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Rhetoric, Divorce and International Human Rights: The Limits of Divorce Reform for the Protection of Children

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Rhetoric, Divorce and International Human Rights: The Limits of Divorce Reform for the Protection of Children

*Barbara Stark**

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I. INTRODUCTION

When I was very young and impressionable (about nine) there was a feral cat in the neighborhood who gave birth to four scrawny kittens, although she did not look much bigger than a kitten herself.

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* Visiting Professor, Hofstra University School of Law. I am deeply grateful to Professor Lucy McGough and the *Louisiana Law Review* for inviting me to participate in this Symposium and to the other panelists for their illuminating presentations and very helpful comments. Patricia Kasting, reference law librarian at Hofstra, provided invaluable research assistance.

Her nest was in the recess of a basement window of the garden apartment where we lived. A day or two later, there was a terrible storm and I ran home from school to see the kittens mewling in the rising water as their mother howled, distraught and clueless, nearby. After quite a bit of mewling and howling on my part, my mother agreed to let me bring them in the house. We could not catch the mother, but we placed the kittens on a folded piece of flannel in a basket, put them near a warm radiator, and tried to feed them with a dropper. They all died within twenty-four hours. Years later, a friend at college had a cat who had kittens and I saw what a mother cat actually did. It was only then that I realized that, without the mother, those earlier kittens had not had much of a chance.

This conference is grounded in a similarly deep, primal, intuitive understanding. We realize the terrible vulnerability of children. We realize that, in general, parents are their best hope for survival or, less melodramatically, for a decent life. These are dangerous times and we live in a dangerous world. It is the job of parents to protect their children from drugs, violence, disease, hunger, and child molesters, to provide them with nutritious meals and adequate healthcare.

Divorce often makes this job harder. Since it takes a parent out of the home, and often takes everyone out of the home, it reduces the number of on-site adults available to protect the child from whatever dangers are out there. At the same time, divorce may well increase the child's potential exposure to the storms of economic need as well as the predictable traumas of divorce itself, including anger, guilt, and emotional loss. As recent studies confirm, American children are increasingly at risk. Thus, a Symposium focusing on the protection of children is important and timely and I would like to thank Professor Lucy McGough, Alison Cain, and the *Louisiana Law Review* for inviting me to participate.

But like an ungrateful cur, to mix metaphors, in this paper I bite (or at least snap at) the hand that feeds me. "Divorce Reform for the Protection of Children" contains three premises that I would like to challenge. First, it tacitly assumes that divorce reform can protect "children" in general, rather than a relatively small, and quite demographically distinct, population of children in particular. Second, it assumes that divorce itself poses a danger to these children. Third, it assumes that the law should step in to avert, or at least manage that danger. This paper interrogates each of these propositions.

My project may strike some as painfully obvious. Of course there are bigger, broader threats to American children, but this conference is not about the top five threats to American children; it is about divorce. Surely we can make divorce less difficult and less painful

for children and surely that is worth doing. There is an impressive assembly of brainpower in this Symposium devoted to precisely that.

But my thesis here is that first, there are built-in costs and built-in limits to this particular approach. Second, both can be constructively addressed by re-situating the discussion of the protection of children in the broader rhetorical framework of human rights law.

This paper is divided into four parts. First, I want to ask, "Protect *which* children?" My second question is, "From *what*?" The third question is, "Is this a job for *law*?" Finally, drawing on the answers to these questions, I propose an alternative framework that protects more children, at greater risk of graver dangers, within a well-established legal framework. Specifically, any discussion of the protection of children should be situated in the broader context of international human rights law, starting with the Convention on the Rights of the Child (hereafter the "Children's Convention" or "CRC").¹

II. PROTECT WHICH CHILDREN?

As Jacobus tenBroek noted forty years ago, there are two systems of family law in America, one for the rich and one for the poor.² Divorce is primarily for the former, welfare laws are entirely for the latter. This has not changed. As my colleague John Gregory recently noted in commenting on the ALI Principles on Family Dissolution, "They should be called 'the ALI Principles for the Rich and Famous.'"³

Situating the "protection of children" in the context of divorce assumes a pre-tenBroek world that fails to recognize that divide.⁴ By doing so, it begins by leaving out the most vulnerable children—those with no parent to protect them, including children in the foster care system. More than 125,000 children in foster care are waiting for permanent placements.⁵ By omitting these children,

1. United Nations: Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448.

2. See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 17 Stan. L. Rev. 614 (1965); *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 Stan. L. Rev. 900 (1964).

3. John Gregory, Remarks at Workshop on ALI Principles, Harvard Law School, Oct. 2004.

4. This is movingly expressed in the photos of Ralph Eugene Meatyard, currently on exhibit at the International Center for Photography in New York. While Meatyard memorably captured an edgier side of childhood (in a series of children wearing grotesque masks, for example), many of his photos convey a mythic innocence, sweet but not sentimental.

5. Press Release, Children's Defense Fund, The State of America's Children

moreover, the damage caused by the foster care system itself is ignored. As Dorothy Roberts has recently pointed out, children of color are vastly overrepresented in this system.⁶ Black children comprise roughly one-fifth of the population, but two-fifths of the children in foster care.⁷ Children of color comprise one-third of the population, but sixty percent of the children in foster care.⁸ Professor Roberts cites sociologist Robert Hill for similar data on Native American children.⁹ Roberts painstakingly documents not only the devastating impact of the removal of these children on the children themselves, but on the communities they leave behind.¹⁰ This includes, of course, the children in those communities who are not removed, but learn that being taken away by strangers from your family and your home is always a possibility.

In addition, situating the “protection” of children in the context of divorce leaves out the growing number of children unlikely to ever be affected by divorce because their parents are not married. Currently, approximately thirty percent of American children are in this category.¹¹ These children are disproportionately poor, compared both to children in general and to children of divorce in particular. Thus, they are in greater need of protection from the risks posed by poverty, which, as discussed below, are among the most serious risks confronting American children.

III. FROM WHAT?

This Part analyzes the real risks affecting American children. Children are in danger. There is a storm, but it is neither caused by divorce nor limited to children of divorce. In fact, focusing on those children not only erases most of the children at grave risk in this country, but also distorts our basic understanding of those risks.

A. Risks Facing American Children

2004: A Continuing Portrait of Inequality Fifty Years After *Brown v. Board of Education* (July 13, 2004), *available at* <http://www.childrensdefense.org/pressrelease/040713.aspx>.

6. Dorothy Roberts, Siben Lecture: The Community Dimension of State Child Protection, Hofstra Law School (April 6, 2005).

7. *Id.*

8. *See generally* Donald N. Duquette et al., *We Know Better than We Do: A Policy Framework for Child Welfare Reform*, 31 U. Mich. J.L. Reform. 93, 95 (1997).

9. Roberts, *supra* note 6.

10. *Id.*

11. Douglas E. Abrams & Sarah H. Ramsey, *Children and the Law-Doctrine, Policy, and Practice*, 128 (2nd ed. 2002).

1. Poverty

As Abraham Maslow noted decades ago, the satisfaction of basic needs—food, shelter, healthcare—is necessarily the first priority.¹² It is only after these basic needs are met that we can function as productive, contributing members of society. The impact of poverty on children may be particularly damaging, physically as well as psychologically, because it impedes or precludes normal development. The earlier a child falls behind, the harder it will be for her to ever catch up. James Heckman, the Nobel prize-winning economist, suggests that if disadvantaged children fail to acquire life skills at an early age, it becomes increasingly difficult for them to do so.¹³

Poverty affects every aspect of a child's life and its impact in one area, such as substandard housing, is likely to exacerbate its impact in another, such as health.¹⁴ The examples provided below, accordingly, are merely intended to serve as illustrations. There are many other indicia of children's well-being affected by poverty, such as literacy, hunger, and access to mental health care. The multiple consequences of poverty interact with each other and are cumulative. Thus, the effects, such as poor performance in school, are over-determined and often resistant to piecemeal reform.

a. Health

Although the United States boasts some of the best hospitals, research centers, and medical specialists in the world, it falls below most of the other industrialized democracies in terms of providing healthcare for the poor. The evisceration of social safety nets through "the end of welfare as we know it" in the mid-nineties¹⁵ and the Bush

12. Abraham Maslow, *Motivation and Personality* (1970) (Maslow's "hierarchy of needs" begins with "physiological" and progresses through safety, love, esteem, and self-actualization).

13. See, e.g., Stephen J. Dubner, *Toward a Unified Theory of Black America*, N.Y. Times Magazine, Mar. 20, 2005, at 54, 58. Heckman's notable, albeit technical, works include: James Heckman, *Lecture Notes on Longitudinal Data Analysis* (1997) and a monograph, *Understanding the Contribution of Legislation, Social Activism, Markets and Choice to the Economic Progress of African Americans in the Twentieth Century* (2001).

14. See generally *Children and Poverty*, 7 *Future of Children* 8–9 et passim (Summer/Fall 1997).

15. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

administration's relentless campaign against social welfare programs¹⁶ has deepened the crisis, as shown in Table 1, Appendix A.¹⁷

b. Education

The impact of poverty on education is similarly well-documented, as shown in Table 2, Appendix A.¹⁸

Some neoconservatives have argued that the relationship between poverty and low educational achievement is one of correlation rather than causality; i.e., that low native intelligence produces both.¹⁹ Although these arguments have been refuted repeatedly, and rejected by educators, the Bush administration has refused to provide the resources needed to upgrade schools in low-income areas. Instead, the Administration crafted the infamous "No Child Left Behind" policy, linking school funding to annual performance reviews which rely heavily on student test scores.²⁰ The net result, as critics have pointed out, is that schools in low-income areas are under pressure to keep children in the same grade year after year.²¹ In fact, American public schools are widely regarded as failures, with the exception of those in affluent suburbs and a few, highly competitive, magnet schools. The rich and upper middle class send their children to private schools.²² The not-so-rich and the poor home school their children or send them to Charter schools.²³

16. See, e.g., Correspondents Report: Bush Embarks on Ambitious Social Welfare Reform (Feb. 6, 2005), available at <http://www.abc.net.au/correspondents/content/2004/s1296568.htm> (describing the President's plan to privatize social security).

17. Children's Defense Fund, *Defining Poverty and Why It Matters For Children* (Aug. 2004), available at <http://www.childrensdefense.org/familyincome/childpoverty/definingpoverty>.

18. *Id.*

19. Richard Herrnstein & Charles Murray, *The Bell Curve* (Free Press 1994).

20. Barbara Mantel, *No Child Left Behind: The Issues*, 15 CQ Researcher 469 (2005).

21. Monica Davey, *A Child Left Behind*, N.Y. Times, Jan. 16, 2005, at 4A. "No Child Left Behind" has inspired considerable academic commentary, most of it negative. See, e.g., Sarah D. Greenberger, Comment, *Enforceable Rights, No Child Left Behind, and Political Patriotism: A Case for Open-minded Section 1983 Jurisprudence*, 153 U. Pa. L. Rev. 1011 (2005); James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. Rev. 932 (2004); Melanie Natasha Henry, Comment, *No Child Left Behind? Educational Malpractice Litigation for the 21st Century*, 92 Cal. L. Rev. 1117 (2004). But see Amy M. Reichbach, Note, *The Power Behind the Promise: Enforcing No Child Left Behind to Improve Education*, 45 B.C. L. Rev. 667 (2004).

22. *Letting Parents Decide*, Washington Post, June 28, 2002, at A28.

23. Norman Draper, *New Frontier for Charter Schools: Once Mainly Urban or Rural, More Are Opening in Twin Cities Suburbs and Attracting Students From Other Schools*, Star Tribune, September 5, 2004.

2. Juvenile Justice

The juvenile justice system, like the foster care system, is an example of the way in which the absence of a focus on children's rights harms poor children. It also suggests that arguments about the lack of resources might better be focused on the misuse of resources. As in the foster care system, enormous sums are being expended counterproductively. Instead of serving the needs of children, the juvenile justice system dehumanizes them. The children most at risk, and who arguably pose the most serious risk to society,²⁴ are treated like adult criminals, rather than like troubled children.²⁵ This is not to trivialize either the gravity of some of their offenses, or the violence in their lives. According to the Children's Defense Fund:

[T]he national crime rate has dropped nearly 25 percent since 1993, but more than one quarter of violent crime victims known to police in the U.S. are juveniles. Youth ages 16 to 19 currently experience overall violence, including rape and general assault, at higher rates than people in all other age categories.²⁶

The point is simply that if the project is the "protection of children," this may well be a more urgent site for intervention than divorce.

B. Risks Facing American Children of Divorce

The focus here shifts to behavioral problems. According to Professor Robert Hughes of Ohio State:

On the one hand, the majority of children from divorced families did not have serious problems requiring professional help. On the other hand, a larger percentage of children from divorced families than intact families did have serious problems. Another way to say this is that most children in

24. Adele Bernhard, who directs the criminal clinic at Pace University, suggests that the risk posed by these children is overestimated. She points out that many of them are charged with committing acts, such as possession of drugs and intoxication, that their suburban counterparts engage in with impunity, in the privacy of their suburban homes. Interview with Adele Bernhard, Associate Professor of Law, Pace Law School, in Hempstead, N.Y. (Feb. 23, 2005).

25. See, e.g., Thomas L. Hafemeister, *Parameters and Implementation of a Right to Mental Health Treatment for Juvenile Offenders*, 12 Va. J. Soc. Pol'y & L. 61 (2004). See generally Conference, *Beyond These Walls: Promoting Health and Human Rights in Juvenile Justice*, New York City (Apr. 30, 2005).

26. Children's Defense Fund, *supra* note 5.

divorced families do not need help, but more children in this group than in intact families are likely to need help.²⁷

More specifically, Professor Hughes notes:

90% of adolescent boys and girls in intact families were within the normal range on [behavioral] problems and 10% had serious problems that would generally require some type of help. The percentages for divorced families were 74% of the boys and 66% of the girls in the normal range and 26% of the boys and 34% of the girls were in the problematic range.²⁸

Assuming for the purposes of argument that these "serious problems" can be effectively addressed by existing programs or treatment regimes, the question remains: why focus on children of divorce? Is the assumption that parents in intact families have greater access to such programs or regimes? If so, an alternative response might be to assure such access to children in divorced families. It cannot be assumed that divorce is the exclusive cause of such problems, since such problems also occur in intact families. Nor can it be assumed that divorce causes the incremental increase, since it may in fact be the other way around; that is, children with serious problems can impose strains on families that may cause some couples to separate.

Finally, and crucially, where is the data on children with "serious problems" in single parent families, never-married families, or in families without parents, including the burgeoning number of children being raised by grandparents?²⁹ These questions may be naïve, and expose a fundamental ignorance of empirical methodologies. At the same time, any normative project that begins with the exclusion of the most vulnerable must be questioned, and justified.

IV. THE ROLE OF LAW

Law for the protection of children may be usefully conceptualized as functioning along a rough continuum. This reflects a range of views on the role of the State in protecting children, from least interventionist, to more pro-active, to micro-managing, as shown below.

27. Robert Hughes, Jr., *The Effects of Divorce on Children*, (1996) available at <http://www.hec.ohio-state.edu.famlife/divorce/index.htm>.

28. *Id.* (citing findings of Mavis Hetherington (1993)).

29. The anecdotal accounts are sobering. See, e.g., Shaila K. Dewan, *Parents of Mentally Ill Children Trade Custody for Care*, N.Y. Times, Feb. 16, 2003, at 35 (describing parents who relinquished custody of their children in order to obtain treatment for them).

The Role of the Law

negative positive changing hearts and minds
(micro-managing)

“Least interventionist” refers to negative rights, freedom from State intervention. Negative rights are firmly enshrined in American Constitutional jurisprudence, which prohibits State establishment of religion or State restriction of free speech. The more “pro-active” view refers to positive rights, imposing affirmative obligations on States to assure the basic needs of its people. Positive rights have never established a foothold in American jurisprudence,³⁰ although broad-based support for certain economic rights, such as Medicare and Social Security, has not eroded.³¹ This is confirmed by the continuing resistance to President Bush’s recent campaign to privatize Social Security.³² The final category, changing hearts and minds, draws on a long and vigorous tradition of American optimism and belief in our capacity to reinvent ourselves, a tradition that has itself been transformed and renewed in the context of post-divorce parenting since the no-fault divorce revolution of the 1970s.³³

30. In part, this hostility can be attributed to the rhetoric of opportunity, the rhetoric of the “American Dream.” Barbara Stark, *Postmodern Rhetoric, Economic Rights and an International Text: “A Miracle for Breakfast”*, 33 Va. J. Int’l L. 433, 438 (1993). In part, it can be attributed to the Cold War, to what Professor Henkin has referred to as the “blind confusion of ideological communism . . . with commitment to the welfare of individual human beings” Louis Henkin, *Preface to Human Rights: An Agenda for the Next Century*, (Louis Henkin & John Lawrence Hargrove eds. 1994). See generally David M. Oshinsky, *A Conspiracy So Immense: The World of Joe McCarthy* (1983).

31. See Marmor et al., *America’s Misunderstood Welfare State: Persistent Myths, Enduring Realities* 47–48 (1990) (noting widespread public support for the Medicare, Food Stamp and Social Security programs). See generally Wallace C. Peterson, *Silent Depression: The Fate of the American Dream* (1994) (describing the paradox of a growing economy and increasing hardships for most of the population).

32. *Hitting the Middle Class, Again*, N.Y. Times, May 3, 2005, at A24.

33. See, e.g., Salem et al., *Parent Education as a Distinct Field of Practice: The Agenda for the Future*, 34 Fam. & Conciliation Cts. Rev. 9, 13 (1996). Parent education courses generally focus on teaching parents communication skills that reflect acceptance of the child, build self-esteem, promote independence and reduce conflict between parents and children. See, e.g., Thomas Gordon, *Parent Effectiveness Training: The “No-Lose” Program for Raising Responsible Children* (1970); Philip Osborne, *Parenting for the 90s* (1989); Rudolf Dreikurs, *The Challenge of Parenthood* (1991) (arguing children must be taught to respect order and accept social rules; conflict with children should be avoided, and children need constant encouragement to develop self-confidence and self-reliance).

These views roughly correspond to general views on the appropriate role of the State, with some important caveats. The crucial points here are: 1) that negative and positive rights are interdependent, and neither means much without the other; 2) that changing hearts and minds is contingent upon the satisfaction of basic needs, which are not assured under existing American law; and 3) that models that work for adults do not necessarily work for children. Nor can the adult models simply be "scaled down." Because "autonomy" has a different meaning for children, for example, negative rights, or freedom from government interference, similarly has a different meaning. Negative rights may in fact simply leave children at the mercy of parents who abuse or neglect them.

A. Negative Rights

The notion of family privacy, and the distinct but related notion of deference to parental autonomy,³⁴ has historically served as a check on State intervention. The caveat here is the recognition that State non-interference, freedom from State intrusion, may in fact reinforce and perpetuate power inequalities within the family. Thus, as feminists have long noted, "family privacy" has historically supported the privileges of the husband and father, at the expense of his wife and children.³⁵ Children, especially young children, may be particularly vulnerable, moreover, because of their complete physical and financial dependency on adults.

The State, accordingly, has historically intervened where necessary to protect the child.³⁶ While some scholars, such as Professor Roberts, have criticized the State for being too willing to take children away from their families and their communities, others have criticized the State for failing to intervene until it is too late. In the frequently criticized case of *DeShaney v. Winnebago County*

34. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625 (1923) (holding that parents could have their children taught German in school notwithstanding state statute prohibiting such instruction); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534, 45 S. Ct. 571, 573 (1925) (parents have a liberty interest in directing the "upbringing and education of children under their control"). These cases have generated substantial commentary, including the groundbreaking critique, Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 Wm. & Mary L. Rev. 995 (1972).

35. See Barbara Stark, *Deconstructing the Framers' Right to Property: Liberty's Daughters and Economic Rights*, 28 Hofstra L. Rev. 963, 1015 *et. seq.* (2000). See generally Mary Beth Norton, *Founding Mothers and Fathers: Gendered Power and the Forming of American Society* (1996); U.S. History as Women's History: New Feminist Essays (Linda K. Kerber et al. eds., 1995).

36. But see *Santosky v. Kramer*, 455 U.S. 745, 102 S. Ct. 1388 (1982) (holding that parents' rights in their natural child cannot be terminated by the State without clear and convincing evidence).

Dept. of Social Services,³⁷ for example, the Supreme Court held that the State could not be held liable for failing to remove Joshua DeShaney from the custody of his abusive father until the boy was permanently injured and required institutionalization. Although *DeShaney* sparked a national debate,³⁸ the problems continue. Indeed, many commentators suggest that they have grown worse.

In other areas, there has been a gradual, grudging recognition that the State must intervene, at least in divorce. The assumption that fathers will support their children after divorce, for example, has been recognized as a fallacy.³⁹ In response, the Family Support Act of 1988⁴⁰ was enacted. It requires all states to enact legally-binding child support guidelines. This is a far cry, however, from the child support assurance of other Western democracies, which guarantee the custodial parent essential support, whether or not the other parent contributes.⁴¹

B. Positive Rights

Positive rights in the context of the protection of children refer generally to affirmative obligations assumed by the State for the children's benefit. Internationally, in addition to State assurance of child support, noted above, this includes programs like free universal pre-school in France and health care for children as part of comprehensive national health care systems.⁴²

In the United States, in contrast, children at best have a right to the standard of living their parents can provide. As Marsha Garrison and others have noted, child support remains inadequate, notwithstanding the guidelines.⁴³ Thus, children of divorce, in

37. 489 U.S. 189, 109 S. Ct. 998 (1989).

38. See, e.g., *Affirmative Constitutional Obligations of Government Officials, The Supreme Court, 1988 Term*, 103 Harv. L. Rev. 167 (1989); Patricia M. Wald, *Government Benefits: A New Look at an Old Gifthouse*, 65 N.Y.U. L. Rev. 247 (1990). For a defense of the much-criticized decision, see Barbara Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 Mich. L. Rev. 982 (1996).

39. See, e.g., Ira Ellman et al, *Family Law* 576–80 (1998).

40. Pub. L. No. 100-485, 102 Stat. 2343.

41. Barbara Stark, *International Family Law: An Introduction* (Ashgate 2005).

42. Jobcentre Plus, *Living and Working in France*, available at <http://www.jobcentreplus.gov.uk/cms.asp?Page=/Home/Customers/WorkingOrTrainingInE.htm> (last visited 7/5/2005) (noting that 100% French five year olds attend pre-school, most (85%) in free public institutions). See also Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. Gender, Race and Justice 411 (2002) (noting that, "The U.S. stands virtually alone among developed nations in its conviction that child rearing is a private frolic rather than a social enterprise of vital importance.").

43. See generally Marsha Garrison, *Child Support Symposium, Child Support*

general, are more likely to need some kind of supplemental support, some kind of safety net, than children in intact families. But children who have never been part of an intact family are likely to need such support even more.⁴⁴

A major argument against economic rights in the United States is that they will encourage dependency.⁴⁵ This argument has little force as applied to children, however, because children are dependent in any case. The only question is whether they should be penalized by being denied basic economic rights because their parents are unable to assure them.

The argument that the cost to society of providing such rights is prohibitive, similarly, is unpersuasive in this context. The investment in future, productive citizens is most justifiable the earlier it is made, as proponents of the Headstart program have amply demonstrated.⁴⁶

C. *Changing Hearts and Minds*

Many of the excellent papers included in this Symposium focus on more constructive approaches to the divorce process itself. These include models for collaborative divorce,⁴⁷ proposals for defusing high conflict divorce,⁴⁸ and a range of creative interventions intended

Policy: Guidelines and Goals, 33 Fam. L.Q. 157 (1999); see also Marsha Garrison, *An Evaluation of Two Models of Parental Obligation*, 86 Cal L. Rev. 41 (1998).

44. I have described elsewhere how the financial burdens of nurturing work disadvantages American women across the board. This includes, but is not limited to, their disproportionate assumption of responsibility for their minor children. See, e.g., Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 Harv. Women's L.J. 169, 176-77 (1996); Barbara Stark, *Nurturing Rights: An Essay on Women, Peace, and International Human Rights*, 13 Mich. J. Int'l L. 144 (1991).

45. The rhetoric against economic rights in the U.S. has a long and colorful history. See, e.g., Stark, *Postmodern Rhetoric*, *supra* note 30. Other arguments, none of which are entirely specious, include: that economic rights are a communist plot, that Americans do not need them because of our unique opportunities, and that they perpetuate poverty.

46. The basic argument is that early intervention avoids later expenses. See, e.g., Peter A. Greenwood et al., *Diverting Children From A Life of Crime: Measuring Costs and Benefits* (1998) (estimating costs and benefits of early interventions for children at risk). A recent, and alarming, twist is the growing evidence that the sky-rocketing costs of prisons in the U.S. are in fact resulting in reduced spending on education. See, e.g., Center on Juvenile and Criminal Justice, *From Classrooms to Cell Blocks: A National Perspective* (2002) available at www.cjcj.org/pubs/higher.national.html.

47. See, e.g., Julie MacFarlane, *Will Changing the Process Change the Outcome?*, 65 La. L. Rev. 1487 (2005).

48. Robert Emery, *Long Term Outcomes Mediated and Litigated Child Custody Disputes, Randomized Research and Non Random Reflections* (2005) (on file with the Louisiana Law Review).

to make the process less traumatic for all of the parties, especially the children.

There is no question that such interventions can be effective and even transformative.⁴⁹ Indeed, the groundbreaking Report of the California Commission on No-Fault Divorce, widely regarded as the opening salvo of the no-fault divorce revolution,⁵⁰ explicitly called for a support staff of counselors, including psychologists and social workers, to assist in the work of the new family court system.⁵¹

To the extent such approaches are mandatory, i.e., legally enforceable, however, they contemplate a very different role for the State. This raises several intriguing issues in this context, including the ethical obligation of a lawyer to zealously represent her client, the potential for reinforcing power imbalances between the parties, and the legality and appropriateness of delegating judicial responsibilities to mental health professionals, most of which are beyond the scope of this paper.⁵² For present purposes, however, the issue is whether parental priorities should be trumped by State priorities, specifically the State interest in reducing conflict at divorce for the protection of children.

As I have explained at length elsewhere, parents, especially mothers, may well have other priorities, and there may be good reasons for deferring to them.⁵³ From a human rights perspective, the critical point here is simply that changing hearts and minds requires resources. Dr. Susan Gamache pointed out that the model of collaborative divorce developed by her and her colleagues was no more expensive than litigation, at least for those with national health care.⁵⁴ But we do not have national health care in the United States. The interventions described in this Symposium arguably merit State support under several human rights instruments, including the CRC and the Economic Covenant,⁵⁵ requiring the State to protect the

49. In a related context, Barbara Bennett Woodhouse has described how the simple visit of a home nurse to the homes of newborns made a significant difference in the quality of parenting. Barbara Bennett Woodhouse, *Home Visiting and Family Values: The Powers of Conversation, Touching and Soap*, 143 U. Pa. L. Rev. 253 (1994).

50. Ira Ellman et al., *Family Law*, 198–99 (3d ed. 1998).

51. This part of the Committee's recommendation was defeated. *Id.*

52. See, e.g., Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 Harv. L. Rev. 727 (1988).

53. Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrines*, 9 Hofstra L. Rev. 293 (1997).

54. Susan Gamache, Ph.D., *Collaborative Practice A New Opportunity to Address Children's Best Interest in Divorce*, 65 La. L. Rev. 1455 (2005).

55. See *infra* Part IV.

family and promote its development, but the United States is not a party to these instruments.

In sum, changing hearts and minds assumes the enjoyment of basic human rights. This mode necessarily contains negative and positive elements. That is, there must be some recognition of negative rights, of family privacy and autonomy, including children's privacy and autonomy. At the same time, positive rights must be recognized, because State support may well be critical, especially for single parent families in poverty. But these rights cannot be assumed in the United States. While this might not be an issue for the relatively affluent, for the law to ignore it perpetuates and exacerbates the dual system of family law decried by tenBroek.⁵⁶

Reducing conflict at divorce will certainly benefit some children. The approaches which the participants developed for doing so surely can and should be made more widely available. The point remains, however, that most of these proposals are simply not options for poor children and their parents. Indeed, reforms focused on divorce are for the most part irrelevant to their lives. If the focus is truly "the protection of children," we cannot forget those parents who will never divorce, because they never believed that marriage would be their ticket to a better life.

V. AN ALTERNATIVE FRAMEWORK—THE CRC

A. *How It Would Help*

1. *A Well-Established Legal Framework*

Human rights law is a powerful and growing international system of treaties and customs—an emerging global consensus. More than 180 states have ratified the Civil Covenant, the Economic Covenant, the Women's Convention, and the Convention on the Rights of the Child.⁵⁷ By incorporating human rights law, domestic law accedes to an international bottom line. Domestic law incorporating human rights norms, accordingly, is likely to be compatible with a broad range of foreign law similarly incorporating these norms. As a

56. See generally tenBroek, *supra* note 2.

57. Louis Henkin et al., Basic Document Supplement to International Law Cases and Materials 151 (Civil Covenant), 146 (Economic Covenant), 174 (Women's Convention), 188 (Convention on the Rights of the Child) (3d ed. 1993). In 1948, when the Universal Declaration was adopted, there were only 56 States parties. 48 States voted in favor of the Universal Declaration, none opposed and 8 abstained. *Id.* at 143. The Child's Convention has been ratified by 192 States. Available at <http://www.unicef.org/crc/crc.htm>.

corollary, it is increasingly likely to resonate for growing numbers of an increasingly mobile population.

Human rights law is grounded in the Universal Declaration of Human Rights drafted in 1948.⁵⁸ But the Universal Declaration was merely aspirational; the parties did not intend it to be legally binding.⁵⁹ Rather, it represented a rough consensus, an inchoate commitment to the idea of human rights. Under the Universal Declaration, for example, States parties recognized that, "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."⁶⁰ The more contentious questions of how "family" was to be defined, and the precise kind and scope of "protections" to which it was entitled, were left for another day. It was expected that a binding convention would be drafted and a committee was formed for that purpose. The idea was abandoned because of the Cold War, the East/West split, and the emerging consensus that different kinds of rights could be better implemented by different mechanisms. Instead of one legally-binding convention, there were two, the International Covenant on Civil and Political Rights (the "Civil Covenant")⁶¹ and the International Covenant on Economic, Social and Cultural Rights (the "Economic Covenant").⁶² Together with the Universal Declaration, these comprise the International Bill of Rights.

There is some overlap between the two covenants. For example, Article 23 of the Civil Covenant expressly reiterates the State's obligation to protect the family as "the natural and fundamental group unit of society" as set out in the Universal Declaration.⁶³ Article 10 of the Economic Covenant, similarly, provides, "The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children."⁶⁴ This arguably requires the State to enact laws protecting vulnerable parties, especially women and children.

58. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

59. Many argue that many of the provisions set out in the Universal Declaration have since become binding as a matter of customary international law. Henkin et al., *supra* note 57, at 322.

60. Declaration of Human Rights, *supra* note 58, art. 16.3.

61. 999 U.N.T.S. 171 (1976).

62. 993 U.N.T.S. 3 (1976).

63. Article 15.3 of the Universal Declaration provides, "The family is the natural and fundamental group unit of society and is entitled to protection by the society and the State." Declaration of Human Rights, *supra* note 58, art. 15.3.

64. Declaration of Human Rights, *supra* note 58, art. 10 (Economic Covenant).

For the most part, however, the Civil Covenant addresses negative obligations of the State; that is, it imposes limits on State interference with individuals. The Economic Covenant, in contrast, basically addresses affirmative obligations of the State, including the provision of welfare and social security benefits. The Economic Covenant requires the State to affirmatively assure its people an adequate standard of living, healthcare, education, and employment. In Article 10 of the Economic Covenant, for example, the States parties recognize that mothers are entitled to "special protection" before and after childbirth, including paid leave.⁶⁵ Thus, a State party would be required to incorporate into domestic law either welfare provisions assuring compensation or a requirement that private employers do so.

Even if the United States refuses to ratify the CRC, it can be drawn upon for the protection of children.⁶⁶ International human rights norms have been adopted in a broad range of contexts to provide normative guidance, from adoption by municipalities (such as San Francisco) and States (such as Massachusetts) to signal support for human rights,⁶⁷ to the adoption by multinational corporations of Model Codes of Conduct, both to signal support for human rights and, it has been suggested, to pre-empt binding regulation. Even if particular human rights instruments are not ratified or acceded to by the State, in short, they may be relied upon as non-binding "soft law." The Sullivan Principles in South Africa are a well-known example of the use of soft law to promote human rights.⁶⁸

The CRC includes both civil (political) and socio-economic rights. Although the earlier treaties arguably include "children" within their ambit of protection, the CRC "focuses on children as right bearers, not simply as objects of protection."⁶⁹

2. *Protect More Children*

The CRC does not privilege children of married, or divorced, parents over other children. Rather, its protections are universally

65. *Id.*

66. The U.S. is not a party to the Economic Covenant or the Women's Convention, although it has signed both. However, neither of these treaties have been ratified by the Senate. Henkin et al., *supra* note 57 at 784.

67. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 120 S. Ct. 2288 (2000) (holding Burma law of Massachusetts invalid under the Supremacy Clause).

68. See generally *Sanctions Against Apartheid* (Mark Orkin ed., 1989).

69. Susan Kilbourne, *Placing the Convention on the Rights of the Child in American Context*, 26 Hum. Rts. 27 (1999).

extended to all children. Thus, its approach is more like that of general entitlement programs, such as Social Security, than means-tested programs, such as welfare. General programs, unlike means-tested programs, carry no stigma. As a corollary, in this context the approach of the CRC would undermine the bifurcated system of family law described by tenBroek.⁷⁰

3. *At Greater Risk*

The CRC would provide better protection for the children at greatest risk because it was drafted for precisely that purpose. It explicitly addresses the economic rights which those children so conspicuously lack. Equally important, it identifies them as rightholders, as active subjects, as players in the game, not pawns.

It may even be better for children of divorce. The focus on divorce may well exacerbate the risks facing children of divorce themselves. Leading experts in the area, for example, have focused on the risks to children posed by their warring parents. Andrew Schepard founded the P.E.A.C.E. project to educate parents regarding the harm they caused their children by treating them as pawns in divorce.⁷¹ June Carbone has aptly described custody battles as "ground zero in the gender wars."⁷²

It would benefit children of divorce to re-situate this argument, from the context of divorce, a proceeding in which they are not even parties, to the context of human rights, where they are recognized as subjects and as rights holders. The CRC explicitly addresses the child's situation at divorce in two of the four articles that are generally referred to as "general principles:" 1) "the child's right to be heard in matters affecting him or her" and 2) the "best interest of the child" standard.⁷³ Under the CRC, however, these are a child's rights, independent of divorce. They are owed to each child, by the State, regardless of the parent's marital status.

The child's "right to be heard" is not dependent on the strategy of the parent's divorce lawyer; it is an ongoing right of the child. This is a crucial move and its significance is reflected in the growing number of children's advocates who have shifted the focus from domestic family law to the more far-reaching protections of international human rights law. As Barbara Bennett Woodhouse notes:

70. See tenBroek, *supra* note 2.

71. Andrew Schepard, *Planning for P.E.A.C.E.: The Development of Court Connected Education Programs for Divorcing and Separating Families*, 23 Hofstra L. Rev. 845 (1995).

72. June Carbone, *From Partners to Parents* (2000).

73. Kilbourne, *American Context*, *supra* note 69, at 27.

Americans tend to sort children into two categories. There are "our own children" and "other people's children." Our children are coddled and spoiled by adoring parents Other people's children, especially if they are inner city children of color, are predatory monsters and are totally out of control This divide between our children and other people's children is an illusion. It ignores a fundamental tenet of human rights: All people are my brothers and sisters, parents and children.⁷⁴

Perhaps more telling is the astonishing energy conservative groups—the same groups that have been the most vocal defenders of "family values" in the divorce context—have expended in targeting the CRC.⁷⁵ They understand that recognizing children's voices, however problematic, is a step away from control by the churches.

B. Necessary But Not Sufficient

Ratification, and implementation, of the CRC is necessary for the protection of American children, but it is not sufficient. Remember the kittens? Children cannot be protected if their mothers are left to drown. Thus, ratification of the CRC would be a start, but ratification of the rest of the International Bill of Rights, along with the Women's Convention, should follow. As Janet Giele has pointed out:

[F]eminists note that divorce, lone-mother families, and women's employment is on the rise in every industrialized nation. But other countries have not seen the same devastating decline in child well-being, teen pregnancy, suicides and violent deaths, school failure and a rising population of children in poverty. The other countries have four key elements of social and family policy which protect all children and their mothers: "(1) work guarantees and other economic supports; (2) child care; (3) health care; (4) housing subsidies."⁷⁶

74. Barbara Bennett Woodhouse, Symposium, Keynote, *Legal Reform and Children's Human Rights*, 14 St. John's J., 331 (2000); Symposium, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. Pa. J. Const. L. 1 (1999).

75. See, e.g., Alison Dundes Renteln, *Who's Afraid of the CRC: Objections to the Convention on the Rights of the Child*, 3 ILSA J. Int'l & Comp. L. 629 (1997); Susan Kilbourne, *U.S. Failure to Ratify the Convention on the Rights of the Child: Playing Politics with Children's Rights*, 6 Transnat'l L. & Contemp. Probs. 437 (1996).

76. Janet Z. Giele, *Decline of the Family: Conservative, Liberal and Feminist Views*, reprinted in Margaret Brinig et al., *Family Law in Action* 28-29 (1999).

Feminist economists⁷⁷ and others,⁷⁸ similarly, have linked women's economic subordination to women's nurturing work—the mostly unpaid cooking, cleaning, feeding, clothing, and general housekeeping work they do for the children and men with whom they live. Women are the major source of unremunerated nurturing work at every income level of American society.⁷⁹ Nurturing work is so deeply internalized that women do it unconsciously and so deeply embedded in the culture that no one sees them doing it. Nurturing work remains “women's work” that is not only unpaid but also unrecognized by the market. As a result, not only do women work an uncompensated “second shift,”⁸⁰ but a market structure that refuses to recognize other demands on women's time limits women's access to better-paying, higher-status jobs.⁸¹

Nurturing work is not the only cause of women's poverty, but it is almost always a substantial factor.⁸² The notoriously low wages for paid nurturing work, such as childcare or nursing, leave many of the women in these fields hovering dangerously near the poverty line.⁸³ Because of their unpaid nurturing work at home, moreover, women earn substantially less than men, and their attachment to the labor force is weaker.⁸⁴ While the majority of women are not poor, the majority of the poor are women.⁸⁵ Even those who are not currently poor are far more likely to have been poor and to become poor than are men. Women are the most economically vulnerable if they become sick and when they become old.⁸⁶

Law that spreads the cost of nurturing work is already recognized as part of international human rights law. The Economic Covenant

77. See, e.g., Marilyn Waring, *If Women counted: A New Feminist Economics* (1988).

78. See, e.g., Martha A. Fineman, *The Concept of the Natural Family and the Limits of American Family Law*, 4 Int'l Rev. Comp. Pub. Pol'y 15 (1992).

79. See Arlie Hochschild & Anne Machung, *The Second Shift: Working Parents and the Revolution At Home* 8 (1989).

80. *Id.*

81. See Victor R. Fuchs, *Women's Quest for Economic Equality* 4 (1988). See generally Alice Kessler-Harris, *A Woman's Wage: Historical Meanings and Social Consequences* (1990).

82. Fuchs, *supra* note 81, at 58 *passim*.

83. For a chart showing occupations primarily held by women and their median weekly pay in comparison with men in the same occupation, see Peter T. Kilborn, *More Women Take Low-Wage Jobs Just So Their Families Can Get By*, N.Y. Times, Mar. 13, 1994, § 1, at 24.

84. Fuchs, *supra* note 81, at 58–74.

85. See Bureau of the Census, U.S. Dep't of Commerce, *Poverty in the United States*: 1992, 60-185 T.5 (1992).

86. According to the U.S. Department of Health and Human Services, the median income of widowed women over sixty is \$6,300, compared to \$26,202 for retired couples in their late sixties. Doris Wild Helmering, *Economics of Retiring: He Says Yes, She Says No*, Knoxville News-Sentinel, May 27, 1995, at B.

recognizes the right of every human being to be nurtured—to be housed, fed, clothed, healed, and educated. These “nurturing rights” are inverted descriptions of women’s work, what American women actually do. I am not suggesting complete congruence, a perfect fit. Women obviously do not, and could not, assume sole responsibility for assuring all of the rights set forth in the Economic Covenant.⁸⁷ Nevertheless, the overlap where women’s work satisfies obligations imposed by the Economic Covenant is substantial. By requiring States to “take steps to progressively realize” nurturing rights, the Economic Covenant shifts responsibility from women to the State for nurturing work. The Women’s Convention goes even further, requiring States to recognize “all forms of discrimination against women,” including culturally determined conceptions of “work.”⁸⁸

By linking nurturing rights to legal entitlements, and explicitly requiring States to “recognize” them, the Economic Covenant also makes women’s work more visible, less women’s personal concern, and more a subject for public debate. Ratification of the Economic Covenant would trigger and support a national discussion of women’s work.

VI. CONCLUSION

The CRC is hardly a panacea. As critics have noted, its almost universal ratification is matched by its almost universal unenforceability. It is more rhetorical than legal; it is more public relations than art. But these are stormy times, and children are drowning. The CRC has its problems, and its application in an American context remains an open and profoundly controversial question. But international human rights lawyers have shown that the CRC offers some protection for children in a surprisingly broad range of contexts.⁸⁹ In the hands of children’s advocates like the participants in this Symposium, it could certainly provide some shelter for American children, including American children of divorce.

87. For a scholarly collection of papers analyzing household resource distribution issues from the perspectives of anthropology, economics, and psychology, see *Intra-Household Resource Allocation: Issues and Methods for Development and Planning* (Beatrice L. Rogers & Nina P. Schlossman eds., 1990).

88. As Marilyn Waring observes, “[I]t seems to me that one of the most glaring tools of continual enslavement of more than half of the human species finds its focus in the inadequate international patriarchal concept of ‘work.’” Waring, *supra* note 77, at 182.

89. See, e.g., L. Elizabeth Chamblee, *Rhetoric or Rights?: When Culture and Religion Bar Girls’ Right to Education*, 44 Va. J. Int’l L. 1073 (explaining how the CRC assures a right to education); Barbara Stark, *Lost Boys and Forgotten Girls: African Refugees, Adoption, and International Human Rights Law*, 22 St. Louis U. Pub. L. Rev. 275 (2003) (explaining how the CRC affects adoption).

APPENDIX A

Table 1

Outcomes	Low-Income Children's Higher Risk
Health	
Death in infancy	1.6 times as likely
Premature birth (under 37 weeks)	1.8 times as likely
Low birth weight	1.9 times as likely
No regular source of health care	2.7 times as likely
Inadequate prenatal care	2.8 times as likely
Family had too little food sometime in the last 4 months	8 times as likely

Table 2

Outcomes	Low-Income Children's Higher Risk
Education	
Math scores at ages 7 to 8	5 test points lower
Reading scores at ages 7 to 8	4 test points lower
Repeated a grade	2.0 times as likely
Expelled from school	3.4 times as likely
Being a dropout at ages 16 to 24	3.5 times as likely
Finishing a four-year college	Half as likely

