"DON'T FORGET ABOUT ME": IMPLEMENTING ARTICLE 12 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

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I. INTRODUCTION

Children hold a unique position in the world. Adults have historically viewed children in various ways, from "little adults," to the property of their parents, and sometimes as a confused mixture of both.[1] During the Middle Ages, children were expected to participate in "adult" tasks, including apprenticeships, and, during the Renaissance, this view evolved to where children were viewed as weak and in need of their parents' protection.[2] American society changed the purely paternalistic Renaissance view to the notion that children should be seen and not heard.[3] Although this sentiment may not be as prevalent as in previous generations, both the law and society in the United States continue to view children as inferior to adults and in need of protection instead of as individuals possessing their own rights.[4] The United States continues to view children through a paternalistic lens while many other nations around the world attempt to move to a new model of children's rights. Those nations struggle with the inherent tension between the paternalistic model of protecting children and the view that children should be viewed as autonomous beings who participate in society with the full gamut of rights. This note will discuss this dichotomy by focusing on the United Nations Convention on the Rights of the Child ("CRC" or "Convention").[5]

The CRC is the most quickly ratified UN human rights treaty ever.[6] It possesses contradictory language, unsure of whether to protect the child's "best interests"[7] or to give the child a voice in the legal system.[8] This note will focus on one area of the law where this tension is perhaps most prevalent: child custody and

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1. Christine D. Davies, *Access to Justice for Children: The Voice of the Child in Access and Custody Disputes*, 22 CAN. FAM. L. Q. 153 (2004).

2. *Id.*

3. *See, e.g.*, Linda C. McClain, *Family Constitutions and the (New) Constitution of the Family*, 75 FORDHAM L. REV. 833, 849 (2006).

4. *See infra* Part III.

5. Convention on the Rights of the Child, G.A. Res. 44/25, Art. 3, U.N. Doc. A/44/49 (Nov. 20, 1989), *available at* http://www.unhchr.ch/html/menu3/b/k2crc.htm [hereinafter CRC].

6. Nicola Taylor, *Articles: What do we know about Involving Children and Young People in Family Law Decision Making? A Research Update*, (2006) AUS. J. FAM. L. 5, 15 (2006) [hereinafter *A Research Update*].

7. CRC, *supra* note 5, art. 3.

8. CRC, *supra* note 5, art. 12.

divorce cases.[9] By definition, child custody cases affect the child. The emotions and adversarial system surrounding the custody "battle," as is often denoted, are ill-suited to benefit the child's emerging role as a possessor of rights because the law focuses almost exclusively on the parties to the lawsuit: the parents.[10] Throughout the world, various nations are struggling to acknowledge the children in divorce cases while struggling with the inherent tension between Articles 3 and 12 of the CRC, and they are also trying to find the best representative model for children.[11] Although the United States has chosen not to ratify the CRC, it is no stranger to the search for the best model for children model in custody litigation.[12]

This note will focus on the worldwide effort to ease the tension expressed by Articles 3 and 12 by looking to various representations of the Anglo model of legal representation for children in private family law cases. Part II is an in-depth look at the CRC and its role in protecting the emerging place children hold in society. Part III will consider the current law and practices around the United States concerning the position of children's wishes in judicial proceedings that affect them. Part IV will look to various Anglo legal traditions including the United Kingdom, Ireland, Australia, and South Africa. Part V is a close look at the evolution of the Family Court in New Zealand, a forerunner in protecting children and their rights. While no nation has found the answer, the CRC's requirements ensure that these nations continue looking. This note concludes that the United States should sign the Convention in order to ensure that children will be afforded the rights they deserve because the problem can only be remedied by facing the fact that our children need to be heard.

II. REQUIREMENTS OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The CRC was adopted and opened for signature in November 1989[13] and entered into force on September 2, 1990.[14] Currently, there are 193 parties and 140 signatories to the Convention, and only two nations have not ratified it: the United States and Somalia.[15] It has been called the "'most comprehensive single treaty' ever

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9. There is much scholarship covering the representative model with respect to public protective proceedings where the state is a party. For a comprehensive world overview of various systems *see* 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 (2006).

10. *See infra* Part III.

11. *See infra* Parts IV-VI.

12. *See infra* Part II, which discusses that many of the CRC's provisions were created by people from the United States.

13. CRC, *supra* note 5.

14. *Id.*

15. *See* Office of the High Commissioner of Human Rights, Ratifications and Reservations, *Convention on the Rights of the Child New York, 20 November 1989*, *available*

to appear in the field of human rights."[16] The CRC has influenced the world, both in how societies regard children and in how they react to children as people. It was drafted with the vision that children should gain the "special care and assistance" that are unique to childhood.[17] Furthermore, the drafters wanted children to be "be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular, in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity."[18] Thus, the drafters and the State Parties wanted to ensure that children will be supported and guided throughout their childhood so that they may become full and functioning adult members of society.

The general framework of the CRC illustrates the ongoing international debate regarding children's rights; however, that discussion is not within the scope of this note. Instead, this note will give a brief overview of the CRC's various provisions with a central focus on the tension between Articles 3 and 12. The CRC is the first international document to give children full rights independent of their parents.[19] As one commentator has noted, "[t]he most fundamental requirement for the implementation of the CRC is that the child is recognized and fully respected as a human being with rights."[20] It is this foundational principle, however, that creates "the tension between the public duty to protect children's welfare and the tradition of allocating power over children to the private realm of family life."[21] This tension is most apparent when comparing Article 3, the best interests standard, with Article 12, the right of the child to be heard in judicial proceedings.

The Convention's drafters viewed children as individuals with independent rights, but they knew that those rights could only be protected by the people in charge—adults and the state parties.[22] Article 18 gives parents the primary freedom and responsibility for their children's upbringing and qualifies it by requiring that parents make their children's best interests their "basic concern."[23] Thus, the

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at http://www2.ohchr.org/english/bodies/ratification/11.htm#reservations [hereinafter Ratification Report].

16. Richard G. Wilkins, et. al., *Why the United States Should Not Ratify the Convention on the Rights of the Child*, 22 ST. LOUIS U. PUB. L. REV. 411, 411 (2003); *see also* Jaap E. Doek, *What does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199 (2006). The drafters would have liked to add more provisions, but they ran out of time because they wanted to meet a deadline for the Convention to be written by 1989. Cynthia P. Cohen, *Introductory Note to United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989).

17. CRC, *supra* note 5, pmbl.

18. *Id.*

19. Cohen, *supra* note 16, at 1450 (noting that this is the first treaty to recognize "the relationship between the individual child, the family, and the state.").

20. Doek, *supra* note 16, at 199.

21. Barbara Bennett Woodhouse, *Talking about Children's Rights in Judicial Custody and Visitation Decision-Making*, 36 FAM. L.Q. 105, 108 (2002).

22. CRC, *supra* note 5, art. 18.

23. *Id*.

Convention gives children the right to have their best interests protected by their parents in all aspects of their lives, and it leaves the best interests standard to be interpreted by those parents as long as they do not deny children any other substantive rights set forth by the Convention.[24]

The CRC gives children rights that currently exist in various other human rights treaties.[25] These other human rights treaties do not exclude children, so some commentators believe that there is no need for the CRC, which may even provide for children rights that are against their best interests.[26] The drafters recognized that these other treaties exist; nonetheless, the drafters believed that children were still in need of their own recognition and that it would require "the international co-operation for improving the living conditions of children in every country . . .."[27]

The CRC recognizes that children have special needs created by their unique position in the world, which stems from the inherent tension between their rights as human beings and their inherent need for protection.[28] These unique needs are not protected by other treaties because those treaties do not focus exclusively on children, but instead assume the autonomy of the individuals that they aim to protect.[29] The CRC, on the other hand, addresses these issues not by "articulating claims to be asserted by children in courts of law but . . . [by] proposing norms of justice to guide those engaged in developing laws and social policies."[30] In other words, the CRC protects children by giving them some rights, while also explicitly creating responsibilities on individuals within the state parties. For example, the CRC protects children from "arbitrary or unlawful interference with [their] privacy, family, home or correspondence" or from any "unlawful attacks" against their "honour or reputation."[31] The CRC continuously shifts between discussions of children's special need for protection,[32] their growing need for autonomy,[33] and the protection and enforcement of parents' rights and duties, respectively.[34]

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24. *Id.* art. 3. Article 3 includes a variety of groups and state actors that must act on behalf of the best interests of the child including "private social welfare institutions, courts of law, administrative authorities or legislative bodies." *Id.* art. 3(1).

25. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. Mtg., U.N. Doc A/810 (Dec. 12, 1948), *available at* http://www.un.org/Overview/rights.html; International Covenant on Civil and Political Rights, Dec. 19, 1966, 9 U.N.T.S. 171, 6 I.L.M. 368.

26. Doek, *supra* note 16, at 200; *see also* 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, 449-50 (1996).

27. CRC, *supra* note 5, pmbl.

28. *See generally* Doek, *supra* note 16.

29. 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, 164-66 (2006).

30. Woodhouse, *supra* note 21, at 109.

31. CRC, *supra* note 5, art. 16.

32. *See, e.g.,* CRC, *supra* note 5, art. 19 (protection from abuse).

Article 3 is the CRC's best interests standard: "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."[35] Before articulating most of the substantive rights, including participation rights, the CRC ensures that children's best interests are protected. The best interests standard, as a paternalistic model, is stronger in Section 2, which states:

> States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.[36]

Accordingly, parents possess rights with respect to both the State and their children so long as they fulfill their duties to act on the best interests of their children. The Convention does not, however, elaborate on the meaning of the best interests standard.

Contrary to the paternalistic best interests standard in Article 3, Article 12 gives children their first participation rights.[37] Article 12 states, "(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."[38] This participation right recognizes that children must be given the right to express themselves and to participate in their own lives. In Article 12, the Convention recognizes that age and maturity are important to the analysis of *how* to implement the right of participation, but not *whether* a child possesses the right.[39] This distinction contradicts many views with respect to children in modern legal systems.[40]

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33. *See, e.g., id.* art. 12 (right to express views in judicial proceedings concerning them); art. 13 (freedom of expression); art. 14 (freedom of thought, conscience, and religion); art. 16 (right to privacy).

34. *See, e.g., id.* art. 5 (protection of parental rights and duties); art. 18 (responsibilities of parents).

35. *Id.* art. 3(1).

36. *Id.* art. 3(2). Section 3 says, "States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision." *Id.* art. 3(3). This provision focuses on the state's duties to implement protection for the child, and it will not be addressed in the remainder of this note.

37. CRC, *supra* note 5, art. 12.

38. *Id.* art. 12(1).

39. *Id.* art. 12.

40. *See generally* Hafen & Hafen, *supra* note 26.

Children's participation rights are very new to the legal traditions of most signatories, so the Convention's drafters gave some instruction on how to implement Article 12: "[f]or 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."[41] Thus, all children have the essential right to be heard in *any* judicial proceeding affecting the child, including a custody dispute; where the child is so affected, he has a right to have his wishes or views heard and recognized by the court.[42] The Convention leaves the specifics of Article 12 implementation to the individual state parties, but the basic requirement remains that they must give *all* children the right to be heard in judicial proceedings that affect them.[43]

Article 12 recognizes the increasing autonomy of children, and state parties must recognize that autonomy in their legal systems, including those who represent children. Professor Jean Koh Peters studied the implementation of Article 12 around the globe with respect to child protective proceedings, and she concluded that "[w]hile the CRC certainly does take as a central principle the best interests of the child, the Convention focuses on the expression of the child's views and thus reserves for the representative a role distinct from determining and expressing the representative's view of the child's best interests."[44] According to Peters, Article 12's recognition of children's autonomy has given the child's representative a new role.[45] The representative, while no longer constrained by a wholly paternalistic model, must also act as the child's lawyer.[46] This new model has opened the door to controversy over whether it is really in a child's best interests to afford him this participation right.[47]

Just as important as recognizing what the CRC strives to do, it is important to recognize what it does not do. It has been argued that because children are given "choice rights" in addition to "protection rights," there is a possibility that children are being abandoned to their autonomy.[48] The argument is that children are given the right to choose their religion, their identity, and their privacy irrespective of their parent's wishes.[49] The debate continues that not only is it contrary to traditional

41. CRC, *supra* note 5, art. 12(2).

42. It is worth noting here that Article 12 does not give a child the right to *decide* his fate in all judicial proceedings affecting him, only the right to be heard. *Id*.

43. *Id.*

44. Peters, *supra* note 9, at 1020.

45. *Id.* at 973.

46. *Id.* at 977. Although the representative does not have to be a lawyer, the role is to represent the child and not merely advocate what would be in the child's best interests.

47. *See infra* Parts III.D, F; IV.

48. Peters, *supra* note 9, at 977.

49. Hafen & Hafen, *supra* note 26 at 458 (claiming that this Convention breaks new ground for children's rights by giving them adult rights such as speech, association, religion, assembly, and the right to privacy).

notions of the family, but that it is unfair to the child.[50] These concerns are well noted, but they do not withstand historical scrutiny with respect to the framing of the CRC.[51] They are also possibly inconsistent with our expanding knowledge of child development.[52]

Article 14 protects children's right to have a religion.[53] Two frequent commentators, Hafen and Hafen, argue that these rights deny parents their parental right to control the upbringing of their children as well as put undue strain on the child.[54] This argument is, however, unsupported by the Convention's language and its history.[55] In addition to protecting a child's right to have a religion, Article 14 also obligates the state parties to respect the rights of parents and allow them to take an active role in their children's religious education.[56] Arguably, those who merely read these provisions may find it difficult to conclude that parents truly retain their rights with respect to their children. The history of Article 14, however, suggests that parental rights were considered and implemented when writing the Convention.[57] Many of the Islamic delegations originally objected to this article (as well as the article on adoption), because they believed that only an adult can choose a religion as it is against the Koran for a child to choose his own religion.[58] In her introductory note to the Convention, Patricia Cohen writes, "[t]he final text of the articles guaranteeing freedom of religion and the right to adoption and foster care are the result of very difficult and delicate negotiations."[59] When interpreting these provisions, it is necessary to remember the delicate negotiations that went into their drafting, and to remember that parents have not lost their right to direct their child's religion. Instead, children have gained the right to have their ability to practice their religion, as chosen by themselves or their parents, protected by the state parties.

The Convention does differentiate between the rights and responsibilities of parents, but it does so under the pretext that all countries have different cultures and traditions that influence the development of the child.[60] Hafen and Hafen find the language of the Convention's various articles concerning the best interests of the

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50. *Id.* at 491.

51. Cohen, *supra* note 16.

52. *See infra* Parts III.D; IV.

53. CRC, *supra* note 5, art. 14. Section 1 states, "State parties shall respect the right of the child to freedom of thought, conscience, and religion." *Id.* at art. 14(1).

54. Hafen & Hafen, *supra* note 26.

55. Cohen, *supra* note 16.

56. CRC, *supra* note 5, art. 14. Section 2 states, "States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." *Id.* at art. 14(2).

57. Cohen, *supra* note 16, at 1451.

58. *Id.*

59. *Id.* (citing CRC arts. 20 and 21).

60. CRC, *supra* note 5, pmbl. (The CRC was written to take "due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child").

child standard disturbing because it interferes with parental rights.[61] The Convention allows children to be separated from their parents by the state when "such separation is necessary for the best interests of the child."[62] Because Article 3 requires that "the best interests of the child shall be a primary consideration," and Article 18 requires that parental responsibility, as ensured by the State Parties, requires parents to always act in the best interests of the child, Hafen and Hafen question whether the state parties will have the undisputed right to interfere with family life.[63] They worry that this language means "that any parental care that falls short of serving the child's 'best interests' is sufficiently flawed to trigger intervention."[64] In a libertarian democracy like the United States, this is a valid concern: at what point does the state's moral views about the best way to raise a child interfere with the parental right to raise their children?[65]

What Hafen and Hafen fail to acknowledge, however, is that the CRC drafters foresaw this problem, and drafted the provisions as a check on arbitrary interference by the states. The CRC requires that, "States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."[66] These safeguards, in addition to those offered by Article 5, recognize parental rights with respect to local customs.[67] Under Article 5, parents are free to choose the means by which they protect their children so long as the child is free to exercise "the rights recognized in the present Convention."[68]

Hafen and Hafen finally take fault with Article 12, questioning whether, "[given] the CRC's emphasis on considering children's own views of their interests, could a child trigger state intervention merely by requesting state review of the 'reasonableness' of parental conduct compared to the child's view of his or her best interests?"[69] Once again, Hafen and Hafen ignore the overall picture. Article 12 simply recognizes the right of a child to be *heard* "in any judicial or administrative proceedings affecting the child."[70] Paragraph 1 of Article 12 does give a broader definition of the right, stating that "[s]tates 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

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61. Hafen & Hafen, *supra* note 26, at 463-64.

62. *Id.* at 463 (quoting CRC, *supra* note 5, art. 9).

63. *Id.*

64. *Id.*

65. *See infra* Part III for a full discussion of the topic of parental rights in the United States.

66. CRC, *supra* note 5, art. 9(1).

67. *Id.* art. 5 ("States Parties shall respect the responsibilities, rights and duties of parents . . . in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise of rights recognized in the present Convention.").

68. *Id.*

69. Hafen & Hafen, *supra* note 26, at 463 (citing CRC, *supra* note 5, art. 12).

70. CRC, *supra* note 5, art. 12(2).

matters affecting the child."[71] Article 12 could be read to give a child the right to bring every disagreement before a tribunal, but no state party would read it this way; it would be contrary to any sense of judicial economy. Instead, Article 12 gives a child a voice in a judicial proceeding that has already begun. This has been interpreted around the world to include the criminal justice system as well as public and private domestic concerns.[72] While the right to be heard afforded by Article 12 is a profound right, it has also been read narrowly. It has not been interpreted to give a child the right to initiate proceedings where he disagrees with how his parents are raising him, and it does not say that the child shall have the final say in any proceeding that has already begun.[73] Perhaps the best description of the CRC's resolution was given by Professor Nicola Taylor, from New Zealand, where she described the CRC as "[r]ecogni[zing] the interdependence of family members and fit[ting] children's rights within the broader context of parental, extended family and community responsibilities, rights and duties (Article 5) and state obligations to implement children's rights to the maximum extent of the nation's available resources (Article 4)."[74] The host of evils envisaged by Hafen and Hafen are simply not supported by the actual words of the Convention or by its drafting history.

III. CHILDREN'S RIGHTS AND PARENTAL RESPONSIBILITIES REGARDING CHILD CUSTODY IN THE UNITED STATES

As noted above, the United States has not ratified the CRC.[75] This does not mean, however, that it has no influence over the United States' legal practices.[76] Peters has articulated two ways in which the United States is bound, as a signatory, to uphold the CRC—"[f]irst, as a signatory to the [C]onvention, the United States is bound to not contravene the object and purpose of the [C]onvention. In addition, American courts have just begun to examine whether or not the Convention on the Rights of the Child constitutes customary international law, binding the United States despite its failure to ratify the convention."[77] The second reason articulated by Peters is more controversial because many judges and several Supreme Court

71. *Id.* art. 12(1).

72. *See infra* Parts IV-V.

73. CRC, *supra* note 5, art. 12(2).

74. *A Research Update*, *supra* note 6, at 4.

75. President Clinton signed the CRC on Feb. 16, 1995, but Congress has never ratified it. *Ratification Report*, *supra* note 15.

76. *See supra* Part I.

77. Peters, *supra* note 9, at 1005 (citing Vienna Convention on the Law of Treaties, art. 18, 1155 U.N.T.S. 331 (1980); Sadeghi v. Immigration & Naturalization Serv., 40 F.3d 1139, 1147 (10th Cir. 1994) (Kane, J., dissenting); Nicholson v. Williams, 203 F. Supp. 2d 153, 234 (E.D.N.Y. 2002); Beharry v. Reno, 183 F. Supp. 2d 584, 600-01 (E.D.N.Y. 2002)).

justices believe that it is unconstitutional to consider non-binding international and foreign laws when interpreting domestic law.[78]

Regardless of the CRC's influence over domestic law, the U.S. legal system considers children in three areas, and each model has its own provisions regarding the participation of children: (1) the criminal justice system, (2) child protection proceedings, and (3) child custody cases. Basic constitutional rights exist for adults in these three areas, but the United States has struggled to interpret general Constitutional rights with respect to children.[79] In criminal cases, children have a Constitutional right to representation.[80] In child protection proceedings, "the United States[']' research reveals that the commitment of all the U.S. jurisdictions to provide representatives in these proceedings stems from a federal statute which made funding of the states[']' child protective bureaucracies contingent upon the provision of guardians ad litem to 'represent the best interests of the child' in all proceedings."[81] Essentially, states have a financial interest in appointing a guardian ad litem (GAL) to represent the best interests of the child, but no parallel interest in appointing a child's lawyer to represent the views of the child, irrespective of the adult's vision of the child's best interests.

The divorce and custody model presents perhaps the most difficult scenario. In a divorce case, the child is not a party to the suit, but his interests are central to the outcome. Because divorce is a private proceeding between two parents, parental rights and due process concerns take precedence over those of the child. The CRC requires, however, that the child's wishes be considered in "all judicial . . . proceedings affecting the child."[82] In the tumult of a divorce, because children are not a party to the lawsuit, they are often stuck in the middle with no one to protect them.[83] Not only are their views and wishes not expressed, but sometimes their best interests are determined completely through their parents' eyes. This section will focus on children's rights generally in the United States and their rights vis-à-vis their parents in child custody cases.

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78. *See e.g.*, Lawrence v. Texas, 539 U.S. 558 (2003) (Scalia, J., dissenting).

79. The CRC reduces this problem outside the United States because even though it reiterates the types of rights that all people possess in other treaties, it ensures that those rights apply to children as well. Cohen, *supra* note 16.

80. In re Gault, 387 U.S. 1 (1967). *See infra* Part III.A.

81. Peters, *supra* note 9, at 1015 (quoting Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, § 4(B)(3), 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5119c (2005))).

82. CRC, *supra* note 5, art. 12.

83. *See generally* PHILIP M. STAHL, PARENTING AFTER DIVORCE: A GUIDE TO RESOLVING CONFLICTS AND MEETING YOUR CHILDREN'S NEEDS (2000) [hereinafter STAHL, PARENTING AFTER DIVORCE].

A. History of Children's Rights Generally

The United States has taken, at best, an ambivalent approach regarding general children's rights. With respect to Constitutional rights, *In re Gault*[84] held that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."[85] One commentator called *Gault* "the most important children's rights case ever decided by the Court."[86] In *Gault*, the Court recognized that children must be afforded the same due process rights as adults in criminal proceedings,[87] recognizing for the first time that the constitution must protect children as well as adults, and the Court also recognized that children have some rights as autonomous individuals.[88]

Yet, *Gault*'s recognition of children's Constitutional rights has not extended far. The Court has found various ways to limit children's rights in many other areas of the law.[89] In *New Jersey v. T.L.O.,* the Court held that the Fourth Amendment offers less protection to children in schools.[90] The Court held that because schools have a heightened need to protect students, school administrators may conduct a warrantless search of a student's belongings with only reasonable suspicion.[91]

Outside the confines of the school setting, courts have struggled between giving children rights as autonomous human beings and protecting them from having to grow up too fast.[92] Courts have faced issues from children "divorcing" their parents to whether a juvenile needs parental authority to have an abortion.[93] While

84. 387 U.S. 1 (1967).

85. *Id.* at 13.

86. Martin Guggenheim, *Ratify the U.N. Convention on the Rights of the Child, but don't Expect any Miracles*, 20 EMORY INT'L L. REV. 43, 46 (2006).

87. 387 U.S. 1.

88. However, the Court held that "the child and his parents must be notified of the child's right to be represented by counsel retained by them." *Id.* at 41. Thus, the Court recognized children's rights for the first time but also implied that those rights exist with the parents as well. The Court was unable to take a stronger stand on children having rights completely independent of their parents. *Id.*

89. New Jersey v. T.L.O., 469 U.S. 325 (1985) (limiting Fourth Amendment protections in schools).

90. *T.L.O.*, 469 U.S. at 347; *see also* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (upholding a statute allowing drug testing of all students participating in extracurricular school activities).

91. *Id.* Under traditional Fourth Amendment jurisprudence, a police officer must have probable cause to search without a warrant. U.S. CONST. amend. IV.

92. *Compare* Janet L. Dolgin, *The Fate of Childhood: Legal Models of Children and the Parent-Child Relationship*, 61 ALB. L. REV. 345, 349-350 (1997) (citing Neil Postman, The Disappearance of Childhood 56-64 (1994)), *with* Hafen & Hafen, *supra* note 26.

93. Bellotti v. Baird, 443 U.S. 622 (1979) (finding a Massachusetts statute unconstitutional which failed to allow for a judicial bypass for a pregnant minor seeking an abortion); Kingsley v. Kingsley, 623 So. 2d 780 (Fl. App. 5 Dist. 1993) (holding that a child may only bring a lawsuit by a next friend who does not become a party because the child remains the real party in interest).

courts are moving in the direction of giving children more rights, when those rights come in direct conflict with parents' due process rights, the courts turn in the other direction.[94]

B. Do Children Have a Right to be Heard in Custody Proceedings?

In general, children have no right to be heard in custody proceedings. The Court has found a Constitutional right to representation for children in juvenile proceedings, but this right has not been extended to child disputes.[95] Furthermore, where states attempt to resolve divorce disputes through Alternative Dispute Resolution (ADR), children are often not represented in any way.[96] It is common practice, however, for judges to consider children's whishes as one factor in determining a child's custodial situation.[97] The Uniform Marriage and Divorce Act (UMDA) states that "[t]he court shall determine custody in accordance with the best interest of the child. The court *shall* consider all relevant factors including . . . (2) the wishes of the child as to his custodian."[98] Under the UMDA, therefore, a judge must ascertain the child's "wishes" to help determine what is in the child's best interests. This appears to be in accord with the CRC's Article 12 and Article 3 requirements.[99] Courts in states that have not adopted the UMDA remain free to exercise discretion over whether it is within the child's best interests to ascertain the wishes of that child.[100] Only eight jurisdictions have adopted the UMDA,[101] which means that, in a vast majority of states, the legislature or the courts determine the process for a child's best interests. They may or may not, therefore, determine that a child's views or wishes are important.

Some states have independently determined that at a specified age, children should be granted a more substantial say in the outcome of the decision. For example, Georgia gives children aged at least fourteen a dispositive choice in

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94. Bellotti, 443 U.S. at 373.

95. Rebecca Hinton, *Giving Children a Right to be Heard: Suggested Reforms to Provide Louisiana Children a Voice in Child Custody Disputes*, 65 LA. L. REV. 1539, 1540 (2005).

96. *See, e.g.*, *id.*

97. *See generally* cases cited in D.W. O'Neill, Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R. 3d 1396 § 3 (1995 & 2002 Supp.).

98. Unif. Marriage & Divorce Act § 402, 9A U.L.A. 282 (1998) [hereinafter UMDA] (emphasis added).

99. *See supra* Part II.

100. *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, 632 (2003) ("Trial judges in Arizona have almost limitless discretion in determining how much weight to give children's preferences in custody litigation and in deciding how to elicit those preferences.").

101. Lll: Uniform Matrimonial and Family Law Locators, *available at* http://www.law.cornell.edu/uniform/vol9.html#mardv (jurisdictions include: Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington).

custody.[102] In 2003, the Georgia Supreme Court reaffirmed that a child of fourteen has the dispositive choice and "the court has no discretion to act otherwise."[103] Here, the child has a choice greater than that granted by the CRC. Where the CRC never gives a child a final say, the Georgia legislature has determined that once a child reaches age fourteen, he has the right to determine his custodial situation. In order for a Georgia court to deny the child the right to choose, the court must find that the parent is not a "fit and proper person to have custody."[104] This is a higher threshold than the common "best interests" standard that the court must meet to undermine the choice of the child.

Most states have not taken the Georgia approach, but have instead instructed the courts to give a higher level of consideration to children of a specific age. Some states list a specific age at which the child's wishes shall bear more weight.[105] Other states leave that decision to the courts' discretion.[106] Maryland takes a very different approach to children's wishes than do other states by allowing children who are sixteen or older to petition the court for a change in custody.[107] The child may bring the petition without a guardian or next friend, and the court shall hold a hearing where it may amend the custody decree.[108] With the exception of Georgia and Maryland, courts around the country remain free to use their discretion even if they must hear the child's wishes. It is here that the history of parental due process rights becomes important to this debate.

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102. "In all custody cases in which the child has reached the age of 14 years, the child shall have the right to select the parent with whom he or she desires to live. The child's selection shall be controlling unless the parent so selected is determined not to be a fit and proper person to have the custody of the child." Ga. Code Ann. § 19-9-3(a)(4) (2006).

103. Scott v. Scott, 578 S.E.2d 876, 878 (2003) (quoting Harbin v. Harbin, 230 S.E.2d 889 (1976)).

104. *Id.*

105. *See, e.g.,* Ind. Code § 31-17-2-8(3) ("The court shall consider all relevant factors, including . . . The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age."); Tenn. Code Ann. § 36-6-106(a)(7) (stating that a relevant factor for determining the child's best interest is "the reasonable preference of the child if twelve (12) years of age or older." Also allows the court to consider "the preference of a younger child upon request. The preferences of older children should normally be given greater weight than those of younger children.").

106. *See, e.g.,* Colo. Rev. Stat. § 14-10-124(1.5)(a)(II) (granting the court discretion to determine the best interests of the child through several factors, including "[t]he wishes of the child if he or she is sufficiently mature to express reasoned and independent preferences as to the parenting time schedule").

107. Md. Code Ann. Fam. Law § 9-103(a) (West 2006).

108. *Id.* § 9-103(b), (c).

C. Parents' Due Process Rights

One of the many reasons why children cannot be asked for their wishes in a child custody proceeding is that it could violate the parents' Constitutional due process rights.[109] As one commentator has noted, "[f]ew American laws have 'children's rights' in their title. This is in part because many believe that if children are afforded 'rights' that they will come at the expense of parental rights."[110] This conflict remains one of the key concerns addressed by case law considering a child's right to be heard in custody proceedings.[111] In the United States, there is no question that parents have an historical right to raise their children without interference from the state. The Supreme Court recognized this right as early as 1923.[112] Since then, the Court has repeatedly affirmed that the state may not interfere with parents' rights.[113] Most recently, the Court held that this "fundamental liberty interest" that parents have in raising their children outweighed the best interests of the children with respect to grandparent visitation.[114]

In *Troxel*, the Court held that a mother's due process rights are violated when there is court ordered visitation by the paternal grandparents,[115] even though the trial court determined that it would be in the best interests of the child to maintain a relationship with the grandparents.[116] The Court also held that the Washington statute[117] violated the mother's due process rights under the Fourteenth Amendment

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109. *See, e.g.,* Atwood, *supra* note 100, at 639.

110. 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, 70 (2006).

111. Atwood, *supra* note 100, at 639 ("These concerns fall loosely into three categories: (1) judicial interests in rendering competent decisions, (2) children's privacy and welfare interests, and (3) parties' due process rights.").

112. Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that parents have the right under the Due Process Clause to raise their children and provide for their education free of state interference); *see also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (holding a state statute requiring public school attendance unconstitutional because it interfered with the parental right to send children to private school).

113. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997) (recognizing the long history of cases protecting parental rights as a fundamental liberty interest); Stantosky v. Kramer, 455 U.S. 745 (1982) (holding that a parent's due process rights are violated unless the State shows by clear and convincing evidence that its allegations of child abuse are legitimate); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Amish parents have the right to keep their children from attending mandatory public education after the 8th grade); Meyer v. Nebraska, 262 U.S. 390 (1923) (recognizing parents' rights to create a home for their children and educate them).

114. Troxel v. Granville, 530 U.S. 57, 65 (2000) (plurality).

115. *Id.* The mother was willing to give the paternal grandparents some visitation, but they requested more under the Washington statute.

116. *Id.* at 61.

117. Wash. Rev. Code § 26.10.160(3) says in part, "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court

because it allowed *any person* to petition for visitation at *any time*.[118] The Court noted that "[t]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[119] This statute, by allowing any person to petition for custody, was overbroad.[120] Evidence suggests that children benefit from relationships with extended members of their family; the Court, however, relied on the trial court's assessment that the children's best interests were to remain with their mother.[121] Although the best interests of the children were contested, there was no question that the plurality relied heavily on the history of parental rights with respect to their children.[122]

Justice Stevens, in his dissent, derided the majority for failing to acknowledge the children in the case:

> Cases like this do not present a bipolar struggle between the parents and the State over who has final authority to determine what is in a child's best interests. There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies–the child.[123]

Justice Stevens recognized that the child is the one most affected by this decision. Some courts have rationalized the parental rights approach and "explained that with this Constitutional liberty comes a presumption (albeit a rebuttable one) that 'natural bonds of affection lead parents to act in the best interests of their children.'"[124] Courts are virtually stuck if they believe that a parent is not acting in the best interest of a child because of this presumption that they always will. The CRC obligates the state to ensure that the child's best interests are protected so long as it does not interfere with parental rights.[125]

Judges cannot be expected to fully understand the underlying psychological debates regarding children and custody because they have not been trained in that area. In an attempt to address this problem, the book *Legal and Mental Health Perspectives on Child Custody Law: A Deskbook for Judges* compiles articles and

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may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances." *Id.*

118. *Troxel*, 530 U.S. at 73.

119. *Id.* at 65.

120. *Id.* The plurality left open the possibility of upholding a narrower statute, though, especially one placing the burden on the grandparents to show that it is in the child's best interests to have visitation with the grandparents.

121. *Id.* at 61. There was no consensus in the opinion as to what the best interests of the children really were. *Id*.

122. *Id.* at 65-66. The plurality cited cases dating back to 1923 upholding a parent's rights with respect to raising a child. *Meyer*, 262 U.S. 390.

123. *Id.* at 87 (Stevens, J., dissenting).

124. *Id.* (quoting Parham v. J. R., 442 U.S. 584, 602 (1979)).

125. CRC, *supra* note 5, art. 18.

other information for judges about issues related to child custody.[126] Even this compilation, created by attorneys and non-attorneys alike, places children's rights subordinate to parental autonomy even though the "authors recognize that children may in fact form very important bonds with extended family and other caregivers."[127] Parental authority to raise their children as they see fit is a well-established set of rights that trumps even these bonds that children *may* form.[128]

Therefore, many people believe that either the children have rights or the parents have rights, but not both.[129] This has led courts to redefine the very notion of childhood and children's relationships with their parents.[130] If children are to be given more rights, they must be seen as autonomous individuals; this means that eventually the very notion of childhood, a time during which children should be protected, may be in danger in the United States.[131] The law is in a better position than it was fifty years ago to define children in various contexts and for various purposes as autonomous individuals.[132] One aspect of autonomy is being able to express personal views in judicial proceedings that affect the person. In the world of custody battles, this means recognizing the child's views, either directly or through a qualified representative.

D. The Psychological Debate Over Listening to Children

Another factor that the courts must consider is the psychological impact that questioning children will have on their future.[133] The question that all state actors must ask is whether questioning the child will have a beneficial or harmful effect on the child. No clear answer to this question exists, but there is some research regarding the impact that questioning a child has.[134] The full argument is not within the scope of this note, but a brief overview will help the reader understand the different approaches that various states have taken with respect to the issue.

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126. ELISSA P. BENEDEK & ROBERT J. LEVY, *LEGAL AND MENTAL HEALTH PERSPECTIVES ON CHILD CUSTODY LAW: A DESKBOOK FOR JUDGES* (West Group 1998).

127. Woodhouse, *supra* note 21, at 112.

128. *Troxel*, 530 U.S. 65.

129. Davidson, *supra* note 110, at 70 (explaining that part of the reason why many American laws do not contain the words "children's rights" in their titles is because "many believe that if children are afforded 'rights' . . . they will come at the expense of parental rights").

130. *See generally* Dolgin, *supra* note 92.

131. *Id.* at 367.

132. *Id.* at 349.

133. *See generally* Richard A. Warshak, *Payoffs and Pitfalls of Listening to Children*, 52 FAM. RELATIONS 373 (2003).

134. In this section I will examine the American research literature. Research done in other countries will be examined with respect to those countries' laws regarding listening to children. *See infra* Part IV.

Few people insist that children should be able to make the final decision in a case regarding their custodial placement.[135] Most people agree that simply asking a child to choose between parents causes the child far too much emotional strain, but that it remains important to nonetheless find a way to give the child a voice in the proceeding. In order to protect the child while still offering him a chance to speak to his wishes, one custody evaluator, Dr. Stahl, questions children as follows:

> You know, one of the things about a custody evaluation is that it is about your life, not your parents', and not mine. You've told me about some of your feelings about your mother and your father, and I wonder if you've thought about how you would like to spend time with each of them. While the ultimate decision will either be made by your parents or the judge, if you have any thoughts about how you like to spend your time with each of your parents, and if you want to share those thoughts with me, I can use that information in making my recommendations. Just so you know, however, I don't make my recommendations simply based on what you tell me you'd like, but based on all of the issues that I think are important in your life. As we talk, if you have any questions about that, please let me know.[136]

Dr. Stahl's approach addresses many of the concerns that courts and researchers have. First, he articulates clearly and often that the final decision will not be made by the child; it will be made by the adults to whom the child expresses his views. By not giving the child too much power in the decision, courts are able to shield the child from being placed directly in the middle of their parent's struggle.[137] Courts have attempted to remedy this problem by utilizing children's wishes as only one factor among many.[138]

Another major concern addressed by Dr. Stahl is the problem of parental alienation.[139] In a nutshell, parental alienation is where one parent convinces the child that the other parent is bad or unfit for parenting, hoping that the child will convey that message to the evaluator or the court.[140] This is one of the biggest problems facing family court judges today because its very existence is

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135. *But see* Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. 299, 301 (1994) (claiming that "the stated preference of any child over the age of six years should be legally dispositive of that child's custody").

136. PHILIP M. STAHL, COMPLEX ISSUES IN CHILD CUSTODY EVALUATIONS 121-22 (1999) [hereinafter STAHL, COMPLEX ISSUES].

137. Warshak, *supra* note 133, at 376.

138. *See supra* Part III.C.

139. STAHL, COMPLEX ISSUES, *supra* note 136, at 8-15.

140. For an in-depth analysis of parental alienation and its effects on children and divorce see Warshak, *supra* note 133, at 374-76.

controversial.[141] The controversy surrounding parental alienation is directly related to the first concern raised in the case law as noted by Professor Atwood: "judicial interests in rendering competent decisions."[142] If, after years of study and training regarding parental alienation, a psychologist is unable to always ascertain when a child may be suffering from parental alienation,[143] how is a judge, who is untrained in psychological matters, expected to understand it, or even to recognize when it occurs?[144] The final question is whether children even want to be asked about their wishes, and often that is not answered until years after the divorce is over.[145]

E. Differences Between U.S. Law and the CRC Requirements

The difference between the United States and the nations that have ratified the CRC is that, in the United States, children's "best interests" are to be determined by the judge and the States are free to determine whether the judge is required to ascertain the children's views.[146] Under the CRC, however, children have a "right" to have those interests protected.[147] It has been said that "[i]n the United States, society is living in a time warp: the world of pre-CRC jurisprudence. Children's interests are continually spoken of instead of their rights, as rights are perceived as something that is useful only to an autonomous individual who is fully capable of making mature choices."[148] As noted earlier, the United States is generally willing to recognize that children have certain rights, but those rights are denied in situations which directly affect their lives and where it believes that it must protect children from themselves.[149] The best interests standard, without rights recognition, creates an entirely paternalistic model.

The difference between the best interests standard in the United States and the best interests standard under the CRC is semantic. In the United States, adults do not recognize that children have a *right* to have their best interests protected. Hillary

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141. *See generally* Carol S. Bruch, *Parental Alienation Syndrome and Parental Alienation: Getting it Wrong in Child Custody Cases*, 35 FAM. L. Q. 527 (2001). *See also* Philip M. Stahl, *Understanding and Evaluating Alienation in High-Conflict Custody Cases*, 24 WIS. J. FAM. L. 1 (2004); Joan B. Kelly & Janet R. Johnston, *The Alienated Child: A Reformulation of Parental Alienation Syndrome*, 39 FAM. CT. REV. 3 (2001).

142. Atwood, *supra* note 100, at 639.

143. STAHL, COMPLEX ISSUES, *supra* note 136, at 8-15.

144. Warshak, *supra* note 133, at 375 ("Without specialized understanding of child development and training and experience in interviewing children, lawyers and judges may not effectively elicit children's private feelings, nor discriminate between children's mature and reasonable positions and positions that are immature, transient, irrational, or heavily influenced by the favored parent.").

145. *See* STAHL, PARENTING AFTER DIVORCE, *supra* note 83, at ch. 12.

146. *See supra* Part III.B.

147. CRC, *supra* note 5, art. 12.

148. Woodhouse, *supra* note 21, at 110.

149. *See supra* Part III.A.

Rodham Clinton, in 1973, called the best interests test "a rationalization by decision-makers justifying their judgments about a child's future, like an empty vessel into which adult perceptions and prejudices are poured."[150] The U.S. presumption that parents act in the best interests of their children fails to adequately protect the child because parents have no duty to protect their children's best interests.[151] Other countries have seen a positive shift in the lives of their children after signing the CRC.[152] There are still people, however, who believe the United States should not ratify it.

F. Arguments that the U.S. Should Not Sign the Convention

The most common argument against ratification is that the empowerment of children emphasized by the Convention actually harms rather than benefits children.[153] This correlates directly with the psychological concerns in the United States of affording children a voice specifically for custody proceedings.[154] Dolgin, a law professor at Hofstra University, gives an overview of the history of the family in the United States and concludes that children today are more autonomous than ever before.[155] Dolgin does not use this fact to argue against ratifying the CRC, but she lays out the important distinction between societal views of children as either members of a no longer existent family or as "little adults."[156] She concludes that too much autonomy for children, where society no longer recognizes the differences between adults and children, "will likely be unfortunate."[157]

Hafen and Hafen find that the problem for children lies in the distinction between protection rights and choice rights.[158] The problem, as they view it, is that giving children the choice rights, as the CRC does, confers upon them "the burdens and responsibilities of adult legal status, which necessarily removes the protection rights of childhood."[159] Once again, they fail to recognize the safeguards in place

150. Guggenheim, *supra* note 86, at 63 (quoting Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487, 513 (1973)).

151. *See supra* Part III.A.

152. *See infra* Parts V-VI.

153. Hafen & Hafen, *supra* note 26.

154. *See supra* Part III.D.

155. Dolgin, *supra* note 92, at 430.

156. *Id.*

157. *Id.* at 431.

158. Hafen & Hafen, *supra* note 26, at 461. The authors define protection rights as rights "which do not depend on any minimum level of capacity, includ[ing] such safeguards as rights to property, rights to physical care and security, and rights to procedural due process." *Id.* They define choice rights as those rights which grant individuals the authority to make affirmative and legally binding decisions, such as voting, marrying, making contracts, exercising religious preferences, or choosing whether and how to be educated. *Id.*

159. *Id.*

under the Convention.[160] Dolgin points out that it is through the restructuring of the family in the twentieth and twenty-first centuries that children have gained their autonomy.[161] The CRC recognizes this and therefore protects the individual needs of children as well as the family structure. The Preamble to the CRC calls the family "the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children."[162] It continues by asserting that the family must be protected in order to fulfill its responsibilities of providing a place in which children can grow.[163] Most importantly, this consideration of the family follows an acknowledgment that "childhood is entitled to special care and assistance."[164]

Hafen and Hafen are correct, however, in that the CRC wants to promote some degree of childhood autonomy, but they fail to notice the protections it also offers. The CRC answers one of Dolgin's final conclusions on the fate of childhood that "[i]f society continues to understand children as inherently different from adults, as vulnerable, immature, and in need of adult guidance, then children face the risk that, without the support of enduring familial settings, they will never mature, that they will, in effect, remain adolescents throughout life."[165] With the protections afforded by the CRC, as well as the guiding principles, children can grow and become autonomous in developmentally sound ways.

IV. CHILDREN'S VIEWS IN THE COMMONWEALTH AND OLD COMMONWEALTH COUNTRIES

In order to understand where the United States fits into the overall picture, it is important to see how other Anglo legal systems have evolved after implementing the CRC. This section will consider the United Kingdom, Australia, Northern Ireland, and South Africa. Section V will focus exclusively on New Zealand because it has proven to be the forerunner in family and children's issues.

These nations are finding various ways to resolve the tension created between Articles 3 and 12 of the CRC through both the legislative and judicial processes. One of the main reasons for this variance between their views about children and the United States is that the research from these other countries has noted a different psychological reaction in children who are consulted about the divorce process. One study "found that children who had been consulted about

160. *See supra* Part II.

161. Dolgin, *supra* note 92, at 419 ("Society clings to traditional images of childhood, but the social and cultural universe within which those images made sense and could, in theory at least, be actualized, has largely disappeared.").

162. CRC, *supra* note 5, pmbl.

163. *Id.*

164. *Id.*

165. Dolgin, *supra* note 92, at 430.

living arrangements were more positive about having to live in two households."[166] Americans tend to be concerned with parental alienation and harm to the child,[167] but these other countries have found that children actually benefit by having their voices heard.

Instead of focusing almost exclusively on the harm that may befall children who become involved in the divorce process, the studies relied upon by scholars in other nations focus on the need for children to be involved to *improve* their psychological reaction to the divorce.[168] One scholar considers the child's reaction to the divorce a "crisis," albeit "a normal and natural reaction" to the situation.[169] He cites a study concluding that "at such times of crisis, children, first, require reliable information about what is happening and what to expect and, secondly, they need consistent emotional support and understanding."[170] The information makes the emotional reaction easier.[171] Perhaps even more important than the need for information about the divorce, the study found that the children who were given the opportunity to express their wishes or views about living arrangements had less negativity towards living in two households.[172] This difference in the scholarly approach to children's participation has led to various systems emerging to hear and involve children.

The newest research update stresses children as independent actors and differing in their reactions to the same types of "stressors."[173] The international research has begun to dismiss the predominant research done by Jean Piaget, in which he sets forth his stages of childhood development.[174] Today, however, researchers have noted that children grow based on their social bases, not only through their cognitive development schemes.[175] In this new model of childhood within the family law system, parents and lawmakers are expected to support children by being the more skilled actor, while also allowing the children the opportunity to grow for themselves.[176] This has been called scaffolding, and Professor Taylor has noted, "The onus is now on the adult to understand, support,

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166. Mervyn Murch, *The Voice of the Child in Private Family Law Proceedings in England and Wales*, INT'L. FAM. L.J. 2005 (8), Part One—The importance of information and support for children when parents separate and divorce.

167. *See supra*, Part III.D.

168. *See generally* Mervyn Murch, *supra* note 166.

169. *Id.* at Section: "The importance of information and support for children when parents separate and divorce."

170. *Id.*

171. *Id.*

172. *Id.*

173. *See generally*, Taylor, *supra* note 6.

174. *Id.* at 13. Jean Piaget conducted the most influential research regarding childhood cognitive development in the early twentieth century. He theorized that children go through cognitive stages before reaching a point where they can really participate in reasoning and think as mature adults. *Id.* at 9.

175. *Id.*

176. *Id.* at 14.

have positive expectations, and, when appropriate, guide and assist the child, whereas it has historically been the child's cognitive capacity and level of development that has been regarded as determining their competence."[177] As the rest of the world focuses on the emerging research about children, that research can be implemented into the family court systems without harming children because adults can be expected to guide and support children.[178]

Finally, the research suggests a vast difference between a child being asked about his wishes and a child's decision to live with one or the other parent.[179] This addresses the above concerns that we are "abandoning children to their autonomy" by turning them into little adults.[180] Professor Taylor further suggests that it is important to recognize that many children will choose not to participate, but that this does not mean that those who do want to participate should be denied the opportunity.[181] Taylor's exploration of the research depicts that the worst action adults can take with respect to children is to leave them in the dark.[182] It is the pain of not knowing that causes them the worst emotional issues and not the fact that their parents have divorced.[183] With this understanding, the United Kingdom, Australia, South Africa, and New Zealand have focused their family court reforms on involving children in the process as well as the outcome of private family law.

A. Children's Views in the United Kingdom and Ireland

The United Kingdom's experience, from past to present, may help shed some light on current conditions in the United States. Ireland passed the Children Act 1997, formalizing the child's role and position in the legal system. Prior to that, however, the Irish experience resembled the current situation in the United States. One commentator described the old system:

> Whether in public or in private law matters they had no separate voice to their parents and no one could relate their welfare independently to the court. Although such formalism was often side-stepped by judges eager to hear the child's story, whether in chambers or at a boat show, this kind of informalism often involved the worst of both worlds, lacking as it did any structural or professional safeguards. Many judges were aware of the danger

177. *Id.* (citing J Garbarino, F Stott and Faculty of the Erikson Institute, *What Children Can Tell Us: Eliciting, Interpreting and Evaluating Critical Information from Children,* Jossey-Bass Publishers, San Francisco, 1992).

178. *See generally* Warshak, *supra* note 133; *See also* Hafen & Hafen, *supra* note 26.

179. Taylor, *supra* note 6, at 19.

180. *See supra* Part IV; Hafen & Hafen, *supra* note 26.

181. Taylor, *supra* note 6, at 19.

182. *Id.* at 22.

183. *Id.* at 22-23.

> that children might be coached and acted accordingly. But the basic problem remained-that children's interests were not adequately represented in the courtroom.[184]

This description matches almost exactly the situation here in the United States. Ireland, in passing the Children Act 1997, attempted to remedy the basic problem of not adequately representing children's views in the courtroom, but Shannon argues that Ireland has not gone far enough.[185]

In private law cases, Irish courts will only appoint a guardian ad litem (GAL) "if satisfied that having regard to the special circumstances of the case it is necessary in the best interests of the child to do so."[186] This is in stark contrast to England, which requires a GAL appointment unless the court is satisfied that there is no legitimate reason to do so.[187] Unlike GALs, however, children's lawyers are not required.[188] Instead, "with a few exceptions lawyers are uncomfortable about dealing directly with children."[189] Thus, in England, there is someone to protect the child's best interests but no one to necessarily advocate for the child's wishes.

With respect to private law cases, children are not automatically parties to the lawsuit, which means that the judge need not appoint a GAL for the child in all cases.[190] GALs are appointed under the Children Act 1989 to represent the child's wishes, but if the wishes of the child are different than those of the guardian, the guardian may request that a solicitor be appointed specifically for the child.[191] The decision to make the child a party, however, remains the judge's decision.[192] The Practice Directions, issued in April 2004, remind judges that making a child a party to the suit and appointing a GAL for him may actually result in increased litigation

184. Geoffrey Shannon, *Giving a Voice to the Child – The Irish Experience*, 14 INT'L. J. L. POL'Y & FAM. 131 (2000), at Section II: Child Representation—the Historical Perspective.

185. *Id.*

186. *Id.*

187. *Id.*

188. Murch, *supra* note 166, at Section: "Giving children a direct voice in private law proceedings - the new focus on children's participation in the legal process."

189. Murch, *supra* note 166, at Section: "Parental separation and divorce" (citations omitted).

190. The Children and Family Court Advisory and Support Service (CAFCASS), The Law about Children Contact and Residence, *available at* http://www.cafcass.gov.uk/English/Lawaboutchildren/contactandResidence.htm [hereinafter Children Contact and Residence].

191. *Id.*

192. Murch, *supra* note 166 (citing Practice Direction issued by the President of the Family Division, 2004).

time and emotional turmoil for the child.[193] Thus, judges are instructed to only appoint a GAL where the case involves "significant difficulty."[194]

Even though a child is not necessarily a party to the lawsuit, the Court "must have regard to the welfare checklist set out in s1" of the Children Act 1989.[195] The first requirement of the welfare checklist is the "ascertainable wishes and feelings of the child concerned (considered in light of his age and understanding)."[196] The law, however, gives no indication how these wishes and feelings are to be determined.

The United Kingdom's discomfort with appointing guardians and solicitors by making the child a party to the proceedings is similar to the current reluctance in the United States, but that may be changing. Murch cites several examples of ways in which the various countries are increasing child participation in private-law cases, including that the trend to appoint separate representation for children in private-law cases is on the rise, and "following devolution, the governments of Wales and Scotland have appointed special children's commissioners to act as a public watchdog on children's matters. Both England and Wales also have ministers for children."[197] These ministers for children exist to increase the context of child participation at all levels of the governmental scheme.[198]

For example, the United Kingdom is looking for various ways to involve children in more policy-making decisions. A Department of Constitutional Affairs was created in June 2003 and in its new policy statement, entitled *Involving Children and Young People: Draft Action Plan 2004-2005*, the Department declared its intention:

> To involve children and young people in departmental policy making. Being here 'for the public' requires us to listen to what children and young people need and to shape our policies and services to reflect what we know in our approach. We must find effective ways to consult, involve and listen to children and young people for whom the justice system and Constitution also exist.[199]

Such recognition puts children on a new level. Not only are these legal systems determining children's views in particular situations, but they are asking for children's aid in developing the policies that will affect them within those systems.

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193. *Id.*

194. *Id.* (citing the various ways that children may be made a party to the suit including: allegations of abuse, difference in views among various children, where the child has a view not able to be expressed by any adult, where all contact has ceased with one adult, etc.).

195. Children and Contact Residence, *supra* note 190.

196. *Id.*

197. Murch, *supra* note 166, at Section "Giving children a direct voice in private law proceedings - the new focus on children's participation in the legal process."

198. *Id.*

199. *Id.* at Section "The government's general approach to the participation of children in policy making."

Although these countries may not have fail-proof systems to hear children, they recognize the importance of discovering not only their best interests but listening to their wishes as well.

B. Children's Views in Australia and South Africa

Australia and South Africa, although not two countries that would often be grouped together, actually bear a close resemblance in their struggles to determine children's rights.[200] Both countries have signed the CRC and each one is trying to find the best way to implement it.[201] They are both former members of the Commonwealth, so they possess similar legal frameworks. Finally, each country must struggle with multiculturalism, indigenous peoples, and the effects of cultural differences on their respective family courts.

Australia has a long history of commitment to children's rights in family law.[202] In 1959, the Australia legislature passed the Matrimonial Causes Act, which recognized that "the interests of the children are the paramount consideration."[203] In 1973, the importance of listening to children was recognized, and the High Court said that children's wishes are "a matter to be taken into account by the court."[204] The legislature codified this statement in the Family Law Act 1975.[205] It required a court to make an order following the wishes of a fourteen-year-old so long as the court did not find any special circumstances to not do so.[206] The law has since been modified, however. Today, there is no age limit on when a court must follow the wishes of a child.[207] The Family Law Act has been amended to require a judge to consider a child's wishes in all circumstances, respecting, of course, "any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views."[208] Australia, therefore, recognizes the right for all children to voice their wishes as required by the CRC.

Similar to the United States, Australia has interpreted a child's competence and maturity with respect to contraception.[209] In *Gillick*, the Court recognized the

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200. June Sinclair, *Family Law Processes and South Africa: Multiculturalism in a Developing Country and Some Comparisons with Australia*, [2004] AUS. J. FAM. L. 13.

201. *Id.*; *see also* Ratification Report, *supra* note 15.

202. In re Marriage of Harrison & Woollard, (1995) 126 F.L.R. 159.

203. *Id.* (quoting Matrimonial Causes Act 1959).

204. Reynolds v. Reynolds, (1973) 47 A.L.J.R. 499, 502.

205. Family Law Act 1975, *available at* http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D57A9F76BC62AA1CCA25726000065DAC/$file/FamilyLaw1975_WD02.pdf (last visited Mar. 19, 2007).

206. *Harrison & Woolard*, (1995) 126 F.L.R. at 170 (quoting Family Law Act 1975).

207. Family Law Act 1975, *supra* note 205 § 60CC(3)(A).

208. *Id.*

209. *See* Gillick v. West Norfolk & Wisbech Area Health Authority, (1986) 1 A.C. 113 (H.L.) (U.K.) (the *Gillick* competence doctrine is followed in Australia; the case was first

evolving standard for children's maturity and recognized that children could be competent to make decisions before they reach the age of maturity.[210] This approach has now reached the Family Court, but the Court remains free to override the child's wishes when those wishes contradict the child's best interests as determined by the judge.[211] According to the High Court, a judge must analyze several factors when determining the child's best interests, including "the strength and duration of their wishes, their basis, and the maturity of the child, including the degree of appreciation by the child of the factors involved in the issue before the court and their longer term implications."[212] These requirements protect the child from himself as well as recognize the importance of listening to children. This must all be analyzed against the backdrop of the child's welfare.[213] Finally, the Court has noted that when considering both statutory and common law, where there are ambiguities, the Court should look to the CRC for clarification but may not interpret the CRC to overrule clear legislation.[214]

South Africa does not have anywhere near as long a legal history in this area. But South Africa, by creating a new nation and a new constitution, has given children autonomy rights since its inception.[215] Chapter 2 of the South African Constitution is entitled "Bill of Rights," and Section 28 specifically applies to children.[216] In South Africa, a child's best interests are constitutionally protected.[217] Such an institution was necessary in South Africa as it emerged from apartheid and communal laws of indigenous Africa.[218] The constitutional recognition of children's rights may be a groundbreaking step, but the implementation has been less than perfect.[219] That should not undermine the importance of trying to create constitutional protection. The fact that South Africa has attempted to implement the

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considered as "persuasive authority" in Australia's Sec'y, Dep't of Health & Cmty. Servs. V. J.W.B. & S.M.B., (1992) C.L.R. 218).

210. Gillick (1986) 1 A.C. 113.

211. *Harrison & Woolard*, (1995) 126 FLR at 173.

212. *Id.*

213. *Id.*

214. *Id.*

215. *See generally* Tshepo L. Mosikatsana, *Children's Rights and Family Autonomy in the South African Context: A Comment on Children's Rights Under the Final Constitution*, 3 MICH. J. RACE & L. 341 (1998). The South African Constitution was enacted December 10, 1996, and entered into force on February 4, 1997. CIA, The World Factbook: South Africa, *available at* https:// www.cia.gov/cia/publications/factbook/geos/sf.html (last visited Mar. 19, 2007).

216. S. AFR. CONST. 1996 ch. 2, § 28. As of 1999, one commentator has noted that South Africa may be the only country to constitutionally protect children's rights. Lauren M. Spitz, *Implementing the U.N. Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution*, 38 VAND. J. TRANSNAT'L L. 853, 873 (2005) (quoting Walter H. White, Jr., A Report from the Chair, 26-SPG HUM. RTS. I (1999)).

217. S AFR. CONST. 1996 ch. 2, § 28(3).

218. Mosikatsana, *supra* note 215, at 392.

219. *Id.* at 887 (noting that laws in South Africa fail to protect children in police custody and from being used in armed conflict).

meaning behind Article 12 is evidence that the South African legislature is willing to work toward the goal of eventually fulfilling its obligations under the Convention.[220]

The varied legal and cultural histories that exist in Australia and South Africa have also led to different structures in their family law courts. It is here, perhaps, where lies the best comparison.[221] South Africa has been called a "mixed legal system."[222] It is mixed between the Roman-Dutch civil law and the English common law.[223] Each system of law recognizes different family units, and South Africa must also consider the effect of African extended families on its family law structure.[224] Similarly, the early argument against the Family Law Act in Australia was that it did not adequately consider the needs of aboriginal families.[225] Perhaps because of these historical similarities, both countries are attempting to move towards a less adversarial approach to divorce proceedings.[226]

South Africa used to have separate divorce courts for black South Africans, but in 1997 the divorce courts were given general jurisdiction over all of the simpler divorces in the nation.[227] This, among other changes in the court system, has led to a more unified approach to family courts throughout the nation.[228] Australia, on the other hand, is moving in the opposite direction and is spreading its courts throughout its various states.[229] Australia is a more developed nation and has more resources with which to experiment; it has attempted to reduce the role of the family courts and to implement three hours of free counseling to separating couples in sixty-five different regions.[230]

Although both countries aim to consider the children's opinions, these new approaches could adversely affect them. For example, as long as the case proceeds in a court setting in Australia, the child's voice must be heard, at least to the extent that the judge determines the child is mature enough to express his wishes.[231] But during the pre-trial stages, or where there is no trial, the child has no legal protection under the Family Law Act.[232] Judge Chisholm of Australia's Family Court believes

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220. *Id.* at 878 ("The inclusion of children's rights in the South African Constitution provides children with institutional means to influence the decisions affecting their lives.").

221. *See generally* Sinclair, *supra* note 200.

222. *Id.* at 8.

223. *Id.*

224. *Id.* at 14 (also noting that South Africa must contend with the fact that so many families are headed by people either infected with AIDS or where the head of the household has died from AIDS).

225. *Id.* at 12 (also noting that the Amendments now require a judge to consider the child's background when determining what is in the best interests).

226. *Id.* at 23.

227. Sinclair, *supra* note 200, at 20.

228. *Id.* at 23.

229. *Id.*

230. *Id.*

231. Family Law Act 1975, *supra* note 205, § 60(CC)(3).

232. Richard Chisholm, *Children's Participation in Family Court*, (1999) AUS. J. FAM. L. 7, 13.

that the child's best interests should be considered paramount even during these pre-trial stages, and their bests interests include their voices being heard.[233] South Africa's approach is constitutionally different. As noted above, the "child's best interests are of paramount importance in every *matter* concerning the child."[234] The word "matter" is broader than the Australian legislation, which places the child's right to voice his wishes under the provisions of how a court is to determine the child's best interests.[235] As South Africa continues to develop its eleven-year-old constitution, it may become the forerunner for children's rights internationally. Until that happens, however, the most "advanced" legal system protecting children is in New Zealand.

V. CHILDREN'S VIEWS IN NEW ZEALAND

The New Zealand Family Court is on a mission: "the Family Court is committed to making children count."[236] Judge Boshier, the chief judge of the Family Court, wants children to hold a new position in his country. New Zealand is a country with a land mass about the size of Colorado and a population of slightly more than 4 million people.[237] New Zealand's size makes it the perfect country to take enormous steps in family law because there is only one family court, but it also struggles with many indigenous people's issues with its native Maori population.[238] In comparing New Zealand to Australia, two commentators noted "the Family Court in New Zealand, which is a smaller country with a population of four million people, has a national reach and a comprehensive jurisdiction over *all matters concerning children and families*."[239] Whereas Australia and the United States are large

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233. *Id.*

234. S. AFR. CONST. 1996 ch. 2, § 28(2) (emphasis added).

235. Family Law Act 1975, *supra* note 205, § 60CC(3).

236. Peter Boshier, Principal Judge New Zealand Family Court, Speech to Save the Children New Zealand, Brentwood Hotel, Kemp Street, Kilbirnie,Wellington, Making Our Children Count: The New Care of Children Act 2004 – Is Section 59 Of the Crimes Act 1961 Still Good Law? (June 17, 2005), *available at* http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=boshier.asp [hereinafter Making Our Children Count].

237. CIA, The World Factbook: New Zealand, *available at* https://www.cia.gov/cia/publications/factbook/geos/nz.html (last visited Mar. 19, 2007).

238. Peter Boshier, Principal Judge New Zealand Family Court, The 2001 World Congress on Family Law and the Rights of Children and Youth, Can We Protect Children and Protect Their Rights? (September 21, 2001), http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=boshier.asp [hereinafter Can We Protect Children?]. "One of the hallmarks of this Act was its recognition of the indigenous peoples of New Zealand, the Maori, by importing many aspects of important Maori culture into the Act." *Id.* (citing the Children Young Persons and Their Families Act).

239. Nicola Taylor & Robyn Fitzgerald, *Children's Participation in Family Law Proceedings in New Zealand and Australia: Inclusion and Resistance* (Paper presented at the

countries that allow their regions or states to have varying laws, New Zealand is governed by one set of laws and on e court.[240] This gives New Zealand the ability to enact new ideas more quickly and more effectively. Family law reform, with all of its potential for pitfalls, requires this sort of overarching policy, and New Zealand is ahead of the rest.

In 1980, New Zealand established the Family Court, independent from the other courts, but unified throughout the nation.[241] The complexities of family law make it a discipline that cannot be covered by the general legal profession,[242] so the New Zealand Family Court "was to be more of a problem-solving court. It's [sic] processes were intended to be less austere and intimidating."[243] In 2004, in an effort to comply with the CRC, New Zealand passed the Care of Children Act 2004 (COC Act).[244] The COC Act specifically addresses Article 12 in its own section 6.[245] The United States should look to New Zealand as evidence of the various possibilities that exist with respect to Family Law, children's views regarding custody, and implementation of Article 12.

A. Guardianship Act 1968

From 1968 until 2005, the Guardianship Act 1968 governed New Zealand family courts.[246] The Guardianship Act required the courts to consider the child's welfare and best interests as the "paramount consideration,"[247] but the Guardianship

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"Childhoods: Children and Youth in Emerging and Transforming Societies" Conference, University of Oslo, Norway, June 29 – July 3, 2005) (on file with author) (emphasis added).

240. *Id.*

241. Pauline Tapp, *Judges are Human Too*, [2006] NZ L. REV. 35, 36.

242. *Id.* at 36.

243. Peter Boshier, Principal Judge New Zealand Family Court, New Zealand Law Society Family Law Section, Family Law: The New Era – Professionalism in the Family Court (October 10, 2005), *available at* http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=nzls-family-law-section-10-10-2005.asp [hereinafter Professionalism Speech].

244. Peter Boshier, Principal Judge New Zealand Family Court, Children's Issues Centre, 6th Child and Family Policy Conference, St David Street, Lecture Theatre, Dunedin, The Care of Children Act 2004 – Does it Enhance Children's Participation and Protection Rights? (July 7, 2005), *available at* http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp?inline=children-issues-centre-7-july-2005.asp [hereinafter COC Speech].

245. Care of Children Act, 2004 S.N.Z. No. 90, *available at* http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=641601786&infobase=pal_statutes.nfo&jump=a2004-090&softpage=DOC [hereinafter COC Act].

246. Making Our Children Count, *supra* note 236.

247. Peter Boshier, Principal Judge New Zealand Family Court, Relationship Services, Level 6, Navigate House, 69-71 Boulcott Street, Wellington, New Counselling Options under the Care of Children Act, and Parent Information Programmes to Help Families in Conflict (August 16, 2005), *available at* http://www.justice.govt.nz/family/publications/

Act gave little guidance as to how to fulfill this obligation.[248] Under the Guardianship Act, prior to the ratification of the CRC, the Court's main role was to protect children's interests.[249] For thirty-six years, New Zealand family courts struggled.[250] In the intervening years, the role of the family changed and the CRC was adopted and ratified faster than any other human rights treaty in history.[251] Section 23(2) of the Guardianship Act required the Court to ascertain the wishes of the child.[252] In its last year of effect, 24,905 applications were brought under the Guardianship Act, representing 37.5% of all applications brought before the family court that year.[253] With the ratification of the CRC and the changing views of children's roles, New Zealand courts began to change their perspective from one of paternalistic protection to recognition of children's rights.[254] On July 1, 2005, the Care of Children Act 2004, which gave the Family Court more guidance and established children's rights as fundamental in New Zealand, went into effect.[255]

B. Care of Children Act 2004

New Zealand's Care of Children Act 2004 went into force on July 1, 2005.[256] The COC Act did not fully incorporate the provision of the CRC; however, it did codify Article 12 as section 6 (s6) of the Act.[257] Section 6, entitled "Children's Views," states:

> (1) This subsection applies to proceedings involving---
> (a) the guardianship of, or the role of providing day-to-day care for, or contact with, a child; or
> (b) the administration of property belonging to, or held in trust for, a child; or
> (c) the application of the income of property of that kind.
>
> (2) In proceedings to which subsection (1) applies,---
> (a) a child must be given reasonable opportunities to express views on matters affecting the child; and
> (b) any views the child expresses (either directly or through

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speeches-papers/archive.asp?inline=relationship-services-16-august-2005.asp [hereinafter New Counselling Options].

248. *Id.*
249. Tapp, *supra* note 241, at 37.
250. *Id.*
251. New Zealand ratified the CRC on May 6, 1993. Ratification Report, *supra* note 15.
252. Tapp, *supra* note 241, at 36.
253. New Counselling Options, *supra* note 247.
254. *See, e.g.,* Tapp, *supra* note 241, at 37.
255. New Counselling Options, *supra* note 247.
256. Care of Children Act, Introduction.
257. *Id.* § 6.

a representative) must be taken into account.[258]

The Act recognizes more than a child's right to participate. Some of the most important changes are semantic, but the different words reflect the underlying policy changes, and they have largely different meanings to those implementing the Act. For instance, the COC Act changes the word "wishes" as used under the Guardianship Act to "views."[259] Children may not necessarily have specific wishes as to their choice of parent, but they may have particular views.[260] The High Court has noted that one commentator considers the word "views" to be broader than "wishes."[261] Furthermore, the word "custody" has been changed to "day-to-day care."[262] These semantic changes recognize that the courts "need to provide an environment for children in which [their] special dependence can be catered for, while ensuring that protection does not become overly paternalistic and turn into oppression. It is crucial in this respect that children are able to participate in judicial proceedings."[263] Custody implies that children may be owned by their parents. People have custody of documents and other property—they should not have custody of children. Day-to-day care respects the CRC where it requires parents to protect children.[264]

The COC Act has made other significant changes regarding the child's voice. Instead of stating that the child's wishes should be ascertained "if the child is able to express them," the Act simply requires that a child's views be ascertained.[265] Another deleted phrase required judges to consider the child's views while "having regard to their age and maturity."[266] One commentator has noted that "the new legislation would seem to go well beyond the [CRC], which still carries two riders to the consideration of children's views: (1) that the child is 'capable of forming' those views; and (2) that the views be 'given due weight in accordance with the age and maturity of the child.'"[267] Thus, in the area of children's voices, New Zealand has gone above and beyond the requirements of the Convention.

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258. *Id.*

259. COC Speech, *supra* note 244.

260. Additionally, asking a child to express his wishes implies that he is choosing, whereas the word views simply means that the child can express that he has no particular wishes. This eases the burden on the child and helps him to understand that he is not going to be the one to make the final decision. *See supra* Part IV.

261. C v. S, [2006] N.Z. Fam. L.R. 745, at ¶ 31(e) (citing Mark Henaghan, *The Impact of the Care of Children Act 2004 on Family Law Practice*, presented at the October 2005 Family Law Conference).

262. COC Speech, *supra* note 244.

263. *Id.*

264. CRC, *supra* note 5, art. 18.

265. *Id.*

266. *Id.*

267. Dale Clarkson & Hugh Clarkson, *The Rights of Children Under the Care of Children Act 2004, with Particular Reference to cases of Parental Alienation or Intractable Contract Disputes*, [2005] 5 N.Z. FAM. L.J. 91, Section "The Right to Express Views."

Perhaps the most significant semantic change is in the name of the Act itself. With the Guardianship Act, all of the emphasis was on the adults and the guardians. Now, under the Care of Children Act, the New Zealand Family Court has a new focus—the child. The focus is exemplified in Section 3, entitled "Purpose of this Act."[268] Section 3 provides:

> (1) The purpose of this Act is to –
>
> (a) promote children's welfare and best interests, and facilitate their development, by helping to ensure that appropriate arrangements are in place for their guardianship and care; and
>
> (b) recogni[z]e certain rights of children.[269]

The new Act separates the best interests of children from their rights. As noted above, many people debate whether a best interests standard is overly paternalistic.[270] New Zealand recognizes that the debate exists and, therefore, aims to protect the best interests of children while still recognizing that they are autonomous human beings capable of possessing rights.

The COC Act has impacted parents as well as children. It recognizes the themes of the CRC and mentions the responsibilities of guardians rather than their rights.[271] The Act itself states that guardianship of a child gives that guardian "all duties, powers, rights, and responsibilities that a parent of the child has in relation to the upbringing of the child."[272] The Act, therefore, gives parents and guardians all their rights but recognizes that along with those rights come certain responsibilities.

The COC Act also requires the appointment of a lawyer for children when the proceedings go to trial.[273] Section 7(2) provides that the Court must appoint a lawyer for a child where the proceedings will "(a) involve the role of providing day-to-day care for the child, or contact with the child; and (b) appear likely to proceed to a hearing," unless the Court is satisfied that "it will serve no useful purpose."[274] Therefore, there is a general presumption that the appointment of a child's lawyer in day-to-day care proceedings will benefit a child. In order for the Court not to appoint a lawyer, it must be convinced that such an appointment is useless. In order to ensure the child's participation in the proceedings, the Act requires that the attorney meet with the child "unless he or she considers it inappropriate to do so because of exceptional circumstances."[275] Having a lawyer gives a child added protection and rights when a situation so likely to impact their lives gets to the stage

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268. COC Act, *supra* note 245, § 3.
269. *Id.*
270. *See supra* Part III.D.
271. New Counselling Options, *supra* note 247.
272. COC Act § 15(1)(a), *supra* note 245.
273. *Id.* § 7.
274. *Id.* § 7(2).
275. *Id.* § 7(3).

of a proceeding. Judge Boshier recognized this importance and noted a key difference between U.S. law and New Zealand law by recognizing the importance of codifying the right to have a lawyer in private family law cases.[276] The simple act of recognizing this duty in legislation makes it all the more fundamental.

Finally, the COC Act gives all parties the right to an appeal to the High Court.[277] This right extends to children as well.[278] This provision ensures that children's views are *really* considered and it provides them the opportunity to know that although they are not parties to the litigation, they are central to it. Giving children the right to an appeal may give substance to the concerns raised by some of the American commentators that children are gaining rights at the expense of their parents.[279] The right to an appeal does not appear to be without limits, however. Instead, the pamphlets for children and teenagers on the New Zealand family law website inform children that they "may" have the right to an appeal and to ask their lawyer about such an option.[280]

C. Care of Children Act in Practice

Section 6 creates an entirely new situation for lawyers and judges in New Zealand, and if they "are to give the utmost interpretation of s6 and the child's right to participate, all those involved in the process must commit themselves to understanding how best to go about this challenging task."[281] As Dr. Stahl's example of talking to children exemplified, it is not an easy task to ascertain children's views without forcing them to choose.[282] Judges and lawyers are not usually trained in child development, nor do they normally learn how to properly interview child clients, but section 6 requires them to do just that.

The Care of Child Act is not self-executing, and it is important that the Court and all involved take an active role in implementing its provisions. Judge Boshier, the Head Judge of the New Zealand Family Court, has expressed on numerous occasions the importance of implementing the COC Act and the CRC in order to help children become full-fledged members of society while protecting them from entering that society too quickly.[283] He also acknowledges the problems

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276. COC Speech, *supra* note 244 ("While this was already part of recommended practice, the elevation to a statutory requirement reflects the important role the lawyer for the child is expected to play in facilitating the right to participation.").

277. COC Act, *supra* note 245 § 143(2).

278. *Id.*

279. *See supra* Part IV.

280. New Zealand Family Court Pamphlets, *available at* http://www.justice.govt.nz/family/publications/pamphlets/default.asp [hereinafter Pamphlets].

281. COC Speech, *supra* note 244.

282. *See supra* note 136 and accompanying text.

283. *See generally* Family Court of New Zealand Speeches and Papers Archives, *available at* http://www.justice.govt.nz/family/publications/speeches-papers/archive.asp.

associated with attempting to ascertain a wide range of children's views.[284] The New Zealand High Court has not reneged on its duty to protect children, but it continues to struggle to find the best avenues for doing so. Its struggles should be recognized as informative to what the United States could do in order to provide more rights and protection for children.

While the COC Act gives the New Zealand courts far more direction than the Guardianship Act gave, it is by no means explicit, so the courts have had to find their own interpretations. In 2003, prior to the passage of the COC Act, the New Zealand Family Court held that a lawyer did not have a duty to ascertain her client's wishes.[285] The Court held that "[y]oung children very rarely express wishes. These can at best be inferred from the observations of the psychologist and the Court's own conclusions about the relationship between a young child and each parent."[286] After the passage of the COC Act, however, the Court took a new stance. In a controversial decision, the Court held that a Court must ascertain the views of a four-year-old child.[287]

In *C v. S*, the Court was asked to interpret sections 6 and 7 of the COC Act for the first time.[288] The Court noted that the COC Act requires that the child be given a reasonable opportunity to express his views and that it is within the court's discretion to "determine what is reasonable and appropriate in the circumstances."[289] The Court must consider the age and other circumstances of the child, but it must also entertain the notion that children, especially very young children, may express views non-verbally.[290] The Court further concluded that reasonableness may require more than one opportunity for the child to express views; conversely, too many opportunities may be burdensome to the child who may not understand what is at stake.[291] Thus, the Court acknowledges the inherent tension that a child's lawyer faces when attempting to ascertain the child's views.

The court-appointed lawyer is not the only person capable of ascertaining the wishes of the child client. Instead, the Court has recognized three ways through which a child's wishes may be ascertained: (1) through the lawyer appointed for the child, (2) the judge may interview the child, or (3) a child psychologist may write a report through which the child's views are ascertained.[292] Professor Tapp worries that a child may choose not to communicate his views when talking to someone who is unskilled or untrained in listening to children. She notes that "[l]istening involves

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284. *Id.*

285. R v. S, [2004] N.Z. Fam. L.R. 207.

286. *Id.* ¶ 106.

287. C v. S, [2006] N.Z. Fam. L.R. 745, at ¶ 34 ("But the issue of weight is a separate issue and, at least in the case of a child capable of articulating views, the obligation under s 6 of the Act is not usually complied with unless a reasonable opportunity is given to the child to express her views verbally.").

288. *Id.* ¶ 37.

289. *Id.* ¶ 31(c).

290. *Id.*

291. *Id.* ¶ 31(d).

292. COC Speech, *supra* note 244.

both understanding what the child is communicating from the child's perspective, and conveying to the child that they will be heard and their views respected. If this does not occur, the child may lose trust and cease to attempt to communicate."[293] This is the fundamental problem, and the lawyer, the judge, and the expert each play a different role in ensuring that this right exists.

Judge Boshier explains these three roles, how they interact with one another, and how each may be used to ascertain the child's views.[294] Judge Boshier immediately acknowledges the dual roles played by the attorneys in New Zealand. He says "[t]hey must act on behalf of children as would an adult's lawyer but also advance the child's best interests in a way that is not expected of a traditional lawyer."[295] This dual role for the lawyer has been the focus of debate around the world, but New Zealand accepts that the lawyer is capable of advocating in both roles for the child client. The judicial interview is another process through which the court may ascertain a child's views, and this process serves several useful functions.[296] Most notably, when a child speaks with a judge, the child sees the person responsible for the final decision and realizes that he, the child, is not responsible for the outcome of the case.[297]

While it will not affect the legality of the order, the lawyer must ensure that the order be explained to the child client "to an extent and in a manner and in language that the child understands."[298] Thus, New Zealand law not only gives the child the right to be heard, it also requires that the child understand why and how the court reached the decision affecting the child's life. Explaining the procedure to the non-attendant child recognizes that children must be treated fairly in custody decisions.[299] This simple step acknowledges, once again, that the child is an actual, albeit absent, participant in the proceedings and is deserving of respect and rights.

The second option for obtaining children's views is in a direct interview with the judge.[300] Historically, High Court judges in New Zealand have been more open to speaking with children regarding custody cases.[301] These "proceedings were originally commenced by a writ of habeas corpus."[302] Seeing a custody battle as a child's habeas claim led early judges to listen to children. As early as 1928, Judge

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293. Tapp, *supra* note 241; *See also* Dr. Stahl's approach, *supra* note 136 and accompanying text.

294. COC Speech, *supra* note 244.

295. *Id.*

296. *Id.*

297. *Id.*

298. COC Act § 55(4), (5), *supra* note 245.

299. COC Speech, *supra* note 244 ("Children do not attend as of right, so where they are participating in an indirect manner it is only fair for them to be aware of what was said on their behalf, and of the outcome.").

300. *Id.*

301. Tapp, *supra* note 241, at 41.

302. *Id.* *See also* BLACK'S LAW DICTIONARY (8th ed. 2004 defining "writ of habeas corpus" as a petition to the court because a person is being restrained illegally.

MacGregor spoke to a six-year-old during custody proceedings;[303] in 1942, Judge Smith spoke to an eight-year-old.[304] The judicial interview actually began to dwindle during the years between the enactment of the Guardianship Act 1968 and the 1993 ratification of the CRC because judges found judicial interviews less necessary where a lawyer was appointed to ascertain the wishes of the child.[305] In 1988, a survey of Family Court judges found that "[n]one of the judges who spoke with children said they did so in order to ascertain the child's views."[306] More surprisingly, perhaps, the vast majority of judges who appointed an expert or counsel for the child did not think that it was that person's job to ascertain the child's wishes.[307] By 1996, however, three years after ratifying the CRC, 88% of judges responding to a survey believed that part of their role was to ascertain the wishes of the child.[308] The judicial interview remains one of the most powerful methods by which the court may obtain the child's views and its importance was sparked by the ratification of the CRC.

There are numerous pros to conducting the judicial interview, but there are almost as many cons. When a judge speaks directly with the child to ascertain his views, the child is fully legitimized as a human being deserving of respect.[309] Additionally, as stated previously, if the child speaks with and knows the judge, the child can more fully understand that it is the judge, and not the child, who is responsible for the final decision.[310] Many children do not want that responsibility on them, and seeing the person who will make that final decision reinforces the various roles played by each actor in the process.[311] Judge Boshier lists several other pros of the judicial interview: (1) children's views change, and a judicial interview later in the proceedings can give the most up-to-date information; (2) the judge can see the child as a person giving him the opportunity to know the amount of weight that should be given to his views; and (3) the judge is one more person with whom the child may be able to form a trusting relationship.[312] Overall, the better the judge knows the child, the more likely it will be that the judge makes an informed decision regarding the day-to-day care of that child. Only so much information can be passed from either child to lawyer to judge or child to expert to judge.

Even though the judge may want this up-to-date information directly from the child's mouth, it may be impossible for the judge to obtain it, and it may also create additional problems for children and parents. A judge may be unable to ascertain the child's views simply because judges are not trained to listen to children

303. In Re Hylton, [1928] N.Z.L.R. 145, 145 (cited in Tapp, *supra* note 241).
304. M v. M, [1942] N.Z.L.R. 12, 12 (cited in Tapp, *supra* note 241).
305. Tapp, *supra* note 241.
306. *Id.*
307. *Id.*
308. *Id.*
309. COC Speech, *supra* note 244.
310. *Id.*
311. *See* STAHL, COMPLEX ISSUES, *supra* note 136.
312. COC Speech, *supra* note 244.

or to elicit answers to difficult questions without directly asking.[313] Even if a judge were more qualified, he may simply not have the time to create the trust relationship necessary to elicit the child's views.[314] The harm that may befall the child is three-fold. First, the child, even after reassurances to the contrary, may believe that he is responsible for the decision of which parent he will live with, simply by having spoken to the judge.[315] Second, the child may simply fear the judge as a person with such power and authority.[316] Third, the child's parents may try to influence the child's discussions with the judge.[317] Thus, having the judicial interview could actually increase the possibility that there will be significant parental alienation problems.[318] The judicial interview also has the potential to infringe upon the parent's due process rights.[319] New Zealand has established several ways to attempt to remedy the problems associated with the judicial interview. In order to ensure that the child's views remain open to scrutiny by the parties, the judge may either talk to the child in the presence of parents' counsel or record and transcribe the conversation.[320] Both of these have their own drawbacks, but they are attempts to ensure that the child is heard and that the parents are afforded due process. Therefore, while the judicial interview is a powerful tool for obtaining the child's views, its power may actually be its biggest drawback.

The third way that the court may ascertain the child's views is through an expert report, usually written by a psychologist.[321] It should be noted, however, that the Court has expressly stated that a psychologist's report may not be ordered solely to ascertain a child's wishes.[322] "A report by a child psychologist gives the child the benefit of speaking with someone who is specifically trained to communicate with children in stressful situations."[323] Thus, when the psychologist writes the report, the court knows that it has received the child's views correctly. Even though the psychologist may be the most skilled individual, the courts have held that the judge and the counsel for the child should remain the key people through which the child's views are ascertained.[324] Judge Boshier insists that "there is still a role, particularly in difficult cases, for psychologists to ascertain the views of the child."[325]

Perhaps one of the most interesting aspects of the New Zealand Family Court is its transparency. As noted above, the lawyer must ensure that the child have

313. Tapp, *supra* note 241; *see also* COC Speech, *supra* note 244.
314. COC Speech, *supra* note 244.
315. *Id.*
316. *Id.*
317. *Id.*
318. *See supra* Part III.D.
319. COC Speech, *supra* note 244.
320. *Id.*
321. *Id.*
322. K v. K, [2005] N.Z. Fam. L.R. 28, ¶ 90.
323. Tapp, *supra* note 241.
324. M v. Y, [1994] 1 N.Z.L.R. 527, 537.
325. COC Speech, *supra* note 244.

the process explained in such a way that the child is sure to understand.[326] Equally important, however, is that the family court maintains a website on which it posts numerous pamphlets designed to aid each person in the process[327] and the COC Act now allows media into the courtroom.[328] When the New Zealand Family Court was first created, there was no such transparency; it existed in a world of secrecy and informality.[329] Privacy was paramount, so the family court excluded the public and the media.[330] The judges wore no gowns, the rules of evidence were relaxed, and the building of the court itself was separated from that of the other courts.[331] The citizens did not like this new setup because they began to see the court as an extension of the mediation process and not as a court able to render enforceable judgments.[332] Judge Boshier has recognized that as the "Family Courts continue to be upgraded and refurbished, there will be much greater formality in the layout of [the] Courts and, just as importantly, more security."[333] He refers to the security of the judgment because a judgment is only secure if it is followed. This security will affect the child because when the Family Court is a respected court, people will more likely adhere to its judgments. Therefore, the Family Court will have more power to protect the lives of children.

This new formality does not mean that the Family Court is the same as other courts, though. Because of the personal nature of family law, "[j]udges [must] recognise that a decision is more likely to be accepted if the child and the family consider they have participated in the legal process, and that their perspective has been heard and respected by the decision-maker."[334] Family courts play a substantially different role than other courts. Generally speaking, families are free from state intervention until a problem arises, at which time the courts step in. Simply because there is a problem within the family does not necessarily mean that people believe a court should tell them how to live in such a private sphere of their lives. A simple belief that the Family Court is a court with enforceable power will not automatically cause people to adhere to the judgments rendered. How can a judge expect a decision to be followed in an area of life so fundamental to each person if the people do not feel that they have been heard in the decision-making process? The participation of the parties and the information provided allow all involved to feel that they are a part of the process, and people are always more likely to follow rules when they believe that they had some role in forming them.[335]

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326. *Id.*
327. *See generally* Pamphlets, *supra* note 280.
328. COC Act § 137(1)(g), *supra* note 245.
329. Professionalism Speech, *supra* note 243.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. Tapp, *supra* note 241, at 37.
335. Professionalism Speech, *supra* note 243.

This transparency extends to the children as well. The pamphlets on the Family Court website are geared toward informing children about the function of the court, the role of the child's lawyer, and the child's own role in the proceedings.[336] The pamphlets include: *An Introduction to the Care of Children Act, Children's Guide to Family Separation–What happens to us when our Parents Break Up?, Children's Guide to the Family Court–How the Family Court works for you, Lawyer for the Child, Listen to Your Kids, Putting Your Children First,* and *Teenagers' Guide to the Family Court–How the Family Court works for you*.[337] The overarching theme is to provide information but also to instill power in the parties. Children are reminded that they have an opportunity to voice their opinions but also that they may choose not to say anything.[338] The *Children's Guide to the Family Court* gives children an outline of what will happen to them throughout the proceedings.[339] It outlines the roles of the child's lawyer, the expert, and the judge.[340] It instructs the child that he has the right to inform his lawyer of his views, including where to have meetings.[341] It tells the child about the possibility of an appeal and gives information on how to contact the Court.[342] The *Teenagers Guide to the Family Court* provides very similar information, but in greater detail, and also makes it clear that once a child reaches sixteen, he has the right to choose where he lives.[343]

Finally, New Zealand also faces problems similar to Australia.[344] Judge Boshier is concerned that the COC Act's requirement to ascertain children's wishes does not come into effect until litigation is underway; he notes that children are only represented once proceedings have been initiated.[345] Also similar to Australia, New Zealand recognizes the importance of keeping families out of litigation.[346] This, however, creates the most difficult tension with respect to children and their views; while emotionally, it is better for everyone to stay out of court, but in order for the child to gain an adequate voice, court proceedings must begin. Therefore, even though New Zealand has made substantial progress, it have not fully rectified the situation. Their path since the Guardianship Act, and especially since ratifying the CRC, is illustrative of various measures the United States could take. The most important step would be for the United States to finally recognize that child custody

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336. *See generally* Pamphlets, *supra* note 280.

337. *Id.*

338. New Zealand Family Courts, *Children's Guide to Family Separation*, 12, http://www.justice.govt.nz/family/pdf-pamphlets/courts-150-childrens-guide.pdf; *see also* New Zealand Family Courts, *Children's Guide to the Family Court*, 8, http://www.justice.govt.nz/family/pdf-pamphlets/courts-151-childrens-guide-court.pdf.

339. *Children's Guide to the Family Court*, *supra* note 338.

340. *Id.*

341. *Id.* at 6.

342. *Id.* at 10-11.

343. *Teenagers' Guide to the Family Court: How the Family Court Works for You*, 7, http://www.justice.govt.nz/family/pdf-pamphlets/courts-153-teen-court-guide.pdf.

344. *See supra* Part IV.

345. Can We Protect Children?, *supra* note 238.

346. *Id.*

battles, by definition, affect the children, and their views are therefore necessary both to the process and to the emotional support of the child involved.

VI. CONCLUSION

This note has studied the various ways that nations have tried to overcome the tension that exists between the paternalistic protection of children and their absolute autonomy with no support from the adults around them, especially as it is affected in divorce proceedings. The struggle remains difficult, and there may be no "right" answer. But, as the adult world begins to see children in a new way, and as the syntactical strategies that have permeated children's rights (or lack thereof) since the Renaissance change, perhaps the answer will become apparent. It is, perhaps, most important to remember that courts are scary, and they are even scarier for children.[347] Where families are forced to be in the court process, however, it is possible to not only protect children but to also give them a new social sense and a feeling of empowerment. Judge Boshier notes, "[a]llowing children and young people to speak through a variety of means such as oral and written communication, artwork and song, are all ways of allowing children to speak out, and to learn the importance of constructive participation in a social sense."[348]

Children are human beings, and they are entitled to the same degree of respect as adult human beings.[349] Simply respecting children and attempting to understand that they are different and may need a certain amount of protection may be the best way to protect them and help them grow. After all, although 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. Recognizing this vital difference will relieve much of the tension between children's best interests and their participation rights. The CRC respects both sides of the tension and the United States could gain insight by looking not only to the Convention's protocols but to the way it has been implemented around the world. By ratifying the Convention, the United States would be acknowledging this emerging view of children, and acknowledgement is a good part of the battle. After all, New Zealand and other nations still struggle to find the right answer, but their syntactical and theoretical changes have sparked the debate that is necessary to lead them to an eventual answer.

347. *Id.*
348. *Id.*
349. COC Speech, *supra* note 244.