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Are Children's Rights Enough?

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ARE CHILDREN'S RIGHTS ENOUGH?

CLARE RYAN*

Are parental rights or children's rights better for protecting children and vindicating their interests? In this ongoing debate, American family law scholars and advocates are deeply divided. Children's rights proponents often criticize the United States for failing to ratify the Convention on the Rights of the Child and for denying children constitutional family rights. This critique of U.S. family law assumes that incorporating children's rights would result in better outcomes for children. This Article challenges the assumption that children's rights are enough to vindicate children's interests. Instead, this Article identifies how current conceptions of children's rights present structural barriers to full vindication of the child's interests.

To illustrate how these structural barriers operate, this Article analyzes case law on custody and family separation from a jurisdiction that uses a strong children's rights approach, the European Court of Human Rights. These cases provide a valuable comparator to test whether children's rights framing changes how courts reason about children.

This Article contends that three major obstacles thwart the efficacy of a children's rights framework. First, when children's interests conflict with their parents, someone must decide whose interest will prevail. This conflict empowers states to intervene in families' lives in ways that can undermine children's well-being. Second, a children's rights model must give children a voice in legal proceedings. However, rights litigation is traditionally the purview of adults,

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and children often lack standing to assert their own rights claims. Even when they do, young children lack the capacity to assert their interests in a way that is cognizable by a court. Finally, a children's rights model must address the ways in which the state uses children as leverage to deter or compel their parents. To be effective rights-holders, children must be agents and not merely objects in the eyes of the law.

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INTRODUCTION

Divorced parents in Texas fight over custody of a gender non-conforming child.¹ In California, intended parents seek to establish their rights to a child born via assisted reproductive technology.²

1. See Marie-Amélie George, *Exploring Identity*, 55 FAM. L. Q. 1, 1–2 (2021) (discussing the case of Luna Younger, a child whose parents fought over custody because of differing views on her gender identity).

2. See Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CAL. L. REV. 401, 413 (2021) (cataloging surrogacy and other assisted reproductive technology laws by state); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2301 (2017) (“In contrast to the relatively few disputes involving donor eggs, the use of IVF

Across the country, states remove children from their parents and place them into foster care every day.³ Some state removals will be temporary, and some will result in permanent termination of parental rights.⁴

In all of these situations, parents can assert their constitutional right to the care, custody, and control of their child.⁵ Parental rights are not absolute,⁶ nevertheless, they form a bedrock for determining custody, parentage, and child removal in the United States.⁷ By contrast, the child's right to remain with their parents, and to have their needs and interests treated as central considerations, is far less developed in U.S. constitutional law.⁸

Many children fare poorly in the United States. The child removal system, immigration enforcement, and incarceration separate thousands of children from their parents, and those children often suffer serious mental and physical health consequences from sustained deprivation and trauma.⁹ Parental decision-making can also harm children—both in the short-term and in the child's long-term

in surrogacy provoked greater controversy by disturbing the foundational assumption that the woman giving birth is the child's mother.”).

3. For foster care statistics, see *The AFCARS Report*, U.S. DEP'T HEALTH & HUMAN SERV. (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-29.pdf> [<https://perma.cc/DC6H-B9PQ>] (reporting that in 2021, more than 600,000 children were within the foster care system in the United States).

4. See, e.g., Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 843 (2020) (discussing the processes by which children are placed in foster care).

5. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (“The 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.”).

6. See *infra* Section I.B for discussion of the “best interests of the child” standard. See also Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 223 (2022).

7. See *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (“The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”).

8. See *infra* Section I.A for discussion of children's rights.

9. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 527 (2019); Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016). I have written elsewhere about the harms suffered by children who are separated or removed from their parents. See Clare Ryan, *Children as Bargaining Chips*, 68 UCLA L. REV. 410, 415 (2021) [hereinafter Ryan, *Bargaining Chips*].

prospects of becoming a flourishing adult.¹⁰ Embracing children's rights is one possible avenue for addressing these harms. Advocates and scholars in the United States invoke children's rights, and children's *human* rights, as a solution for remedying many of the ills children suffer. This Article asks: If courts used children's rights to guide their decisions, would it change the outcome?

Debates over the role of children's rights and parental rights echo through state legislatures,¹¹ the American Law Institute,¹² and the pages of scholarly journals—most prominently in the *Yale Law Journal*.¹³ One side argues that children's interests are best protected by vesting children with rights, while the other side contends that parents, and parental rights, are better positioned to protect children's interests.¹⁴ At stake in the parental rights debate are both the attention-grabbing cases in which families are thrust into the larger “culture

10. Much has been written about trauma, abuse, and neglect in early childhood and its impact of cognitive and emotional development. For a compilation of the psychology and neuroscience research, see Jan Jeske & Mary Louise Klas, *Adverse Childhood Experiences: Implications for Family Law Practice and the Family Court System*, 50 *FAM. L.Q.* 123, 126 (2016) (showing that the research on childhood trauma “reveals staggering proof of the health, social, and economic risks that result”).

11. See Nadra Nittle, *Parental Rights Bills Have Been Introduced in Most States. Teachers are Pushing Back*, 74 *MILLION* (Apr. 2, 2022), <https://www.the74million.org/article/parental-rights-bills-have-been-introduced-in-most-states-teachers-are-pushing-back> [<https://perma.cc/ZTP5-JJEK>] (describing the scope and politicization of “parental rights” legislation efforts in the United States).

12. See *Children and the Law*, *AM. L. INST.*, <https://www.ali.org/projects/show/child-ren-and-law> [<https://perma.cc/5N3C-WHEN>] (providing regularly updated language and details on the forthcoming new Restatement project).

13. See, e.g., Cheryl Bratt, *Top-Down or from the Ground?: A Practical Perspective on Reforming the Field of Children and the Law*, 127 *YALE L.J.F.* 917, 919 (2018) (advocating a “youth-led” approach to advancing the rights and autonomy of children); Martin Guggenheim, *The (Not So) New Law of the Child*, 127 *YALE L.J.F.* 942, 943 (2018) (suggesting that contemporary leading scholarship on children's rights has failed to create a framework to fundamentally improve the lives of children).

14. For some of the most recent examples, see Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 *MICH. L. REV.* 1371, 1413–18 (2020) [hereinafter, Huntington & Scott, *Legal Childhood*]; Nancy D. Polikoff & Jane M. Spinak, *Foreword: Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-being*, 11 *COLUM. J. RACE & L.* 427, 430 (2021); Anne C. Dailey & Laura A. Rosenbury, *The New Parental Rights*, 71 *DUKE L.J.* 75, 96 (2021) [hereinafter Dailey & Rosenbury, *Parental Rights*].

wars” and the everyday decisions that separate children from their parents.¹⁵

The choice to adopt a children’s rights frame is not merely theoretical. Many parts of the world have adopted such an approach, deploying both constitutional and human rights analyses to disputes around family separation.¹⁶ Since the promulgation of the Convention on the Rights of the Child (“CRC”)¹⁷ in 1989, courts and lawmakers around the world have grappled with the question of how to interpret and vindicate children’s rights.¹⁸ In Europe, for example, the European Court of Human Rights (“ECtHR” or the “Strasbourg Court”) has been instrumental in incorporating the CRC into family law disputes across the continent.¹⁹ The United States, however, has not grounded the constitutional rights of the family in children’s rights—adopting instead a parental rights approach. The United States is now the only country in the United Nations that has not ratified the CRC, making it an outlier in a growing global consensus around the centrality of children’s rights.²⁰

The European experience with children’s rights, therefore, can serve as a real-world model that American advocates for children’s rights can look to for inspiration.²¹ And there are some helpful lessons

15. See Naomi Cahn, *The Political Language of Parental Rights: Abortion, Gender-Affirming Care, and Critical Race Theory*, 53 SETON HALL L. REV. 1443, 1446 (discussing the influence of politicized rhetoric in parental rights).

16. See CLAIRE FENTON-GLYNN, CHILDREN AND THE EUROPEAN COURT OF HUMAN RIGHTS 9 (2020).

17. U.N. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

18. *Id.*

19. See FENTON-GLYNN, *supra* note 16, at 9 (“The United Nations Convention on the Rights of the Child has been particularly influential . . . [and is] recognised by the [ECtHR] as constituting ‘the standards to which all governments must aspire in realising . . . rights for all children.’”).

20. See, e.g., Martha Minow, *Children’s Rights Debates, Revisited*, 75 FLA. L. REV. 195, 206 (2023) [hereinafter Minow, *Children’s Rights Debates*] (remarking with surprise that the United States is the only member of the United Nations that has not ratified the CRC); Katharine G. Young, *Human Rights Originalism*, 110 GEO. L.J. 1097, 1122 n.143 (2022) (noting that the United States is now the only country not to ratify the CRC and the implications of that outlier status in U.S. Supreme Court jurisprudence).

21. See Kim Hai Pearson, *Children Are Human*, 8 TEX. A&M L. REV. 495, 499–500 (2021) (emphasizing the importance of international human rights models for children’s rights); LAURA FIELDS DE ROSE, NAOMI R. CAHN, JUNE CARBONE & W. BRADFORD WILCOX, *UNEQUAL FAMILY LIVES: CAUSES AND CONSEQUENCES IN EUROPE AND*

to offer. But Europe's experience also serves as a cautionary tale. Advocates of children's rights contend that the United States gives too much deference to parents without consideration for the child's distinct needs and interests.²² As this Article reveals, however, the European model risks over-relying on state intervention in the name of children's rights.²³ As American legal scholars have demonstrated, the "best interests of the child" can serve as a proxy for the state's interests, rather than the child's interest.²⁴ Decisions that award custody, for instance, can serve to punish parents whose lifestyles the state wishes to deter.²⁵ A child-focused best interests standard often becomes a deference doctrine for state control over custody.²⁶ Consequently, deference to experts in determining "best interests" tends to prioritize dominant societal views regarding parenting, which are likely to disproportionately harm and exclude groups that do not conform to these expectations.²⁷ This Article will show how a children's rights approach can exacerbate the risk of state control over marginalized families.

In many ways, the debate between parental rights and children's rights is one about the role of the state in family lives. The more deference the law gives to parents, the less state intervention is permissible in the name of the child's interests. The more the law elevates children's rights, the greater likelihood that state actors will pierce family privacy and autonomy to address the needs and interests

THE AMERICAS I (2018) (discussing the differences between children in Europe and the United States).

22. See *infra* Section I.A.

23. See *infra* Section III.B.I.

24. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 41 (2005) [hereinafter GUGGENHEIM, CHILDREN'S RIGHTS].

25. See Jordan Blair Woods, *Bigotry, Civil Rights, and LGBTQ Child Welfare*, 120 MICH. L. REV. 1011, 1023 (2022) (reviewing LINDA C. McCLAIN, WHO'S THE BIGOT? LEARNING FROM CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (2020)) (describing how, historically, "[i]n family courts, judges embraced stereotypes of lesbian and gay adults as sexual predators and threats to children in order to deem them unfit parents . . .").

26. See GUGGENHEIM, CHILDREN'S RIGHTS, *supra* note 24, at 41.

27. See S. Lisa Washington, Essay, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1126 (2022) (discussing how marginalized parents are pathologized as a "compliance mechanism").

of children.²⁸ The question of too much or too little deference, however, often fails to capture whether—and how much—parental rights or children's rights framing actually matters to how courts adjudicate cases. I argue that focusing on parental rights versus children's rights is often a distraction from the state's broad power to intervene in family lives regardless of whose rights are evoked.

To better understand how the European approach could inform American debates over children's rights, this Article examines how apex courts interpret the rights to custody and parent-child separation within the context of their constitutional and human rights orders. The purpose of this inquiry is to assess whether a children's rights framework leads to more robust protection of children's needs and interests by courts. To answer this question, the Article compares the reasoning in landmark cases before the U.S. Supreme Court and the ECtHR involving custody and family separation. It examines how the courts identify and balance competing interests in these cases, with a particular eye to how the courts treat the child's interests when they are in apparent conflict with the parents' interests or with the state's objectives.

This Article posits that the debate over parental rights versus children's rights exaggerates the extent to which this framing matters to the outcomes for children and families. As the Article demonstrates, states exert considerable influence over decisions involving children regardless of whether a parental rights or child's rights model is in place. A legal system's use of the language of parental rights or children's rights is a less important limit on state power than one might think. This Article's critique of the European children's right framework does not demand a whole cloth rejection of children's rights, but it does suggest that new approaches are required.

28. The extent to which children's rights are at odds with family privacy and parental authority is a longstanding debate within the United States. See Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1249 (1999) ("A] . . . source of criticism of traditional family privacy are those who focus on the rights of children."); Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1215–16 (1999) ("Parental conduct, be it discipline or decision-making, is generally protected unless it constitutes abuse or neglect of the child. Courts consistently reiterate the common law presumption that parents act in the best interests of their children . . . [But] in recent decades, the idea of family privacy has been severely criticized by feminists, children's rights proponents, and others concerned with the potential for physical, emotional, or psychological abuse of some family members by others.").

A key reason why children's rights framing makes little difference to the outcome of cases is that the traditional individual rights framework is ill-suited to the unique needs and capacities of children. This Article identifies aspects of the current children's rights approach that serve as barriers to the full vindication of children's interests. First, courts struggle to implement an effective mechanism for balancing parents' rights and children's rights when they conflict. Second, because children often lack the capacity to bring cases on their own behalf—and are frequently not parties to the cases that implicate their rights—children's interests are defined by adults. Third, in cases where the state has a strong interest in deterring a parent's behaviors, the child's rights are often minimized or ignored.

The purpose of this Article is to inform the American parental rights/children's rights debate by demonstrating how a robust rights-protecting court embraced a children's rights model and the challenges that it faced in doing so. Much as the European system can be lauded as a more rights-focused and humane system with respect to the parent-child relationship, Europe can also serve as a warning that overreliance on children's rights might have unintended consequences. In offering this detailed analysis of the impact of children's rights in high courts, this Article fills a significant gap in the literature. Other scholars have explored whether children have rights and the effectiveness of these rights.²⁹ But the existing literature, especially in the United States, does not give sufficient attention to how courts operationalize a children's rights approach.³⁰

29. For an overview of this literature, see JONATHAN TODRES & SHANI M. KING, *THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW* (2020) [hereinafter TODRES & KING, *CHILDREN'S RIGHTS*]. This compilation of leading global experts on children's rights offers rich account of children's rights around the world, however, even within this definitive text, very little space is spent on the role of courts.

30. See John Tobin, *Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations*, in *THE HUMAN RIGHTS OF CHILDREN: FROM VISIONS TO IMPLEMENTATION* 62 (Antonella Invernizzi & Jane Williams eds., 2011) (critiquing the existing literature and "how to" publications on children's rights for their failure to "demonstrate an awareness of the social, political, institutional and disciplinary obstacles to the implementation of such an approach"). One notable exception is, Bernardine Dohrn, *Something's Happening Here: Children and Human Rights Jurisprudence in Two International Courts*, 6 *NEV. L.J.* 749, 749–50 (2006), which identified the emerging trend of children's rights framing in human rights courts. Dohrn observed that "[t]he ECHR and IACHR are cautiously but significantly re-defining the paradoxical and contested zone where children's rights

The Article proceeds as follows. Part II situates this Article within the existing literature on children's rights and parental rights. It then analyzes the "Best Interests of the Child" standard and its relationship to children's rights in Europe and the United States. Part III defines the method and scope of inquiry, which focuses on parents' and children's rights framing by the U.S. Supreme Court and the ECtHR. In Part IV, the Article engages with child custody and family separation cases to reveal how the parental rights and children's rights framing do—or do not—make a difference in the court's reasoning and conclusion. This Part identifies the structural barriers to full vindication of a children's rights model that the European case law reveals. It offers reasons, that are not grounded in rights, for why children fare better in Europe. The Article concludes by suggesting that a genuine alternative to a parental rights model requires re-envisioning rights for children.

I. CHILDREN'S RIGHTS & CHILDREN'S INTERESTS

A. *Children's Rights & Parental Rights*

The academic resurgence of the parental rights versus children's rights debate in American family law has been shaped by several recent forces—among them, the American Law Institute's new *Restatement on Children and the Law*, which has taken a firm parental rights stance.³¹ The abolition movement, which, among other things, seeks to hold state agents accountable for violence toward families of color, calls for a fundamental reconsideration of the American family regulation system.³² As legal scholar Lisa Washington explains: "Recent calls to defund the police were often followed by demands to redirect resources to social service agencies, such as the family regulation system—more commonly referred to as the 'child welfare

meet parental rights. In this arena the courts have steered away from violating national norms and traditions, and frequently have affirmed the national holding based on a margin of appreciation." *Id.* at 750.

31. For a recent articulation of the Restatement's position, see Huntington & Scott, *Legal Childhood*, *supra* note 14.

32. Jessica Dixon Weaver draws these two threads together by addressing the Restatement's discussion of corporal punishment using a Critical Race Theory lens to highlight the perspective of Black families and the connection between corporal punishment and state violence in *A Critical Race Theory Approach to Children's Rights*, 71 *AM. U. L. REV.* 1855, 1859 (2022). See also Polikoff & Spinak, *supra* note 14, at 427.

system.’ These calls fail to recognize the entanglement and shared carceral logic of these systems.”³³

These forces catalyzed a debate among family law scholars who split into two main camps, although individual scholars’ views and approaches vary within and across these camps. The first view, espoused by scholars like Clare Huntington and Elizabeth Scott, supports the Restatement and underscores the value of parental rights for the well-being of children and parental authority as a shield against state intervention.³⁴ On the other side are Anne Dailey and Laura Rosenbury, whose work sets out an ambitious new children’s rights approach for American family law.³⁵

The stakes of this debate are multi-faceted but can be summarized as follows. Supporters of parental rights argue that parents, on the whole, should be trusted to act in the best interest of their child.³⁶ Parental rights are the bulwark that allow for family autonomy in the face of state agents that are hostile, especially to poor families, families of color, immigrant families, indigenous families, and LGBTQ+ families (hostility that is amplified when these family identities intersect).

Importantly, according to this view, vesting rights in children risks imbuing the state with even more power.³⁷ Because children, especially very young children, lack the developmental capacity to make decisions for themselves, their rights claims must be filtered through other actors.³⁸ If those actors are agents of the state-judges, social

33. S. Lisa Washington, *supra* note 27, at 1102–03.

34. Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 FORDHAM L. REV. 2529, 2529 (2022) [hereinafter Huntington & Scott, *Parental Rights*].

35. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1448 (2018) [hereinafter Dailey & Rosenbury, *New Law of the Child*]; Dailey & Rosenbury, *Parental Rights*, *supra* note 14, at 75–76. Dailey and Rosenbury critique the Restatement by arguing that:

In taking a strong stand in favor of protecting expansive parental rights, the Restatement ensures that parents exercise nearly unfettered decision-making authority over children’s lives except in cases of serious harm. The Restatement presumes this authority is in children’s best interests and thus protects parents’ choices in all but the most dire circumstances.

Id. at 95.

36. See Huntington & Scott, *Legal Childhood*, *supra* note 14, at 1416 (discussing how parents have a “superior knowledge of and association with the child as compared with outsiders of the family”).

37. See GUGGENHEIM, CHILDREN’S RIGHTS, *supra* note 24, at 46.

38. Huntington & Scott, *Legal Childhood*, *supra* note 14, at 1415.

workers (and others)—then the state's priorities will be translated into the language of children's rights. As Huntington and Scott contend:

[C]hildren, particularly younger children, are often incapable of making decisions on their own behalf about healthcare, education, and other critical matters. Thus, a surrogate decisionmaker will be required—and that surrogate will be either the child's parents or a state actor. If parents' authority is withdrawn or seriously restricted, the state necessarily will have a larger role regulating families than under current law.³⁹

Martin Guggenheim presents one of the more forceful versions of this view in his book, *What's Wrong with Children's Rights*. In his view:

Any alternative to the parental rights doctrine empowers state officials to meddle in family affairs and base their decisions on their own values. The parental rights doctrine protects parents from having to defend their right to their children's custody on grounds that parental custody would further the children's best interest.⁴⁰

Parents, therefore, are better suited to vindicating rights of family integrity than children are, so it is entirely appropriate that rights vest with them.

Critics of parental rights contend that children's interests often diverge from parental decisions: in who the child forms relationships with outside of their parents, where (and whether) the child attends school, what medical care the child receives, and the like.⁴¹ While recognizing that a child's autonomy develops as they mature, these scholars argue that even young children can express their interests in ways that are legally cognizable as rights.⁴² Anne Dailey and Laura Rosenbury argue:

[T]he new law of the child loosens the grip of parental rights on American law [T]he law's existing deference to parental rights in both statutes and legal decisions would give way to a more child-centered analysis that elevates children's broader interests over parents' individual liberty claims. Parental rights have a role to play under the new law of the child, but only to the extent they further children's broader interests.⁴³

Advocates of the children's rights model believe that standards grounded in the child's interest can be created in ways that do not

39. *Id.*

40. See GUGGENHEIM, *CHILDREN'S RIGHTS*, *supra* note 24, at 38.

41. Dailey & Rosenbury, *Parental Rights*, *supra* note 14, at 79–80.

42. *Id.* at 82.

43. Dailey & Rosenbury, *New Law of the Child*, *supra* note 35, at 1452.

unnecessarily empower the state.⁴⁴ Evidence-based definitions of the child's interest, alongside the child's own articulation of their interest, offer an alternative to pure parental power that is not merely a smokescreen for state policy.⁴⁵ Furthermore, advocates of children's rights dispute the idea that parents are always in a position to defend their children's interests. As Professor Catherine Smith contended in a recent keynote address,

relying on the assumption that *all* parents have the political power to protect their children, ignores the unequal political power between and among groups in American society. There are times when children must possess their own rights to protect themselves because their parents do not have the political power to act in their best interests.⁴⁶

A potential middle ground in this debate is offered by those who argue that children should have a right to family integrity so long as it is compatible with parental rights. In other words, the child's right should be used as a shield against state intervention, but not as a means of diluting or undermining parental authority. Professor Shanta Trivedi makes a compelling case for this middle path, in the context of criminal sentencing and immigration, that would apply only when "the right in question is the constitutional right to family integrity asserted against a government entity that is trying to separate a family."⁴⁷ This work offers a vital contribution to the debate by showing how a child's constitutional right to family integrity could actually

44. Dailey & Rosenbury, *Parental Rights*, *supra* note 14, at 84.

45. Introducing their argument that respecting children's agency and autonomy is compatible with a new vision of parental rights, Dailey and Rosenbury contend that: [e]xpansive parental rights privilege the interests of parents over those of children, reinforce a myth of state nonintervention in the family in ways that further harm children's interests, and adversely impact racially and economically marginalized families. By conceiving of the family as a unified private entity, existing law represses children's independent interests and identities and fails to offer nonpunitive forms of state support for children and their families.

Dailey & Rosenbury, *Parental Rights*, *supra* note 14, at 96.

46. Catherine E. Smith, *Keynote Speech: "Children's Equality Law" in the Age of Parents' Rights*, 71 KANSAS L. REV. 533, 534 (2023).

47. Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 HARV. C.R.-C.L. L. REV. 267, 269-70, 277 (2021).

operate in U.S. constitutional law.⁴⁸ However, this approach would only apply in a limited set of circumstances. Additionally, it must confront the crucial problem that when the state separates families, it can often reframe its intervention as in the “child’s interests,” even when advocates argue that the parent and child’s family integrity interests align.⁴⁹

Although much of the debate among American family law scholars remains squarely focused on the United States, some scholars and advocates reach for solutions outside the American legal context. Human rights, and especially the CRC, offer a powerful alternative framework. Scholars of the human rights model argue that imbuing children with rights does not need to come at the cost of parental rights, but rather can be seen as mutually reinforcing. In Martha Minow’s foundational article on the subject, she argued that “[a]s human beings, children deserve the kind of dignity, respect, and freedom from arbitrary treatment that rights signal. This dignity, respect, and freedom does not displace or undermine parents, but instead reminds parents and other adults of their fundamental responsibilities toward children.”⁵⁰

In recent work on children and human rights, Professor Kim Hai Pearson carries forward this perspective by contending that “[i]f the United States ratifies the CRC, the greatest legal benefit that could redound to children is a conceptual shift toward recognizing children

48. I recognize that the near future for American constitutional law, especially as it pertains to substantive due process rights, is highly unsettled. The current U.S. Supreme Court majority has expressed a willingness to undo longstanding precedent and is not friendly to broad interpretations of substantive due process rights. That said, support for family autonomy is not something that falls along political or ideological lines. So, while the current Court is not going to embrace the principles of the CRC or read a robust child’s right to family into the Due Process Clause of the 14th Amendment, it is not unreasonable to think that family autonomy claims of various sorts will still have traction. Not to mention that some of the proposals supported by children’s rights advocates would not require implementation by the U.S. Supreme Court. Finally, the debate over children’s rights has been around for generations and will be around for generations to come. It is still worth imagining the ideal world options, even if that world is very far from the one in which we live.

49. I have offered an alternative approach in circumstances where the state seeks to separate parents and children in Ryan, *Bargaining Chips*, *supra* note 9, at 410, which emphasizes the rights of parents not to be forced to choose between custody of their child and other fundamental rights.

50. Martha Minow, *What Ever Happened to Children’s Rights?*, 80 MINN. L. REV. 267, 296 (1995).

as rights holders because of their status as human children.”⁵¹ She notes that in the United States:

There has been little need conceptually to separate children’s rights from parent’s rights. The current legal regime that addresses children, family law, welfare and dependency, and juvenile law is believed to be a responsive and satisfactory model of rights, based solely on protecting children as a vulnerable population, not as agentic subjects. However, there are children’s issues that are becoming more pressing domestically that do not fit within the traditional model of protecting children’s rights through the conduit of parental rights and interests.⁵²

Outside of the United States, children’s rights scholars often condemn the American focus on parental rights and authority. U.K. scholar and founding editor of the *International Journal of Children’s Rights*, Michael Freeman, critiques Guggenheim’s rejection of children’s rights. He argues that it is “one stage on from conceptualising children as the property of their parents.”⁵³ Furthermore, although Guggenheim evokes a “constant stream of cases in which children’s rights are invoked by adults to gain some advantage over other adults,” Freeman asserts that he has not seen evidence of this phenomenon in England.⁵⁴ Freeman argues that those who deny children’s rights do so out of a failure to recognize the autonomous personhood that even very young children possess.⁵⁵ He contends that children’s rights serve a vital function in the constellation of human rights because “they recognise the respect their bearers are entitled to. To accord rights is to respect dignity: to deny rights is to cast doubt on humanity and on integrity.”⁵⁶

This literature also adds another dimension to the debate, which is the expressive value of children’s rights, even where those rights are

51. Kim Hai Pearson, *Children Are Human*, 8 TEX. A&M L. REV. 495, 520 (2021). Pearson also suggests that Europe’s implementation of the CRC is benefitting children, but only references to one 2001 article that does not delve into how courts have operationalized children’s rights in recent practice. *Id.* at 519.

52. *Id.* at 498.

53. Michael Freeman, *Why It Remains Important to Take Children’s Rights Seriously*, in CHILDREN’S RIGHTS: PROGRESS AND PERSPECTIVES 11, 11 (Michael Freeman ed., 2011) [hereinafter Freeman, CHILDREN’S RIGHTS].

54. MICHAEL FREEMAN, A MAGNA CARTA FOR CHILDREN? RETHINKING CHILDREN’S RIGHTS 38 (2020).

55. *Id.* at 51 (explaining that childhood was often deemed a rights-free zone because children were regarded as a work in progress).

56. Freeman, CHILDREN’S RIGHTS, *supra* note 53, at 8.

only vindicated with the help of adults. Proponents of this approach often focus on efforts to improve conditions for children outside the context of adversarial litigation, often through access to resources and human rights education.⁵⁷ While this work is vital, it does not directly confront how to implement this new rights-consciousness in litigation and before courts.

B. *The Best Interests of the Child*

The “best interests of the child” is a globally popular concept which has appeared across legal systems at various levels of governance around the world.⁵⁸ The CRC uses a best interests standard, as does the ECtHR (incorporating the CRC in its analysis).⁵⁹ The best interest standard is so popular in part because it is open-ended. Vastly different societies can implement a “best interests” approach without needing to find consensus around what those interests entail.⁶⁰ It is also an often-criticized standard for this very reason.⁶¹

57. See, e.g., Jonathan Todres & Sarah Higinbotham, *A Person's a Person: Children's Rights in Children's Literature*, 45 COLUM. HUM. RTS. L. REV. 1, 4 (2013) (“[W]hat children learn about, and how they experience, human rights and the rule of law is essential to their lives as children and later as adults. Individuals who do not learn about rights, at whatever stage of life, are less likely to be in a position to recognize and realize their own rights. Conversely, individuals who learn about and can realize their rights as children will be better positioned to secure their rights as adults and participate meaningfully in their society.”).

58. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 339 (2008) (“[T]he doctrine of the best interests of the child is genuinely and uniquely American, and . . . [has] greatly influenced child law globally.”).

59. See *infra* Part III for more on the human rights incorporation of the “best interests” standard.

60. See Jonathan Todres, *Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law*, 30 COLUM. HUM. RTS. L. REV. 159, 173 (1998) (“Primary concerns about this principle include questions of who decides what is in the best interests of the child, and what criteria are used to determine what is in the best interests of the child. Some argue that it is not a viable standard because it relies too heavily on culture and social context.”).

61. See Kohm, *supra* note 58, at 337 (“The best interests of the child doctrine is at once the most heralded, derided and relied upon standard in family law today. It is heralded because it espouses the best and highest standard; it is derided because it is necessarily subjective; and it is relied upon because there is nothing better.”).

The best interests standard has two functions, one as a statement of values and the other as a decision rule.⁶² As a value statement, the notion that a child's interests should be an important consideration in decisions about their lives is shared across the United States and Europe. It operates differently as a standard for determining the outcome of the case—including custody and removals. In the United States, the best interests of the child standard is used in a variety of contexts. In private law, the standard guides the court's judgment about parenting time and custody.⁶³ Often, the standard is a mechanism for deferring to parental decisions.⁶⁴ Even when parents are in conflict, such as in divorce cases, courts will often defer to parental choices regarding the child and only undertake their own best interests analysis if parents are unwilling or unable to do so.

In cases involving parental decisions relating to their child, as the U.S. Supreme Court has articulated, a fit parent is presumed to act in the best interest of the child.⁶⁵ When the state seeks to remove a child from their home, the threshold for intervention is higher: when there is imminent danger to the health or life of the child.⁶⁶ As the U.S. Supreme Court articulated in *Santosky v. Kramer*,⁶⁷ "the State cannot presume that a child and his parents are adversaries. After the State

62. The foundational account of the best interests standard as a decision rule comes from Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975). See also Katharine T. Bartlett & Elizabeth S. Scott, *Foreword: Child-Custody Decisionmaking*, 77 LAW & CONTEMP. PROBS. i, i (2014) ("Professor Mnookin analyzed the best-interests-of-the-child standard, which by the 1970s had emerged as the dominant custody decision rule. Although the best-interests standard seemed on its face to be an uncomplicated and straightforward way to put the interests of children first in custody decisionmaking, Professor Mnookin explained its distinctive character and deficiencies as a legal rule. His two core themes were the indeterminacy of the best-interests standard and the differences between private custody disputes and those in which the state seeks to take custody of a child from a parent.").

63. See, e.g., 27C C.J.S. *Divorce* § 1043 ("[A] divorce court is vested with broad discretion in determining what is in the child's best interests . . .").

64. States give deference to parents' private custody agreements, often preferring that parents come to their own arrangements before going before the court. For general discussion of the deference divorce courts give to parental decisions, see 24A Am. Jur. 2d *Divorce and Separation* § 803 ("Where the parties stipulate to a custody arrangement, it must be given a great deal of deference.").

65. *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (plurality opinion).

66. The exact standard varies across states but is similarly heightened. See 38 A.L.R.4th 756 (1985).

67. 455 U.S. 745 (1982).

has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.⁶⁸ When a parent has been deemed unfit, the best interests analysis returns in determining the best placement for the child.

By contrast, the human rights frame, adopted by many other countries, as well as supranational institutions, interprets the best interests standard using a children's rights approach.⁶⁹ This means that children have a substantive and procedural right to have their best interests treated as a primary consideration in decisions concerning them.⁷⁰ In Europe, for example, courts have tended to minimize parental rights in favor of a more child-centered analysis when it comes to questions of custody.⁷¹ Although there is still the default presumption that a child should stay with their parents, that presumption can be overridden by a "best interests" analysis.⁷² The child-centered model in Europe applies both to custody decisions between private actors, such as divorcing parents, as well as decisions by state actors in the child removal or immigration systems.⁷³

A recent survey of United States and Norwegian attitudes toward the role of the state in parenting, for example, concluded that:

[T]he Norwegian system allows for far more state intervention oriented to support positive liberties With a rich array of

68. *Id.* at 760.

69. *See* Dohrn, *supra* note 30, at 751 (examining the ECtHR's increased use of the CRC as a tool for interpreting European Convention).

70. In 2013, the U.N. Committee on the Rights of Children issued a General Comment, which explained that the best interests standard "gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere." U.N. Comm. on the Rights of the Child, General Comment No. 14, ¶ 1 (2013). Legal scholarship on this Comment finds that the Committee defines best interests as a substantive right, an interpretive legal principle, and a procedural rule. *See* Wouter Vandenhoe & Gamse Erdem Turkelli, *The Best Interests of the Child*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at 208.

71. *See* ANDREA BÜCHLER & HELEN KELLER, FAMILY FORMS AND PARENTHOOD: THEORY AND PRACTICE OF ARTICLE 8 OF THE ECHR IN EUROPE 536–37 (2016) (discussing the European approach to custody determinations).

72. *Id.* at 55–57, 535–36.

73. *See* FENTON-GLYNN, *supra* note 16, at 1 ("[T]he [ECtHR] has developed a substantial and ever-growing body of case law concerning children, covering issues ranging from juvenile justice and physical integrity to immigration, education, and religion. Moreover, in the sphere of private and family life the Court has developed a 'whole code of family law'").

supportive services offered universally and voluntarily to all families, and long-lasting, saturated services offered to targeted families, the Norwegian child protection model aspires to Berlin's notion of "positive liberty", where the individual is afforded opportunities to be *free to*: to be supported to become the ideal-type or at least a better parent.⁷⁴

Children's rights and children's interests describe different roles for the child as a legal actor. Although there are many competing definitions of both concepts, this Article will use the following understanding of rights and interests. To say that a child has rights means that they have claims and entitlements against the state, as well as third parties, that can be vindicated through legal action.⁷⁵ Children's interests, by contrast, include everything that could further the child's well-being.⁷⁶ A child's interests can be defined by the child themselves, but they are more often defined by adults. Children's rights are a means of advocating for a child's interest, but it is not the only method. Parental rights can also serve to further a child's interest, as can any number of state policies.

At the heart of the children's rights debate is the question of whether capacity is necessary to be a rights-holder. This deep philosophical question goes far beyond the scope of this intervention, but the capacity question raises some very practical problems for children's rights.⁷⁷ One response is to say that children lack the capacity to identify, articulate, and assert their interests and, therefore, cannot be

74. Jill D. Berrick, Marit Skivenes & Joseph N. Roscoe, *Parental Freedom in the Context of Risk to the Child: Citizens' Views of Child Protection and the State in the U.S. and Norway*, J. SOC. POL'Y 1, 5 (2022).

75. See Freeman, CHILDREN'S RIGHTS, *supra* note 53, at 11 ("Rights then offer fora for action. Without rights the excluded can make requests, they can beg or implore, they can be troublesome; they can rely on, what has been called, noblesse oblige, or on others being charitable, generous, kind, co-operative or even intelligently foresighted. But they cannot demand, for there is no entitlement.")

76. See Huntington & Scott, *Legal Childhood*, *supra* note 14, at 1377 (explaining that child well-being goes beyond individual rights and is grounded in "developmental research" and "social welfare.")

77. For a discussion of the philosophical approaches to the question of children's rights, see Michael Freeman, *Taking Children's Human Rights Seriously*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at 52-57 (discussing a range of contemporary philosophers who have addressed whether children can be rights-holders).

rights-holders. This is the traditional liberal view.⁷⁸ Children are subjects to which various actors (including the state) may have duties of care, but the child cannot be meaningfully understood as a rights-holder because they lack the fundamental characteristics of the liberal rights-holder: the autonomous individual with agency.⁷⁹

The paradigm of the liberal, rational rights-holder is clearly incompatible with family law scholarship's understanding of human beings as interdependent, vulnerable actors who are motivated by complex human psychology, not rationality. But that does not mean that family law scholars agree on how to conceive of children's rights.⁸⁰ Perhaps the closest argument to the traditional liberal rejection of the child as a rights-holder—in effect, if not normative basis—is that children's ability to make decisions and communicate about their own interests develops as they mature. Because children are developmentally limited in their capacity to assert their own interests, someone must do so for them (usually a parent).⁸¹ This is why children

78. See Mhairi Cowden, *Capacity, Claims and Children's Rights*, 11 CONTEMP. POL. THEORY 362, 365 (2012) ("The argument from incompetence generally can be described as thus: 'To hold a right one must have certain capacities, such as the capacity to feel pain, make choices or to think rationally. Children are in a state of developing those capacities and acquiring competency and therefore cannot hold the rights, unlike adults whose physical and cognitive competencies are fully developed.' The argument from incompetence can be seen throughout traditional liberal philosophy.").

79. See Martha Minow, *Preface*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at xi ("Legal and political traditions framed in terms of rights often reflect Western preoccupations with autonomous individuals and with protections against state power.").

80. See Soo Jee Lee, Note, *A Child's Voice vs. A Parent's Control: Resolving Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 699 (2017) (finding that some scholars believe "[t]he emphasis on children as autonomous beings . . . may compromise the pursuit of the best interests of a child, weaken the authority of adults better situated to care for a child's welfare, and therefore ultimately harm the child.").

81. See Nancy E. Dowd, *Children's Equality Rights: Every Child's Right to Develop to Their Full Capacity*, 41 CARDOZO L. REV. 1367, 1416 (2020):

Why do children have distinctive equality rights? First, they are unique because they are dependent on adults for their development. Their needs give them an affirmative claim on social resources to ensure their developmental success. Second, they are vulnerable because of their lack of development, vulnerability that changes over time and must be balanced with their evolving capacities. It is an essential positive characteristic of development that is the foundation for their being and for their evolution. Third, they are valued and

have legal guardians who have a duty to identify and assert the child's interests. It also is what justifies granting autonomy rights to children only when they are sufficiently mature to assert such rights.⁸²

An alternative approach is to reject that maturity or capacity are necessary elements of being a rights-holder at all.⁸³ This view contends that there are means of identifying a person's interests and asserting those interests in the form of rights, even when the person lacks capacity.⁸⁴ As Professor Martha Minow articulated:

[T]he language of rights motivates mobilization of political action, resources, legislation, and judicial enforcement, and the rhetoric of rights remains a central tool for any who seek change in the conditions of children around the world, including in the United States. Nations that have enacted the Convention on the Rights of the Children have overcome the political hurdle of accepting "rights talk," even if the distance between ideals and reality remains large for too many.⁸⁵

valuable because they are children. Their perspectives and understandings are unique; they are not simply becoming adults, or mini adults; they are themselves, in their own right. Their humanity is precious and valuable. Finally, they are our future; they join society and democracy, their neighborhoods and communities, as full social citizens when they reach adulthood. Their future role makes their development and their equality socially essential.

82. See Huntington & Scott, *Parental Rights*, *supra* note 34, at 2536 (advocating in favor of increased decision-making autonomy for adolescents and deference to parents where children are too young to make independent decisions).

83. See Dailey & Rosenbury, *New Law of the Child*, *supra* note 35, at 1454 ("The concept of maturity has emerged in recent years as a focal point of legal decision making about children. Children who are deemed mature have access to adult rights and responsibilities, while those who are deemed immature remain subject to more paternalistic regulations. Yet focusing exclusively on maturity risks masking the real interests at stake in any given situation.")

84. See Rosalind Dixon & Martha C. Nussbaum, *Children's Rights and A Capabilities Approach: The Question of Special Priority*, 97 CORNELL L. REV. 549, 559–60 (2012):

[A Capabilities Approach ("CA")] provides a clear account . . . for why children should be recognized as rights bearers The idea of agency has a central role to play in the CA: the CA sees people as striving agents, and in contrast to approaches that aim only at the satisfaction of preferences, it aims at supporting the growth of agency and practical reason. This emphasis on agency, under a CA, further means that children should be afforded the maximum scope for decisional, freedom consistent with their actual—or potential—capacity for rational and reasoned forms of choice, or judgment.

85. Minow, *Children's Rights Debates*, *supra* note 20, at 212.

Rather than embrace a specific view of children as rights-holders, this Article seeks to identify how the concept of “children’s rights” has been instrumentalized by courts and state actors. The aim is to focus on the practical question of how children are treated within existing legal systems. This does not preclude any of the above perspectives on the nature of children’s rights in theory, but it does shed light on which of these notions of children’s rights might be more—or less—effective in practice.

II. METHOD

As with any comparative project, some context is required regarding the sources of law and judicial decisions upon which this Article relies. The United States and Europe govern families at the local, national, and supranational levels with different degrees of autonomy and variation across jurisdictions.⁸⁶ The absence of a clear allocation of jurisdictional authority over the parent-child relationship, combined with the hodgepodge of substantive law that implicates this relationship—family law, immigration, criminal law, laws governing the allocation of public benefits, and so on—makes identifying relevant points of comparison even more challenging.⁸⁷

In the United States, family law was traditionally thought of as falling within the exclusive competence of the states.⁸⁸ Modern trends, however, have placed more authority over families in federal and constitutional law.⁸⁹ The U.S. Supreme Court and the federal appellate

86. See Dohrn, *supra* note 30, at 771 (suggesting that “enforceability of international human rights law depends on the establishment of a set of norms” and those norms must be structuralized to establish uniformity in international law and “domestication of children’s human rights into national law”).

87. There is a long history of resistance to comparative family law efforts, or at least a focus on difference. See Fernanda G. Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777, 787 (2010) (“Family law was considered exceptional by comparative lawyers in one of two ways: the family was either marginalized by comparative law projects committed to harmonization, or it was the central focus of comparative inquiries concentrating on legal pluralism in different societies.”).

88. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 629 (suggesting that the majority in *United States v. Morrison* used the argument that family law fell under state jurisdiction to mask its influence in the realms of commerce, women’s roles, and violence).

89. See *id.* at 621 (contending that “[d]ecades of federal constitutional family law create substantive rights anchored in the Fourteenth Amendment for parents and children, just as decades of federal legislation—addressing welfare, pension, tax,

courts tend to keep their parental and children's rights pronouncements broad. There is much room for variation in implementation. Although much of American family law remains a matter for the states, this Article focuses on the federal constitutional rules that allocate rights and cabin state authority in all U.S. jurisdictions because this is the level at which the parental rights/children's rights debate is often framed—this is where the rights-framing happens, even if it is not where it is mostly applied.

The European Union has progressed along somewhat parallel lines to the United States. Despite taking the position that substantive family law is within the competence of Member States,⁹⁰ the European Union has nevertheless significantly extended its reach into questions of family formation, support, and dissolution.⁹¹ As in the United States, both in regulating movement and commerce and in enforcing equality principles (distinct from substantive family law), the European Union directly or indirectly influences family law within its Member States.⁹²

bankruptcy, and immigration—have defined membership in and relationships within groupings denominated 'families' by the national government.”).

90. Aude Fiorini, *Which Legal Basis for Family Law? The Way Forward*, EUR. PARL., DIRECTORATE-GEN. INTERNAL POL'Y UNION, PE 462.498 at 5 (Nov. 2012), [https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT\(2012\)462498_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/note/join/2012/462498/IPOL-JURI_NT(2012)462498_EN.pdf) [<https://perma.cc/XA3W-EBBS>] (“Given the core EU principle of conferral of jurisdiction, and the lack of any provisions transferring competence to the EU in the sphere of domestic family law, there can be little doubt substantive family law falls within the exclusive competence of Member States.”).

91. The European Council adopted the Brussels II regulation designed to harmonize divorce, annulments, separation, and child support in 2000. According to one Irish scholar, this regulation

Marked a watershed in the evolution of EU law, and had very profound indirect consequences, in its curtailment of judicial discretion and in its impact on, and interaction with, the wider legal, social and political environment. In hindsight, it is also apparent that the Regulation heralded a new era of European Family Law, with Member States ceding competence in core areas of social policy.

Máire Ní Shúilleabháin, *Ten Years of European Family Law: Retrospective Reflections from a Common Law Perspective*, 59 INT'L & COMP. L. Q. 1021, 1022 (2010). In 2022, the Brussels IIter Regulations—which updated the original Brussels II rules—came into effect, clarifying and further harmonizing European family law procedures. See Luís de Lima Pinheiro, *A General Approach to the Recognition of Other Member States' Decisions Under the Brussels IIter Regulation*, CIDP RSCH. PAPER NO. 20/2022 (Sept. 2022).

92. Harmonization within the EU, particularly related to the free movement of EU citizens, often plays a role in EU regulations touching on family law. For discussion of the role EU institutions and legislation play in family law, see generally EUR. COMM'N,

Although the European Union is not itself a source of comparison for this Article, its presence as a background condition of the European family law system is a necessary element for understanding the ECtHR's role.

The ECtHR is a powerful regional human rights institution distinct from the European Union, both in jurisdiction and substantive competence.⁹³ The ECtHR expressly embraces the power to decide on family law questions, at least insofar as they implicate human rights.⁹⁴ The ECtHR relies on Article 8 of the European Convention on Human Rights,⁹⁵ which protects private and family life (as well as Article 12 regarding marriage and 14 on equality).⁹⁶

However, even with this express textual allocation of competence, the ECtHR substantially defers to states on core family questions through its margin of appreciation doctrine.⁹⁷ On issues where there is little European consensus and where there is a sensitive moral or

Family Law, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/civil-justice/family-law_en [<https://perma.cc/9MBZ-WB9Y>].

93. See ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 120–26 (2018) (discussing the institutional history and authority of the ECtHR).

94. A note on citations to ECtHR cases: Because the cases referred to in this Article are mostly recent judgments, many of them have not yet been officially translated—meaning that there is currently only an English version or a French version depending on the language preference of the chamber that issued the judgment. The court publishes chamber judgments in one official language—French or English—and will translate many, but not all, cases into the other official language at a later point. The ECtHR judgments are translated paragraph by paragraph, meaning that paragraph five in the English version will always correspond to paragraph five in the French version regardless of how many words or pages each language version contains. As such, it is essential to cite the paragraph number, rather than pagination.

95. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

96. *Id.* arts. 8, 12, & 14.

97. As a former judge of the ECtHR described:

The Court restricts itself to the extent or depth to which it will scrutinize the decisions taken on the national level Broadly speaking there are . . . two types of cases that fall under the structural concept. Firstly, cases where there is no consensus among the member states, and secondly, cases where deference is based on the idea that Contracting Parties are better placed to decide on sensitive issues. It is within this version that the Contracting Parties are given margin, for example, to favour the moralistic preferences of the majority and to justify denial or restriction of rights on that basis.

David Thor Björgvinsson, *Reflections on Legal Reasoning in the Case Law of the European Court of Human Rights*, 69 IUS GENTIUM 251, 259 (2018).

ethical issue, the Strasbourg Court often provides broad leeway for states to balance individual rights with state interests.⁹⁸ In the area of child custody, the ECtHR has repeatedly stated that it will review whether the broad principles of children's rights have been respected and whether the Member State's procedures are sufficient to protect children's interests.⁹⁹

The ECtHR's expansive body of case law, which covers the (now) forty-six¹⁰⁰ member states of the Council of Europe, provides a glimpse into the range of national approaches to the parent-child relationship. It also articulates rights that parents and children can plead in European domestic legal systems.¹⁰¹ As with most supranational human rights bodies, the ECtHR requires that applicants exhaust domestic

98. I have written about this deference doctrine elsewhere, see Clare Ryan, *Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights*, 56 COLUM. J. TRANSNAT'L L. 467, 469–74 (2018).

99. See *Factsheet – Parental Rights*, EUR. CT. HUM. RTS. PRESS UNIT (Nov. 2022), https://www.echr.coe.int/documents/d/echr/fs_parental_eng [<https://perma.cc/J4CK-D89Q>] (compiling summaries of ECtHR case law on parental rights and organizing them thematically).

100. Now that Russia is no longer a member. See Kanstantsin Dzehtsiarou & Laurence Helfer, *Russia and the European Human Rights System: Doing the Right Thing . . . But for the Right Legal Reason?*, EJIL: TALK! BLOG (Mar. 29, 2022), <https://www.ejiltalk.org/russia-and-the-european-human-rights-system-doing-the-right-thing-but-for-the-right-legal-reason> [<https://perma.cc/K4J9-7JN6>]. Russia was expelled from the Council of Europe in March of 2022, and consequently from the jurisdiction of the ECtHR. However, the court has concluded that applications referring to events that occurred prior to Russia's expulsion may still be considered. *Id.* In fact, the Grand Chamber of the ECtHR issued a landmark ruling in *Fedotova v. Russia* in January of 2023, in which it held that all Member States must provide legal recognition for same-sex relationships. See Laurence R. Helfer & Clare Ryan, *CONTESTING SEXUAL ORIENTATION RIGHTS BEFORE THE ECtHR*, in *INTERNATIONAL SEXUAL AND REPRODUCTIVE RIGHTS LAWFARE* (Malcolm Langford & Siri Gloppen eds., 2023) (manuscript at 33), <https://dx.doi.org/10.2139/ssrn.4321097> [<https://perma.cc/G95Q-PA88>].

101. The mechanisms for pleading European Convention rights differ from country to country and are not equally effective in all courts. As a functional matter, some jurisdictions are staffed with judges that have the training, resources, and inclination to robustly protect individual rights, while others are not. As a matter of interpretive theory, some courts treat ECtHR judgments as having *erga omnes* effect, while others consider themselves bound only by the text of the Convention and not the case law of the court. For more on this topic, see, e.g., STONE SWEET & RYAN, *supra* note 93, at 126.

remedies before submitting a claim to Strasbourg.¹⁰² Consequently, the court's judgments almost always include a section describing the domestic litigation and the reasoning of domestic courts.

Because ECtHR judgments contain both detailed accounts of domestic practices and human rights principles that are—at least in theory—universally applicable across the Council of Europe, this Article relies primarily on its case law to present a picture of the European system. This choice has its limitations: ECtHR judgments provide a selective retelling of the underlying domestic proceedings, which can present a skewed view of how domestic law operates in practice; the court's admissibility criteria and focus on individual rights claims against member states limit the scope of its jurisdiction; and the court has only a limited array of remedies at its disposal, since as a supranational institution, it cannot overturn domestic law.¹⁰³

It would also be valuable to compare children's rights approaches at the national, or even local, level to determine how these broad frameworks are used in disputes that never reach the highest courts. I hope that future work, both my own and others, can use this Article as a roadmap for more finetuned local comparisons. The purpose of this Article, however, is not to provide a direct comparison of how a particular area of law, such as custody or child protection, operates in each jurisdiction. Instead, by examining the potential and the pitfalls of how the ECtHR weighs children's rights and interests, I hope to offer insight into the current children's rights discourse in the United States.

To some extent, American and European family law scholars discussed in the previous Part are talking past each other by using the same terms but imbuing them with different culturally specific meanings. Those who study comparative rights models in the United States and Europe have long emphasized that the differences run deep. As James Whitman famously described in the context of fundamental differences between European and American conceptions of privacy:

102. Council of Europe, Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 155 E.T.S. (1994), art. 35, https://www.echr.coe.int/documents/library_collection_p11_ets155e_eng.pdf [<https://perma.cc/BWB3-68LN>].

103. See, e.g., STONE SWEET & RYAN, *supra* note 93, at 124–30 (discussing the interplay between domestic legal systems and the ECtHR's admissibility criteria, focus on individual rights, and standard of review for pending applications).

We do not have the same intuitions, as anybody who has lived in more than one country ought to know. What we typically have is something else: We have intuitions that are shaped by the prevailing legal and social values of the societies in which we live. In particular, we have, if I may use a clumsy phrase, *juridified* intuitions—intuitions that reflect our knowledge of, and commitment to, the basic legal values of our culture.¹⁰⁴

The core conception of individual rights, how courts balance rights claims against other interests, and how individuals view themselves as rights-holders in relationship to the state, is not the same across jurisdictions.¹⁰⁵

Crucially, race and racism play a decisive role in American family law, especially around family separation.¹⁰⁶ America's history of separating Black families during the era of slavery through to the modern child removal system is central to explaining both the formal legal structure and the effects of legal practices.¹⁰⁷ The same is true for the American government's role in separating indigenous families as a

104. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 *YALE L.J.* 1151, 1160 (2004).

105. There is a substantial literature on the differences in rights and rights adjudication in the United States and Europe. A full inquiry into these differences goes beyond the scope of this article. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 *HARV. L. REV.* 109, 121 (2005) (noting, while also critiquing, the view that “[o]ne important strand of [American] national constitutional identity is the belief that the United States should be a leader in protecting those individual rights with roots in the U.S. Constitution.”); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1227–28, 1230–31 (1999) (describing the uses of comparative law in the area of constitutional rights and its limitations).

106. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 10 (2002) (explaining that the foster care system in the United States operates like an apartheid institution since it functions “as a system designed to deal with the problems of minority families—primarily Black families—whereas the problems of white families are handled by separate and less disruptive mechanisms.”).

107. See *id.* at 6 (“If you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.”). Professor Roberts recently published a reflection on her 2002 book, in which she observed that “today’s carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained” and connected this historical trajectory of the carceral system to the family regulation system. Dorothy Roberts, *How I Became a Family Policing Abolitionist*, 11 *COLUM. J. RACE & L.* 455, 461 (2021).

means of cultural destruction and forced assimilation.¹⁰⁸ Europe's history of colonial and post-colonial racism, xenophobia, and anti-Roma violence, too, play a significant role in the construction of family rights and their implementation in practice.¹⁰⁹ But these histories are different, and their effects on modern family law are complex and far-reaching.¹¹⁰

The idea of the child and the child's place in the family and society also differs across countries (and across time). Because family rights are so deeply embedded in the larger legal and political cultures, to say the United States should adopt a European approach to children's rights would be absurd. Nor would it be reasonable to expect European states to adopt a more parental rights-focused approach. Rather, each system can serve to highlight strengths and weaknesses in the other.

III. BARRIERS TO CHILDREN'S RIGHTS: THE EUROPEAN AND AMERICAN EXPERIENCES

Before the ECtHR, the best interests of the child often supersedes competing interests, including parental rights.¹¹¹ In large part, this child-centered approach is thanks to Europe's adherence to human rights conventions—most importantly the European Convention on

108. See Victoria Haskins & Margaret D. Jacobs, *Stolen Generations and Vanishing Indians: The Removal of Indigenous Children as a Weapon of War in the United States and Australia, 1870–1940*, in CHILDREN AND WAR: A HISTORICAL ANTHOLOGY 227, 228 (James Marten ed., 2002) (noting that the idea to “assimilate Indians through removing Indian children originated in 1875” and that removal of Indian children as a full fledge “systematic state policy” began in the 1880s).

109. See, e.g., Noam Peleg, *Marginalisation by the Court: The Case of Roma Children and the European Court of Human Rights*, 18 HUM. RTS. L. REV. 111, 113 (2018) [hereinafter Peleg, *Marginalisation by the Court*] (describing Roma as the “largest and most marginalised ethnic minority group in Central and Eastern Europe”). See generally E. Tendayi Achiume, *Governing Xenophobia*, 51 VAND. J. TRANSNAT'L L. 333, 379–82 (2018) (describing “xenophobic anxiety” in Europe in the context of migrants' rights).

110. See, e.g., Barbara Bennett Woodhouse, *The Child's Right to Family*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at 237 (noting that “[s]eparating children from their families has been a hallmark of oppression throughout human history,” and that changing conceptions of children's right to family continue to raise complex issues in both domestic family law and international human rights law).

111. For more on the ECtHR's core case law on children's rights, see a compilation prepared by the court's Press Unit, which is regularly updated as new judgments are rendered. *Factsheet — Children's Rights*, EUR. CT. HUM. RTS. PRESS UNIT (updated Apr. 2023), https://www.echr.coe.int/documents/d/echr/FS_Childrens_ENG [<https://perma.cc/WK3M-UUH4>].

Human Rights and the CRC.¹¹² The European Convention protects the right to “private and family life”:

European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹¹³

The court has interpreted this provision to incorporate the “best interests of the child” standard originating in the CRC.¹¹⁴ Article 9 of the CRC states 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.”¹¹⁵

The last two decades have seen a shift in how the ECtHR frames cases of family rights, especially in the context of parent-child separation. The case that is often credited with formalizing the shift toward a children’s rights model is the 2010 Grand Chamber judgment *Neulinger & Shuruk v. Switzerland*,¹¹⁶ in which the court stated:

In this area the decisive issue is whether a fair balance between the competing interests at stake—those of the child, of the two parents, and of public order—has been struck, within the margin of appreciation afforded to States in such matters The child’s best interests may, depending on their nature and seriousness, override

112. See Ana Beduschi, *Vulnerability on Trial: Protection of Migrant Children’s Rights in the Jurisprudence of International Human Rights Courts*, 36 B.U. INT’LL.J. 55, 70–73 (2018) (finding that the ECtHR has followed the principle of best interests of the child outlined in the CRC in its decisions concerning the rights of migrant children).

113. European Convention on Human Rights, *supra* note 96, art. 8.

114. See, e.g., *Sommerfeld v. Germany* [GC], App. No. 31871/96, Eur. Ct. H.R. ¶¶ 37–39, 62 (2003), <https://hudoc.echr.coe.int/eng?i=001-61195> [<https://perma.cc/25JG-VHUV>] (“[C]onsideration of what lies in the best interest of the child is of crucial importance . . .”).

115. Convention on the Rights of the Child art. 9, Nov. 20, 1989, 1577 U.N.T.S. 3.

116. [GC], App. No. 41615/07, Eur. Ct. H.R. (2010), <https://hudoc.echr.coe.int/FRE?i=001-99817> [<https://perma.cc/4JCA-RW5X>].

those of the parents . . . [T]here is currently a broad consensus—including in international law—in support of the idea that in all decisions concerning children, their best interests must be *paramount* . . .¹¹⁷

Since *Neulinger*, the court has taken an expressly child's rights approach to family rights cases.¹¹⁸ The shift in the court's language toward a more child-centered model allows for a useful comparison. Has the court vindicated children's rights more robustly since its assertion of their primacy? This Section illustrates why the answer to this question is a qualified "no."

A. *The ECtHR Case Law: A Tale of Children's Rights in Action*

The following is an account of three recent Grand Chamber judgments on family separation and custody cases, along with a discussion of key chamber judgments addressing similar issues in the years surrounding these pronouncements by the highest level of the Strasbourg Court.¹¹⁹ Although it does not cover every such case decided by the court, whose caseload is in the thousands every year, many of which have family rights implications,¹²⁰ this Part seeks to illustrate challenges that the court has faced in implementing children's rights. The cases described below serve to highlight important limitations on the children's rights model.

The following Part divides the Strasbourg Court's treatment of children's rights into three categories that often bleed together in individual cases but emphasize different moments of state intervention into families. The first category—removing children—concerns cases in which the state actively intervenes to remove children from their parents. The second category—raising children—involves cases, often arising from private custody disputes, over a child's religious or

117. *Id.* ¶¶ 134–35 (emphasis added).

118. See FENTON-GLYNN, *supra* note 16, at 305–07 (arguing that after *Neulinger*, the ECtHR pivoted towards a child's-rights approach where a child's interests receive paramount consideration and may outweigh the interests of the child's parents).

119. The ECtHR issues judgments sitting as a Committee of three judges, a Chamber of seven judges, or a Grand Chamber of seventeen judges. The Grand Chamber's judgments are binding on all the chambers. For more on the structure and functioning of the ECtHR, see EUR. CT. HUM. RTS., *Information Documents*, [https://echr.coe.int/Pages/home.aspx?p=court/doc_info&c=\[https://perma.cc/E5DF-CU8N\]](https://echr.coe.int/Pages/home.aspx?p=court/doc_info&c=[https://perma.cc/E5DF-CU8N]).

120. For recent children's rights cases, see *Factsheet – Children's Rights*, *supra* note 111.

educational upbringing. The third category—recognizing children—involves cases in which the state must decide if a child belongs to a certain family or to its polity. In these cases, the state often withholds legal recognition to deter unwanted behavior by the child’s parents.

1. *Removing children*

The 2019 Grand Chamber judgment, *Strand Lobben v. Norway*,¹²¹ brought the potential for conflict between parental rights and children’s rights to the fore.¹²² A young Norwegian mother with developmental disabilities was living in a state-run facility for mothers and babies.¹²³ When the baby’s health declined, the state removed the child from his mother.¹²⁴ The child was placed in foster care, and visitation with the mother was steadily reduced to only four two-hour visits per year by the time the child was almost two-years-old.¹²⁵ After years of litigation and demonstrably changed circumstances in the mother’s life (she married, had another child, and was living independently), the state continued to oppose reunification.¹²⁶ Ultimately, the Norwegian courts approved the child’s adoption by his foster parents.¹²⁷

The judgment of the Grand Chamber was highly fractured. The first issue was whether the mother had standing to bring a claim on behalf of her son, as well as herself.¹²⁸ Norway argued that, because the child had been adopted, only his adoptive parents had legal standing to raise a human rights claim on his behalf.¹²⁹ The Grand Chamber, however, rejected this view, stating that:

[T]he question of a possible conflict of interest between the first and second applicants [mother and son] overlaps and is closely intertwined with those which it is called upon to examine when dealing with the complaint. . . . [The court] discerns no such conflict of interest in the present case as would require it to dismiss the first applicant’s application on behalf of the second applicant.¹³⁰

121. [GC], App. No. 37283/13, (Sept. 10, 2019), <https://hudoc.echr.coe.int/eng?i=001-195909> [<https://perma.cc/E8Z3-EDLM>].

122. *Id.* ¶ 158.

123. *Id.* ¶¶ 12–17, 63.

124. *Id.* ¶¶ 20–22.

125. *Id.* ¶¶ 17, 22, 41, 44, 65.

126. *Id.* ¶¶ 81–82, 86, 90, 94–97.

127. *Id.* ¶¶ 90, 95, 98, 112–14, 118–21.

128. *Id.* ¶¶ 153–55.

129. *Id.* ¶ 154.

130. *Id.* ¶ 159.

This conclusion is rather puzzling, given that the crux of the domestic litigation was whether the mother's claim to custody of her child would harm the child's best interest.¹³¹ Nor did the court address the fact that the child's interests are represented only to the extent that they coincide with the mother's rights.¹³² It may be that the two are aligned, but the proceedings did not offer a way for the child's voice to be heard.

The majority then determined that there had been a violation of the right to private and family life under Article 8 of the European Convention.¹³³ The court held that: "the [procedure in domestic court] was [not] accompanied by safeguards that were commensurate with the gravity of the interference and the seriousness of the interests at stake."¹³⁴ In its narrow conclusion, the majority focused on the mother's claims that the Norwegian courts had not sufficiently considered her changed personal circumstances when they decided to terminate her parental rights.¹³⁵

In 2021, the Grand Chamber issued another judgment holding that Norway's child removal system violated human rights. In *Abdi Ibrahim v. Norway*,¹³⁶ a young Somali refugee living in Norway had her son removed when he was an infant (and the mother was, herself, still a minor).¹³⁷ The Norwegian child protection authorities removed the child from his mother on the grounds of "gross neglect."¹³⁸ The mother sought to have her child placed with a family member, but the authorities determined that the housing situation was not suitable and that the child needed specialized care due to his "abnormal psychological development."¹³⁹ They also ordered visitation between mother and child in the form of "four short contact sessions a year."¹⁴⁰

Finally, the mother requested that her child be placed in a Somali or Muslim home where he would not be required to attend Christian

131. See, e.g., *id.* ¶¶ 81, 90–95.

132. See *id.* ¶¶ 153–59 (omitting any mention of potential discrepancies between mother and child's interests in determining that the mother had standing to bring a claim on her child's behalf).

133. *Id.* ¶¶ 214–26.

134. *Id.* ¶ 225.

135. *Id.* ¶ 220.

136. [GC], App. No. 15379/16, (Dec. 10, 2021), <https://hudoc.echr.coe.int/eng?i=001-214433> [<https://perma.cc/X9RP-QFFR>].

137. *Id.* ¶¶ 13–20.

138. *Id.* ¶¶ 20–21. Exactly what "gross neglect" means is not defined.

139. *Id.* ¶¶ 17–18, 21–24.

140. *Id.* ¶ 22.

church or eat pork, and where he could maintain a connection to this religious and cultural heritage.¹⁴¹ Instead, he was placed with an evangelical Christian family whose diet was incompatible with the mother's wishes for her child's religious upbringing.¹⁴² After several years of contestation, the Norwegian authorities terminated the mother's parental authority so that the Christian and ethnically Norwegian family could adopt the boy.¹⁴³

Before the Strasbourg Court, the mother argued that the Norwegian authorities' actions had violated her rights. The Chamber's judgment found that "the decision-making process leading to the impugned decision to withdraw the applicant's parental responsibilities for [the child] and to authorise his adoption, was conducted so as to ensure that all views and interests of the applicant were duly taken into account."¹⁴⁴

The Grand Chamber agreed, holding that:

the Court is fully conscious of the primordial interest of the child in the decision-making process. However, the process leading to the withdrawal of parental responsibility and consent to adoption shows that the domestic authorities did not attempt to perform a genuine balancing exercise between the interests of the child and those of his biological family, but focused on the child's interests instead of trying to combine both sets of interests¹⁴⁵

Notice that, even when finding a human rights violation, the court deferred to the Norwegian government's argument that its actions were done in the child's best interests. The court framed the dispute as an imbalance between parental rights and children's interests, rather than between family integrity and state intervention.¹⁴⁶

In both cases, very young children were removed from mothers who were, themselves, in vulnerable situations.¹⁴⁷ In both, the state made strong assertions that its actions were justified, even necessary, to

141. *Id.* ¶¶ 27–28, 30.

142. *Id.*

143. *Id.* ¶ 35. The foster parents further stated that they intended to baptize the child and change his name; they also stated that they would not allow any further contact between the child and his biological mother. *Id.*

144. *Abdi Ibrahim v. Norway*, App. No. 15379/16, ¶ 64 (Dec. 17, 2019), <https://hudoc.echr.coe.int/eng?i=001-199382> [<https://perma.cc/RFG5-FNAN>].

145. *Abdi Ibrahim* [GC], App. No. 15379/16, ¶ 151.

146. *Id.* ¶¶ 151, 161–62.

147. *Id.* ¶¶ 32, 35; *Strand Lobben v. Norway* [GC], App. No. 37283/13, (Sept. 10, 2019), <https://hudoc.echr.coe.int/eng?i=001-195909> [<https://perma.cc/E8Z3-EDLM>] ¶¶ 12–17, 63.

protect the primordial interest of the child.¹⁴⁸ And in both cases, the ECtHR found that the Norwegian state had failed to honor its human rights obligations—not by removing the child, or even because of its assertions about the child's interests—but rather because of procedural defects in the decision-making process.¹⁴⁹ In the next Part, this Article will address how these cases illustrate challenges with applying a children's rights model to state intervention into family life.

2. *Raising children*

The case of *Vojnity v. Hungary*,¹⁵⁰ decided by a Chamber judgment in 2013, illustrates how the state's assessment of the child's "best interests" is also central to private custody disputes between divorced parents.¹⁵¹ The mother, who had primary custody, objected to the father's visitation rights because of his strict religious adherence.¹⁵² Despite initially supporting visitation between father and son, the state sided with the mother and denied visitation rights.¹⁵³ A psychologist appointed by the local court determined that "the [father] held unrealistic educational ideas hallmarked by religious fanaticism which rendered him unfit to provide the son with a normal upbringing; indeed, he forced his beliefs on his son to an extent that it resulted in the latter's alienation from him."¹⁵⁴ In other words, the father's behavior made a relationship with his son inconsistent with the boy's best interests.

Although the Hungarian court's conclusion appeared to be consistent with the "best interests" standard, the ECtHR found a violation of the *father's* right to private and family life because "when deciding on the applicant's suitability to contribute to his son's development, the domestic authorities added to their consideration the factor — for that matter, evidently the decisive one — of the

148. *Abdi Ibrahim* [GC], App. No. 15379/16, ¶¶ 150–51; *Strand Lobben* [GC], App. No. 37283/13 ¶¶ 41–42.

149. *Abdi Ibrahim* [GC], App. No. 15379/16, ¶¶ 5, 65; *Strand Lobben* [GC], App. No. 37283/13 ¶ 225.

150. App. No. 29617/07, Eur. Ct. H.R. (2013), <https://hudoc.echr.coe.int/fre?i=001-116409> [<https://perma.cc/92DD-H9UN>].

151. *Id.* ¶¶ 24–26.

152. *Id.* ¶ 7.

153. *Id.* ¶¶ 6–7, 13.

154. *Id.* ¶ 9.

applicant's religious conviction . . . [A] distinction based essentially on a difference in religion alone is not acceptable"¹⁵⁵

This case underscores one of the central challenges that the court faces when implementing a children's rights frame. Here, the father's rights are central to the court's analysis.¹⁵⁶ He was the applicant who brought the case before the court and framed his claims as a religious discrimination claim, in addition to an infringement upon his right to family life.¹⁵⁷ Discrimination on the basis of religious conviction is something that the court is familiar with addressing, and it is simpler to frame the case in those terms than to see it as a potential conflict between the parent's right and the child's right.¹⁵⁸ The court signaled its commitment to the best interests of the child without meaningfully engaging with the child's interests by criticizing the domestic authorities for their failure to make a more nuanced determination about the father's fitness.¹⁵⁹ It may very well be that the child's rights and the father's rights are aligned in this case, but the court sidesteps this issue by focusing on the parent.

On the other hand, in some cases, the court upheld domestic decisions to override a parent's decisions about religious or educational upbringing in the name of the child's best interests. The case of *Wunderlich v. Germany*¹⁶⁰ offers a stark example of the state's "best interests" analysis superseding a family's decisions about their children's upbringing.¹⁶¹ The Wunderlich family had four children whom they decided to instruct in the home, violating Germany's prohibition on homeschooling.¹⁶² After repeatedly fining the parents for failure to comply with the state's compulsory attendance law, the educational authorities:

155. *Id.* ¶ 31.

156. *Id.* ¶¶ 6–7, 12–14.

157. *Id.* ¶¶ 3, 7.

158. For a recent analysis of the court's approach to parental religion and the "best interests" standard, see Simona Florescu, *Walking on a Tightrope: Some Reflections on the ECtHR's Role in Assessing the Best Interests of the Child in Parental Disputes over the Child's Religious Upbringing*, STRASBOURG OBSERVERS (Sept. 23, 2022), <https://strasbourgobservers.com/2022/09/23/walking-on-a-tightrope-some-reflections-on-the-ecthrs-role-in-assessing-the-best-interests-of-the-child-in-parental-disputes-over-the-childs-religious-upbringing> [<https://perma.cc/S4ZC-VFUC>].

159. *Id.*

160. App. No. 18925/15, (Jan. 10, 2019), <https://hudoc.echr.coe.int/?i=001-188994> [<https://perma.cc/XA4D-RZZP>].

161. *Id.* ¶ 12.

162. *Id.* ¶¶ 7–8.

concluded that the children were growing up in a “parallel world” without any contact with their peers and that they received no attention of any kind which would enable them to have a part in communal life in Germany [The educational authorities also argued that] the children’s best interests were endangered owing to their being systematically deprived of the opportunity to participate in “normal” life.¹⁶³

In a proceeding to remove parental authority, the court determined that “[o]wing to the persistent refusal of the applicants to send their children to school, only withdrawing parts of parental authority could ensure the children’s continual attendance at school and would prevent them suffering harm on account of them being educated at home.”¹⁶⁴

The parents’ attempts to appeal this determination were unsuccessful. Consequently, police officers arrived at the family home and physically removed the children, who actively resisted being taken from their parents.¹⁶⁵ The children were then given state-administered exams to test their educational attainment and were not returned to their parents until a month later, when the parents finally assented to send their children to school.¹⁶⁶

In the proceedings before the ECtHR, a unanimous chamber judgment first concluded that Germany’s compulsory attendance laws:

are aimed at protecting the physical, mental or psychological best interests of a child. There is nothing to suggest that it was applied for any other purpose in the present case. Consequently, the Court is satisfied that the authorities acted in pursuit of the legitimate aims of protecting “health or morals” and “rights and freedoms of others.”¹⁶⁷

Therefore, the court held that: “there were ‘relevant and sufficient’ reasons for the withdrawal of some parts of the parents’ authority and the temporary removal of the children from their family home. The domestic authorities struck a proportionate balance between the best interests of the children and those of the [parents].”¹⁶⁸

These cases involve religious minorities whose decisions about how to raise their children conflicted with the mainstream views of the

163. *Id.* ¶ 10.

164. *Id.* ¶ 12.

165. *Id.* ¶ 19.

166. *Id.* ¶¶ 19–21.

167. *Id.* ¶ 45.

168. *Id.* ¶ 57.

societies in which they lived. But the difference in outcomes demonstrates how those normative disagreements about child-rearing can lead to quite different results depending on how the claim is framed. The next Part will address how a children's rights model might further permit the state to further ostracize or punish minority or disfavored groups, while justifying its actions as in the "best interests of the child."

3. *Recognizing children*

A third form of state power over the parent-child relationship arises when families seek legal recognition from the state. In these cases, the state sometimes withholds its power to recognize families in order to deter a wide range of behaviors—such as commercial surrogacy or clandestine entry into the territory. One of the clearest examples of the conflict between children's rights and the state's interest in deterrence arose in the 2017 Grand Chamber judgment *Paradiso v. Italy*.¹⁶⁹ In that case, an Italian couple went to Russia to engage a surrogate who gave birth to their child.¹⁷⁰ Although the couple claimed that they believed the husband's sperm was used in the surrogacy procedure, Italian authorities demanded a DNA test.¹⁷¹ When the results showed no genetic connection to the couple, the child (who had lived with them for the first eight months of his life) was immediately removed.¹⁷² He remained in a children's home for more than a year before being adopted by another couple and never saw his original intended parents again, and they were unable to receive any news about him.¹⁷³ The reason the Italian government gave for this swift and definitive response was that surrogacy is illegal in Italy and the intended parents had no legal right to the child.¹⁷⁴

In the chamber judgment, the court determined that the measures violated the child's right to private and family life because the removal was based on a categorical rule and did not include an individualized assessment of his best interests.¹⁷⁵ Importantly, however, the Chamber

169. [GC], App. No. 25358/12, (Jan. 24, 2017), <https://hudoc.echr.coe.int/fre?i=001-170359> [<https://perma.cc/77XF-8EMN>].

170. *Id.* ¶¶ 11, 14.

171. *Id.* ¶¶ 27–28.

172. *Id.* ¶¶ 30, 36.

173. *Id.* ¶¶ 49–50.

174. *Id.* ¶¶ 21–53.

175. *See* *Paradiso v. Italy*, App. No. 25358/12, Eur. Ct. H.R. ¶¶ 84, 86–87 (2015) <https://hudoc.echr.coe.int/eng?i=001-151056> [<https://perma.cc/H5FQ-Y2AG>].

also ruled that the intended parents did not have standing to raise the child's rights.¹⁷⁶ Indeed, no party to the case could raise the child's rights; instead, consideration of the child's best interests was left solely to the court to identify.¹⁷⁷

The Grand Chamber, accepting the Chamber's conclusion that no party would represent the child's rights, found that there was no violation of Article 8.¹⁷⁸ The court narrowly defined the question before it as whether the applicants had a right to develop their private life with the child.¹⁷⁹ Unsurprisingly, given this framing, the court concluded that the state's interest in deterring illegal surrogacy contracts sufficiently outweighed the applicants' right to private life.¹⁸⁰ This conclusion, however, entirely avoids the question of whether the child's rights were violated when he was removed from the only family he had ever known and placed into foster care at only eight months old, even though the Italian authorities determined that he was safe and well cared for by his intended parents.

Other surrogacy cases have found that the child's right to identity was violated.¹⁸¹ If there is a *genetic* connection between the child and the parent, the court has consistently held that the child has a "private" right to identity which requires the state to recognize the parent-child relationship.¹⁸² This might seem like a significant step, especially given that the court has also consistently found that the intended parents have no right to be recognized as a parent if the state chooses to criminalize or otherwise prohibit gestational surrogacy.¹⁸³ However,

176. *Id.* ¶¶ 48–50.

177. *See* *Paradiso v. Italy* [GC], App. No. 25358/12, ¶¶ 86–87 (Jan. 24, 2017), <https://hudoc.echr.coe.int/fre?i=001-170359> [<https://perma.cc/5M2M-TS4V>].

178. *Id.* ¶¶ 86, 216.

179. *Id.* ¶ 198.

180. *Id.* ¶¶ 203–04.

181. This right was first articulated in *Mennesson v. France*, App. No. 65192/11, Eur. Ct. H.R. ¶¶ 96, 101–02 (2014) and *Labassee v. France*, App. No. 65941/11, Eur. Ct. H.R. (2014).

182. *See Factsheet – Gestational Surrogacy*, EUR. CT. H.R. PRESS UNIT (Dec. 2022), https://echr.coe.int/Documents/FS_Surrogacy_ENG.pdf [<https://perma.cc/VH8J-5SVU>] (collecting case law on children born via surrogacy).

183. *See, e.g.,* *Paradiso v. Italy*, App. No. 25358/12, Eur. Ct. H.R. ¶¶ 49–50 (2015) <https://hudoc.echr.coe.int/eng?i=001-151056> [<https://perma.cc/XZ4V-PCBV>] (finding that a couple did not have standing to represent the minor's interest in court when the child was born using a surrogate because no biological ties existed and Italy did not recognize the parent-child relationship).

grounding the rights analysis in the child's right to identity alone has some serious drawbacks.

First, it has allowed the court to exclude the claims of many de facto and intended parents who lack a genetic link to their child.¹⁸⁴ It has also meant that because the ECtHR judgments focus on the child, the court has avoided questions of equality given that these claims often arise in the context of same-sex couples.¹⁸⁵ It also allows the court to find "no violation" where the child's experience (according to the court) is not meaningfully affected by the lack of legal recognition, even if the parents struggled to maintain legal access to their child.¹⁸⁶

The ECtHR's jurisprudence also presents a difficult to parse set of judgments about how much of a burden the state can place upon children to deter parental behavior in the context of immigration. Consider, for instance, the 2011 First Section judgment *Osman v. Denmark*.¹⁸⁷ In that case, a Somali national immigrated with her family to Denmark at age seven.¹⁸⁸ As a teenager, she struggled in school and had some "behaviour" problems, so her father sent her to a refugee camp in Kenya to care for her elderly grandmother.¹⁸⁹ After two years, and while still a minor, she applied to return to live with her family in Denmark, and her application was denied because her residence permit had lapsed.¹⁹⁰ Denmark had a law:

[L]imiting the right to family re-unification to children under 15 years instead of under 18 years in order to *discourage the practice of some parents* of sending their children on "re-upbringing trips" for extended periods of time to be "re-educated" in a manner their

184. See *Fjölfnisdóttir v. Iceland*, App. No. 71552/17, ¶ 59 (May 18, 2021), <https://hudoc.echr.coe.int/fre?i=001-209992> [<https://perma.cc/8ZLX-MBUA>] (explaining that although de facto parentage might be recognized for non-genetic parents, it requires genuine personal ties, a lengthy cohabitation, and that the state not deprive the de facto parent of access to the child in order to form such bonds).

185. *Id.* ¶ 79 (rejecting the equality claim as "manifestly ill-founded").

186. *Id.* ¶ 75 ("[In] the absence of an indication of actual, practical hindrances in the enjoyment of family life, . . . the Court concludes that the non-recognition of a formal parental link, . . . struck a fair balance between the applicants' right to respect for their family life and the general interests which the State sought to protect by the ban on surrogacy.").

187. App. No. 38058/09, Eur. Ct. H.R. ¶¶ 11–19 (2011) <https://hudoc.echr.coe.int/fre?i=001-105129> [<https://perma.cc/344B-KXK6>]

(demonstrating how reunification efforts of children to rejoin their families can be hindered by the state).

188. *Id.* ¶ 9.

189. *Id.* ¶¶ 9–10.

190. *Id.* ¶¶ 12, 14.

parents consider more consistent with their ethnic origins. It was preferable in the legislator's view for foreign minors living in Denmark to arrive as early as possible and spend as many of their formative years as possible in Denmark.¹⁹¹

In reviewing the Danish law, the ECtHR highlighted the law's deterrence rationale and how it conflicted with the child's interests.¹⁹² The legislation's goal was to "discourag[e] parents from sending their children to their countries of origin" for their education.¹⁹³ However, "the children's right to respect for private and family life cannot be ignored."¹⁹⁴

The court concluded that:

[T]he exercise of parental rights constitutes a fundamental element of family life, and . . . the care and upbringing of children normally and necessarily require that the parents decide where the child must reside . . . [and other restrictions] on the child's liberty Nevertheless, in respecting parental rights, the authorities cannot ignore the child's interest including its own right to respect for private and family life.¹⁹⁵

This conclusion positions the parent's right to the upbringing of their child against the child's right. However, nowhere in this analysis does the court address the fact that the child and her father were not in conflict in bringing their claim before the court. Rather, both parent and child were aligned in seeking recognition from the state, recognition that the state denied because of its interest in deterring the kind of upbringing that the father sought for his child.

Lending further credence to the idea that the ECtHR permits the consequences of deterrence measures to fall on children is the case of *Berisha v. Switzerland*.¹⁹⁶ In 2013, a divided Chamber decided that there was no violation of the children's right to private and family life when they were ordered deported from Switzerland to Kosovo because their parents had concealed the children's presence from Swiss authorities.¹⁹⁷ The case concerned a father, mother, and three

191. *Id.* ¶ 19 (emphasis added).

192. *Id.* ¶ 69.

193. *Id.*

194. *Id.*

195. *Id.* ¶ 73.

196. *Berisha v. Switzerland*, App. No. 948/12, Eur. Ct. H.R. ¶¶ 12, 14, 18, 20 (2013) <https://hudoc.echr.coe.int/fre?i=001-122978> [<https://perma.cc/3CC7-UDBY>] (ruling on an immigration decision to prohibit family reunification when the legal requirements had not been met).

197. *Id.* ¶ 14.

children.¹⁹⁸ The father had moved to Switzerland first to claim asylum, but when his claim was rejected, he married and then divorced a Swiss national.¹⁹⁹ He then moved back to Kosovo and married the mother, who then returned with him to Switzerland and obtained a residency permit.²⁰⁰ The children were born before or during this period, but all remained in Kosovo with their grandmother.²⁰¹

Once the parents were settled in Switzerland, they applied for reunification with their children,²⁰² which the Swiss authorities denied because neither parent had made mention of the children in their applications for residency.²⁰³ The parents then brought the children clandestinely from Kosovo to Switzerland, at which point their parents again sought to regularize their children's legal status.²⁰⁴ The Swiss court held that, "th[e] dissimulation alone justified the refusal of the children's residence permits, because it breached public order; that the applicants had illegally brought the children to Switzerland and thereby presented the authorities with a *fait accompli*" did not change the fact that the parents had acted illegally.²⁰⁵

The ECtHR sided with the Swiss government in holding that:

[T]aking into account the applicants' conduct in the domestic proceedings, which was not irreproachable, it cannot be found that the respondent State has failed to strike a fair balance between the applicants' interest in family reunification on the one hand and its own interest in controlling immigration on the other. Although it may well be that the applicants would prefer to maintain and intensify their family links with the three children in Switzerland, Article 8 does not guarantee a right to choose the most suitable place to develop family life²⁰⁶

The cases discussed in this Part illustrate some of the challenges that the Strasbourg Court has faced as it implements a children's rights

198. *Id.* ¶ 7.

199. *Id.* ¶¶ 8–9. It was never expressly stated in the case, but it appeared that the marriage was for the purpose of gaining legal residency in Switzerland. At a hearing, the ex-wife testified that he "‘had abused her naivety and her good will’ and ‘had lied to her by hiding from her the fact that he had children, especially one born during their marriage’." *Id.* ¶ 11.

200. *Id.* ¶ 10.

201. *Id.* ¶ 19.

202. *Id.* ¶ 11.

203. *Id.* ¶ 14.

204. *Id.* ¶¶ 15, 17.

205. *Id.* ¶ 24.

206. *Id.* ¶ 61.

framework for custody and family separation cases. Each case presents unique circumstances, and the ECtHR balances each situation differently depending on particular facts. Nevertheless, these cases reveal patterns in the court's reasoning that show how recurring themes present obstacles to full realization of the child's well-being. The next Part examines these obstacles and why they are likely to arise in children's rights cases.

B. Why Aren't Children's Rights Enough?

The previous Part highlights three points of intervention into the family in which children's rights and children's interests are invoked. In child welfare removal cases, the state justifies its power to separate the parent and child based on its authority to act in the child's best interests.²⁰⁷ In the disputes over child raising, the state justified its power to allocate or override parental authority on the child's best interests.²⁰⁸ In the recognition cases, by contrast, the state defends its actions on the ground that the child's best interests are insufficient to overcome a greater state interest.²⁰⁹ In all three circumstances, the ECtHR uses its children's rights framework to balance the state's justification against the individual rights claim.²¹⁰ These cases reveal the challenges to using a children's rights approach to decide disputes around removal, child rearing, and recognition. The following Part will address the nature of these distinctive children's right challenges.

1. Challenges with the children's rights frame

The cases discussed above reveal three main reasons why a children's rights frame is difficult to implement in the context of individual rights adjudications. These challenges are: first, how to balance parental rights and children's rights when they appear to conflict; second, how to include the child's voice and participation when they are not a party to the case; and third, how to address the state's deterrence rationale for infringing on children's rights.

207. See Note, *In the Best Interests of the Child Asylum-Seeker: A Threat to Family Unity*, 134 HARV. L. REV. 1456, 1456 (2021) (discussing "the shortcomings that may accompany the [best interests] principle's many benefits to asylum").

208. See, e.g., *supra* Section III.A.2.

209. See, e.g., *supra* Section III.A.3.

210. See, e.g., *supra* notes 207–09 and accompanying text.

First, parents still have human rights, even in a child-focused system.²¹¹ Without a clear decision rule, courts do not have an effective mechanism for balancing a child's and parent's rights. Sometimes, they do so by framing the issue as being about two conflicting rights of the child: the right to family integrity and the right to protection.²¹² But that is unsatisfying because it ignores the fact that the parent's right to family integrity and the child's are not necessarily coextensive. It also fails to interrogate *who* determines the child's need for protection when parental rights and children's rights appear to conflict. As a result, the state's determination of the child's interest often receives significant deference.²¹³ The question of who determines what is in the child's best interest, therefore, becomes dispositive because that person (or institution) will decide whether to elevate the right to protection or the right to remain with the family. This can lead to significant uncertainty for families about when their children can permissibly be removed, or parental rights terminated entirely.

Consider, for instance, how the ECtHR dealt with the Norwegian child removal cases. In both, the court attempted to protect parental rights by focusing on the narrow procedural question.²¹⁴ In doing so, the court avoided addressing the harder problem of how parental rights should be weighed when the child's right is meant to be paramount. Several judges wrote separately to highlight this very problem. In *Strand Lobben v. Norway*,²¹⁵ the dissenting judges explained that "[The majority's focus on] reuniting the natural parent(s) and the child [as] the 'inherent' and 'ultimate' aim . . . [gave] the impression that the 'ultimate aim' of reuniting the biological family might override the best interests of the child."²¹⁶ The problem with that

211. See *Mother Wins Legal Fight to get her Children Back*, COUNCIL EUR. PORTAL: IMPACT EUR. CONVENTION HUM. RTS., <https://www.coe.int/en/web/impact-convention-human-rights/-/mother-wins-legal-fight-to-get-her-children-back> [<https://perma.cc/R8D9-TD7Y>].

212. See FENTON-GLYNN, *supra* note 16, at 255.

213. See *infra* Section III.B.2.

214. See generally *Abdi Ibrahim v. Norway* [GC], App. No. 15379/16, (Dec. 10, 2021), <https://hudoc.echr.coe.int/eng?i=001-214433> [<https://perma.cc/7D3Y-ZZ6G>] (focusing on the validity of the decision-making process); *Strand Lobben v. Norway* [GC], App. No. 37283/13, (Sept. 10, 2019), <https://hudoc.echr.coe.int/eng?i=001-195909> [<https://perma.cc/EJ7P-SELN>] (focusing on the mother's standing to bring a claim).

215. [GC], App. No. 37283/13.

216. *Id.* ¶ 8 (Kjølbro, J., Polackova, J., Koskelo, J. & Norden, J., dissenting).

approach, they point out, is it conflicts with the view that children's interests should be a paramount consideration.²¹⁷ The judges present a theory as to why there is a mismatch between the "paramount" child's interest and the actual approach taken by the Strasbourg Court:

The ECHR is rooted in the protection, and balancing, of the rights of everyone within a State's jurisdiction, including those who have formed a family, whereas the CRC is focused on strengthening and protecting children as holders of distinct individual rights It is always the case that efforts must be made to reconcile the rights of each of the individuals concerned. There are, however, inevitable limits to the possibilities available for such reconciliation. Consequently, it may ultimately be necessary to decide which consideration takes precedence.²¹⁸

In pointing out the lack of clarity and coherence between the CRC's approach to the best interests of the child, and the Strasbourg Court's application of this approach in a way that prioritized parental rights, the judges raise a key obstacle to the application of children's rights. It makes sense that the ECtHR would analyze the individual human rights claim of the applicant (the parent) in a way that could not possibly recognize children's interests as paramount in all circumstances.

This framing of the dispute also pits the parent's rights against the state's goal of protecting the best interests of the child. The child's perspective on what their interests are vanishes from the case. Instead, the court assumes that the state is correct in its assertion that separating the parent and child was in the child's interest, and instead focuses on whether the parent's rights were violated in the method by which the child was removed. In *Abdi Ibrahim v. Norway*,²¹⁹ for example, the court could have held that Norway violated the *child's* rights to be removed from his mother and from his religious and cultural roots, but to do so would have been difficult. The child was not a party to the case, and it was not clear who—if anyone—had standing to assert his rights, given that his biological mother did not have parental authority or custody of the child.²²⁰

Perhaps, the ECtHR could have called for a guardian ad litem ("GAL") or a similar role to be appointed to represent the child's

217. *See id.*

218. *Id.* ¶ 9.

219. *See supra* Section III.A.1 (describing the case in detail).

220. *See generally* Section III.A.1 (listing the parties to the case and excluding the child).

interests.²²¹ The GAL option presents many of these challenges with children's rights. If the problem is that children are not able to navigate the legal system or articulate their interests in a way that is cognizable in court, but the child's interests may conflict with the parents, then appointing a GAL might seem like an ideal solution. However, the first question that must be answered is: When? If the child is the rights-holder and they must affirmatively assert that right, then how would a court even know to appoint a GAL? It could only happen in the context of existing litigation involving an adult or if the parent helped the child file a claim asserting the child's rights. In other words, something would have to trigger the appointment of the guardian. Second, who decides when a GAL is appointed? Should one be assigned in all cases involving a child's interests? Because the child is not a party, it is not always clear when a GAL would be required. Third, who are GALs? Is there a way for them to not just reproduce the state's view of the child's best interests? Fourth, what standard would the GAL use? Would they rely on their own best interests determination? Would they serve as an advocate for the child's expressed interests? Would it vary based on the type of case, the maturity of the child, etc.? The challenge with GALs is that while they might be good at ensuring that some version of the child's interests are kept in mind during a case, they are less equipped to affirmatively assert the child's rights.

It is also worth noting that the Grand Chamber's judgment in both *Strand Lobben* and *Abdi Ibrahim* probably reached the best result for family integrity overall by concluding that the mother's rights were violated.²²² The mothers were able to assert their rights in the face of

221. The issue of children's representation and the possible role of GAL has been discussed extensively in American scholarship. See Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 256 (1998) ("Most lawyers, judges and guardians ad litem would acknowledge (at least privately, if not to the parent) that they are not really sure how to explain what *guardian ad litem*s do."). For a recent discussion of how significant barriers exist to children's active participation in asserting their own rights, see Lisa V. Martin, *Securing Access to Justice for Children*, 57 HARV. C.R.-C.L. REV. 615, 617-18 (2022) (collecting data on state laws regarding representation and GAL for children and discussing the limitations of these rules).

222. See *Abdi Ibrahim v. Norway* [GC], App. No. 15379/16, ¶¶ 162, 177 (Dec. 10, 2021), <https://hudoc.echr.coe.int/eng?i=001-214433> [<https://perma.cc/7D3Y-ZZ6G>] (finding a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms and awarding the mother reimbursement of costs and

serious state interference into family life and were also able to raise the interests of their children to bolster their claims.²²³ If the children's rights had indeed been *paramount*, given the ECtHR's deference to the state's articulation of those interests, it is harder to see how the court could have reached the same result. Both children had been with their foster parents for most of their lives and had not developed a deep parent-child relationship with their birth mothers.²²⁴ Not to mention that if the mother had been barred from pursuing her independent parental right to custody, then it is unlikely any challenge to the Norwegian law would have been brought in the first place. The children, who were babies at the time, would not have known to bring a case, nor could they have initiated litigation on their own, and none of the other adults in their lives (social worker, foster or adoptive parents, etc.) would have had any incentive to raise the children's rights themselves since the result was in their favor before the domestic courts.²²⁵

This illustrates the second barrier to effective children's rights: when a child is the primary rights-holder, but also lacks the legal or developmental capacity of a full legal actor, their rights must be vindicated by someone else.²²⁶ This filters the child's voice through adults. Much then hinges on which adults act as interpreters of the child's rights. Experts provide testimony regarding what is in the

expenses); *Strand Lobben* [GC], App. No. 37283/13, ¶ 226 (finding a violation of the Convention for the Protection of Human Rights and Fundamental Freedoms).

223. See generally *Abdi Ibrahim*, App. No. 15379/16, (facing state interference in the form of a care order for foster care despite the biological mother's opposition); *Strand Lobben*, App. No. 37283/13, (challenging the state's forced removal of a child and subsequent adoption by a family with different religious beliefs than her own).

224. *Abdi Ibrahim*, App. No. 15379/16, ¶¶ 13, 15–17 (placing the child in foster care before their first birthday); *Strand Lobben*, App. No. 37283/13, ¶¶ 17–22 (placing the child in foster care at one month old).

225. *Abdi Ibrahim*, App. No. 15379/16, ¶¶ 13, 28, 58 (initiating appeal proceedings when the child was under three years old in 2010 and receiving a final judgement in 2015); *Strand Lobben*, App. No. 37283/13, ¶¶ 4, 17, 23 (initiating appeal proceedings when the child was only a month old and ordering a final judgement when the child was nine years old).

226. See FENTON-GLYNN, *supra* note 16, at 256 (“While it is possible for a child to bring a case before the [ECtHR] in their own right, in practice the very nature of legal claims and court proceedings ‘makes it difficult for all but the most confident and competent children to participate effectively.’”).

child's best interests.²²⁷ Lawyers and other legal actors shape children's words into terms that are cognizable in court.²²⁸ In a children's rights model, these adult interpretations are—at least ostensibly—intended to reflect the child's interests. Determining whether adult state actors can and do authentically capture the child's voice takes on greater importance.

As European legal scholars characterize the ECtHR's approach to the best interests standard, “[the] European Court has often viewed the best interests of the child as a proxy for children's rights Regrettably, the [court] has only rarely paid attention to the views of the child in question in the attempt to define what was in her or his best interests.”²²⁹ Even when the child's expressed wishes are clearly to the contrary, as in the *Wunderlich* case, the state's determination of the child's best interests is what prevails.²³⁰

Further bolstering this concern, in response to the CRC's Article 12, which provides a right for children to participate, Professor Noam Peleg observes:

On the one hand, Article 12 respects the child's right to participate in decisions concerning her life, and it is often celebrated as one of the biggest achievements of the Convention in moving children's social and legal positionalities from subject to object. But on the other hand, Article 12 gives adults the power to decide whether and how children will participate, and how much weight a child's voice should be given, by enabling adults to qualify children as immature and consequently silencing them.²³¹

227. See, e.g., Jon Amundson & Glenda Lux, *Tippins and Whitman Revisited: Law, Social Science, and the Role of the Child Custody Expert 14 Years Later*, 57 FAM. L.Q. 88 (2019) (discussing the challenges of using experts in “best interests” determinations).

228. 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 Reprinted with Permission*, 6 NEV. L.J. 966, 1030 (2006) (compiling data on how children are heard in legal proceedings around the world and noting the challenges in implementation and practice).

229. Vandenhole & Turkelli, *The Best Interests of the Child*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at 212.

230. See generally *Wunderlich v. Germany*, App. No. 18925/15, (Jan. 10, 2019) <https://hudoc.echr.coe.int/?i=001-188994> [<https://perma.cc/6DZM-LW3C>].

231. Noam Peleg, *A Children's Rights Dilemma - Paternalism versus Autonomy*, in THE RIGHTS OF THE CHILD: LEGAL, POLITICAL, AND ETHICAL CHALLENGES 9 (Rebecca Adami, Anna Kaldal, Margareta Aspan, eds., 2023).

Because the child is not the prototypical liberal autonomous actor, it is easier for courts to avoid addressing the child's rights. As Jonathan Todres and Shani King explain:

The liberal tradition of rights is built on the idea of the autonomous individual. That traditional construct is an awkward fit for children, especially young children Indeed, infants and young children cannot survive without a caregiver. And even the most mature adolescents typically have incomplete autonomy (both individually and as a result of their status as a minor under the law).²³²

The third challenge is that the court sometimes simply disregards the child's rights argument in favor of other considerations. One of the state's strongest justifications for interfering in individual rights is that it is necessary to deter illegal or otherwise harmful action. But, this Article contends, because the child's interests are often deeply intertwined with their parent's choices, the children's rights frame can conflict with the state's interest in deterrence. In a parental rights system, when the state wishes to deter certain choices by parents, the person being deterred is also the rights-holder. For example, if the state seeks to deter clandestine migration by separating parents and children, as the United States has done, then the person whose behavior the state is seeking to deter (the parent who chooses to cross the border) is the rights-holder (the parent who has a right to custody of their child).²³³ In a children's rights model, however, the state still has deterrence interests, but the rights-holder (the child) is separate from the actor that the state wishes to deter (the parent). As a result, the state's interest in deterring *parental* actions leads to cases in which the *child's* purportedly paramount interest is all but ignored by the court.

The ECtHR's immigration case law illustrates the challenge with protecting children's rights when the state has a strong deterrence claim. Commentators have pointed out that the ECtHR's protections of the parent-child relationship are less than full-throated in the immigration context.²³⁴ As one scholar observed, the court is highly

232. Jonathan Todres & Shani M. King, *Children's Rights in the Twenty-First Century: Challenges and Opportunities*, in TODRES & KING, CHILDREN'S RIGHTS, *supra* note 29, at 721–22.

233. For a discussion of this dynamic in U.S. law, see Ryan, *Bargaining Chips*, *supra* note 9, at 445.

234. See, e.g., Vladislava Stoyanova, *Populism, Exceptionality, and the Right to Family Life of Migrants under the European Convention on Human Rights*, 10 EUR. J. LEGAL STUD. 83

deferential to state's authority over migration control and will only find that Article 8 interests outweigh the state's deportation powers in "exceptional circumstances."²³⁵ In addressing whether the state can use the exclude or expel children to deter clandestine immigration by parents, the court has held that "strong immigration policy considerations would in principle militate in favour of identifying children with the conduct of their parents, failing which there would be a great risk that parents exploited the situation of their children in order to secure a residence permit for themselves and for the children."²³⁶ In other words, to put the best interests of the child first would undermine the state's capacity to deter and punish unauthorized migration.

The immigration cases show how the court uses the state's deterrence rationale to minimize the primacy of children's rights. In *Berisha v. Switzerland*,²³⁷ the dissenters observed the seeming conflict with the best interests of the child standard:

[T]he refusal of a residence permit for [a child] on the ground of family reunification cannot be justified merely by the wrongful conduct of her parents The children cannot be held responsible or suffer for their parents' incorrect or even illegal behaviour. This would be against the best interests of the children, a principle which is very well developed and always stressed in the case-law of the European Court²³⁸

Nevertheless, the court's approach permits the state's deterrence rationale to prevail, even in situations where the best interests of the child seems to be at the forefront of the analysis. In the *Osman v. Denmark*²³⁹ case, for example, by framing its conclusion as about the father's decision to send his daughter to Kenya, the court sidestepped the question of whether it is ever permissible to punish a child to deter parental behavior.²⁴⁰ Instead, the court read the question as whether the *father's* decision could be overridden in the name of the child's best

(2018) (explaining how the court has been restrained in its adjudication of family rights for immigrants and generally sides with the state in such cases).

235. *Id.* at 89.

236. *Butt v. Norway*, App. No. 47017/09, Eur. Ct. H.R. ¶ 79 (2012).

237. App. No. 948/12, Eur. Ct. H.R. (2013), <https://hudoc.echr.coe.int/fre?i=001-122978> [<https://perma.cc/7X3A-YPTF>].

238. *Id.* ¶ 4 (Jočienė, J. and Karakaş, J., dissenting).

239. App. No. 38058/09, Eur. Ct. H.R. ¶ 73 (2011), <https://hudoc.echr.coe.int/fre?i=001-105129> [<https://perma.cc/T7FU-ZC4G>].

240. *See id.* ¶ 73.

interests.²⁴¹ Ironically, unlike in some of the cases described in the previous Part, in this case, the court did balance the parent's rights and the child's rights and found that the child's right prevailed.²⁴² However, in *Osman* the child was not contesting her father's decision directly, or whether the state permitting her father to send her away violated her rights.²⁴³ Rather, both parent and child were aligned in challenging the consequences imposed by the state on her in an effort to induce her father to make a different choice (or, more precisely, future fathers faced with similar choices).²⁴⁴ Indeed, the ECtHR left open the possibility that with adequate notice, the state might be able to use family separation as a deterrence tool.²⁴⁵

Each of the obstacles presented in the ECtHR's case law—the question of how to balance parental rights; the absence or distortion of the child's voice; and the power of the state's deterrence rationale—diminishes the chances that a child's well-being will dictate the outcome of the case, but for different reasons. In nearly every child removal case, the child was unable to assert their own interests, either because no party had standing to raise the child's interests or because the child's voice was diluted through interpretation by state experts.²⁴⁶ The deterrence cases furthermore show that if the state's interest is powerful enough, the child's well-being can be ignored or minimized to effectuate state policy.²⁴⁷

241. *Id.*

242. *Id.* ¶¶ 76–77.

243. *See id.* ¶ 19 (challenging the Immigration Service's decision that her trip constituted an impermissible "re-upbringing" trip, not her father's decision to send her away).

244. *See id.* ¶ 12 (establishing that father and daughter worked together on their goal to reunify the family in Denmark).

245. *See id.* ¶ 75 (noting that the Danish law was amended after the child left for Kenya, which the family could not have foreseen).

246. *See supra* notes 175–76 (describing how in *Paradiso v. Italy*, the court denied the applicants' standing to assert the child's rights); *see also* FENTON-GLYNN, *supra* note 16, at 256 ("there is a danger that some of the child's interests will not be brought to the Court's attention: for example, if only the parent with custody can complain on behalf of the child that custody has been awarded in a discriminatory manner, then it is unlikely that they will do so.").

247. *See supra* notes 234–38 (describing how in immigration cases, the court sometimes ignores the child's best interest in favor of the state's deterrence arguments).

2. *Comparing European and U.S. approaches*

The previous Part illustrates the barriers the Strasbourg Court has faced in implementing a children's rights approach to family separation, custody, and removal cases. Still, given the emphasis on children's rights in the European cases and on parental rights in the American cases, one could easily assume that the two systems would reach different results in cases about family rights. Yet, this Article suggests that the differences are not as great as we might expect. To understand how similar the outcomes are in the European and American cases, consider the following situations and how the two systems have dealt with them.

Notwithstanding the famous line that children do not shed their rights at the "schoolhouse gate,"²⁴⁸ the U.S. Supreme Court has been reluctant to locate rights for children in the Constitution. Children do have constitutional rights as individuals to freedom of speech and religion, to due process, and to rights when they are accused or convicted of crimes.²⁴⁹ But within the family, children have few constitutional rights. At least according to the U.S. Supreme Court, children do not have a reciprocal right to be cared for in the custody of their parents, as parents do to the care and custody of their children.²⁵⁰ Parental rights are foundational, but children's rights are not.²⁵¹

248. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (challenging a school's dress code policies as a violation of the children's First Amendment rights).

249. See, e.g., Julia Halloran McLaughlin, *The Fundamental Truth About Best Interests*, 54 ST. LOUIS U. L.J. 113, 116 (2009) ("Children possess many . . . recently recognized rights. The Court, however, has not afforded children's relationship rights strict protection.").

250. See Ryan, *Bargaining Chips*, *supra* note 9, at 450–51 (discussing parental rights in U.S. law).

251. See Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2101 (2011) ("The theory that children do not possess adult rights because they lack autonomous decisionmaking skills is reinforced by the existence of a robust constitutional doctrine of parental rights. Since the early 1920s, parents have enjoyed broad constitutional rights to the care and custody of their children. Parents possess decisionmaking authority because, as the Supreme Court has observed, children are not yet 'fully rational, choosing agent[s].' The Court's enthusiastic recognition of parental rights fortifies the view that individuals below the age of majority lack the state of mind required of constitutional rights-holders.").

In *Michael H. v. Gerald D.*,²⁵² the Supreme Court held that a child did not have a constitutional right to form a legal relationship with both her biological father and her legal father (the man married to her mother).²⁵³ Because there was no fundamental right, neither the child nor the biological father could establish a relationship absent consent of the mother.²⁵⁴ One might imagine that a children's rights focused model might come to a very different conclusion. But in a series of cases involving German families, the ECtHR reached the same result from a child's interest perspective.²⁵⁵ Holding that the child's interest in being part of an intact family unit was greater than the interest in establishing a parent-child relationship with the biological father, the father could neither prevail based on his own human rights, nor could he bring a claim on behalf of his biological child.²⁵⁶ Why? Because of reliance on an expert's articulation of what was best for the child.²⁵⁷

In the child removal context, the Supreme Court has held that termination of parental rights requires "clear and convincing evidence" of parental unfitness.²⁵⁸ Although the efficacy of this procedural protection is open to dispute, it does offer some protection for parents seeking to retain custody of their children. In the ECtHR cases, concern for the child's best interests is supposed to supersede parental rights, which might lead to different outcomes. However, in fact, the courts have come to essentially the same result: for a child to be separated from a parent, the parent must be deemed unfit, and the

252. 491 U.S. 110 (1989).

253. *See id.* at 130–31 (finding the rights of the marital father trumped the rights of the non-marital biological father).

254. *See id.* at 110 (explaining the effect of the marital presumption in U.S. law).

255. *See* FENTON-GLYNN, *supra* note 16, at 237 (discussing the ECtHR cases establishing that state authorities could give "precedence to an existing family relationship between the child and legal father" over the claim of a biological father.); BÜCHLER & KELLER, *supra* note 71, at 529 (discussing the margin of appreciation applied to domestic legal systems on questions of biological fathers' right to establish paternity).

256. *See* FENTON-GLYNN, *supra* note 16, at 275–76 (describing the rights of biological fathers in private law custody disputes).

257. *See id.*

258. *See* *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982) (holding the Due Process Clause requires a finding of unfitness by clear and convincing evidence to sever the rights of a biological parent over their child).

removal must be in the child's best interests.²⁵⁹ Like the Supreme Court in the case of removal, the Strasbourg Court has been highly deferential to state's assessment of the child's best interests and has instead focused exclusively on the parent's procedural rights. So long as the *process* by which the child was removed was fair, courts will rarely, if ever, question the state's determination that the removal was warranted in the child's best interests.

In private custody disputes, one might imagine that the ECtHR's emphasis on children's rights would mean that any considerations of parental characteristics and unfitness could be considered. However, the Strasbourg Court has found human rights violations when states find parents unfit because of their religious convictions and other characteristics protected by the parent's human rights.²⁶⁰ The same is true in the United States. The best interests of the child standard gives judges broad discretion in deciding custody disputes, but the Constitution provides a backdrop for impermissible considerations, such as—at least in some contexts—racial bias.²⁶¹ Even then, both courts have been highly equivocal about what factors family court judges are barred from considering: giving wide discretion to factfinders, experts, and local decisionmakers when reviewing custody decisions.²⁶²

For the children who are subject to these legal regimes, it does not seem to matter much whether their rights are central to the analysis. In the United States, the parental rights model allows adults, with full capacity under the law, to bring claims vindicating their own rights and interests. The European children's rights model emphasizes to courts and lawmakers that children are human beings who have human rights, and whose interests may be separate from their parents. The

259. See *Strand Lobben v. Norway* [GC], App. No. 37283/13, ¶ 207 (Sept. 10, 2019), <https://hudoc.echr.coe.int/eng?i=001-195909> [<https://perma.cc/E8Z3-EDLM>] (“the best interests of the child dictate . . . that the child's ties with its family must be maintained, except in cases where the family has prove[n] [to be] particularly unfit”). See generally *Factsheet – Parental Rights*, *supra* note 111 (explaining key precedent in the ECtHR).

260. See *Vojnity v. Hungary*, App. No. 29617/07, Eur. Ct. H.R. ¶ 43 (2013), <https://hudoc.echr.coe.int/fre?i=001-116409> [<https://perma.cc/2U6H-K8VA>] (“Consequently, the applicant has been discriminated against on the basis of his religious convictions in the exercise of his right with respect to family life.”).

261. See *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984) (invalidating a lower court's grant of custody to the father based on the changed circumstances of the mother moving in with a Black man).

262. See *supra* Section I.B on the wide discretion of the “best interests” standard.

child's interests, however, are filtered through adult voices—in the form of experts, GALs, and state courts.

In light of the similarities in outcome between parental rights cases in the United States and children's rights cases before the Strasbourg Court, one might suspect that the ECtHR is not actually deciding cases on the basis of children's rights, but is only claiming to do so, while still defaulting to a parental rights approach in practice. Put differently, we might ask whether the recent ECtHR cases described above reveal problems that go to the essence of children's rights, or do they instead reveal problems with how the ECtHR has applied children's rights?

Partly both. On the one hand, children's rights pose unique challenges to implement in an individual rights-based system. On the other hand, the court has not always been as transparent or consistent as it could be in applying its own children's rights framework (as many of the dissenting opinions emphasize). So, some of the problems that this Article identifies could be alleviated by a more faithful application of the principles of children's human rights. However, even if a court were to take children's rights seriously in all cases, there would still be obstacles to the full realization of children's interests because of how courts decide individual rights claims.

Consider the example in which the court ignores children's rights in immigration cases. Imagine a case in which a parent is seeking a residence permit for a child whom they brought unlawfully into the country. If the court took its commitment to children's rights as paramount seriously, it would reconsider this claim in light of the child's interests in remaining with their parents and in the new country.²⁶³ However, the court is limited by the fact that the child was not a party to the underlying case, even if they are an applicant before the court. And if they are an applicant before the court, typically it is their parent who is representing their interests—a person with their own set of rights and interests in the case as well. Focusing solely on the child's rights also does not address the state's deterrence claim: How should the court address a legitimate state interest that can (at least by the State's estimation) be undermined by parents unless the child's right is burdened? Focusing on the child's interest *ex post* will invariably ratify the parent's illegal actions. In such cases, states are likely to continue to claim that deterrence is the only solution.

263. The ECtHR does consider the child's interest to remain in a country and offers more protections for minors in immigration; however, other considerations often take priority over the child's interests. See FENTON-GLYNN, *supra* note 16, at 108–09.

Normally, it would be impermissible for the state to punish an innocent party to deter the actions of another person, but within the context of family decision-making this is complicated. It is complicated because the parent acts as the primary decisionmaker for the child, so the state cannot address the parent's behavior without also impacting the child.

Better implementation of the children's rights frame also does not solve the epistemic problem of determining the child's interest. That requires a much deeper inquiry into developmental capacity, expertise and evidence, and representation of children. That must be a part of the substantive interpretation of children's rights.

The question also remains of what to do with parental rights. Does a genuine children's rights framework obviate the need for parental rights? If not, in what circumstances do parental rights survive? If there are cases in which parental rights and children's rights conflict, how are they balanced? Do children's rights always prevail in the face of adult rights? If not, whose authority determines the proper balance?

3. *If not rights, then what?*

Starting from the premise that children's well-being suffers under the current U.S. legal system, the next step is to diagnose the cause. Other scholars have made persuasive cases for structural inequality and racism, neoliberal policies that work to privatize dependency, and overly punitive criminal law and immigration systems as the rotten foundation upon which children's interests are judged.²⁶⁴ Once diagnosed, the next inquiry is: what are the remedies? One possible remedy would be to introduce children's rights into the constitutional structure and/or to adopt the CRC. This Article offers evidence of what such an approach might look like and how it would—or more likely would not—treat the ills listed above.

If not rights, then, what explains differences in child well-being? Although this Article cannot claim with certainty why children are better off in Europe (or even that they are), I am convinced that the

264. See, e.g., DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEMS DESTROY BLACK FAMILIES — AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022) (analyzing the child welfare system in the United States and its disproportionate effects on Black children); MAXINE EICHNER, *THE FREE-MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED)* (2020) (exploring the effect of economic inequality and neoliberal economic policy on American families); MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004) (explaining how the absence of meaningful state support harms families).

answer is not because they have more rights. To the extent that children in Europe fare better because of children's rights, it has more to do with the fact that children's rights language reflects a symbolic commitment to treating children better, not because of their status as rights-holders. Causal claims are outside the scope of this Article, but there are some plausible explanations as to why children fare better in Europe that are not dependent on children's rights. The evidence suggests that a combination of several related factors contribute to the differences in outcomes for children.

Probably the most significant difference between the experience of European and American families is the social safety net. In many European countries,²⁶⁵ families have more protection from extreme poverty.²⁶⁶ In the United States, most child removal cases are based on neglect, very often arising from housing instability, food insecurity, lack of medical care or similar consequences of poverty.²⁶⁷ Additionally, because many European families use the European social safety net, they do not face the same level of stigma or scrutiny that parents seeking welfare aid in the United States do.²⁶⁸

265. See The KidsRights Index 2020, KIDSRIGHTS FOUNDATION (2020) (reporting on the various levels of access to social services for children around the world).

266. See, e.g., Innocenti Report Card 16: *Worlds of Influence: Understanding what Shapes Child Well-being in Rich Countries*, UNICEF (2020), <https://www.unicef.org/media/77571/file/Worlds-of-Influence-understanding-what-shapes-child-well-being-in-rich-countries-2020.pdf> [<https://perma.cc/4N92-KSVZ>].

267. For a broad analysis of poverty and children in the United States, see Jacob Goldin & Ariel Jurow Kleiman, *Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs*, 131 YALE L.J. 1719, 1722 (2022) ("Child poverty is a staggering problem in the United States. Roughly 11 million children are growing up in families that live below the poverty line, comprising nearly one-third of all Americans living in poverty. Research finds that, compared to nonpoor children, children living in poverty suffer worse physical and mental health, lower educational attainment, higher stress levels, and other negative outcomes that persist into adulthood. These findings should surprise no one. And yet, for the past several decades social safety-net programs in the United States have often failed to reach the poorest children.").

268. See Joel F. Handler, *Welfare, Workfare, and Citizenship in the Developed World*, 5 ANN. REV. L. & SOC. SCI. 71, 81 (2009) ("Whereas the U.S. welfare state is organized on the distinctions between the deserving and undeserving poor and allocates the various welfare programs between the federal government and the state and local governments, the Scandinavian and Continental European welfare states are founded on solidarity and redistribution and are administered at the national level, although in several programs jointly with labor unions and employer associations."); see also KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017) (explaining how accessing welfare in the United States leads to scrutiny and state interference into the family).

But the European social welfare model also might help explain why the ECtHR cases skew so heavily in favor of the state.²⁶⁹ The state is expected to care for families, and when there are ruptures within the family, that receives greater state scrutiny.²⁷⁰ The cases that reach Strasbourg, therefore, very often involve families that do not fall within the normative expectations of the European system because of religion, mental health, substance use, immigration status, etc. In other words, the European system protects many children, but for those children that it does not protect, granting them rights offers little support.

Another difference, which is likely a driver of recent family rights conflicts in the United States, is that parental rights are politicized.²⁷¹ Parental rights issues are highly politicized in the United States in ways that might lead to distorted treatment of these claims in courts.²⁷² The recent litigation around gender affirming treatment for minors can only be understood within the greater context of the hyper-politicization of gender and gender identity in the United States.²⁷³ Parental rights have been “weaponized” to resist vaccinations, to alter public school education, and to ban books.²⁷⁴ Although many of the

269. See Berrick et al, *supra* note 74, at 6 (comparing the social welfare model in Norway with the U.S. liberal welfare model).

270. See, e.g., *id.* at 12 (“There are significant differences between Norwegian and California public attitudes about restricting a parent’s freedom . . . Regardless of [level of] risk [to the child], respondents from Norway are less supportive of unrestricted parenting than respondents from California and they are more supportive of restricted parenting.”).

271. See Cahn, *supra* note 15, at 1446 (“[T]he parent-child-state triad has another participant, almost a fourth leg: political partisanship. The rhetoric of parental rights is used as a Trojan horse for restricting abortion rights, banning gender affirming care, preventing the teaching of critical race theory, and even limitations on ‘cabaret’ (or drag) shows—regardless of what parents actually want—thus, it is not really about parental rights at all.”).

272. See, e.g., Jill Filipovic, *Opinion: The Right-wing Approach to ‘Parents’ Rights’ Put Kids at Risk*, CNN (Jan. 25, 2023, 01:17 PM), <https://www.cnn.com/2023/01/25/opinions/children-gender-identity-parental-rights-filipovic> [<https://perma.cc/84KZ-WKUK>] (exploring how conservative perceptions of parental rights may be harmful to children).

273. See George, *supra* note 1, at 1 (“Custody disputes between parents who disagree as to how to address their child’s gender identity have become the newest battleground in the country’s culture wars.”).

274. See Paige Williams, *The Right-Wing Mothers Fuelling the School-Board Wars*, NEW YORKER MAG. (Oct. 31, 2022), <https://www.newyorker.com/magazine/2022/>

same issues have some political resonance in Europe, it is not as contested and polarized as in the United States. Consequently, these decisions are more likely to be left to the expertise of bureaucracy rather than to the reactive state legislatures passing headline-grabbing laws with little nuance regarding their effects on families.

4. *Redeeming children's rights*

Notwithstanding the shortcomings of children's rights, this Article does not promote categorical rejection of these rights. In fact, the goal of this analysis is to point out pitfalls so that children's rights advocacy in the future can be more effective. Rather than throwing the baby out with the bathwater, this Article concludes by asking whether there are measures that could make children's rights a more fruitful avenue for further development.

If vindicating children's rights simply entails attaching adult-like rights to children, then that model is probably destined for failure for the reasons described above. However, children's rights can also include a new vision of what a rights-holder can be and how their interests are heard and understood within the legal system. A full-fledged re-envisioning of children's rights is beyond the scope of this Article, but this comparative study offers some insight into where scholars and advocates might focus their attention.

First, the value of emphasizing children's well-being and their personhood should not be understated. One fundamental element of human rights is human dignity.²⁷⁵ Advocates of children's rights are right to emphasize the expressive value of affirming that children are human beings and not simply the property of their parents. However, the current model of children's rights does not always follow up this powerful expressive statement with meaningful change in how children are treated. Vindicating the human dignity of children would, in part, mean that all children live with a certain level of material well-being. But it also means that human beings are treated as subjects and

11/07/the-right-wing-mothers-fuelling-the-school-board-wars [https://perma.cc/D9R9-CHEY] (describing the money and effort to school board elections as part of larger efforts to shape culture and policy); "Critical Race Theory" is Being Weaponised. What's the Fuss About?, *ECONOMIST* (July 14, 2022), <https://www.economist.com/interactive/united-states/2022/07/14/critical-race-theory-is-being-weaponised-whats-the-fuss-about> (describing how critical race theory quickly became a conservative talking point).

275. See, e.g., Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 *ALB. L. REV.* 1725, 1726 (2011) ("[T]he notion of a right to dignity has assumed a prominent role in many international human rights instruments").

not objects of the law. Respect for a child's dignity would include prohibiting laws that instrumentalize children to compel parental behavior and allowing for broader standing for children to vindicate their own rights as agents, rather than passive objects of legal determinations.

Second, many custody and family separation decisions are made with little oversight. Moreover, state actors receive significant deference from both domestic and supranational courts. Clear and accessible processes for reviewing ground-level decisions are needed to protect families from arbitrary and/or discriminatory application of custody rules. This also includes access to lawyers, both for parents and children.²⁷⁶ This becomes especially important given how much deference courts give to local decisionmakers. Deference to experts is especially likely to occur in cases where young children are involved because of the difficulties of defining the child's interest. In these cases, expertise in child development and child psychology often takes the place of the expertise within the family. Furthermore, the formal experts are often state actors, but even when they are not, they usually speak for the dominant social and cultural group. Their expertise translates the experience of a particular child and a particular family into the general language of best interests. In that act of translation, much can be lost. This is especially dangerous when the family is from a disfavored or vulnerable group, and where the state has broad discretion.²⁷⁷

Third, children should have the ability to participate in decisions about their lives, including in litigation, but this must be done in a manner that is developmentally appropriate. Advocates and lawmakers are developing better ways to incorporate child participation through the Child Friendly Justice initiative.²⁷⁸ This participation, it should be

276. A 2005 study on children's representation across the world found that although "nearly unanimous consensus unites nations of the world in their legal obligation to assure the child the right to be heard in child protective proceedings" many countries fall short in offering such representation. Peters, *supra* note 228, at 995.

277. Professor Washington refers to this as "epistemic injustice" in the American family regulation system, where "the marginalization of Black and Brown voices in punitive family regulation cases, which already disproportionately affect families of color, ultimately reinforcing the cycle of subjugating marginalized knowledge." S. Lisa Washington, *supra* note 27, at 1108.

278. See *JUVENILE JUSTICE IN EUROPE: PAST, PRESENT AND FUTURE* (BARRY GOLDSON ed., 2019) (describing the human rights origins of the Child Friendly Justice initiative in Europe).

emphasized, does not simply mean that the judge hears the testimony of a child psychologist who interviewed the child or even that the court hear testimony from the child directly (although that might be an element). Rather, the right to participation means meeting the child where they are and offering venues for expressing their interest that are most likely to capture the child's voice.

Participation also means that the child, or the child's representative, should have standing in cases that implicate the child's interests without relying on whether the court finds that the parent can represent the child's interests. So many of the cases discussed above hinge on whether the parent (or putative parent) can make a claim on the child's behalf, but this means that some children's interests will be excluded from discussion based on the court's determination of parental rights. As Australian legal scholar Noam Peleg explains:

The . . . [child empowerment] principle requires, and asks, whether the judge positions the child and her rights at the centre of analysis, and examines the dispute from the child's point of view. . . . The procedural principle requires the judge to respect the child as a party to the dispute, and to ensure that all the procedural rights that any party is entitled to, as part of the rights to a fair trial and due process, are respected. This principle should be followed even when the child herself, or a group of children, is not listed as a formal party to the case, a not uncommon situation in cases concerning children. It inherently provides the child with the opportunity to participate in a process that relates to her rights. . . . This approach should remedy an adult-centric approach that ignores children, and perpetuates their social marginality.²⁷⁹

Children's participation also importantly occurs outside of the courtroom.²⁸⁰ Scholars like Jonathan Todres focus on the work of educating children about their human rights and offering young people accessible means of expressing their perspectives.²⁸¹ Children's rights advocacy *outside* of litigation avoids many of the issues raised in this Article. It also bolsters children's ability to meaningfully

279. Peleg, *Marginalisation by the Court*, *supra* note 109, at 112.

280. See, e.g., Jonathan Todres, Charlene Choi & Joseph Wright, *A Rights-Based Assessment of Youth Participation in the United States*, 95 *TEMPLE L. REV.* 411, 426 (2023) (describing a rich constellation of participation rights for children that go beyond the courtroom).

281. U.S. legal scholar, Jonathan Todres, has contributed enormously to the field of human rights education for children. See *Human Rights Education: The Project*, <https://jonathantodres.com/human-rights-education> [<https://perma.cc/R53V-T5MB>].

participate in rights claims in the future. More emphasis and resources should be put into this work.

Finally, in many cases, the context of the dispute—private custody, immigration, child removal, etc.—seems to be more determinative of the outcome than whether the court is using a parental rights or a children’s rights approach. The particular doctrines, deference to state interests, and biases of the institutional actors toward different groups (such as poor mothers or undocumented immigrants) all influence whether a child’s rights will be considered at all, let alone respected in a meaningful way. By focusing on the child’s well-being *across* areas of law, courts could reduce the disproportionate harm experienced by poor children, children of socially or politically unpopular groups, and children in migration.

CONCLUSION

Why should American family law scholars and advocates care about the case law of the ECtHR? In addition to being a window into a different legal system, the ECtHR’s experience with children’s rights cases suggests that the children’s rights/parental rights debate might be a distraction from the real problems facing children and families. If tomorrow every court in America were to begin framing custody and removal cases through the lens of children’s rights, would children be better off? Probably not.

The biggest risk of implementing a children’s rights approach is that it would further empower the state to intervene in the lives of vulnerable families in ways that do far more harm than good to children’s well-being. Although previous critiques of children’s rights have made a similar point, few have made use of the natural experiment playing out as other parts of the world implement children’s rights.²⁸² Of course, this is not the kind of experiment from which any strong causal connections can be drawn, nor should we imagine that the American experience with children’s rights would necessarily follow the same path as its European counterparts. What it does provide, however, is a fresh perspective on the potential obstacles posed by a children’s rights model.

282. See *supra* Part I.

What would it take for children's rights to be "enough?"²⁸³ Enough to vindicate and honor children's well-being; enough to prevent unnecessary and harmful state intervention into the family; enough to give children autonomy while also recognizing their vulnerability? These questions remain unanswered, but the hope is that this Article offers some greater insight into the ways in which the current system is not nearly enough.

283. This question, and the title of the Article are a nod to the diverse body of scholarship that questions whether human rights are ever enough. *See* SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 219–20 (2018) (contending that the modern human rights system is not equipped to address social and economic justice).
