

HOW DO WE DECIDE WHAT IS IN CHILDREN’S BEST INTERESTS?

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ABSTRACT

This essay addresses the meaning of the term “best interest of the child,” which serves as one of the core principles reflected throughout the Convention on the Rights of the Child, and which Article 3 requires to be “a primary consideration” in all legal and administrative actions. The essay notes the complexity of ascertaining a child’s best interest in the broad range of legal contexts in which it is pressed, and the importance of considering not only where children’s interests lie, but also who should decide this and by what process. It also compares the interpretation and application of children’s “best interests” under the Convention to its interpretation and application in the United States, where the Convention has not been ratified.

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I.

INTRODUCTION

Article 3 of the Convention on the Rights of the Child (CRC) directs that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹

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¹ Convention on the Rights of the Child, art. 3(1), Nov. 20, 1989, 1577 U.N.T.S. 3.

This “best interest principle” has been identified as one of four core principles of the Convention,² and several other articles of the Convention expressly require a best interest analysis to shape, or even determine, the state’s resolution of the issues addressed.³ Less clear, however, is what is best for children, and how “best interests” are to be determined. The indeterminacy of the “best interest” standard has long been recognized,⁴ and many of the rights and values set out in the CRC pull in different directions in accounting for what is best for children.

In this essay, I consider how different choices of legal design shape the law’s account of children’s best interests. These choices can address the substance of the question: the “what?” that constitutes children’s best interests. They can also address the “who?” by assigning decision making authority to one or another individual or entity, and I will suggest that how the law answers this question may be more important, in many circumstances, than how it defines children’s best interests in substantive terms. Related but distinct is a third shaping question, the “how?”—establishing through what process children’s best interests will be determined.

To aid my analysis of the various choices regimes can make in accounting for children’s best interests, I compare the CRC’s approach to that of the United States, which, famously, is the only state that has failed to ratify the CRC. Conventional wisdom treats the United States’ resistance as an indication of its lesser commitment to children’s interests, but I will argue that, in some contexts, the United States’ approach better serves children’s best interests than the CRC, and, where there is flexibility in how the CRC is incorporated into domestic law, I will suggest that the United States’ approach offers a model for implementing the best interest principle under the CRC. But I will also concede that in some contexts, the United States’ legal system ignores children’s interests entirely. By working through this comparative analysis, I hope to shed some light on the many and complicated ways in which children’s best interests are shaped and accounted for in law.

II.

THE CRC’S APPROACH TO SAFEGUARDING CHILDREN’S BEST INTERESTS

The language in Article 3 setting out the best interest principle is telling in several respects. First, it requires that a child’s best interests “shall be a primary consideration.”⁵ This underlines the importance of the best interest inquiry but stops

² *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties Under Article 44, Paragraph 1(a), of the Convention*, U.N. COMM. ON THE RTS. OF THE CHILD, 4 (1991), <https://digitallibrary.un.org/record/137523?ln=en&v=pdf> [<https://perma.cc/44XE-2WPH>] (last visited Oct. 27, 2024) [hereinafter *U.N. Comm. on the Rts. Of the Child-Guidelines*].

³ See e.g., Convention on the Rights of the Child, *supra* note 1, arts. 9, 18, 20, 21, 37, 40.

⁴ See generally Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 J. L. & Contemp. Probs. 226 (1975).

⁵ Convention on the Rights of the Child, *supra* note 1, art. 3(1).

short of the paramouncy requirement that some Nations have included in their domestic laws.⁶ This is in part out of recognition that the rights of others may be implicated and potentially in tension. But it also reflects humility. Where a child's best interests are determinative, a state decision maker will necessarily need to identify conclusively where those interests lie. In contrast, a requirement that a child's best interests be seriously considered allows a state decision maker to account for other interests close to or even overlapping with the child's interests, such as those of a child's parents or community, without having to determine precisely how those interests interrelate.

Also notable in Article 3 is the breadth of the circumstances under which children's best interests are to be given primary consideration. It includes "all actions concerning children."⁷ This broad phrase, in turn, has been given an even broader construction, covering all actions affecting children, that is, having any impact on children.⁸ This means that the best interest principle applies not only in cases that are directly about children, including cases and legislation addressing custody, adoption, third-party visitation rights, juvenile justice proceedings and the like, but also in cases and legislation addressing the rights and duties of others, especially parents, whose fate is directly tied to their children's, and even cases and legislation addressing a broad range of topics with society-wide impact. In imposing a consideration of children's best interests on this broad range of decisions, the CRC clearly affords a significant protection to children not afforded in the United States.

Best Interest requirements are also expressly included in several other CRC Provisions. Article 9, for example, directs that "a child shall not be separated from his or her parents . . . except when competent authorities subject to judicial review determine . . . that such separation is necessary for the best interests of the child,"⁹ and Article 40 imposes a best interest limitation on a parent's presence in proceedings in which a child has been accused of committing a crime.¹⁰ These more specific applications of the term anticipate a state actor's involvement in assessing a child's best interests in a particular case, involvement the U.S. regime seeks to keep to a minimum.

III.

THE UNITED STATES' APPROACH TO SAFEGUARDING CHILDREN'S BEST INTERESTS

⁶ See, e.g., Children Act 1989, c. 41, § 1 (UK), <https://www.legislation.gov.uk/ukpga/1989/41/section/1> [<https://perma.cc/NS84-5NJZ>] (last visited Oct. 27, 2024) (requiring that, in courts in the United Kingdom where decisions are made concerning a child's upbringing, "the child's welfare is the paramount consideration").

⁷ Convention on the Rights of the Child, *supra* note 1, art. 3.

⁸ John Eekelaar & John Tobin, *Article 3 The Best Interests of the Child*, in *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD, A COMMENTARY*, 73-107 (John Tobin ed., 2019).

⁹ Convention on the Rights of the Child, *supra* note 1, art. 9(1).

¹⁰ *Id.*, art. 40(2)(b)(iii).

In the United States, there is no single source of law, like the CRC, that addresses children's interests in universal terms. Instead, children's interests are accounted for in a patchwork of sources, including the United States Constitution (which sets out a number of constitutional rights that apply to children and to parents), state constitutions (which require states to provide a sound basic education to all its children at no cost), and federal and state legislation that addresses specific issues that apply to children, including child protection, custody, adoption and juvenile justice. Most significant (and for champions of the CRC, often controversial) is the strong protection afforded by the U.S. Constitution to parental rights, rights understood to be a primary source of the United States' resistance to ratifying the CRC. On another view, our strong protection of parental rights represents an important means by which we protect children's interests from destructive intervention by the state.¹¹ The U.S. Constitution also affords considerable constitutional protections to children including civil rights and procedural rights. Moreover, in the many areas of law expressly governing courts' determinations on behalf of children, the United States frequently requires a best-interest-furthering outcome. Lacking from the U.S. system of laws, however, is any overarching requirement that the impact of law and policy on children be considered when those laws and policies are being enacted and applied.

IV.

THE PARENTAL DEFERENCE BASELINE

In protecting children's best interests, both the CRC and U.S. law start with a common baseline: In the vast majority of circumstances in which children live at home under the care of their parents,¹² those parents are the designated decision-makers determining their children's best interests. This parent-controlled decision making predated legal regimes and there are excellent reasons for preserving this system under law: Parents know their children, and the circumstances in which their children live, best. In this sense they are the child-specific experts on the "what" of best interests. Moreover, in most cases, parents are fervent advocates for their children's best interests, more bent on achieving those ends than many a state bureaucrat. This does not, of course, mean that parents are always, in fact, the best judges of their children's interests, but even where their judgment is flawed, allowing alternative decisionmakers to interject themselves into the raising of children comes with costs, sometimes higher precisely because parents, who are overwhelmed and underprepared for parenthood, react adversely to this involvement. Of course, in some circumstances parents so misjudge their children's interest, or so act in conflict with those interests, that intervention is required, but

¹¹ For a more extensive discussion of this theme, see Clare Ryan, *Are Children's Rights Enough?*, 72 *Am. Univ. L. Rev.* 2075 (2023).

¹² In this essay, I use "parents" to include parents, guardians, and custodians who have childrearing authority over children in their care.

the heavy default, in the interest of children, is to leave most decision making about how children lead their daily lives to their parents.

In these circumstances, the choice of “who” drives the best interest decision making, and the legal system protects the child by safeguarding parental control. The CRC does this in Article 5 by directing that “State Parties shall respect the responsibilities, rights and duties of parents . . . to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of [their] rights,”¹³ and in Article 18, which states that “parents . . . have the primary responsibility for the upbringing and development of the child.”¹⁴ This sentence in Article 18 is followed by the somewhat oddly phrased declaration that “[t]he best interests of the child will be their [parents’] basic concern.”¹⁵ The use of the predictive “will” rather than the more prescriptive “shall” suggests that the CRC is stating a legally approved presumption about parenting rather than a mandate. And read this way, it is well aligned with the United States’ approach. In the United States, parents’ right to control the upbringing of their children is protected by the Constitution, and this protection is justified by an expressly recognized presumption that “fit” parents act in, and are most qualified to identify, their children’s best interests.¹⁶

V.

WHERE THE STATE’S OWN ACCOUNT OF A CHILD’S BEST INTERESTS OVERRIDES THAT OF A CHILD’S PARENTS

There are two primary ways in which the state can substitute itself as the “who,” as the decider of best interests, over a child’s parents, and they are often inter-connected. The first is through categorical mandates or prohibitions. Where, for example, sexual abuse of children is prohibited, the law reflects the judgment that, in all cases, the prohibited behavior would disserve the interests of children. The second is through the establishment of best interest assessing processes. Where the state sets up some deliberative body to which it assigns authority to adjudge children’s best interests on a particular topic, such as parental custody, it is assigning authority to the state over a child-specific best interest judgment, all relevant factors considered.

In the United States, parents’ constitutional rights have been interpreted to severely limit the circumstances in which the state’s judgment about what is best for children will justify state intervention in child rearing, either by setting categorical rules or by establishing a mechanism for child-specific assessments. As I will note, some of these same limitations might be imposed under the CRC, but some of the language of the Convention itself, as well as its interpretation by courts and by the

¹³ Convention on the Rights of the Child, *supra* note 1, art. 5.

¹⁴ *Id.*, art. 18(1).

¹⁵ *Id.*

¹⁶ *Troxel v. Granville*, 530 U.S. 57, 58 (2000) (citing *Parham v. J. R.*, 442 U.S. 584, 602 (1979)).

Committee, suggest that the Convention allows the state to play a greater role than the United States permits in defining a child's best interests.

A. *Child-Specific Best interest Determinations by the State*

The reach of the state's authority to displace parental best interest judgments in the second, child-specific, manner was tested in the U.S. in the context of "third-party" visitation regimes. By the turn of the 21st Century, all 50 states had enacted some version of these visitation laws, which permitted third-parties, classically but not exclusively grandparents, to go to court to seek visitation with children whose parents sought to avoid or limit those visits. Although there was considerable variation among these statutes, many of them authorized some form of "best interest" assessment by the court that could override the parents' resistance to the visits sought. Thus, the state inserted itself as the final arbiter of a specific child's best interests in any visitation challenge brought to court.

The Supreme Court's rejection of these laws in *Troxel v. Granville* was roundly criticized by some children's rights advocates as disregarding children's interests,¹⁷ but the Supreme Court stressed the link between the Constitution's strong protection of parental rights and the interest of children. In addition to noting the law's presumption that parents act in their children's best interest, the Court expressed concern for the harm done to families, including children, by forcing them to incur the financial and emotional costs of acrimonious litigation.¹⁸ Although critics cited to the prevalence of "best interest" standards applied by courts in other contexts to support the argument that the state was frequently assigned authority to make best interest assessments in individual cases, these arguments overlooked the distinction between circumstances in which the state is *necessarily* involved in decision making (classically, in the adoption context, where the child has no parents to whose judgment a state can defer, and in parental custody disputes, where the disagreement between parents eliminates the ability of the state to defer), and circumstances, such as third-party visitation claims, in which state intervention is optional.

There is nothing in the CRC that expressly rejects the United States' approach of building much of its protection of children's best interest into constitutionally mandated deference to parents, but some of the language in the CRC invites the greater involvement of state actors in best interest judgments. An example of this is set out in Article 9 which provides:

"State 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

¹⁷ See, e.g., Mark Heneghan, *Final appeal courts and Article 3 of the United Nations Convention on the Rights of the Child: what do the best interests of the particular child have to do with it?*, in *IMPLEMENTING ARTICLE 3 OF THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD*, 88-9 (Elaine E. Sutherland et al. eds., 2016).

¹⁸ 530 U.S. at 75.

procedures, that such a separation is necessary for the best interests of the child.”¹⁹

As written, the provision shifts more control over the best interest judgment to state authorities and courts than is permitted in the United States in cases in which the state raises concerns about parental fitness. Although language varies across the states, removal of children from their parents in the United States generally will not be permitted unless a court determines that removal is necessary to protect them from serious harm.²⁰ This higher than a best interest standard for placement reflects, again, a best interest judgment of its own—that allowing children to be removed from their home merely because a court believes it would be better for the children to be placed elsewhere, would not, in the eyes of the law, be in the child’s best interests.

1. *Children’s Own Contribution to Best Interest Decision Making*

In considering circumstances in which child-specific best interest judgments are made, I have thus far focused on the “who,” with its important implications for the “what” of children’s best interest determinations. Where the law defers to parents in determining their children’s best interests, it does not separately regulate the “how.” Parents are allowed to engage in whatever decision-making process they wish in making those determinations, so long as the substantive choices they make are not prohibited. But where the “who,” the decisionmaker, shifts in whole or in part to state actors, the process of decision-making takes on distinct importance under law. Among the issues central to the “how” question are the extent and nature of children’s participation in the decision-making process.

Children’s participation bears on our best interest analysis in two distinct ways. The first ties most tightly with the “who” and the “what.” Children capable of understanding the issues at stake bring their own wisdom and expertise about what is best for them, and they can sometimes do a better job than concerned state authorities in weighing certain identifiable risks (such as the risks that come with some degree of neglect) against the value of familial bonds. The second ties the very process of involvement, the “how” itself, to children’s best interests. Well captured in the legal socialization literature is the value to children of being engaged with state actors in decision making, being shown respect, and having the opportunity to practice engaging in decision making with the support of concerned adults.²¹

¹⁹ Convention on the Rights of the Child, *supra* note ,1 art. 9(1).

²⁰ See RESTATEMENT OF THE LAW - CHILD. AND THE LAW §§ 2.40-2.44 (AM. L. INST., Tentative Draft No. 4, 2024). (limiting the state’s authority to remove children from their home to circumstances in which remaining in the home creates a “substantial risk of serious harm,” that cannot be mitigated without removal).

²¹ See generally Tom R. Tyler & Rick Trinkner, WHY CHILDREN FOLLOW RULES, LEGAL SOCIALIZATION AND THE DEVELOPMENT OF LEGITIMACY (2017).

Both the CRC and American law provide for children's participation in judicial decision-making processes in some circumstances. Article 12 of the CRC provides that state parties "shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" including the "opportunity to be heard in any judicial and administrative proceedings affecting the child,"²² and this participation right has been identified by the Committee, like the primacy of children's best interest, as one of the four core principles of the CRC.²³ The United States Constitution provides all persons, including children, with the right to notice and an opportunity to be heard before the state deprives them of life, liberty or property.²⁴ The Due Process Clause has been applied to require appointment of counsel in Juvenile Justice proceedings²⁵ and an opportunity for students to participate in school disciplinary proceedings.²⁶ In addition, states provide for legal representation of children involved in a range of judicial proceedings, including child protection and custody proceedings.²⁷

Although children's interests are served, even at a fairly young age, by giving them an opportunity to participate in decision-making processes, it is not at all clear that shifting decision-making to a state convened process *in order to* provide for children's participation will, in most cases, serve their best interests. In assessing the value to children of creating a state-controlled opportunity for input, it is important to distinguish circumstances in which children seek, on their own initiative, to depart from their parents' childrearing choices from circumstances in which other adults contend that children might oppose their parents' choices. In the United States, this distinguishes "by-pass" procedures, developed in the context of abortion decision making, which are made available in some states to minors who wish to obtain an abortion without their parents' notice or consent, from numerous other circumstances in which parents make controversial choices on behalf of their children. The danger of creating processes for the purpose of ensuring that children's positions are heard on a broad range of controversial topics is that it could license a wholesale shift to a process of state overseen decision making, with the best interest compromising implications I have set out above. Article 12's direction to State Parties to "assure" that children "have a right to express [their] views freely in *all matters affecting the child*"²⁸ might be read to call for such an expanded set of state-convened procedures, but it might more wisely be read to simply require children's right to participate to be protected where state parties are already involved in decision making on behalf of children.

²² Convention on the Rights of the Child, *supra* note 1, art. 12.

²³ *U.N. Comm. on the Rts. of the Child-Guidelines*, *supra* note 2.

²⁴ U.S. CONST. amend. V; *id.* amend. XIV, § 1.

²⁵ *In re Gault*, 387 U.S. 1 (1967).

²⁶ *Goss v. Lopez*, 419 U.S. 565 (1975).

²⁷ *See, e.g.*, RESTATEMENT OF THE LAW - CHILD AND THE LAW § 2.11 (AM. L. INST., Tentative Draft No. 6, 2024).

²⁸ Convention on the Rights of the Child, *supra* note 1, art. 12(1).

B. *Categorical Best Interest Judgments by The State*

In addition to establishing procedures to adjudge children's best interests in specific circumstances, states sometimes adjudge children's best interests categorically and enact laws that require or prohibit certain child rearing practices. For example, both the CRC and U.S. law prohibit parents from abusing or neglecting their children, and both authorize state intervention to prevent ongoing abuse and neglect. This reflects a state-wide categorical judgment that applies, regardless of whether the abusive or neglectful behavior is perceived by parents to serve their children's interests. These categorical judgments generally reflect a widespread societal consensus about what is good or bad for children. But the CRC has another source of such categorical judgments—human rights norms—which generally lack independent authority under United States law. On at least one topic, corporal punishment, the absence of this independent source of authority in human rights law affects the best interest assessment under the laws of the United States.

Although corporal punishment is not explicitly prohibited by the CRC, Article 19's requirement that State Parties take "all appropriate... measures to protect the child from all forms of physical or mental violence, injury or abuse,"²⁹ has been interpreted by the Committee on the Rights of the Child to create "the obligation of all State parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children."³⁰ Since the CRC was enacted, over 60 countries, invoking the CRC, have prohibited corporal punishment, including in the home.³¹

In contrast, in the United States, "reasonable corporal punishment," that is corporal punishment that does not cause an injury or impose serious pain and that is done for a disciplinary purpose intended to promote the welfare of the child, is permitted in all 50 states.³² Although corporal punishment is increasingly recognized by medical and psychological professionals as ineffective and often harmful, its continued allowance in the United States has been tied to a particular view of children's best interests. In their article, *Conceptualizing Legal Childhood in the 21st Century*, the authors explain that the modern American justification for corporal punishment is not based on a conclusion that such punishment is "beneficial to children and instead is justified as a limit on state power in light of the dangers that accompany state intervention." They go on to explain:

²⁹ *Id.*, art. 19 (1).

³⁰ United Nations Committee on the Rights of the Child, *General Comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, ¶ 2, U.N. COMM. ON THE RTS. OF THE CHILD (MAR. 2, 2007), <https://www.refworld.org/legal/general/crc/2007/en/41020> [<https://perma.cc/396E-KT34>].

³¹ End Corporal Punishment, *Countdown to Universal Prohibition*, END CORPORAL PUNISHMENT, <https://endcorporalpunishment.org/countdown/> [<https://perma.cc/2FHJ-G7TY>] (last visited Oct. 27, 2024).

³² RESTATEMENT OF THE LAW - CHILD. AND THE LAW, § 3.24 (AM. L. INST., Tentative Draft No. 1, 2018).

By maintaining the privilege and tailoring the reasonableness requirement to the form of state action, the privilege recognizes the trade-off between protecting children from harm inflicted by parents and protecting children from harm inflicted by state intervention. The privilege thus promotes the child's interest in the stability of the parent-child relationship and shields the child from the risks that accompany state intervention by limiting it to truly necessary circumstances.³³

As already noted, American law places more weight on the protection of parents as the “who” charged with ensuring children’s best interests. This analysis suggests that, even if they get it wrong, it is better to let parents keep control rather than introduce the “who” of the state into child rearing decision making, absent serious risks to the child.

Countries prohibiting corporal punishment pursuant to the CRC could counter this version of best interest analysis in two ways. First, they could argue that prohibiting a parental practice does not necessarily require intervention in parenting where the prohibition is violated. In Sweden, for example, where corporal punishment was first prohibited, the aim of the law was to “provide valuable pedagogical support,” and did not include any penalties associated with the use of corporal punishment that did not qualify as assault.³⁴ The United States might be criticized for taking a wooden view of what follows from a state’s declaration that certain practices are against a child’s interests. Furthermore, and of deeper significance, the CRC’s prohibition looks beyond what might be called empirically testable measures of well-being (tied to some combination of the harms and benefits of a disciplinary practice, and the harms and benefits of state intervention in families). Central to the CRC’s approach is a recognition of the injury to dignity that comes with the use of violence by one individual against another.³⁵ Under human rights law, violence that causes dignitary harm is prohibited, even if this use of violence were shown to have some efficacy in achieving laudable childrearing aims. In the end, the “who” controlling this particular best interest calculation under the CRC are the institutions that give shape to human rights norms, norms which have limited independent legal influence in the United States. The issue of corporal punishment may, however, be unique. On the myriad of other issues the state confronts in assessing children’s best interests, the United States can be expected to

³³ Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1419–20 (2020).

³⁴ See World Future Council, *Sweden’s Children and Parent Code: At a Glance*, FUTUREPOLICY, <https://www.futurepolicy.org/rightsofchildren/swedens-children-and-parent-code-to-prohibit-all-corporal-punishment-and-other-humiliating-treatment-of-children/> [https://perma.cc/PL3U-3ZPY] (last visited Oct. 27, 2024).

³⁵ See Michael D. A. Freeman, *Upholding the Dignity and Best Interest of Children: International Law and the Corporal Punishment of Children*, 73 LAW AND CONTEMP. PROBS. 211, 214–16 (2010).

draw on the same empirical evidence, policy considerations, and values that regularly shape a best interest analysis under the CRC.

VI.

LEGAL ACTIONS ABOUT CHILDREN V. LEGAL ACTIONS AFFECTING CHILDREN

Thus far I have suggested that the United States' approach, while distinct from the CRC, and, mostly notably, more protective of parental rights, can be said to be as committed to children's best interests as countries implementing the CRC. Despite its failure to ratify the CRC, the United States might be looked to as a model for achieving the CRC's best interests aims that is superior to a system that interjects the state's assessment of children's best interests into a broader range of decision-making about individual children's lives. But there is another, significant application of Article 3's best interest principle that is entirely lacking in American law.

As noted, Article 3's requirement that the child's best interest be "a primary consideration" in all matters "concerning" children has been interpreted to apply to all state actions that affect children, not just actions that are directly "about" children. Thus, parties have successfully argued in cases, and states have adopted legislation directing, that children's best interests should be considered when a state determines whether to deport or imprison a parent, thereby separating the child from the parent or forcing the child to leave the country in order to keep the family intact.³⁶ Children's interests play no comparable role in proceedings involving their parents in the United States. In this sense, the American regime falls short in accounting for the importance, to children, of the fate of their parents. Its individual rights focused design affords excellent protection for children when they are well served by keeping the state out of decision making concerning their lives, but where parents are independently the target of the state's interventions, the fact that children may pay a heavy price is not accounted for in the law. Even if children's interests are often best served by keeping them out of state decision-making processes, once they are brought in, whether it is through the child protection system or indirectly "through" their parents, it becomes essential to ensure that attention is given to their interests.

Impressively, the CRC's best interest principle has been interpreted to reach not only state actions affecting a child's family members, but all actions that could have an impact on children. Examples include laws with an impact on the environment, financial security, and health care policy, just to name a few. Many of these issues are not directly focused on children but will have a major impact on them.³⁷ In these contexts, the "what" of children's best interests may be complex

³⁶ Eekelaar and Tobin, *supra* note 8, at 77-80.

³⁷ *See, e.g.*, Children's Emergency Relief and Protection Act (2016), Rep. Act No. 10821, §§ 2, 12 (Phil.) (mandating, on the authority of the CRC, that the state protect the fundamental rights of

and highly contested, but that is less important than the fact that the “who” of lawmakers and the “how” of the law-making process is charged with taking account of those interests. In the U.S., and many parts of the world, we impose “environmental impact statement” requirements whenever a proposed state action is likely to have some effect on the environment, and we require “cost-benefit analysis” when the state considers imposing regulations. Requiring what is essentially a child-impact statement whenever laws that might have some implications for children are considered ensures that lawmakers pay some attention to children’s interests. Unlike state best interest inquiries applied to laws and legal decisions “about” children where, in the absence of these inquiries, best interest determinations are left to others who are likely in a good position to assess and act on those interests, state best interest inquiries in this broader context put such considerations on the table where they are otherwise entirely ignored.

VII.

CONCLUSION

All those who have devoted their careers to advocating on behalf of children share the view that the law should be designed to protect their interests, but determining how to design a legal regime that accomplishes this is hardly straightforward. In many circumstances, setting up a state decision-making process to assess a child’s best interests may run counter to actually achieving children’s best interests. The United States, infamous in its failure to ratify the CRC, may nevertheless serve as a model for how to design a system of decision-making for children that protects them from intervention by states whose processes impose their own harms and whose output is unlikely to, in most cases, be superior to families’ best interest judgments and implementation of those judgments. But it falls far short of the CRC in failing to ensure that children’s interests are always considered whenever the state acts. Put another way, in divvying up the “who decides” between parents and the state in determining children’s best interests, a system like the United States’ system serves children’s interests well. But where the issue is not “who decides” but rather *whether* any attention is given to children’s interest, the American system falls seriously short.

children during disasters and directing that “the provisions of this Act ... shall be liberally construed in favor of the best interest of the child.”)