her best interests, at least from the government's or parents' point of view. For example, a seventeen-year-old girl might seek to refuse chemotherapy because she is afraid of "tubes sticking out of her." See *In re Cassandra C.*, 112 A.3d 158, 171 (Conn. 2015) (holding minors are presumed incompetent to refuse life-saving medical treatment).

47. See, e.g., Bartholet, *supra* note 13, at 80–81 (explaining the CRC would help promote children's rights abroad and empower children domestically beyond current U.S. law); Rios-Kohn, *supra* note 27, at 141 (describing the CRC as an effective vehicle for improving children's lives and providing rights).

48. Howard A. Davidson, *The Child's Right to Be Heard and Represented: Article 12* [hereinafter Davidson, Article 12], in *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law* 151, 151–52 (Cynthia Price Cohen & Howard A. Davidson eds., 1990) [hereinafter *Children's Rights in America*] ("Article 12 of the [CRC] addresses the need for children to have their voices heard, with the assistance of effective legal counsel, in all judicial or administrative hearings affecting them."); Edwards & Sagatun, *supra* note 35, at 78 (listing "hearings addressing school expulsion, eligibility for benefits, and medical and mental health decisions" as proceedings potentially affected by ratification).

while other provisions of the CRC would help protect and assist children who are vulnerable to maltreatment.<sup>49</sup> As a state party to the CRC, the United States would also be better able to help children abroad by obtaining greater legitimacy for its promotion of children's lives and rights around the world.<sup>50</sup>

Furthermore, the CRC has been effective at establishing legal frameworks and standards that in turn revitalize preexisting law on children, and it could bring the same revitalizing effect to U.S. law. As a consciously modern and comprehensive affirmation of the rights of children, the CRC is a norm-changing document. The proliferation of regional treaties and national legislation following the CRC across the globe<sup>51</sup> demonstrates the power of the CRC to update norms and laws by establishing an international standard for respecting each "child's human dignity."<sup>52</sup> Consequently, adoption of the CRC into U.S. law may lead to drastic changes in family law jurisprudence<sup>53</sup> by establishing a national framework of clear and identifiable objectives better suited to meet the needs of children and their families.<sup>54</sup>

---

49. Rutkow & Lozman, *supra* note 9, at 162 (citing U.S. child abuse and poverty statistics to assert that the "reality of these children's lives demonstrates their need for strong protections"); see also Campaign for U.S. Ratification of the Convention on the Rights of the Child, *Why Ratify?*, Child Rights Campaign, <http://www.childrightscampaign.org/why-ratify> [<http://perma.cc/E54Y-4DJX>] (last visited Oct. 26, 2016) (noting, for example, the improvement the CRC has made in the lives of children in refugee camps and children who were once forced into marriage or prostitution).

50. Rutkow & Lozman, *supra* note 9, at 188–89 ("[T]he United States' ratification of the CRC will . . . give greater credence and international support to its principles."); Gautam, *supra* note 5 (arguing U.S. ratification would enable the United States to better lead the world as a human rights proponent).

51. See, e.g., Cohen, *supra* note 2, at 59–60 ("The adoption . . . of the Convention [has] created a ripple effect that has given rise to a new group of human rights treaties protecting the rights of the child."); Rios-Kohn, *supra* note 27, at 147–52 (describing many initiatives worldwide arising out of the CRC, such as regional treaties and legislation in Ireland, Nepal, Tunisia, Uganda, and Vietnam). The Committee itself has commended the "considerable progress" achieved worldwide since CRC adoption. Committee, General Comment 12, *supra* note 27, ¶ 3. As of 2013, at least two-thirds of ratified states had enacted CRC principles into law in some form. Alison Cleland, *Children's and Young People's Participation in Legal Proceedings in Aotearoa New Zealand: Significant Challenges Lie Ahead*, 2013 N.Z. L. Rev. 483, 485.

52. Cohen, *supra* note 2, at 91–92; see also Rios-Kohn, *supra* note 27, at 141–42 (pronouncing the CRC effective at creating a new code of ethics for improving children's lives and giving them rights).

53. See, e.g., Levesque, *supra* note 25, at 283–89 ("[I]f taken seriously, the Convention would transform American law . . . [and] revolutionize family jurisprudence . . ."). As will be addressed later, this "revolution" is a cause for concern for some as well. See *infra* section I.B.2.

54. See Gautam, *supra* note 5; see also Bartholet, *supra* note 13, at 82 ("[W]hile CRC ratification is no magic pill guaranteeing transformative change, it would very likely make a profound difference abroad and in the United States.").

Specifically, adopting the CRC would help begin to untangle and update the considerable confusion that currently exists in domestic law regarding the role and rights of children.<sup>55</sup> In fact, given the uncertainty about the position of children in U.S. law, the American Law Institute has commissioned the first Restatement on Children and the Law to “reinforce the child welfare goal of legal regulation, and . . . to incorporate the law’s contemporary recognition of children as legal persons.”<sup>56</sup> In spite of strong social and normative trends in practice, the current rhetoric of U.S. law fails to emphasize the rights of children<sup>57</sup> and the duty of parents to serve the best interests of a child.<sup>58</sup> Ratification of the CRC, as well as taking note of related legal trends around the world, would help focus renewed attention on this uncertain area of law.<sup>59</sup>

2. *Reasons to Hold Out: Concerns About Ratification.* — Many commentators also hold serious concerns about the prospect of CRC ratification. Some of the fears simply reflect the usual concerns regarding ratification of human rights treaties; others, however, are specific to the CRC, chief among them the fear that Article 12 would extinguish parental rights in U.S. law.

---

55. See, e.g., John E.B. Myers, *The Child, Parents and the State: Articles 3, 5, 9, 10, 11, 18, 19, 34 and 36*, in *Children’s Rights in America*, supra note 48, at 87, 91 (noting children’s rights jurisprudence in domestic law is in confusion); see also Levesque, supra note 25, at 289–90 (arguing “society continues to fluctuate about which rights should be assured [to] children”).

56. Press Release, Am. Law Inst., *The American Law Institute Launches Restatement on Children and the Law*, PR Newswire (Mar. 3, 2015, 12:30 PM), <http://www.prnewswire.com/news-releases/the-american-law-institute-launches-restatement-on-children-and-the-law-300044672.html> [<http://perma.cc/36Q4-EXQK>] (quoting the principal Reporter, Professor Elizabeth S. Scott, to explain the Restatement is necessary because the “law’s treatment of children [has] become increasingly complex and uncertain over the past few decades”). Interestingly, this description of modern law (child welfare vs. children as legal persons) presents a view of children that reflects the Article 3–Article 12 tension within the CRC. See supra note 46 and accompanying text (describing the tension between the best interests standard and a view of children as rights-bearing individuals in the CRC).

57. See, e.g., Martin Guggenheim, *What’s Wrong with Children’s Rights 8–9* (2005) (expressing skepticism over the U.S. “children’s rights” movement); Howard Davidson, *Children’s Rights and American Law: A Response to What’s Wrong with Children’s Rights*, 20 *Emory Int’l L. Rev.* 69, 74 (2006) (emphasizing the CRC’s potential given a dearth of children’s rights law or movement in the United States); Stahl, supra note 46, at 813 (noting the United States has had an ambivalent attitude toward children’s rights).

58. Stahl, supra note 46, at 820–21 (finding U.S. law has no explicit parental duty to look out for the best interests of a child). However, cultural and social perception of parenting has changed to emphasize the obligation of parents to look after their children. E.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 *Va. L. Rev.* 2401, 2435 (1995) (noting, as support, increasing public concern about abuse and neglect of children, the psychological effect of divorce upon children, and child support obligations).

59. See, e.g., Christine M. Szaj, *The Right of the Child to Be Heard*, in *Analysis of U.S. Ratification*, supra note 11, at 127, 140 (asserting “Article 12 would serve as a catalyst to reformulating current perceptions of children” and their capacity to form a personal view); see also Levesque, supra note 25, at 289–90 (arguing the CRC would help resolve confusion by asserting that the “adolescent comes first”).

Domestic adoption of international law, and human rights treaties in particular, often faces stiff opposition within the United States.<sup>60</sup> This hostility to adopting international law is generally described as “American Exceptionalism,” or the belief that the United States is somehow unique and should not be bound to international obligations.<sup>61</sup> Opponents often fear that ratification will surrender American sovereignty to foreign parties, while others resent international attention brought upon domestic matters.<sup>62</sup> Finally, some believe ratification is simply unnecessary, as U.S. law already offers robust rights protection.<sup>63</sup>

Some opponents also doubt that the treaty, especially Article 12, would truly benefit children.<sup>64</sup> The emphasis on children as autonomous beings, for example, may compromise the pursuit of the best interests of a child, weaken the authority of adults better situated to care for a child's welfare, and therefore ultimately harm the child.<sup>65</sup> However, the apprehension over the consequences of the CRC—and particularly the parti-

---

60. The U.S. reluctance to ratify human rights treaties is well-recognized. See, e.g., Jonathan Todres, *Analyzing the Opposition to U.S. Ratification of the U.N. Convention on the Rights of the Child*, in *Analysis of U.S. Ratification*, supra note 11, at 19, 30–31 [hereinafter *Todres, Analyzing Opposition*] (noting a “general reluctance . . . in the United States to ratify any international human rights treaties”).

61. E.g., Gautam, supra note 5; cf. *Roper v. Simmons*, 543 U.S. 551, 622–28 (2005) (Scalia, J., dissenting) (criticizing the Court's consideration of foreign sources). Much has been written on the American resistance to international law. See, e.g., Harold Hongju Koh, Foreword, *On American Exceptionalism*, 55 *Stan. L. Rev.* 1479, 1480–87 (2003) (describing the underlying principle of “American Exceptionalism”).

62. See *Todres, Analyzing Opposition*, supra note 60, at 27–30 (tracing U.S. concerns of sovereignty abrogation under the CRC); see also Rutkow & Lozman, supra 9, at 167–68 (“Concerns about the U.S. sovereignty pervade every human rights convention . . .”). As a result, the United States tends to include a non-self-executing clause, wherein domestic legislation is required for the treaties to be domestically enforceable when ratifying human rights treaties. *Id.* For a detailed discussion on the sovereignty issue of CRC ratification, see *id.* at 173–75.

63. E.g., *Todres, Analyzing Opposition*, supra note 60, at 30–31 (noting the belief that human rights treaties are for non-U.S. states, given rights already protected by the U.S. Constitution and Bill of Rights).

64. See Kilbourne, *Parental Rights*, supra note 19, at 111–12 (pointing out that both opponents and supporters of ratification often argue on behalf of children's welfare).

65. One scholar, for example, argues that the rights framework of the CRC, by “promulgating the idea that children are best protected by having rights,” has resulted in a twist of the best interests standard that fosters “neither the legal rights of children nor what is best for any child.” Kohm, supra note 27, at 60–61. Similarly, another pair of scholars has argued that the CRC, by giving children “choice rights” over their parents' wishes, harms children because parental direction is more likely to result in the greatest benefit for each child than his or her own shortsighted beliefs. 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, 461, 476–77, 491 (1996) (arguing children need limited autonomy “in the short run in order to maximize their development of actual autonomy in the long run”). For a rebuttal to this argument, see Stahl, supra note 46, at 808–11 (rejecting the foregoing claim on the basis of developmental science and the CRC text and drafting history).

icipation right of Article 12—to children’s interests often underestimates the ability of children to understand and exercise their right to participate in society, as well as the benefits that might result from such a right.<sup>66</sup>

In addition, the CRC’s frequent focus on matters of family life implicates concerns over federalism, reproductive rights, and parental rights.<sup>67</sup> First, opponents worry that the CRC would impinge upon federalism, as family law is traditionally within the ambit of state power, and enable the federal government to enact laws that severely curtail state regulation of family life.<sup>68</sup> Second, the issue of reproductive rights is rife with political sensitivities in U.S. politics and law, and some fear that the CRC will affect the current law on abortion.<sup>69</sup> Notably, the CRC takes care to avoid this political hot button.<sup>70</sup>

Last but not least, another concern is that the CRC threatens interference with the privacy of the family, particularly with the parents’ domain over their children. This “parental rights” conflict between U.S. law and the CRC (especially Article 12) is difficult to resolve yet rarely

66. See, e.g., Barbara A. Atwood, *The Child’s Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 *Ariz. L. Rev.* 629, 654–62 (2003) (demonstrating children’s capacity to form valuable insights and potential benefits to children if they are consulted about custody); *infra* notes 169–173 and accompanying text (arguing participation rights should be incorporated into the best interests standard).

67. Rutkow & Lozman, *supra* note 9, at 168.

68. See, e.g., Susan Kilbourne, *The Wayward Americans—Why the USA Has Not Ratified the UN Convention on the Rights of the Child*, 10 *Child & Fam. L.Q.* 243, 245 (1998) [hereinafter Kilbourne, *Wayward Americans*] (acknowledging the CRC deals with the family, normally within the scope of state power).

For an extended discussion about the federalism issue, see generally Kilbourne, *Federalism Issues*, *supra* note 18 (evaluating the federalism concerns of opponents of the CRC); Kerri Ann Law, *Hope for the Future: Overcoming Jurisdictional Concerns to Achieve United States Ratification of the Convention on the Rights of the Child*, 62 *Fordham L. Rev.* 1851, 1866–71 (1994) (discussing the overlap in areas of law that the CRC touches but are traditionally regulated by the states). Scholars and courts have addressed such concerns in a variety of ways that are outside the scope of this Note. See, e.g., Rutkow & Lozman, *supra* note 9, at 182–83 (“Arguments that the CRC, if ratified . . . , will upset the balance between the states and the federal government . . . can be refuted both by the current state of the law and contemporary U.S. practice.”); see also *Missouri v. Holland*, 252 U.S. 416, 434 (1920) (“[P]rivate relations usually fall within the control of the State, but a treaty may override its power.”); *supra* note 18 (explaining states’ usage of RUDs to limit treaty obligations).

69. See Abby F. Janoff, *Note, Rights of the Pregnant Child vs. Rights of the Unborn Under the Convention on the Rights of the Child*, 22 *B.U. Int’l L.J.* 163, 164–65 (2004) (“[T]he [CRC] is silent on the age at which childhood begins, and unclear regarding whether the rights reserved to children under the [CRC] apply to the unborn. . . . The [CRC]’s textual ambiguity calls into question the legality of abortion under the Convention.”).

70. The CRC leaves out any indication of whether a “child” comes into being and possesses rights under the CRC at some point between conception and birth or simply at birth. Cohen, *supra* note 2, at 95 (noting the CRC’s intentional omission of when childhood begins); see Rutkow & Lozman, *supra* note 9, at 186 (finding the CRC takes no position on abortion).

discussed in depth.<sup>71</sup> By recognizing each child's right to participate in *all* matters affecting the child, Article 12 arguably invites government interference into private, family matters, abrogating parental authority over children, "family values," and the well-being of children best left under the care of their parents.<sup>72</sup>

One response to the last concern is to simply point out that the CRC is normative and aspirational, aimed at shifting attitudes about the role of children in societal settings rather than seeking to impose legally enforceable rules.<sup>73</sup> But this is likely an insufficiently comforting response; after all, the right of a parent to manage the upbringing of his or her child without undue interference has a stronghold in U.S. constitutional jurisprudence.<sup>74</sup> Since at least 1923, the Supreme Court has repeatedly recognized parents' liberty interest in "establish[ing] a home and bring[ing] up children," confirming the broad authority of parents to control their children.<sup>75</sup> While this right is not unlimited, the extent to

---

71. Many commentators equate the CRC's emphasis on the importance of the family as a validation of parental rights. See, e.g., Kilbourne, *Parental Rights*, *supra* note 19, at 109–10 (arguing the CRC "demonstrate[s] support and deference to the role of the child's family" and "recognizes the primacy of the parental role in the child's life"). But see *infra* notes 89–92 and accompanying text (surmising the CRC does not provide the same parental rights protection as U.S. law).

72. See, e.g., Guggenheim, *supra* note 57, at 17 ("[T]he bulk of laws affecting children . . . in the United States are interwoven with the laws of parental authority."); Kilbourne, *Wayward Americans*, *supra* note 68, at 252 (surveying critics who believe the CRC is hostile to parental rights); Parkes, *supra* note 18, at 72 (including family decisions within the scope of Article 12); Rutkow & Lozman, *supra* note 9, at 178–80 (listing rationales behind parental rights concerns); *supra* note 46 and accompanying text (admitting that a child's preference does not always match his or her best interests).

Some opponents even believe that Article 12's broad language would enable a child to bring "every disagreement before a tribunal," however petty or private, but such a reading of Article 12 is unrealistic. See Stahl, *supra* note 46, at 811 (reasoning "no state party would read it this way" but rather, "Article 12 gives a child a voice in a judicial proceeding that has already begun").

73. See, e.g., Committee, *General Comment 12*, *supra* note 27, ¶¶ 93–95 (encouraging parent-education programs that help respect a child's right to be heard); Parkes, *supra* note 18, at 66–68 (same); *id.* at 73–76 (describing Article 12 as encouraging a system of conversation and dialogue within family).

74. See, e.g., Rutkow & Lozman, *supra* note 9, at 178–80 (tracing the Supreme Court's doctrine establishing parental rights against state interference).

75. See *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923) (finding the "right of parents to engage [the teacher] so to instruct their children" was implicated by a ban on German language instruction). Building off of *Meyer*, the Court in *Pierce v. Society of Sisters* struck down a statute, which required parents to send their children to a school within their district, for infringing "the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U.S. 510, 534–35 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."). Similarly, in *Wisconsin v. Yoder*, the Court allowed Amish parents to withdraw children from school on religious grounds. 406 U.S. 205, 214, 219 (1972) (recognizing

which the government may step in to intervene in the parent-child relationship is heavily restricted,<sup>76</sup> further demonstrating the extent to which parental rights act as an obstacle to Article 12. Such cases generally fail to acknowledge the child's own views or input in the process,<sup>77</sup> and in fact, courts tend to ignore a child's rights or find that parental rights supersede them when conflict arises.<sup>78</sup>

Over time, however, the rationales posited for parental rights have shifted from protection of the patriarch, who exerts broad control over his family on the basis of his status as the head of the family, to protection of the child's best interests, where parental discretion is often best suited for such a purpose.<sup>79</sup> That is, justifications for parental rights increasingly center on the assumption that parents are in the best position to determine the best interests of a child;<sup>80</sup> however, by focusing on the *right* of parents to control their children, the language of U.S. law fails to accurately depict this trend of rationalizing parental control over children on the basis of parents' duties to their children.<sup>81</sup>

---

"the traditional interest of parents with respect to the religious upbringing of their children" in the context of parents' rights to practice religion).

76. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . ."). But see, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing parental rights but emphasizing that they are not "beyond limitation" and that the state may act as *parens patriae* to "restrict the parent's control" in many ways).

77. See, e.g., *Yoder*, 406 U.S. at 230 ("[O]ur holding today in no degree depends on the assertion of the religious interest of the child as contrasted with that of the parents.").

78. This is certainly the case in Supreme Court jurisprudence. See, e.g., *Levesque*, supra note 25, at 253-55 (citing *Yoder*, 406 U.S. 205; *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390) (tracing U.S. law establishing parental rights over children and noting the rare acknowledgment of children's rights). Generally, the Supreme Court's justifications for why children do not have the same rights as adults include: the vulnerability of children and the need to protect them by limiting their autonomy, inability of children to make certain decisions in a rational and mature manner, and importance of the role and authority of parents in their upbringing. *Myers*, supra note 55, at 91.

79. See, e.g., *Scott & Scott*, supra note 58, at 2401, 2407-08, 2418 (describing older, status-based parental rights law and suggesting parents should instead be seen as akin to fiduciary agents for children).

80. See *Bartholet*, supra note 13, at 85 (describing the protection of children provided by state and parents under U.S. law); *Scott & Scott*, supra note 58, at 2453 ("Although generally not described in these terms, the parent-child relationship is regulated by a variety of interactive mechanisms that function to encourage parents to serve their children's interests better."); see also *Stahl*, supra note 46, at 820-21 (criticizing the false assumption in U.S. law that "parents act in the best interests of their children").

81. See *Scott & Scott*, supra note 58, at 2408, 2413-16 (criticizing the "shadow" of 1920s' parental "rights talk" for obscuring the underlying focus on "responsibility and other relationship values" in family). Instead, Professors Elizabeth Scott and Robert Scott suggest that broad parental discretion should be the "necessary *quid pro quos* for parents undertaking the responsibilities of parenthood," a difficult and complicated task with no financial benefits (unlike a true fiduciary relationship). *Id.* at 2440, 2456.



In any case, under Supreme Court jurisprudence, parents have a well-established right to control the upbringing of their children, whereas Article 12 attempts, arguably, to give children the right to control their lives instead. Thus, from a zero-sum point of view in which one party asserting authority infringes upon the other, Article 12—and therefore the CRC—poses a potent threat to parental rights under U.S. law. Aside from the usual opposition to human rights treaties, the perceived threat to parental rights is perhaps the greatest legal and political barrier to CRC ratification.<sup>82</sup> Whether the CRC promotes greater state intrusion upon parental authority over a child or whether it is more likely to protect the family from state intrusion is largely up for debate.<sup>83</sup> Rarely, however, have commentators delved into the current state of parental rights and children's participation rights in domestic law or how Article 12 has been interpreted in practice. This Note seeks to fill this gap by examining Article 12 and its implications for domestic law.

## II. ARTICLE 12 AND PARENTAL RIGHTS: THE TENSION IN PRACTICE

In order to thoroughly understand the tension between Article 12 and parental rights, section II.A examines international jurisprudence on Article 12 and parental rights. Then, using examples of Article 12 implementation in countries that have already ratified the CRC, section II.B focuses on key areas of domestic law to demonstrate how participation rights of children interact with parental rights in the context of family law proceedings, medical decisionmaking, and psychiatric commitment. This Part concludes that there are both consistency and conflict between Article 12 and U.S. law. Part III suggests ways to reconcile the two.

### A. *Transnational Guidance on Article 12 and Parental Rights*

Because the United States has not adopted Article 12 as law, understanding the implications of Article 12 to parental rights requires an examination of how Article 12 has been interpreted in relation to parental rights in international and comparative law. To lay out the basic context, the United States is unusual in its robust protection of the rights of parents to control—i.e., make decisions on behalf of—their children.<sup>84</sup> The CRC fails to recognize parental rights to quite the same extent; yet,

---

82. See Kilbourne, *Parental Rights*, supra note 19, at 56 (“The argument that the [CRC] will undermine or even negate parental rights and responsibilities is probably the most effective political weapon in the Convention opponents’ arsenal.”).

83. Compare *id.* at 109 (arguing the CRC is family-friendly and devoted to maintaining contact between parent and child), with Levesque, supra note 25, at 285–86 (contending the CRC allows greater government intrusion into family affairs “to ensure that the family appropriately liberates and respects its adolescents”).

84. See supra notes 74–78 and accompanying text (presenting U.S. Supreme Court case law on parental rights); *infra* section II.A.2 (describing the nature of parental rights abroad).

by highlighting the sanctity of the family for the sake of children, the CRC nevertheless respects parental authority over children, albeit to a qualified degree.

1. *Interpretations by the Committee on the Rights of the Child.* — The Committee is the UN entity that monitors the implementation of the CRC and its OPs around the world, primarily by issuing opinions on specific state reports (Concluding Observations) and opinions on select CRC-related topics (General Comments).<sup>85</sup> Over the years, the Committee has issued hundreds of Concluding Observations,<sup>86</sup> as well as a General Comment on Article 12 itself.<sup>87</sup> Thus, the Committee provides the most comprehensive and “official” interpretation of the CRC and is a good starting point for understanding the general import of Article 12.<sup>88</sup>

In its General Comment 12, the Committee underscores the link between Article 12 and the obligation of states parties to “respect the rights and responsibilities of parents . . . to provide appropriate direction and guidance . . . to enable the child to exercise his or her rights” under the CRC.<sup>89</sup> This “right,” notably, is not the U.S. right of parents to *control* their child but rather the right to *guide* their child in exercising his or her rights; furthermore, the parents’ rights diminish as the child grows in knowledge, experience, and understanding.<sup>90</sup> The Committee values the importance of the family environment, as do parental rights advocates;<sup>91</sup> yet the significance of the family does not hinge upon parents but instead on the development of a proper environment in which children may freely express their views.<sup>92</sup> Thus, under the Committee’s interpreta-

85. See Cohen, *supra* note 2, at 24–45 (detailing the function of the Committee, including its supervision of state reporting processes); *supra* notes 6–7 (describing the Committee’s role and the reporting process). The Committee’s recommendations are not binding on states parties, though they are widely respected. See, e.g., Cohen, *supra* note 2, at 32–34 (describing the Committee’s first set of reviews and observing that the states parties’ engagement in the process reflected “seriousness”).

86. See Search Results for Committee’s Concluding Observations, Treaty Bodies Search, Office of the High Comm’r on Human Rights, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en) [<http://perma.cc/J6VV-WHJK>] (use filters “CRC,” “Reporting cycle related,” and “Concluding observations”) (last visited Oct. 27, 2016) (showing 502 results for “concluding observations” by the Committee).

87. See Committee, General Comment 12, *supra* note 27.

88. See Cohen, *supra* note 2, at 5–6 (“[The] linguistic interpretation by the Committee on the Rights of the Child is a central element of [the CRC’s] emerging jurisprudence.”).

89. See Committee, General Comment 12, *supra* note 27, ¶ 91.

90. *Id.* ¶ 84 (“The more the child himself or herself knows, has experienced and understands, the more the parent . . . ha[s] to transform direction and guidance into reminders and advice and later to an exchange on an equal footing.”).

91. See, e.g., Cohen, *supra* note 2, at 19 (noting the CRC’s support for a “caring nurturing family”); Rutkow & Lozman, *supra* note 9, at 187 (noting the CRC affirms the importance of family and parents).

92. See Committee, General Comment 12, *supra* note 27, ¶¶ 89–92 (outlining the role of families in promoting the child’s ability to express his or her views).

tion, parental authority takes a backseat to the development of children's rights.

2. *Interpretations in Comparative Jurisdictions Abroad.* — The Committee's guidance on implementing the CRC has its limits, however. Instead, interpretations of Article 12 in other jurisdictions, such as the United Kingdom, that have had to adapt their preexisting laws to Article 12 provide useful guidance for what implementing Article 12 in the United States may entail.<sup>93</sup> After all, as a body tasked with advocating for children's rights and possessing little enforcement powers, the Committee is less limited by practical concerns and prone to holding an ambitious view of the CRC,<sup>94</sup> in contrast with the tempered, more practical approaches of states burdened with the reality of limited resources, politics, and preexisting law in implementing Article 12.<sup>95</sup> Furthermore, until the Committee issued General Comment 12, implementation of the Article by states parties was the main source of Article 12 interpretation,<sup>96</sup> and the initial lack of guidance from the Committee resulted in a wide variety of methods of implementing the CRC into domestic law.<sup>97</sup> However, the United Kingdom and Germany demonstrate that different approaches to resolving the tension between Article 12 and parental authority have some telling similarities.

---

93. See, e.g., International Law, *supra* note 18, at 713–17 (describing U.S. Supreme Court jurisprudence regarding foreign law). Supreme Court Justices have demonstrated varying levels of willingness to consider foreign or international sources in judicial decisions. See Rutkow & Lozman, *supra* note 9, at 181–82 (noting examples of Supreme Court citations to international law); The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer, 3 *Int'l J. Const. L.* 519, 520–41 (2005) [hereinafter *Conversation Between Justices*] (transcribing discussion between Justice Scalia and Justice Breyer on whether U.S. judges should consult international and foreign sources); see also *Roper v. Simmons*, 543 U.S. 551, 575–78 (2005) (citing to transnational law to support ban on juvenile death penalty); *id.* at 622–28 (Scalia, J., dissenting) (criticizing the majority's consideration of foreign sources).

This Note acknowledges the limitations inherent in most comparative law exercises. However, just as the fifty American states look to each other for guidance, a comparative study is useful as a guidepost if courts and legislatures of the United States wish to apply Article 12. For a debate on the benefits and dangers of comparative law, see *Conversation Between Justices*, *supra*.

94. David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 *Emory Int'l L. Rev.* 967, 983–84 (2003) (noting the Committee's "authoritarian" approach to the CRC).

95. See *supra* note 24 and accompanying text (describing the CRC as intentionally vague and broad).

96. See, e.g., Committee, General Comment 12, *supra* note 27, ¶ 5 (mentioning an earlier "general discussion on . . . meaning and significance of article 12"); Parkes, *supra* note 18, at 44 (presenting the varied, individualized approaches to Article 12 implementation leading up to General Comment 12).

97. See generally *infra* section II.A (describing different approaches to Article 12 abroad).

The CRC has helped update the language of parental authority to emphasize *duties* over *rights*. In England and Wales, the Children Act 1989 translated key principles of the CRC, including those of Article 12, into domestic law.<sup>98</sup> In doing so, the Act “replace[d] the concept of parental rights and duties with the concept of parental responsibility,” abandoning such notions as the “right[s] to custody” in favor of the child’s interests.<sup>99</sup> This was an acknowledgment of the outdated language of parental “rights” and “authority,” incongruous with the modern view that “parenthood is a matter of *responsibility* rather than of rights.”<sup>100</sup>

Germany reflects a similar trend, in which “the child and [his or her] welfare have increasingly become the focal point” in parental authority.<sup>101</sup> Legal reform in 1979 transformed “parental powers” into “parental care,” emphasizing both the rights *and* responsibilities of parents over their children.<sup>102</sup> Thus, if England and Wales reflect an outright rejection of parental *rights* (and replacing it with parental duties), German law demonstrates a more ambivalent approach, recognizing parental rights while also linking them inextricably with parental *duties*. Nevertheless, both approaches mirror the Committee’s emphasis on the child, not the parent, to justify protection of parental authority.

The language of U.S. law, on the other hand, asserts the right of parents to manage their children’s lives on a basis separate from the interests of children.<sup>103</sup> Yet much of the law reflects an underlying rationale grounded in the best interests of a child rather than the liberty interest of parents; in other words, giving parents primary authority and discretion over the upbringing of children is often justified as being in

---

98. Save the Children, The Children Act 1989, Children’s Rights in Wales, <http://www.childrensrightswales.org.uk/childrens-act-1989.aspx> [<http://perma.cc/7GN3-GHGJ>] (last visited Oct. 26, 2016).

99. N.V. Lowe, The Allocation of Parental Rights and Responsibilities—The Position in England and Wales, 39 *Fam. L.Q.* 267, 267–68 (2005) (describing changes under the Children Act).

100. *Id.* at 268–69 (emphasis added). In introducing the Bill to Parliament, Lord Mackay L.C. stated that “the days when a child should be regarded as a possession of his parents . . . are now buried forever. The overwhelming purpose of parenthood is the responsibility for caring and raising the child to be a properly developed adult both physically and morally.” *Id.* at 269.

101. Nina Dethloff, Parental Rights and Responsibilities in Germany, 39 *Fam. L.Q.* 315, 315–16 (2005).

102. *Id.* (“[P]arents not only have a right protected by [German constitutional law] to care for and educate their children; it is also their responsibility and duty as parents to do so.”).

103. For example, much of the original language of parental rights was grounded in the liberty interest of parents. See *supra* notes 74–78 and accompanying text (discussing the most notable U.S. cases on parental rights); see also James G. Dwyer, Parents’ Religion and Children’s Welfare: Debunking the Doctrine of Parents’ Rights, 82 *Calif. L. Rev.* 1371, 1372 (1994) (“Legal commentators . . . universally assume that parents should have some rights with respect to the raising of their children.”).

the child's interest.<sup>104</sup> There is, therefore, an inconsistency between the rhetoric of parental rights and the practice of emphasizing the interests of children to justify parental rights.<sup>105</sup>

B. *Specific Areas of U.S. Law & Their Tension with Article 12*

On a broad, conceptual level, the participation rights of a child seemingly jeopardize the authority of parents by chipping away at their power to make decisions on behalf of the child. This section examines the tension by applying the implications of Article 12, as it has been interpreted in practice, to three of the most threatened areas of U.S. law: First, it examines the implications for abuse, neglect, and custody proceedings in family court, which are in fact largely consistent with Article 12; second, it addresses the area of medical decisionmaking, which shows promising trends in U.S. law that resemble the principles of Article 12 and laws that it has generated; and third, it examines Article 12's implications for psychiatric commitment, the area of law perhaps most in tension with the participation rights of children.<sup>106</sup>

1. *Family Law Proceedings.* — At a minimum, Article 12 recognizes each child's right to be heard in judicial proceedings that affect the child.<sup>107</sup> In general, U.S. law in family law proceedings, most notably

---

104. E.g., Dwyer, *supra* note 103, at 1426 (“Legal scholars usually justify parents’ rights, if at all, on the ground that they are necessary to protect the interests of children.”). Professor James Dwyer argues that parental rights should be replaced with the parental *privilege* of managing children. See *id.* at 1446–47 (arguing the law should “simply grant parents a legal privilege to care for . . . their children” consistent with “children’s temporal interests”). Note that even *Meyer* acknowledged the link between the rights and duties of parents. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life . . .”).

105. As this Note later argues, grounding parental rights explicitly in the *duties* of parents to look after the best interests of their child is a critical factor in the successful incorporation of Article 12 (i.e., participation rights of children) into U.S. law. See *infra* notes 169–173 and accompanying text (arguing participation rights are best understood as part of promoting the best interests of children).

106. This is a representative but nonexclusive list of relevant areas of law. Another field ripe for discussion, for example, is choice of school or education. After all, the leading Supreme Court cases establishing parental rights over children are notable not only for their focus on the right of parents to control their children’s education but also—as Justice Douglas noted in his dissent to *Yoder*—for their failure to consider the children’s own opinions on their education. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (“[T]heir mode of preparing their youth for Amish life . . . is an essential part of [Amish parents’] religious belief and practice.”); *id.* at 244–45 (Douglas, J., dissenting) (“On this important and vital matter of education, I think the children should be entitled to be heard.”); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (reaffirming “the liberty of parents and guardians to direct the upbringing and education of children under their control” (citing *Meyer*, 262 U.S. 390)).

107. See, e.g., Stahl, *supra* note 46, at 807–08 (using the text and drafting history of Article 12 to read Article 12 as requiring increased participation of children in judicial proceedings).

abuse or neglect proceedings and custody proceedings, is consistent with the requirements of Article 12 and also poses little threat to parental authority.

Legislatures and courts in the United States have been receptive to promoting child participation in family-centered proceedings<sup>108</sup> despite children usually not being parties to the lawsuit.<sup>109</sup> The Uniform Marriage and Divorce Act (UMDA), adopted in a small but significant minority of states,<sup>110</sup> requires that a child's wishes be factored into determining his or her best interests for custody decisions;<sup>111</sup> other states have adopted an age-based rule or policy, wherein children at a specified age are granted a more substantial say in the outcome of the decision.<sup>112</sup> Furthermore, in practice, judges regularly solicit and weigh the views of children in custody cases, often deferring to the preferences of older adolescents, even in the absence of statutory requirements to do so.<sup>113</sup> As for abuse or neglect

---

108. See Bartholet, *supra* note 13, at 89–90 (“The only generally recognized child participation right under U.S. law is the right to be represented in court proceedings . . . [such as] when child custody is at issue in a divorce proceeding or in a care and protection proceeding brought by the state.”).

Child participation in family law proceedings generally takes three forms: assigned guardians ad litem (GALs), representation by attorneys, or direct interviews with the decisionmaker (usually a family court judge). See, e.g., Atwood, *supra* note 66, at 636–37 (noting the different methods used to determine children's preferences in custody proceedings); Peters, *supra* note 23, at 995–96, 1001–05 (summarizing trends found in the practice of and discussion on representing children in child abuse and neglect proceedings in the United States). GALs usually represent the best *interests* of the child, while an attorney is more likely to provide client-oriented representation of the child's preferences. See Edwards & Sagatun, *supra* note 35, at 70–72. This has resulted in considerable debate over how Article 12 should be translated in such proceedings. See, e.g., *id.* at 71–72 (noting the confusion over when a child is “capable of forming her own views” and therefore has a right to representation under Article 12); Peters, *supra* note 23, at 1030 (arguing American practitioners “have much to learn” from the CRC given that they “do not focus on expressing the child's wishes to the court, and no two American jurisdictions have identical laws concerning child representation in these proceedings”).

109. See Stahl, *supra* note 46, at 812, 814–15 (noting children are not parties in a divorce proceeding but are often consulted for their views, usually depending on the child's age).

110. *Id.* at 814 (noting, as of 2007, that eight states had adopted the UMDA).

111. Unif. Marriage & Divorce Act § 402 (Nat'l Conference of Comm'rs on Unif. State Laws 1973) (“The court shall determine custody in accordance with the best interest of the child [and] . . . shall consider . . . the wishes of the child as to his custodian.” (emphasis added)).

112. Stahl, *supra* note 46, at 814–16 (“For example, Georgia gives children aged at least fourteen a dispositive choice in custody.”). Other examples include Maryland and Tennessee. *Id.* at 815 & n.105.

113. One empirical study of judges in Virginia, where judges are not required by statute to take a child's views into account in custody proceedings, found that “the vast majority of judges . . . routinely attempted in some way to get information about older children's wishes”; ninety-seven percent of judges considered the views of children over age fourteen, and sixty-five percent of judges made an effort to obtain the views of children aged six to nine. Elizabeth S. Scott et al., *Children's Preference in Adjudicated*

proceedings, an exhaustive, global study of child protective hearings has found that the statutes of a majority of U.S. states comply fully with Article 12 in such cases.<sup>114</sup> Overall, U.S. law has grown to actively encourage child participation in family law proceedings.<sup>115</sup>

This reflects the trend in the laws of countries that have ratified the CRC, albeit in different ways and to differing degrees. The United Kingdom and Ireland focus on providing guardians ad litem (GALs) who advocate for a child's best interests, while Australia requires a judge in family law cases to consider a child's wishes in all circumstances.<sup>116</sup> New Zealand closely parallels the Committee's view of Article 12: Without imposing age limits or giving the preferences of children dispositive weight, New Zealand focuses on affording all children the opportunity to be heard in custody proceedings, whether directly or through a representative, and taking their views into account.<sup>117</sup>

While incorporating Article 12 into domestic law may take different forms, the four former and current Commonwealth states paint an impressionistic landscape of what Article 12 implies for family law proceedings. In general, the voice of a child does not carry dispositive weight,<sup>118</sup> rather, the emphasis is on respecting the child as an individual with a voice, consistent with the Committee's interpretation of Article

---

Custody Decisions, 22 Ga. L. Rev. 1035, 1046–48 (1988). In fact, the study “suggested that courts apply an implicit rule favoring the parent preferred for custody by the adolescent child.” *Id.* at 1037.

114. See Peters, *supra* note 23, at 1014 (concluding statutes and guidelines of thirty-nine states on child protective hearings comply with Article 12 by allowing the child's own wishes to be heard). Federal law also mandates child representation for abuse and neglect proceedings. *Id.* at 968–69 (“[T]he Child Abuse Prevention and Treatment Act . . . [links] funding for state child protective systems to the provision of a guardian *ad litem* for every child subject to child protective proceedings . . .” (citing Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101–5119c (2012))); Szaj, *supra* note 59, at 137 (noting every child has the right to a GAL under CAPTA).

Significantly, the American Bar Association encourages attorneys to give weight to child clients who can hold their own views:

[A] client with diminished capacity [such as a minor] often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being. For example, children as young as five or six years of age, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.

Model Rules of Prof'l Conduct r. 1.14 cmt. 1 (Am. Bar Ass'n 2016).

115. Davidson, Article 12, *supra* note 48, at 163–64.

116. See Stahl, *supra* note 46, at 824–27.

117. *Id.* at 832–33 (discussing New Zealand's Care of Children Act 2004, which codified Article 12).

118. *Id.* at 842 (“[A]lthough the CRC requires that the Nation States allow a child to be ‘heard’ in all judicial proceedings, there is no requirement that they have the final say.”).

12.<sup>119</sup> Like the United Kingdom and Ireland, the United States provides children with some form of representation, mostly through GALs.<sup>120</sup> Furthermore, while there is generally no bright-line rule, age is in practice a major factor in whether a U.S. judge considers a child's views.<sup>121</sup> By and large, then, the United States conforms to the requirements of Article 12 in protective and custody proceedings.

Why the easy acceptance of child participation in U.S. family law proceedings? The primary motivation for the trend is the best interests of the child, as children benefit from having greater say in such decisions.<sup>122</sup> But also notable is the absence of strong parental rights concerns; that is, the state has already stepped into family affairs, to act as a child's protector or as an arbitrator between the two parents. The very existence of each proceeding abrogates the autonomy of parents to oversee their children's lives; parental rights are already compromised in such situations. Therefore, strong child-participation rights in family law proceedings occur in a context of already-weakened parental rights.

A Massachusetts Supreme Court case is a handy illustration. Upon reviewing a custody case, the court hinted that an eleven-year-old son's preference to remain with the father was enough to tip the balance in favor of the father, all else being equal.<sup>123</sup> Here, when the two parents clashed against each other, there was no clear exercise of parental

---

119. See *supra* notes 39–40 and accompanying text (explaining Article 12 advocates' approach of respecting children's views rather than giving dispositive weight to them).

120. See Atwood, *supra* note 66, at 637 (finding courts are more likely to appoint a GAL than an attorney in certain family law contexts); *supra* note 108 (describing different forms of child participation in family law proceedings).

121. See, e.g., Scott et al., *supra* note 113, at 1050 (finding a child's age was "a critical factor" for judges deciding what weight to give to a child's preferences in custody decisions).

122. Children who participate in such proceedings, for example, feel more comfortable, less confused or frustrated, and therefore less psychologically harmed at the end of the process. See, e.g., Fiona Ang, *The Implementation of Participation Rights in the Field of Flemish Child Mental Health*, in *Participation Rights of Children*, *supra* note 28, at 123, 139 [hereinafter Ang, *Flemish Mental Health*] (explaining benefits of letting children "participate in decisions affecting themselves").

Notably, at least one court has affirmed the right of children to be heard without invoking a "best interests" rationale: "There is no question that the children are entitled to counsel, that their autonomy and rights to be heard on issues affecting their interest should be respected, and that their positions, based on mature expression, are entitled to weight in custody proceedings (although not determinative)." *In re Georgette*, 785 N.E.2d 356, 362 (Mass. 2003). This language is remarkably similar to the Committee's view of Article 12. See, e.g., Committee, General Comment 12, *supra* note 27, ¶¶ 15–18 (presenting the Committee's legal analysis of Article 12); see also *supra* note 117 and accompanying text (noting the similarity between New Zealand and the Committee in interpreting Article 12).

123. See *Custody of Vaughn*, 664 N.E.2d 434, 438–40 & n.11 (Mass. 1996) (noting the trial court considered the child's preferences in awarding custody to the father but ultimately remanding for more fact-finding about the father).



authority over the child, and thus the court was free to consider the child's views. At least where parental authority is curtailed and does not pose a serious obstacle, therefore, the United States is arguably in *de facto* compliance with Article 12 in family proceedings—and a *de jure* recognition of this fact, for example through the adoption of state laws and court rules across the fifty states, would only be a small step in ensuring compliance with Article 12 in this area of law.

2. *Medical Decisionmaking.* — One area of law in which the power of parents to make decisions on behalf of their children more directly conflicts with the children's own views is decisions regarding medical treatment. Perhaps as a result, the United States recognizes—albeit on a limited basis—the rights of a “mature minor” to make independent medical decisions. Nevertheless, developments in the common law “mature minor doctrine” suggest that, when recognized, a child's participation rights do not necessarily clash with parental authority.

The general rule under U.S. law is that parents make medical decisions on behalf of a child under the age of majority.<sup>124</sup> Significant exceptions exist, however, to grant minors the right to decide on their own. Statutes in all fifty states allow for numerous exceptions under which a minor may consent to medical care.<sup>125</sup> Similarly, the mature minor rule, adopted in several states, allows a “mature minor,” who can exercise the judgment of an adult and understand the relevant consequences, to give

---

124. See, e.g., Restatement (Second) of Torts § 892A cmt. b (Am. Law Inst. 1965) (explaining consent must be from the parent but noting a child may be able to consent if “capable of appreciating the nature, extent and probable consequences of the conduct consented to”); Szaj, *supra* note 59, at 136–37 (stating the general rule of parental consent, with some exceptions).

125. See generally Nat'l Dist. Attorneys Ass'n, *Minor Consent to Medical Treatment Laws*, [http://www.ndaa.org/pdf/Minor%20Consent%20to%20Medical%20Treatment%20\(2\).pdf](http://www.ndaa.org/pdf/Minor%20Consent%20to%20Medical%20Treatment%20(2).pdf) [<http://perma.cc/4J4D-SBHY>] (last updated Oct. 27, 2016) (presenting a compilation of statutes allowing minors to consent to treatment). Some states have general consent statutes that grant minors over a certain age the power to consent to medical treatments. See, e.g., Ala. Code § 22-8-4 (LexisNexis 2015) (over fourteen years old). Others allow minors of a specific status, such as those who are married, see, e.g., Cal. Fam. Code § 7002 (West 2013); Fla. Stat. Ann. § 743.01 (West 2016), in military service, see, e.g., Mass. Ann. Laws ch. 112, § 12F (LexisNexis 2004), or emancipated, see, e.g., Minn. Stat. Ann. § 144.341 (West 2011), to consent to medical treatment. A vast majority of states also allow minors to consent to specific treatments, such as those related to drug and substance abuse, see, e.g., Cal. Fam. Code § 6929; Fla. Stat. Ann. § 397.601, sexually transmitted infections, see, e.g., Ind. Code Ann. § 16-36-1-3 (LexisNexis 2011); La. Stat. Ann. § 40:1121.8 (2016), access to contraception, see, e.g., Ky. Rev. Stat. Ann. § 214.185 (LexisNexis 2015); Me. Rev. Stat. Ann. tit. 22, § 1908 (West 2004), or outpatient mental health services, see, e.g., Conn. Gen. Stat. Ann. § 19a-14c (West 2011). A minor also has a limited constitutional right to consent to an abortion. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (striking down a blanket parental consent requirement for minors to obtain an abortion). *Danforth* is often cited for its recognition of the rights of minors: “Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Id.*

informed consent to or refuse medical treatment on his or her own.<sup>126</sup> The child's age plays a major role in defining a "mature minor," though other factors are also considered.<sup>127</sup> Furthermore, because informed consent requires that the patient be fully informed of the implications of the treatment,<sup>128</sup> the doctrine ensures that mature minors receive the information needed for the decision. Consequently, the doctrine forces physicians and courts to individually gauge the maturity of a child patient and provide the guidance necessary to make an informed decision, both of which are aligned with Article 12's principles.<sup>129</sup>

Again, comparison with other Commonwealth states party to the CRC provides helpful clarification on the current law and guidance for the future. In England and Wales, minors aged sixteen and over may consent to medical treatment,<sup>130</sup> and a minor under age sixteen may consent to treatment if the child can show that he or she is mature and understands the consequences of the decision.<sup>131</sup> The Canadian Supreme Court has rejected age-based restrictions in favor of *all* children's "right to demonstrate mature medical decisional capacity" and to have a voice

---

126. E.g., *In re E.G.*, 549 N.E.2d 322, 327–28 (Ill. 1989) (stating the mature minor rule). The rule has been applied in a variety of situations, ranging from consenting to minor surgeries to refusing life-saving treatment. See, e.g., *id.* at 327–28 (finding a mature seventeen-year-old girl could refuse life-saving treatment on religious grounds); *Younts v. St. Francis Hosp. & Sch. of Nursing, Inc.*, 469 P.2d 330, 337–38 (Kan. 1970) (holding a youth was capable of informed consent to a small, emergency procedure to restore an accidentally amputated fingertip); *In re Swan*, 569 A.2d 1202, 1204–06 (Me. 1990) (holding it was proper to respect the wishes of "a normally mature high school senior" to not be kept on life support in a permanent vegetative state); *Bakker v. Welsh*, 108 N.W. 94, 96 (Mich. 1906) (refusing to hold a physician liable for a consenting seventeen-year-old boy's unexpected death for lacking parental consent).

127. See, e.g., *In re E.G.*, 549 N.E.2d at 323–24 (describing E.G.'s maturity as well as noting her age); *Cardwell v. Bechtol*, 724 S.W.2d 739, 748 (Tenn. 1987) (listing factors to consider); see also *Carolyn O'Connor, Illinois Adolescents' Rights to Confidential Health Care*, 82 Ill. B.J. 24, 27 (1994) (requiring physicians to consider each minor's maturity and ability to consent). But see, e.g., *Commonwealth v. Robinson*, 910 N.E.2d 911, 921 (Mass. App. Ct. 2009) (implying a minor could not be mature because she was thirteen years old). To be fair, *Robinson* involved suspicious circumstances: An extremely ill and emaciated daughter had allegedly stabbed herself in the abdomen and refused medical care for weeks. *Id.* at 912–13 (describing the daughter's physical state at the time of discovery); *id.* at 919 (presenting and rejecting the mother's argument that her child had been mature enough to refuse treatment).

128. 2 Dan B. Dobbs et al., *The Law of Torts* § 308 (2d ed. 2011) (describing informed consent requirements).

129. See *supra* notes 35–40 and accompanying text (explaining implications of Article 12).

130. Family Law Reform Act 1969, c. 46, § 8(1).

131. E.g., Robert L. Stenger, *Exclusive or Concurrent Competence to Make Medical Decisions for Adolescents in the United States and United Kingdom*, 14 J.L. & Health 209, 225–39 (1999–2000) (citing *Gillick v. W. Norfolk & Wisbech Area Health Auth.* [1986] AC 112 (HL) 184 (appeal taken from Eng.) (opinion of Lord Scarman)) (discussing the so-called "*Gillick*-competence" doctrine development in U.K. law).

in medical decisions.<sup>132</sup> Accordingly, England, Wales, and Canada embody the main principle of Article 12, giving autonomy to children in proportion to each child's maturity; in turn, the United States has its own mature minor doctrine in common law and consent statutes that resemble the same trend.

Of course, U.S. law has to contend with the established principles of parental rights. The requirement for parental consent has significantly eroded in U.S. law, empowering children to make decisions and weakening parental control over them. In practice, however, courts have construed the mature minor doctrine to avoid conflict with parental authority, raising the question of whether the doctrine actually complies with Article 12. For example, in a well-known mature minor doctrine case, the Illinois Supreme Court recognized the importance of parental authority and asserted that, if a parent were to oppose a child's refusal to life-saving treatment, "this opposition would weigh heavily against the minor's right to refuse."<sup>133</sup> In addition, U.S. courts are willing to permit minors to make decisions only in the absence of conflict with parental authority. In another notable case, the Michigan Supreme Court found that a young man had consented to a treatment but emphasized that no evidence showed that his father would *not* have consented.<sup>134</sup> Courts have therefore generally prioritized parental authority over a child's right to make decisions; again, it is only when parental rights do not directly conflict with the views of children that their participation rights are recognized.

However, the laws of the other jurisdictions suggest an alternative way of interpreting this tendency. English law and Canadian law distinguish between consenting to and refusing treatment.<sup>135</sup> This results in a

---

132. See *A.C. v. Manitoba*, [2009] 2 S.C.R. 181, 184 (Can.) (interpreting a statutory age limit as establishing a presumption of incompetence, given children's right to have their views be given due weight); see also Aria Laskin et al., *Beyond Autonomy? A Transnational Comparison of End-of-Life Decision Making by Mature Minors*, 18 *Mich. St. U. J. Med. & L.* 139, 141, 143–44 (2014) (noting Canadian law recognizes a child's right to be involved in decisions regarding own end-of-life care).

133. *In re E.G.*, 549 N.E.2d 322, 328 (Ill. 1989) ("[H]ad E.G. refused the transfusions *against* the wishes of her mother, then the court would have given serious consideration to her mother's desires."); see also *Zoski v. Gaines*, 260 N.W. 99, 102–03 (Mich. 1935) (finding a physician liable for damages resulting from the tonsil removal of a fourth-grade boy because it was clear parents would have refused treatment had they been present).

134. *Bakker v. Welsh*, 108 N.W. 94, 96 (Mich. 1906); see also *Younts v. St. Francis Hosp. & Sch. of Nursing*, 469 P.2d 330, 333 (Kan. 1970) (noting a mother was only "semi-conscious," and therefore unable to give consent, when her daughter was treated for an emergency treatment).

135. See, e.g., *A.C.*, 2 S.C.R. at 237 (distinguishing consent from refusal); Christophe Lemmens, *End-of-Life Decisions and Minors: Do Minors Have the Right to Refuse Life Preserving Medical Treatment? A Comparative Study*, 28 *Med. & L.* 479, 489 (2009) (explaining England sometimes allows minors to consent but never to refuse); Stenger, *supra*

*concurrent* power to consent, in which both the parent and a mature minor may consent to medical care for the minor.<sup>136</sup> The U.K. and Canadian consent–refusal split is not based on parental rights but rather on best interests grounds: the assumption that facilitating access to medical treatment serves a child’s interests (here, the improvement of his or her physical health) and that therefore it is generally preferable to allow children to consent to treatment but not to refuse treatment.<sup>137</sup> The result is that consideration of the best interests of the child leads to the same deference to parental authority under U.S. law.

Under U.S., English, and Canadian law, parents retain their ability to consent to medical treatment on behalf of their children. Whereas U.S. law seems to justify this under the traditional right of parents to control their children, the consent–refusal split under English and Canadian law provides an alternative reading of this tendency: that it is in the *best interests* of any child to facilitate access to medical care by using parental consent as a safeguard for the cases in which a minor refuses treatment.

The mature minor doctrine and consent statutes reflect a trend in U.S. law in which minors may consent to treatment and therefore have a degree of decisionmaking powers in the medical context in line with Article 12 requirements; yet when children’s views conflict with parental authority, the law gives way to the parents. Comparisons with other states that are party to the CRC reveal a similar outcome but difference in reasoning, suggesting that the U.S. emphasis on parental rights is misdirected and could be substituted with a more accurate, modern rationale.

3. *Psychiatric Commitment.* — The question of who holds the decisional power to commit a child to a mental health facility is fraught with difficult implications in law.<sup>138</sup> In the context of participation rights, the psychiatric commitment of youths suffers from a double-incompetency bias: Because both children and the mentally disabled are commonly perceived

---

note 131, at 241 (recommending that U.S. lawmakers “consider . . . distinguishing between consenting to and refusing medical treatment”).

136. See Stenger, *supra* note 131, at 229 n.104 (discussing an English decision on the concurrent powers to consent).

137. See, e.g., *A.C.*, 2 S.C.R. at 218 (“To date, no court in the United Kingdom has allowed a child under 16 to refuse medical treatment that was likely to preserve the child’s prospects of a normal and healthy future . . .”); *id.* at 219 (“[W]here deferring to . . . a child under 16 was likely to jeopardize his or her potential for a healthy future, treatment has always been ordered by courts in Canada over the refusal of the adolescent . . .”); *id.* at 221 (asserting courts have upheld a child’s refusal when “consistent with his or her best interests”); see also Stenger, *supra* note 131, at 226 (describing the English principle that “parental rights are derived from parental duty” (quoting *Gillick v. W. Norfolk & Wisbech Area Health Auth.* [1986] AC 112 (HL) 184 (appeal taken from Eng.) (opinion of Lord Scarman))); *supra* notes 98–100 and accompanying text (presenting the lack of emphasis on parental rights in English law).

138. See generally Eric Rosenthal & Clarence J. Sundram, *International Human Rights in Mental Health Legislation*, 21 *NYL. Sch. J. Int’l & Comp. L.* 469 (2002) (describing human rights issues in psychiatric treatment).

as possessing limited decisionmaking competence, a mentally challenged child must overcome a double-layered perception of incompetency.<sup>139</sup>

Consequently, under U.S. law, the decision to commit a child to a mental facility is almost entirely left to the parents rather than the child or indeed even a judge.<sup>140</sup> The Supreme Court established this in *Parham v. J.R.*, a case in which the Court deferred to the parents' decision to commit their child, and only ruled that a minor was entitled to a "neutral factfinder" (such as a mental health practitioner), but not a full judicial hearing, to challenge the parents' decision.<sup>141</sup> The Court acknowledged the child's liberty interest at stake in institutional commitment but found that the interest was subsumed by the parents' interest in caring for the child.<sup>142</sup> Such deference to parents revolved around the presumption that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for . . . treatment."<sup>143</sup>

Some states have been more inclined to check parental discretion and empower children.<sup>144</sup> For example, the Supreme Court of California has recognized that psychiatric-commitment decisions made solely by parents violate the child's due process rights, holding that "minors aged fourteen and older who object . . . are constitutionally entitled to an administrative hearing" to challenge the commitment.<sup>145</sup> A child's rights

---

139. Ang, *Flemish Mental Health*, supra note 122, at 123.

140. Szaj, supra note 59, at 136–37; see also Howard A. Davidson, *The Child's Right to Be Heard and Represented in Judicial Proceedings*, 18 Pepp. L. Rev. 255, 273–74 (1991) [hereinafter Davidson, *Judicial Proceedings*] (presenting the historical trend of states letting parents commit children without due process); Law, supra note 68, at 1859 (noting many states allow parents to commit children without hearings).

141. 442 U.S. 584, 606 (1979) (requiring "some kind of inquiry . . . made by a 'neutral factfinder' to determine whether the statutory requirements for admission are satisfied").

142. This denial of a child's right to assert his or her interests independently of the parents is representative of an older approach to children's rights. See, e.g., Kelli Schmidt, "Who Are You to Say What My Best Interest Is?" *Minors' Due Process Rights When Admitted by Parents for Inpatient Mental Health Treatment*, 71 Wash. L. Rev. 1187, 1189 (1996) ("Children's rights were viewed as coextensive with the rights of the parent.").

143. *Parham*, 442 U.S. at 603 (asserting the necessity of parents deciding for children).

144. See, e.g., Louis A. Chiafullo, *Innocents Imprisoned: The Deficiencies of the New Jersey Standard Governing the Involuntary Commitment of Children*, 24 Seton Hall L. Rev. 1507, 1510–11 (1994) (noting state legislative efforts to protect minors in civil commitment proceedings by strengthening due process rights). But see note 140 and accompanying text.

145. Carol K. Dillon et al., *Comment, In Re Roger S.: The Impact of a Child's Due Process Victory on the California Mental Health System*, 70 Calif. L. Rev. 373, 375, 378 (1982) (citing *In re Roger S.*, 569 P.2d 1286 (Cal. 1977)); see also *Roger S.*, 569 P.2d at 1289 (concluding parents may curtail a child's liberty interest to fulfill the "obligation to guide the child's development" but not if the child is fourteen or over and the decision implicates freedom from bodily restraint). However, *Roger S.* is constrained by the Court's emphasis on *state* facilities, as opposed to private facilities. See *id.* at 1290 (noting the

admittedly remain limited when his or her parents make the decision, restricting the scope of procedural safeguards available to the child.<sup>146</sup> Nevertheless, state laws demonstrate several notable trends in empowering children in psychiatric commitment decisions: First, courts increasingly recognize children's voices; second, due process rights serve as the main rationale for that recognition,<sup>147</sup> meaning the active participation of children is not the focus; and third, courts remain cautious in abridging parental authority.<sup>148</sup>

Depriving children of any opportunity to express their views disempowers them, reverting them to being passive objects at the mercy of adult authorities.<sup>149</sup> This results in a greater risk of error and harm to the child's well-being, by exposing him or her to those who may either hold inaccurate views about his or her condition<sup>150</sup> or have motivations other than the child's welfare.<sup>151</sup> It also does not align with U.S. law's emphasis

detention of Roger in a *state* hospital is "state action" sufficient to invoke due process protections).

Similarly, the Washington Supreme Court has found that minors whose parents commit them to mental hospitals over their refusal have a statutory right to judicial review, given the deprivation of liberty and privacy and due process under both state and national constitutions. See Schmidt, *supra* note 142, at 1187–88 (citing *State ex rel. T.B. v. CPC Fairfax Hosp.*, 918 P.2d 497 (Wash. 1996) (en banc)).

146. See Dillon et al., *supra* note 145, at 378 (describing various limits on a minor's due process rights in opposing a parental decision to commit a minor to a hospital, under *Roger S.*).

147. See, e.g., *supra* note 145 and accompanying text (highlighting the focus on due process rights among some state courts).

148. See Elyce H. Zenoff & Alan B. Zients, *If Civil Commitment Is the Answer for Children, What Are the Questions?*, 51 *Geo. Wash. L. Rev.* 171, 188 (1983) (describing judicial reluctance to recognize a right to *judicial* hearings for children due to "traditional deference accorded to . . . parental decision making"); *supra* note 146 and accompanying text (noting limitations on children's due process rights).

149. See *supra* note 3 and accompanying text (noting the traditional notion of children as "chattel"); *infra* note 190 and accompanying text (noting antiquated views of children as "property" and passive subjects); cf. Bernard P. Perlmutter & Carolyn S. Salisbury, "Please Let Me Be Heard:" The Right of a Florida Foster Child to Due Process Prior to Being Committed to a Long-Term, Locked Psychiatric Institution, 25 *Nova L. Rev.* 725, 728 (2001) (decrying the practice of shuttling foster children between foster homes and institutions without permitting children to have any input).

150. See Alexander V. Tsesis, *Protecting Children Against Unnecessary Institutionalization*, 39 *S. Tex. L. Rev.* 995, 995, 1005, 1011 (1998) (describing the high potential for misdiagnosis and mismanagement of children's mental health conditions by medical practitioners and parents).

151. See Davidson, *Judicial Proceedings*, *supra* note 140, at 274 (noting parents may misuse mental institutions to lock away "troublesome or rebellious children"); Tsesis, *supra* note 150, at 1005 (accusing staff of diagnosing "mental disorders with menacing names" to receive insurance money). Additionally, children who have a say in their own treatment generally fare better than those that have no voice in the institutionalization process, since the latter are more prone to certain types of psychological harm. *Id.* at 1005–06 (listing psychological damage from ignoring children, including clinical depression, isolation, and impairment of the developmental process).

on the best interests of children. All in all, granting parents too much authority and silencing the children flies in the face of Article 12. The U.S. approach to psychiatric commitment of children fails to individually assess the maturity of a child<sup>152</sup> and to solicit the views of every child capable of *expression*, regardless of his or her capacity of *judgment*. *Parham* is a sweeping rejection of children's decisional capacity, and even states that provide greater protections to children do so in the form of procedural requirements such as involvement by a judge rather than incorporating the child's voice into a decision.<sup>153</sup> This is contrary to growing social science demonstrating children's decisionmaking capacity<sup>154</sup> and the significant interests of the children at stake,<sup>155</sup> and the due process rights of children suffer as a result.

The right of parents to manage their children's lives, separate from the duty of parents to care for their children's best interests, is somewhat unique to U.S. jurisprudence. In family law and medical decisionmaking, the rights and duties of parents are compatible, but less so in psychiatric commitment. Article 12 is not as divergent with U.S. law as critics have argued, and to the extent that it conflicts with the right of parents to manage their children, the differences are not irreconcilable. The next Part provides potential solutions to the conflicts that do exist.

### III. RECONCILING U.S. LAW WITH ARTICLE 12

Given the U.S. policy of "compliance before ratification,"<sup>156</sup> this Part explores ways to resolve the tension between parental rights and participation rights. Accordingly, section III.A examines the effect Article 12 would have on the U.S. parental rights doctrine. Section III.B then suggests specific solutions for aligning particular areas of U.S. law with

---

152. See *supra* note 145 and accompanying text (noting California's categorical age limit on children's due process rights).

153. For a detailed discussion of how the constitutional right of parents to psychiatrically commit their child should depend upon, *inter alia*, the child's own capacity to make the judgment, see generally Note, *The Mental Hospitalization of Children and the Limits of Parental Authority*, 88 *Yale L.J.* 186 (1978).

154. See, e.g., Ang, *Flemish Mental Health*, *supra* note 122, at 133 (noting research that shows nine-year-olds can understand the basics of treatment); Richard E. Redding, *Children's Competence to Provide Informed Consent for Mental Health Treatment*, 50 *Wash. & Lee L. Rev.* 695, 708–09 (1993) (summarizing evidence of perceptiveness and decisionmaking capacities of children); Samantha Schad, *Adolescent Decision Making: Reduced Culpability in the Criminal Justice System and Recognition of Capability in Other Legal Contexts*, 14 *J. Health Care L. & Pol'y* 375, 376–83 (2011) (discussing social science arguing children should be given more autonomy in medical decisionmaking).

155. See, e.g., Redding, *supra* note 154, at 714–15 ("[I]t is the child and not the adult who is faced with a possible deprivation of liberty . . .").

156. See *supra* note 13 and accompanying text (describing U.S. preference to ensure compliance with a treaty *before* ratification of the treaty).

Article 12. In doing so, this Part suggests that, instead of posing a threat, the CRC provides a timely opportunity to reexamine and update the law.

A. *A Principled Basis: Adopting the New and Accurate Principles of Article 12*

The CRC does not mandate a specific rule or procedure—rather, it sets broad principles that acknowledge the emerging norms and attitudes in laws dealing with children, including in the United States.<sup>157</sup> Chief among the CRC's base principles is the idea that children are rights-bearing individuals, and the broad language of Article 12 exemplifies this principle by asserting that children are entitled to participation in society.<sup>158</sup> Article 12 is by its nature enforceable law only in official judicial proceedings; outside the courts, for instance in purely private decisions made within a family, Article 12 delineates a norm and attitude rather than a code of law.<sup>159</sup> Instead, Article 12 confronts old traditions by introducing a new norm of engaging children in a dialogue and respecting their views.<sup>160</sup> It therefore presents an opportunity for the United States to self-reflect and reexamine its social and legal developments in light of modern global trends.<sup>161</sup>

Meanwhile, U.S. law has been myopic, struggling to bend outdated language in the law to fit new priorities and rationales for the law. The right of parents to exercise control over their children's lives in U.S. law may initially have been grounded in parents' liberty interest,<sup>162</sup> but over time, the justification for the right has shifted to the best interests of the child.<sup>163</sup> This suggests that, as in England and Germany,<sup>164</sup> the outdated "parental rights" rhetoric should be replaced, or at least paired, with the

---

157. See *supra* notes 22, 24 and accompanying text (noting the CRC's broad language, consensus-based drafting history, and intention to be universally applicable).

158. See *supra* note 35 and accompanying text (describing Article 12 as both broadly substantive and specifically procedural).

159. See Parkes, *supra* note 18, at 76 (indicating that it would be nearly impossible to impose an enforceable code of law upon purely family-related, private matters); see also *supra* note 73 and accompanying text (noting enforcement of the CRC is limited to preexisting judicial proceedings).

160. Parkes, *supra* note 18, at 60.

161. In fact, members of the Supreme Court have signaled their friendliness to transnational law and other foreign sources. See *supra* note 93 (discussing the Supreme Court's willingness to consider foreign law in identifying global trends or other persuasive authority). See generally Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (2015) (arguing that looking outside national borders for U.S. law is increasingly important in the modern world).

162. See *supra* note 75 and accompanying text (summarizing early cases on parental rights).

163. See *supra* notes 80, 104 and accompanying text (noting an increasing focus on children's interests to justify parental rights).

164. See, e.g., *supra* notes 98–102 and accompanying text (describing English and German reforms).



language of parental “duties” in caring for a child’s welfare.<sup>165</sup> This upgraded approach to the parental rights doctrine would better accommodate the emerging rights of children *and* the duties of parents into U.S. law. After all, giving the child a voice does not necessitate surrendering decisionmaking powers of the parent; it is simply a call to treat children with respect.<sup>166</sup> Doing so does not constitute “abandoning” a child to the consequences of his or her judgment, either;<sup>167</sup> it is entirely possible to restrain the child’s participation and influence, commensurate with the youth’s ability to make decisions.<sup>168</sup> As such, the United States should move toward embracing the language of parental duty.

Revising the definition of the “best interests” of a child to incorporate the benefits of participation is another critical element of incorporating Article 12 into domestic law. Participation rights encourage children to develop their positions as budding citizens in society in a gradual, controlled fashion;<sup>169</sup> hence, encouraging children to gradually develop their right to participate as members of a democratic society is itself in their best interests.<sup>170</sup> Respecting the views of children also teaches them by example to respect all individuals, and it reduces errors in determining each child’s needs.<sup>171</sup> Parents may be affected by biases or other considerations and may not necessarily prioritize the best interests of children in making decisions on their behalf, and in fact some children may simply know better than the parents what is best for themselves.<sup>172</sup> Thus, partici-

---

165. See, e.g., Dwyer, *supra* note 103, at 1374 (“I propose that children’s rights, rather than parents’ rights, be the legal basis for protecting the interests of children . . . [and] that the law confer on parents simply a child-rearing *privilege* . . .” (footnote omitted)); Scott & Scott, *supra* note 58, at 2453 (suggesting “the rhetoric of parental rights” distorts and undermines normative expectations of parents seeking to ensure the best interests of a child); cf. *supra* note 104 and accompanying text (finding U.S. parental rights are often rationalized under parental duties).

166. See *supra* note 40 and accompanying text (noting Article 12 does not give dispositive weight to children’s views).

167. See Hafen & Hafen, *supra* note 65, at 491 (arguing children must not be granted too much autonomy before they are prepared to handle it).

168. See, e.g., *supra* note 135 and accompanying text (noting first that children’s medical decisionmaking can be restricted if likely to harm their health or interests before distinguishing between refusing and consenting to treatment).

169. See Scott et al., *supra* note 113, at 1065 (suggesting a graduated approach to adulthood, in which the “law treat[s] adolescents as though they have a ‘learner’s permit’ for adult life” (quoting Franklin E. Zimring, *The Changing Legal World of Adolescence* 90 (1982))).

170. See Parkes, *supra* note 18, at 77 (explaining Article 12 fosters participation in the family setting).

171. See, e.g., *supra* notes 150–151 and accompanying text (finding greater risk of error when parents rather than the child always make the decisions).

172. See, e.g., Shawn H.E. Harmon, *Body Blow: Mature Minors and the Supreme Court of Canada’s Decision in A.C. v. Manitoba*, McGill J.L. & Health, Aug. 2010, at 83, 96 (“[W]e should be reluctant to force [minors] to bow to the will of adults . . . who may . . .

participation rights ultimately serve the best interests of children, which in turn helps align Article 12 with the familiar, prevalent “best interests” standard of children in U.S. law.<sup>173</sup>

Recall, in the context for, domestic advocacy for increased children’s participation, Justice Douglas’s dissent in *Wisconsin v. Yoder*.<sup>174</sup> There, Justice Douglas contended that “children should be entitled to be heard” on “important and vital matter[s]” and criticized the majority for having “little regard for the views of the child” even though “children themselves have constitutionally protectable interests.”<sup>175</sup> He believed that if a child objects to his or her parent’s wishes, “and *is mature enough to have that desire respected*, the State may . . . override the parents’ religious[] . . . objections.”<sup>176</sup> The view contained within Article 12 that children possess opinions, interests, rights, and decisionmaking capacity and should be treated accordingly is nothing new;<sup>177</sup> indeed, as Justice Douglas pointed out, the Supreme Court has haltingly but continually recognized the individual rights of children.<sup>178</sup> The CRC is a catalyst for reform, seeking to prompt a second look at the current state of the law.

As it currently stands, domestic law on the participation rights of children utilizes traditional arguments such as procedural due process.<sup>179</sup>

know little better than the minor, or who have their own interests . . . at heart, or who may be vindicating their own values . . .”).

173. See supra notes 43–44 and accompanying text.

174. See 406 U.S. 205, 241–49 (1972) (Douglas, J., dissenting); supra note 75 (describing *Yoder*’s holding); see also Bartholet, supra note 13, at 87 (arguing ratifying the CRC would solve the concern raised in the *Yoder* dissent by recognizing the right of children to be heard); Lois A. Weithorn & Susan B. Campbell, *The Competency of Children and Adolescents to Make Informed Treatment Decisions*, 53 *Child Dev.* 1589, 1589–90 (1982) (discussing the *Yoder* dissent as an example of a challenge to the presumption of minors’ decisional incompetency).

175. *Yoder*, 406 U.S. at 244–45 (Douglas, J., dissenting) (“[T]he education of the child is a matter on which the child will often have decided views.”). Two justices agreed Justice Douglas presented an “interesting and important issue.” *Id.* at 237 (Stewart, J., concurring).

176. *Id.* at 242 (Douglas, J., dissenting) (emphasis added); see *id.* at 245 (“It is the student’s judgment, not his parents’, that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny.”).

177. See supra notes 28–33 and accompanying text (describing the CRC’s view of children as rights-bearing individuals who share power with adults in making decisions). Recall also the view of the Massachusetts Supreme Court that children have the right to be heard. See supra note 122 (quoting *In re Georgette*, 785 N.E.2d 356, 362 (Mass. 2003)).

178. See *Yoder*, 406 U.S. at 243–44; see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (“It can hardly be argued . . . students . . . shed their constitutional rights to freedom of speech . . . at the schoolhouse gate.”). But see supra note 57 and accompanying text (noting U.S. ambivalence toward children’s rights). *Tinker* is particularly relevant to participation rights, as it asserted children’s First Amendment rights against restrictions on the free expression of their views, albeit in a school setting. *Tinker*, 393 U.S. at 511 (“[S]chools may not be enclaves of totalitarianism.”).

179. See supra notes 145, 147 and accompanying text (recognizing the emphasis on due process rights in granting children voice in institutionalization proceedings).

At other times, the arguments seemingly stem from an instinct that children should have a voice in matters affecting them.<sup>180</sup> While such preexisting law can become the basis for developing children's participation rights, consciously adopting Article 12's principles and language into litigation and legislative efforts may help shift the focus squarely onto children and their rights to be heard and have agency of their own. And if ratified, and thereby formally incorporated into domestic law, Article 12 could later prove to become a new, independent legal basis—separate and distinct from, for example, the text of the Constitution—for further asserting the right of children to have a voice.

B. *Article 12 in Action: How to Reconcile Specific Areas of U.S. Law*

Section II.B discussed specific areas of U.S. law to illuminate the precise nature of the tension between Article 12 and parental rights. The tension, however, is not irreconcilable. This section seeks to resolve the conflicts that remain by both applying the general principles from section III.A and suggesting other specific reforms to these areas of law.

1. *Family Law Proceedings*. — The principles of Article 12 may help place a thumb on the scale in favor of providing children with better access to information and a greater say in judicial proceedings that affect them. By emphasizing the rights of children to be heard in such proceedings, Article 12 provides clearer guidance on the procedural requirements necessary to best protect children in abuse and neglect proceedings or custody proceedings.

In fact, a strong U.S. trend already exists to encourage consideration of children's views in abuse or neglect and custody proceedings.<sup>181</sup> However, the general tendency is to provide children with GALs, who often are not focused on presenting the child's views and keeping him or her informed of the proceedings.<sup>182</sup> Article 12(2)'s specific focus on the right to *representation* of a child therefore provides a newfound focus on the proper form of support for children; to simply evaluate children and advocate for their best interests, as a GAL would do, is not enough. More precisely, Article 12 implies at least two reforms: Courts should avoid age limits on whether children's opinions are given weight, in favor of official determinations of *each child's* competence to understand and participate in the proceedings;<sup>183</sup> also, courts should, where possible and needed,

---

180. See *supra* notes 122, 175 and accompanying text (noting the belief of the Massachusetts Supreme Court and Justice Douglas that children are entitled to be heard).

181. See *supra* notes 108–113 and accompanying text (explaining how U.S. laws encourage children to participate in family law proceedings).

182. See *supra* note 108 (describing GALs and other forms of representation for children).

183. See, e.g., Scott et al., *supra* note 113, at 1064 (recognizing the gradual erosion of a bright-line rule of decisionmaking authority on the basis of the age of majority).

provide the child with a legal representative who actively solicits the child's views and incorporates them into the case at hand.<sup>184</sup>

Focusing on a child's right to be heard would, first of all, result in practical benefits to children *and* courts. Adolescents in particular are likely to put up greater resistance and therefore require greater enforcement efforts if custody arrangements are contrary to their preferences.<sup>185</sup> Children also benefit psychologically from staying informed and having *some* say in judicial decisions involving their families.<sup>186</sup> Finally, if courts were to adopt a position of giving older children greater weight in custody arrangements, parents may be less inclined to litigate custody disputes, since they can, with some precision, predict the court's likely decision based on the adolescent's wishes.<sup>187</sup> This, in turn, would *decrease* state interference with family affairs and help keep decisions within the privacy of the family, notwithstanding those who worry that the CRC would intensify state intrusion upon the family.<sup>188</sup> Parental authority is not abridged, either; after all, parental claim to authority is already weakened when the parents are not in agreement,<sup>189</sup> and the child's views are essentially a partial (and perhaps more preferable) substitute for an "outside" intervention that would otherwise have occurred.

Granting greater influence to children would also allow protection and custody proceedings to consider children not as mere property-like objects to be fought over but instead individuals with minds and interests of their own who cannot be simply subjugated by parental authority.<sup>190</sup> As

---

184. E.g., Breger, *supra* note 30, at 182, 194 (arguing attorney representation is most aligned with CRC mandate to let children be heard); Peters, *supra* note 23, at 968–69, 1002 (finding “strengthening consensus . . . that child representation should be . . . by lawyers” providing client representation, especially for older children).

185. Scott et al., *supra* note 113, at 1067–68 (noting strong practical reasons for taking adolescent views into account in custody proceedings).

186. See, e.g., *id.* at 1041–42 (noting the positive psychological effects of *participating* and the negative effects of having a *decisional* role). Some scholars posit that younger children are less capable and less used to autonomy, and that they would benefit less from having influence over custody decisions than adolescents. See *id.* at 1068–70. This seems consistent with Article 12's graduated approach to giving “due” weight to children's views on the basis of their age and maturity. See CRC, *supra* note 1, art. 12(1); *supra* note 39 and accompanying text (discussing the prohibition on using only age as a cutoff point).

187. Scott et al., *supra* note 113, at 1070–71 (arguing divorcing spouses bargain in the shadow of the law, and so a parent is less likely to pursue custody litigation when “judges are known to defer to the wishes of adolescents” and the child does not wish to live with the parent).

188. See *supra* note 72 and accompanying text (noting state intervention concerns about the CRC).

189. Scott et al., *supra* note 113, at 1072; see also *supra* notes 122–123 and accompanying text (observing that family law proceedings involve weakened parental authority by nature).

190. See Scott et al., *supra* note 113, at 1067–68 (presenting philosophical and practical grounds for weighing preferences of adolescents, including their right to self-determination).

this section shows, encouraging children's participation in such proceedings does not necessarily abridge parental authority, and it may in fact curtail state interference with family matters. Therefore, advocates of CRC ratification should pursue legal reforms that dismantle strict age limits and provide opportunities for children to speak their minds to the judge in each family law proceeding, pushing forth a new norm of encouraging dialogue with children in matters that affect them.

2. *Medical Decisions.* — The mature minor doctrine and ubiquitous statutory exceptions to the general parental-consent requirement for treating minors indicate that the United States is familiar with providing children the right to be heard in accordance with their age and maturity.<sup>191</sup> In particular, the holistic approach of the mature minor doctrine imitates Article 12 closely. To bring U.S. law into greater alignment with Article 12, then, such trends should be encouraged with renewed energy.

Though the doctrine itself is frequently cited in literature on minors' ability to consent to treatment, the actual jurisprudence on the U.S. mature minor doctrine is fairly limited in breadth, with few states expressly embracing it and the vast majority of states remaining silent.<sup>192</sup> What modest case law exists contains plenty of ambiguities yet unsolved, including a failure to separate decisions consenting to treatment from refusing treatment.<sup>193</sup> However, the case law as well as the special statutes that allow children to consent to specific treatment also demonstrate a trend in which U.S. law gives children greater autonomy when it aligns with their best interests, much like the CRC itself. In order to bring the United States into full compliance with Article 12, then, lawmakers should examine corresponding laws of other jurisdictions<sup>194</sup> to clarify and elaborate on this area of law, and states in particular should continue to develop laws—whether through legislatures or courts—that recognize the right of minors to consent to treatment.<sup>195</sup> For instance, lawmakers should

---

191. See *supra* section II.B.2 (presenting the state of medical treatment decision-making powers for minors and concluding U.S. law is largely consistent with Article 12 in this regard).

192. See Jennifer L. Rosato, *Let's Get Real: Quilting a Principled Approach to Adolescent Empowerment in Health Care Decision-Making*, 51 *DePaul L. Rev.* 769, 779–80 (2002) (“A few courts, acknowledging the absence of recognition for mature minors in statutes, have adopted a common law doctrine to accomplish that result.”); see also *supra* note 126 and accompanying text (citing major mature minor doctrine cases and noting a few states have adopted the doctrine).

193. See *supra* note 135 and accompanying text (noting U.S. law does not distinguish between consent and refusal, unlike English and Canadian law).

194. More specifically, the United Kingdom and Canada both have their own versions of the mature minor rule, a mixture of statutes and case law, that essentially impose *presumptions* (not hard limits) of children's competency or incompetency on the basis of age. See *supra* notes 130–132 and accompanying text (describing U.K. and Canadian law on minors' medical decisions).

195. One interesting tactic to consider is the adoption of a “substituted judgment” standard in the case of minors who are not mature enough to make their own judgments.

avoid strict age-based determinations of whether a minor may consent to treatment and adopt a consent–refusal distinction in medical decisions.

After all, research supports the notion that children are often competent to make decisions regarding their medical treatment—or at least have a say in it. Contrary to what the Supreme Court may have believed in *Parham*,<sup>196</sup> studies show that fourteen-year-olds and older minors are as competent as adults in making informed decisions about medical treatment, and even children as young as nine are capable of comprehending the basic requirements of expressing an informed view about treatment.<sup>197</sup> When a child’s judgment nevertheless falls short of what an adult’s may be, the law limits the potential for harm by allowing parental consent to override a child’s refusal, thereby facilitating the child’s access to treatment.<sup>198</sup>

Reinforcing children’s right to make medical decisions may diminish a parent’s control over a child. But if the United States begins to seriously contemplate the current rationales behind a parent’s right to manage his or her child, the fact that medical treatments are generally in the interest of the child means that the parent has no justifiable reason to prevent a minor from consenting to treatment.<sup>199</sup> The mature minor doctrine and consent statutes reflect a slow but growing trend in line with Article 12—that is, U.S. law increasingly resembles the modern, updated views of the CRC—and all that remains is to explicitly acknowledge this trend and embrace it.

3. *Psychiatric Commitment.* — U.S. law on the psychiatric commitment of minors is in considerable tension with Article 12, and in fact this area

In such a situation, the court would factor in its own substituted judgment for the child, rather than the child’s “best interests.” See Kathleen Marie Heydon, *Guardianship of Phillip B.: Nonparents’ Right to Custody in Canada*, 18 Loy. L.A. L. Rev. 779, 790–96 (1985) (describing the custody battle in *Phillip B.* and the court’s reasoning (citing *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Ct. App. 1983))). However, it is unclear how a court would be able to “judge” for a child when the child him- or herself is unable to do so.

196. See *supra* note 143 and accompanying text (citing *Parham v. J.R.*, 442 U.S. 584 (1979)) (observing the Supreme Court’s presumption that children, even adolescents, are incompetent to make medical decisions).

197. E.g., *Wisconsin v. Yoder*, 406 U.S. 205, 245 n.3 (1972) (Douglas, J., dissenting) (“[T]here is substantial agreement among child psychologists and sociologists that the moral and intellectual maturity of the 14-year-old approaches that of the adult.”); Weithorn & Campbell, *supra* note 174, at 1595–96 (presenting findings from a developmental study on competency of minors to make medical decisions). The Weithorn and Campbell study concluded that its findings supported neither “policies which deny adolescents the right of self-determination in treatment situations on the basis of a presumption of incapacity to provide informed consent” nor age-based cutoffs. *Id.* at 1596.

198. See *supra* notes 130–137 and accompanying text (discussing the reluctance of courts to allow children to refuse treatment and the possibility of both parent and child having concurrent powers to consent to treatment for a child).

199. See *supra* notes 79–81 and accompanying text (noting that parental rights are now justified on the basis that parental control over children is in the best interests of the child).

of U.S. law is rife with outdated norms as well as inconsistencies with trends of other areas of U.S. law in how children are treated under law. In fact, *Parham* has come under heavy fire for its refusal to recognize a stronger right to due process for a child; but it remains good law, for the Supreme Court has yet to revisit the specific issue despite articulating respect for children's rights—and even specifically their right to speak—in other cases since.<sup>200</sup> The psychiatric commitment of minors is also increasingly under attack for allowing parents too much discretion and thereby permitting abuses of the system or impermissible margins of error.<sup>201</sup> Finally, allowing for broad parental discretion at the cost of a vulnerable child's liberty seems outdated in light of other current legal trends in U.S. law, chief among them the increasing recognition of the right of children to participate in decisions affecting them.<sup>202</sup>

U.S. law on psychiatric commitment of minors is in particular need of a revitalization effort in line with Article 12. *Parham*, now almost forty years old, fails to adequately showcase current U.S. justifications for parental rights and the capacity of children to make decisions on their own.<sup>203</sup> *Parham* represents an outdated conception of children that should be updated with the modern principles of the CRC, particularly Article 12. The same body of social science used for medical decisionmaking that demonstrates children often have view-forming and decisionmaking capacities<sup>204</sup> may be relevant here, to show that children themselves should participate in “voluntary” decisions<sup>205</sup> to commit themselves to psychiatric hospitals.

In the meantime, advocates of the CRC should pursue methods of encouraging children to form as much of an informed opinion on their own psychiatric commitment as they can, whether through changing cultural norms or legislative reform. For example, courts should impose greater scrutiny on decisions to commit an adolescent to a psychiatric

---

200. See, e.g., Davidson, *Judicial Proceedings*, supra note 140, at 274 (“Few Supreme Court decisions have been so criticized by child advocates . . . as *Parham*.”); Tsesis, supra note 150, at 1012 (criticizing the Court’s optimistic assumptions underlying *Parham*); see also supra note 78 (citing Supreme Court cases affirming children’s rights, including *Tinker*, which upheld young students’ freedom of speech in a school context).

201. See supra notes 149–151 and accompanying text (criticizing the psychiatric commitment of minors without the minors’ input by noting the harm that results when minors are not consented in their own institutionalization).

202. See, e.g., supra sections II.B.1–2 (detailing U.S. legal trends in family law proceedings and medical decisions that increasingly concede greater decisionmaking powers to children). The Supreme Court has separately acknowledged the liberty interest of children and the requirements of procedural due process to protect such an interest in the juvenile justice setting. See *In re Gault*, 387 U.S. 1, 50 (1967).

203. See supra notes 141–143 and accompanying text (discussing *Parham*); supra note 104 and accompanying text (describing modern parental rights justifications).

204. See supra note 154 and accompanying text.

205. See, e.g., Schmidt, supra note 142, at 1193 (noting parental commitment of children to mental hospitals still constitutes “voluntary commitment” under Washington law).

hospital against the child's own wishes and, if possible, provide representation to the child separate from the parents.<sup>206</sup> Litigators can also use developments in comparable areas of U.S. law to buttress arguments for providing children with greater influence in decisions.<sup>207</sup> Only through such efforts can the U.S. law on psychiatric commitment meet the standards of the normative aspirations of the CRC and its assertion of each child's right to participate in all decisions affecting the child.

This Note has picked out some key legal and social normative trends within the United States that recognize the capacity, benefits, and right of children to share control over their own lives with their parents. The CRC, when considered seriously as both a potential source of law and a helpful articulation of key principles regarding children, draws out such trends to the fore and provides suggestions for how courts, legislatures, practitioners, and all other parties can reexamine the role of children in law, and vice versa. For example, because it is already the practice of many lawyers to rely on the voice of children to determine their fate in family law proceedings, explicitly adopting this *de facto* trend into actual law would bring much of the law of the United States in line with Article 12. In the context of medical decisionmaking, U.S. law has developed promising trends in common law and statutory law that recognize the right of some minors to have decisionmaking authority over their own medical care; advocates should push for such trends to be more widely embraced. Finally, the law on psychiatric commitment of youths is largely stagnant and outdated, out of line with other areas of law that provide greater rights protection for children and respect for their views, and is in need of great reform.

#### CONCLUSION

The CRC represents a modern struggle to achieve the proper balance between protecting and respecting the rights of children. As the last and only UN member state that has not ratified the CRC, the United States must seriously contemplate what ratification would entail and how it might be achieved. This Note tackles a rarely addressed but critical component of this inquiry: the perceived tension between the right of children to participate in decisions involving their own lives, as laid out in Article 12 of the CRC, and the traditional U.S. doctrine of parental rights. Much of

---

206. See Tthesis, *supra* note 150, at 1024 (recommending individual representation for minors).

207. For example, since psychiatric commitment in a mental-health institution often involves similar conditions as the loss of personal liberty at stake in juvenile delinquency proceedings, *In re Gault* is comparably applicable to the institutionalization of children. E.g., *id.* at 1017 (arguing *In re Gault* should be used to recognize liberty interests and procedural due process protections for children in psychiatric commitment (citing *In re Gault*, 387 U.S. 1)); see also *In re Gault*, 387 U.S. at 18 (“[U]nbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure.”).



U.S. law and its trends (as measured by common law doctrines, state statutes, scholarship, and other legal developments) are consistent with both the legal mandate and driving principle contained within Article 12. Where ambiguities and conflicts exist, however, Article 12 (both the ideas that it expresses and as a legal instrument) can act as a tool for clarifying and reenergizing engagement with current U.S. law on how children are perceived in law and in society. The CRC is both a reflection of the past and a blueprint for the future—and the treaty provides the United States a timely opportunity to reassess the state of children in modern society and the proper role of parents in looking after them.

