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Lawrence L. Stentzel II

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# PROSPECTS FOR UNITED STATES RATIFICATION OF THE CONVENTION ON THE RIGHTS OF THE CHILD

LAWRENCE L. STENTZEL, II\*

## I. INTRODUCTION

On November 20, 1989, the United Nations adopted the Convention on the Rights of the Child<sup>1</sup> (CRC) and proposed that the CRC be ratified by all member nations.<sup>2</sup> This was the culmination of ten years of effort by a special Working Group consisting of representatives of 43 nations. The CRC was adopted by the General Assembly without a vote.<sup>3</sup> The United States was an active participant in the deliberations leading to the CRC.<sup>4</sup> The CRC took effect on September 2, 1990, upon ratification by the twentieth state party.<sup>5</sup> No other multilateral human rights treaty has ever taken effect so soon after it was originally proposed for ratification. By October 21, 1991, 132 countries had signed the treaty and 97 had become states parties by ratifying or acceding to it.<sup>6</sup>

The CRC is based upon the Declaration of the Rights of the Child<sup>7</sup> (Declaration) adopted by the United Nations in 1959. The United States voted for the Declaration and actively participated in its drafting.<sup>8</sup> Both the Declaration and the CRC espouse two categories of human rights of children: (i) civil and political rights and (ii) economic, social and cultural rights. Examples of civil and political rights embodied in the CRC are the right to life (Art. 6); freedom of expression (Art. 13); freedom of thought, conscience and religion (Art. 14); freedom of association (Art. 15); protec-

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\* Mr. Stentzel graduated from Indiana University School of Law in 1952. He is Of Counsel in the Business and Finance Section of the Washington office of Morgan, Lewis & Bockius.

1. *Opened for signature* Nov. 20, 1989, 28 I.L.M. 1457 [hereinafter CRC].

2. G.A. Res. 44/25, U.N. Doc. A/44/25 (Dec. 5, 1989), 28 I.L.M. 1456.

3. Cohen, *Introductory Note: United Nations: Convention on the Rights of the Child*, 28 I.L.M. 1448 (1989).

4. *Report of the Working Group on a Draft Convention on the Rights of the Child*, 45 U.N. ESCOR (Agenda Item 13), ¶¶ 5, 61, 68, 73, 78, 79, 96, 103, 104, 108, 112, 122, 147, 164, 171, 172, 177, 181, 197, 210, 216, 272, 280, 302, 311, 320, 322, 342, 413, 417, 446, 468, 479, 484, 531, 536, 537, 541, 544, 556, 575, 595, 601, 603, 604, 605, 608, 618, 619, 627, 632, 652, 664, 732, U.N. Doc. E/CN.4 (1989) [hereinafter *Working Group Report*].

5. CRC, *supra* note 1, art. 49; Friedman, *Summit for the Children: Bush Holds Back on U.N. Convention*, *Newsday*, Oct. 1, 1990, at 3.

6. Information supplied by Anne Reichel, Legal Assistant, United Nations Treaty Section (Oct. 21, 1991).

7. G.A. Res. 1386, 14 U.N. GAOR Supp. (No. 16), U.N. Doc. A/4059 (1959).

8. The Declaration was adopted unanimously by the General Assembly. 1959 U.N.Y.B. 192. References to United States participation are contained in the text describing the proceedings leading to adoption of the Declaration. *Id.* at 193; *see also* U.N. Doc. A/4249 (1959).

tion of privacy (Art. 16); protection against torture and deprivation of liberty (Art. 37); juvenile justice (Art. 40); prevention of sexual exploitation (Art. 34); protection against drug abuse (Art. 33); and protection of children affected by armed conflict (Art. 38). Economic, social and cultural rights provided for in the CRC include health and human services (Art. 24); social security (Art. 26); standard of living (Art. 27); and education (Arts. 28 and 29). All of these subjects were also covered in the Declaration.

In order to focus world attention on the problems of children and to encourage adoption of the CRC, James Grant, the Executive Director of UNICEF, in December 1988 called for the convening of a World Summit for Children.<sup>9</sup> The Summit was held on September 29-30, 1990 at the United Nations.<sup>10</sup> Although the United States voted in the United Nations in favor of the Declaration<sup>11</sup> and interposed no objection to the adoption of the CRC,<sup>12</sup> President Bush has not yet signed the CRC and transmitted it to the Senate for its advice and consent. On September 11, 1990, the Senate adopted a resolution asking the President to sign the CRC in advance of the convening of the World Summit.<sup>13</sup> On September 17, 1990 the House of Representatives adopted a similar resolution urging the President to sign the CRC and seek the advice and consent of the Senate to its ratification.<sup>14</sup> Nevertheless, President Bush was the only one of seventy-nine heads of state attending the Summit who had not signed the CRC, and the only head of state who did not personally sign the Summit Declaration, which urged prompt ratification of the CRC.<sup>15</sup> In fact, the President made no reference to the CRC in his remarks at the Summit.

United States ratification of human rights treaties has typically been a long and arduous process. For example, the Convention on the Prevention and Punishment of the Crime of Genocide<sup>16</sup> was finally ratified by the United States nearly forty years after the treaty was approved by the United Nations.<sup>17</sup> The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>18</sup> approved by the United Nations in

9. McGrory, *A World Summit Long Overdue*, Washington Post, Aug. 23, 1990, at A2.

10. Lewis, *U.N. Says Bush Will Attend Summit Meeting on Children*, N.Y. Times, July 25, 1990, at A3.

11. 1959 U.N.Y.B. 192-93.

12. The CRC was adopted without a vote. See *supra* note 3 and accompanying text.

13. Bradley Amendment No. 2626, 101st Cong., 2d Sess., 136 Cong. Rec. S12,784-86, S12,808-11 (daily ed. Sept. 11, 1990).

14. H. Res. 312, 101st Cong., 2d Sess., 136 CONG. REC. H7685 (daily ed. Sept. 17, 1990).

15. In what appears to have been an ambiguous gesture, the Declaration was initialed for the United States by Secretary of Health and Human Services Sullivan.

16. Dec. 9, 1948, 78 U.N.T.S. 277.

17. The convention entered into force on January 12, 1951. The United States became a party on November 14, 1988. Genocide Convention Implementation Act, Pub. L. N. 100-606, 102 Stat. 3045 (1988).

18. *Opened for signature* Dec. 10, 1984, G.A. Res. 39/46 Annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (entered into force June 26, 1987).

December 1984,<sup>19</sup> was signed on behalf of the United States on April 18, 1988.<sup>20</sup> The Senate adopted a resolution advising and consenting to ratification on October 27, 1990,<sup>21</sup> and the treaty is now awaiting final ratification by the President. The four human rights treaties signed by President Carter in 1978 were the subject of Senate Foreign Relations Committee hearings in 1979<sup>22</sup> and are still awaiting disposition by the Senate, without any indication of favorable Senate action and, presumably, without the active support of the Bush Administration.

## II. BASIS FOR FAILURE TO DATE OF PRESIDENT BUSH TO SIGN THE CRC

Following adoption of the CRC by the United Nations, the United States Department of State solicited comments on the treaty from the Departments of Justice, Defense, Labor, Health and Human Services and perhaps others. Comments by government departments were submitted to the State Department and presumably transmitted to the White House. To date, attempts by U.S. non-governmental organizations supporting the treaty to learn the substance of the agency comments have been unavailing.

While no official explanation has been given, press accounts of the Summit and the CRC have mentioned at least four possible reasons proffered by unnamed White House sources or others for the President's failure to sign the treaty. These are:

(i) The failure of the treaty to explicitly proscribe abortion.<sup>23</sup> In fact, the treaty is neither pro-choice nor pro-life. The intent of the drafters to leave the decision concerning when life begins to individual states parties is clear.<sup>24</sup>

19. G.A. Res. 39/46 Annex, 39 U.N. GAOR Supp. (No. 51), U.N. Doc. A/39/51 (1987).

20. President's Message to Senate Transmitting Convention Against Torture, 24 WEEKLY COMP. PRES. DOC. 642 (May 20, 1988).

21. 136 Cong. Rec. S17,492 (daily ed. Oct. 27, 1990).

22. *International Human Rights Treaties: Hearings Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. I (1979) [hereinafter *Treaties Hearings*]. The four treaties that were the subject of these hearings were: The International Convention on the Elimination of All Forms of Racial Discrimination; The International Covenant on Economic, Social and Cultural Rights; The International Covenant on Civil and Political Rights; and The American Convention on Human Rights.

23. N.Y. Times, Sept. 26, 1990, at A1; Los Angeles Times, Oct. 7, 1990, at M1.

24. The language of Article 1 ultimately accepted by the drafting countries represents a carefully worded compromise. As a result of this compromise, the application of the CRC to the unborn of a State Party will depend on the definition of a human being under the law of that country. The drafters agreed on this compromise to achieve wider ratification of the CRC. Professor Adam Lopatka, Chairman-Rapporteur of the Working Group, stated to the U.N. Commission on Human Rights:

Our attempt to reach an universally recognized instrument of law must mean also that the draft convention is a product of compromises. These compromises reflect, however, not the weakness but the wisdom and mutual understanding which prevailed in our work. A good example is the question of the definition of a "child" contained in art. 1. As it is seen, the Group was able to reach an agreement on an upper age limit; it was unable, however, despite extensive discussion, to reach a consensus on a "lower limit", i.e. on inclusion into, or exclusion from this definition [of] children

Nevertheless, Senator Helms has cynically raised the abortion controversy in a manner calculated to hamstring ratification.<sup>25</sup>

(ii) The conflict between the treaty and laws in several states of the United States condoning the death penalty for crimes committed before age eighteen.<sup>26</sup> There is a conflict between the juvenile death penalty laws of states such as Oklahoma<sup>27</sup> and Missouri<sup>28</sup> and Article 37(a) of the CRC, which prohibits capital punishment for offences committed by persons under eighteen. Unquestionably, the President, with the advice and consent of the Senate, has the constitutional power to ratify a treaty which overrides state laws such as those that permit the juvenile death penalty.<sup>29</sup> If the Administration and the Senate conclude that the right of states to impose the juvenile death penalty should be preserved, this issue could be resolved by a reservation disclaiming the United States adherence to the portion of Article 37(a) proscribing capital punishment for offences committed before age eighteen.

(iii) That the Administration has had insufficient time to study the treaty.<sup>30</sup> The elapse of more than ten months between United Nations approval of the treaty and the World Summit suggests that the Administration had ample time to analyze the provisions of a document only sixteen pages in length. Nor has the Administration offered any comments on, or analysis of the provisions of, the CRC in the months which have elapsed since the World Summit.

before birth. Facing principal divergence of views on this issue as well as its high sensitivity and importance, the Working Group decided not to prejudge any national solution of this question and left it open for appropriate national legislation and policies of State-Parties to the convention. I am strongly convinced about the wisdom of this compromise.

Statement by Prof. Adam Lopatka, Chairman-Rapporteur of the Working Group on a Draft Convention on the Rights of the Child, to the U.N. Commission on Human Rights (March 8, 1989).

The drafters also did not accept the recommendation of several countries that the words "from conception" follow "human being" in Article 1. *Working Group Report, supra* note 4, at 15-16.

25. 136 CONG. REC. S12,787-89 (daily ed. Sept. 11, 1990) (statement of Sen. Helms).

26. Of the 37 states which permit the death penalty, only 12 decline to impose it against juveniles. Possible conflicts between the laws of the remaining 25 states and Article 37 of the CRC (proscribing capital punishment for offences committed by persons below 18 years of age) may be a matter of some concern. See N.Y. Times, Sept. 26, 1990, at A1.

27. An Oklahoma statute provides that a sixteen- or seventeen-year-old suspect charged with murder and other serious felonies shall be considered an adult. OKLA. STAT. ANN. tit. 10, § 1101(1) (1987).

28. In *State v. Wilkins*, 736 S.W.2d 409, 416 (Mo. 1987) (en banc), *aff'd sub nom. Stanford v. Kentucky*, 492 U.S. 361 (1989), the Missouri Supreme Court upheld the imposition of capital punishment with respect to a sixteen-year-old defendant convicted of murder in "a wantonly vile, horrible and inhuman manner." Missouri law permits a sixteen-year-old suspect to be certified for trial as an adult. MO. REV. STAT. § 211.071 (Supp. 1984).

29. See, e.g., Henkin, *The Constitution, Treaties, and International Human Rights*, 116 U. PA. L. REV. 1012, 1014-15 (1968) (citing authorities).

30. *Treaty may not get U.S. signature*, USA Today, Sept. 26, 1990, at 5A.

(iv) A comment attributed to Peter Teeley, the Administration representative who coordinated preparations for the Summit, concerning some "philosophical objections" since the United States regards education as a benefit, not a right.<sup>31</sup> It appears probable that Mr. Teeley has touched upon the real reason for the Administration's failure to support the treaty and that other reasons are largely pretextual. While supporters of the CRC hope that further governmental review may result in the signing of the CRC, this appears to be wishful thinking unless the so-called "philosophical objections" referred to by Mr. Teeley are resolved. The gist of the problem is a decade-long attempt by the Reagan and Bush Administrations to rewrite the accepted international definition of human rights.

In the first year of President Reagan's Administration, the State Department announced this attempted United States redefinition of human rights which carved out, and relegated to a lower status, the entire economic, social and cultural category of human rights.<sup>32</sup> The reasons underlying this redefinition are believed to be related to the "philosophical objections" to which Mr. Teeley referred.

31. Friedman, *supra* note 5, at 1.

32. See *Review of State Department Country Reports on Human Rights Practices for 1981: Hearings Before the Subcomm. on Human Rights and Int'l Orgs. of the House Comm. on Foreign Affairs, 97th Cong., 2d Sess. 12-17 (1982)* [hereinafter *1981 Review Hearings*] (statement of Hon. Elliott Abrams, Assistant Secretary of State, Bureau of Human Rights and Humanitarian Affairs, explaining revised format of 1981 country reports). Mr. Abrams stated:

There has been a shift in the way the reports present the economic and social facts in relation to the rights to the integrity of the person and to civil and political rights. . . . The particular interpretation of economic and social rights that has become common in the last two decades creates two kinds of difficulties for anyone who is trying to do effective work to protect human rights against abuse. First, there is a blurring of what is the vital core of human rights—the core that we must protect at all costs. . . . Unfortunately, the way in which the concept of economic and social rights has recently developed tends to create a growing confusion about priorities in the human rights area and a growing dispersion of energy in ending human rights violations. . . .

. . . .

[W]e must not blur the distinction between two categories. The rights that no government *can violate* should not be watered down to the status of rights that governments should *do their best* to secure. The right to be free from torture or to freedom of speech can and should be easily respected by every government. . . . But the rights to an adequate standard of living or to holidays with pay or to technical and professional education pose enormous challenges to desperately poor nations. . . .

We resist any effort to lower all individual rights to that level.

*Id.* at 12-13, 16-17; see *Review of State Department Country Reports on Human Rights, 1988: Hearings Before the Subcomm. on Human Rights and Int'l Orgs. 101st Cong., 1st Sess. 186, 201-02 (1989)* [hereinafter *1988 Review Hearings*] (statement of J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*). Mr. Shestack stated that "[s]oon after taking office, . . . the Reagan Administration took unilateral steps to eliminate economic and social rights from the United States' definition of human rights and foreign policy concerns." *Id.*; see also Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 372 (1990).

The remainder of this paper will examine three mindsets which appear to be related aspects of the problem that has motivated the United States retreat from recognition of economic, social and cultural interests as human rights. These mindsets are philosophical, economic and geopolitical in origin. They are discussed below under the headings, "The Human Rights Debate," "The Rights-Entitlements Dichotomy" and "Pawn in the Cold War." These sections attempt to lay bare the underpinnings for the 1981 redefinition of human rights and to set forth the principal countervailing positions.

Prospects for United States ratification of the CRC appear to hinge upon the resolution of these issues by this or a future Administration and Senate. As noted above, several significant economic, social and cultural interests are embodied in the CRC. The debate over the definition of human rights is longstanding, with strong advocates both for and against inclusion of economic, social and cultural interests. The severe retrenchment of government programs addressing basic economic needs which characterized the 1980's<sup>33</sup> is indicative of the formidable political obstacle confronting proponents of the economic and social aspects of human rights. The evolving vision of the electorate on the proper role of government and perceptions of distributive justice will influence the outcome.

### III. THE HUMAN RIGHTS DEBATE

#### A. *Historical Development of Human Rights*

The concept of human rights can be traced back to ancient Greek and Roman philosophers.<sup>34</sup> Sixteenth and seventeenth century philosophers such as Hugo Grotius, John Locke and Thomas Hobbes also played important roles in the evolution of the concept that all human beings are entitled to certain basic rights. While no longer widely accepted by philosophers, natural rights and natural law theories played an important part in the development of current thinking about the subject of human rights.

The concept of human rights emerged as an important influence upon governments in the aftermath of the Nazi atrocities perpetrated in World War II. The Universal Declaration of Human Rights<sup>35</sup> adopted by the

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33. See Edelman & Weill, *Status of Children in the 1980's*, 17 COLUM. HUM. RTS. L. REV. 139 (1986). Edelman and Weill state:

Poverty was increasing before President Reagan took office, but as a result of the economic recession, an uneven recovery and unjust budget cuts and economic policies, poor American children are more likely today to suffer death and sickness, hunger and cold, abuse and neglect, and be left alone without adequate child care than they were four years ago. . . . Federal cuts of ten billion dollars a year in already skimpy medical, nutrition, education, child care and family support programs have endangered the lives, health and futures of millions of American children.

*Id.*

34. Weston, *Human Rights*, 6 HUM. RTS. Q. 257, 258 (1984).

35. G.A. Res. 217 (III), U.N. Doc. A/810, at 71-77 (1948) [hereinafter *Human Rights Declaration*].

United Nations in 1948 gave definition to the long evolving philosophical concept that every human being is entitled to certain basic rights. These human rights were further articulated in the Covenant on Civil and Political Rights<sup>36</sup> and the Covenant on Economic, Social and Cultural Rights<sup>37</sup> (CESCR), both approved by the United Nations in 1966.

Although there is widespread acceptance of the concept, the specific definition of human rights continues to be a matter of substantial controversy. The parameters of the controversy are aptly described by Burns Weston:

To say that there is widespread acceptance of the principle of human rights on the domestic and international planes is not to say that there is complete agreement about the nature of such rights or their substantive scope—which is to say, their definition. Some of the most basic questions have yet to receive conclusive answers. Whether human rights are to be viewed as divine, moral, or legal entitlements; whether they are to be validated by intuition, custom, social contract theory, principles of distributive justice, or as pre-requisites [sic] for happiness; whether they are to be understood as irrevocable or partially revocable; whether they are to be broad or limited in number and content—these and kindred issues are matters of ongoing debate and likely will remain so as long as there exist contending approaches to public order and scarcities among resources.<sup>38</sup>

Many writers in the field classify human rights in one of three generations: The first generation, consisting of civil and political rights; the second generation, consisting of economic, social and cultural rights; and the third generation, consisting of solidarity rights.<sup>39</sup> The categories that are directly relevant to United States ratification of the CRC are the first and second generation rights.<sup>40</sup> First generation rights frequently are perceived more in negative than in positive terms. They often are seen as freedoms

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36. G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

37. *Id.* at 49.

38. Weston, *supra* note 34, at 262.

39. Weston, *supra* note 34, at 264.

40. Third generation, or solidarity, rights are not directly relevant to the CRC. However, the action of the Reagan Administration redefining human rights may have been influenced in part by reluctance to recognize third generation rights. In his introductory remarks accompanying the 1981 country reports, Assistant Secretary Abrams commented that the United States resists

. . . any effort to reinterpret economic and social rights so that they belong to groups rather than individuals. We are unwilling to allow them to become demands for an international regime of restriction and redistribution that would obstruct the prospects for growth and the eventual enjoyment of economic and social rights by all people.

1981 Review Hearings, *supra* note 32, at 17.



from governmental or other interference with personal liberties rather than rights to receive something from government,<sup>41</sup> although this distinction is the subject of considerable debate. Second generation rights, on the other hand, are often perceived as positive rights to receive such governmental services as social security, education, health care and a subsistence standard of living. Second generation rights are also frequently identified with state intervention in the allocation of resources.<sup>42</sup> The validity or invalidity of this negative-positive distinction between first and second generation rights is a fundamental issue of disagreement among proponents and opponents of United States ratification of human rights treaties such as the CESCRC and the CRC, which affirm economic, social and cultural rights.

The crux of the issue is the tension between concepts of liberty and justice. Weston defines this tension in the following terms:

The suggestion of greater feasibility that attends first-generation rights because they stress the absence rather than the presence of government is somehow transformed into a prerequisite of a comprehensive definition of human rights, such that aspirational and vaguely asserted claims to entitlement are deemed not to be rights at all. The most forceful explanation, however, is more ideologically or politically motivated. Persuaded that egalitarian claims against the rich, particularly where collectively espoused, are unworkable without a severe decline in liberty and quality (in part because they involve state intervention for the redistribution of privately held resources), first-generation proponents, inspired by the natural law and laissez-faire traditions, are partial to the view that human rights are inherently independent of civil society and are individualistic. Conversely, second- and third-generation defenders often look upon

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41. *Id.* at 6. Assistant Secretary Abrams stated that "[w]e must not blur the distinction between the two categories. The rights that no government *can violate* should not be watered down to the status of rights that governments just *do their best* to secure." *Id.* (emphasis in original); see also Weston, *supra* note 34, at 264-65.

Weston states:

Infused with the political philosophy of liberal individualism and the economic and social doctrine of laissez-faire, it conceives of human rights more in negative ("freedom from") than positive ("rights to") terms; it favours the abstention rather than the intervention of government. . . . Of course, it would be error to assent that these and other first-generation rights correspond completely to the idea of "negative" as opposed to "positive" rights. The right to security of the person, to a fair and public trial, to asylum from persecution, and to free elections, for example, manifestly cannot be assured without some affirmative government action.

*Id.*

42. Weston, *supra* note 34, at 265. Weston states that second generation rights are . . . conceived more in positive ("rights to") than negative ("freedom from") terms, requiring the intervention, not the abstention, of the state for the purpose of assuring equitable participation in the production and distribution of the values involved. . . . [M]ost of the second-generation rights do necessitate state intervention in the allocation of resources. . . .

*Id.*

first-generation rights, at least as commonly practiced, as insufficiently attentive to material human needs. . . .<sup>43</sup>

*B. The Pre-1981 United States Position on Economic, Social and Cultural Rights*

An early United States recognition of an economic interest as a fundamental freedom was contained in President Franklin Delano Roosevelt's 1941 delineation of the four human freedoms. One of these freedoms was "freedom from want which, translated into world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants. . . ."<sup>44</sup>

At least since 1948, human rights have been perceived internationally to include certain economic, social and cultural, or second generation, rights, as well as the civil and political or first generation rights. In that year, the United Nations General Assembly, with the support of the United States, approved the Universal Declaration of Human Rights.<sup>45</sup> The Universal Declaration specifically enumerated as human rights economic, social and cultural interests such as social security, adequate standard of living and education.<sup>46</sup>

The Charter of the Organization of American States<sup>47</sup> (OAS Charter), which entered into force on December 31, 1951 after ratification by President Truman on behalf of the United States in June of 1951,<sup>48</sup> primarily articulates certain rights and duties of states. However, the OAS Charter also affirms principles of social justice and social security. Articles 29 and 30 proclaim social and cultural standards, including the agreements that all human beings have the right to attain material well being (Article 29(a)) and that work is "a right and a social duty . . . to be performed under conditions that ensure life, health and a decent standard of living. . . ." (Article 29(b)) and the right to education, including compulsory elementary education without cost (Article 30(a)). The economic, social and cultural objectives of the OAS Charter are spelled out in further detail in the Protocol of Amendment to the Charter of the Organization of American States.<sup>49</sup>

The United States recognition of second generation human rights was reaffirmed by the Carter Administration. President Carter signed both the

43. Weston, *supra* note 34, at 267.

44. 87 CONG. REC. 44, 46-47 (1941) (address by President Franklin Delano Roosevelt).

45. See *supra* note 35 and accompanying text (describing U.N. adoption of Universal Declaration of Human Rights).

46. *Human Rights Declaration*, *supra* note 35, arts. 22, 25, 26.

47. Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3.

48. *Id.*

49. Feb. 27, 1967, 21 U.S.T. 658, T.I.A.S. No. 6847. The Senate of the United States advised ratification of the Protocol on April 10, 1968. The President of the United States ratified the Protocol on April 23, 1968, and it entered into force February 27, 1970. 21 U.S.T. 811.

CESCR<sup>50</sup> and the American Convention on Human Rights.<sup>51</sup> Additionally, Secretary of State Cyrus Vance delivered a speech in 1977 in which he defined human rights to include rights to fulfillment of vital needs.<sup>52</sup>

While the United States record of active support for multilateral human rights treaties is woefully deficient, there were official affirmances of the internationally accepted definition of human rights. Moreover, there was no official United States disavowal of this definition until the first year of the Reagan Administration.

### C. *The Reagan Administration Redefinition of Human Rights*

A 1981 internal State Department memorandum, which was leaked to the press and reported in the *New York Times*,<sup>53</sup> contained a rejection of economic, social and cultural rights as rights having parity with civil and political human rights. Pursuant to this policy shift, the 1981 State Department Country Reports, which summarize human rights developments throughout the world, redefined human rights to downgrade the economic, social and cultural rights recognized by the Universal Declaration.<sup>54</sup> In sharp contrast, the 1980 Country Reports on Human Rights Practices<sup>55</sup> addressed, on a country by country basis, government policies relating to the fulfillment of the needs for food, shelter, health care and education.

This policy shift was apparent in the categorical assertions by Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs of the Department of State, in an address to the American Council of Young Political Leaders on June 3, 1988. The Deputy Assistant Secretary stated:

We define human rights as the respect for the integrity of the individual and the observance of political/civil rights. . . .

. . . .

Myth #1: "Economic and social rights" constitute human rights. While the pursuit of human rights is a generally popular undertaking, considerable confusion still permeates discussion of this subject. Let's consider the very definition of human rights. There have been efforts to obfuscate traditional civil and political rights with "economic and social rights". . . .

We believe that under present conditions "economic and social rights" are really more in the nature of aspirations and goals than

50. STATE DEPARTMENT, MESSAGE OF THE PRESIDENT TRANSMITTING FOUR TREATIES PERTAINING TO HUMAN RIGHTS, S. EXEC. DOCS. C, D, E and F, 95th Cong., 2d Sess. I (1978).

51. *Id.*

52. *Human Rights and Foreign Policy* (address by Secretary of State Cyrus Vance), 76 DEPT. OF ST. BULL. 505 (1977).

53. *N.Y. Times*, Nov. 5, 1981, at A1.

54. *1981 Review Hearings*, *supra* note 32, at 12-13, 16-17.

55. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1980 SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 1ST SESS. (Comm. Print 1981).

“rights.” This semantic distinction is highly important. It does not make sense to claim that a particular level of economic and social entitlements are rights if most governments are not able to provide them.<sup>56</sup>

The earlier official pronouncement by Elliott Abrams accompanying the 1981 Country Reports had carefully differentiated economic, social and cultural rights as a different category and lower priority of rights while asserting that the United States continues to adhere to the Universal Declaration of Human Rights of 1948.<sup>57</sup> The Dobriansky denial that “economic and social entitlements” even constitute human rights appears to be a flat repudiation of the Universal Declaration.

#### D. *The Narrow Definition*

Maurice Cranston is a leading proponent of the narrow definition of human rights embraced by the Reagan Administration. Professor Cranston summarizes his position as follows:

I shall argue in this paper that a philosophically respectable concept of human rights has been muddied, obscured, and debilitated in recent years by an attempt to incorporate into it specific rights of a different logical category. The traditional human rights are political and civil rights such as the right to life, liberty, and a fair trial. What are now being put forward as universal human rights are social and economic rights, such as the right to unemployment insurance, old-age pensions, medical services, and holidays with pay. I have both a philosophical and a political objection to this. The philosophical objection is that the new theory of human rights does not make sense. The political objection is that the circulation of a confused notion of human rights hinders the effective protection of what are correctly seen as human rights.<sup>58</sup>

Cranston regards human rights as a form of moral right possessed by “all people at all times and in all situations.”<sup>59</sup> Rights claimed by members of a specific class because they are members of that class are not within Cranston’s definition of human rights. Universal rights are natural rights and are to be distinguished from positive rights, derived from positive law. All universal rights bear a clear relationship to duties. If it is impossible

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56. Address by Paula Dobriansky, Deputy Assistant Secretary for Human Rights and Humanitarian Affairs, before the American Council of Young Political Leaders in Washington, D.C. (June 3, 1988), *reprinted in* U.S. DEP’T OF STATE, BUREAU OF PUBLIC AFFAIRS, CURRENT POL’Y No. 1091 1, 1-3 (1988).

57. See *supra* note 32 and accompanying text (describing 1981 State Department redefinition of human rights).

58. Cranston, *Human Rights, Real and Supposed*, in *POLITICAL THEORY AND THE RIGHTS OF MAN*, 43 (D. Raphael ed. 1967).

59. *Id.* at 49.

for a thing to be done, there can be no duty and "it is absurd to claim it as a right."<sup>60</sup> Such a purported right fails to meet Cranston's second test, that of practicability.

A third limiting characteristic in Cranston's definition of a human right is that it must be of "paramount importance."<sup>61</sup> "No one may be deprived of such a right without a grave affront to justice."<sup>62</sup> In his view, the 1948 Universal Declaration "is overloaded with affirmations of so-called human rights which are not human rights at all."<sup>63</sup> According to Professor Cranston, those rights set forth in the Universal Declaration which do not meet his definitions are merely aspirations.<sup>64</sup>

Another proponent of the narrow definition of human rights is Harvard philosopher Robert Nozick. He elevates the negative right to freedom to the highest priority for any free and just society. Private property, in his view, is a basic form of freedom. Redistribution of property is coercive and inconsistent with the right to freedom. Taxation and welfare payments are perceived as usually coercive because they take property away from those who have it, thereby infringing their right to private ownership.<sup>65</sup>

### E. The Broad Definition

Perhaps at the other extreme in the human rights debate is Susan Moller Okin, who contends that welfare rights (economic, social and cultural) and liberty rights (civil, political and personal security) are both human rights,<sup>66</sup> and neither category is more or less important than the other. In her view, the argument for excluding welfare rights from the definition of human rights is erroneous. With respect to the paramountcy test, she responds to Cranston: "But, though what are considered the requirements for subsistence vary from one time or place to another, it would be difficult . . . to find any tradition or people that did not place priority on the continued achievement of their recognized subsistence level."<sup>67</sup>

With respect to Cranston's practicability or absoluteness criterion for human rights, Professor Okin points out that he would exclude economic and social rights from his definition because sufficient resources may not

60. *Id.* at 50.

61. *Id.* at 51.

62. *Id.* at 52.

63. *Id.*

64. Cranston, *Human Rights: A Reply to Professor Raphael*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 95, 100 (D. Raphael ed. 1967). Cranston concludes: "[T]he United Nations Declaration is vitiated by a failure to recognize that the economic and social rights are not really a second kind of universal right because they are not universal rights at all; if they are rights in any sense they are local, regional, tribal, or national rights." *Id.*

65. R. NOZICK, *ANARCHY, STATE AND UTOPIA* 168-169 (1974).

66. Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, 23 *NOMOS* 230, 238 (1981). For another criticism of hierarchical classification of human rights, see Meron, *On a Hierarchy of International Human Rights*, 80 *AM. J. INT'L L.* 1 (1986).

67. Okin, *supra* note 66, at 243.

be available for their fulfillment. She observes that various liberty, or first generation, rights such as the right to a fair trial or to be defended from attack require an outlay of resources that may be beyond the means of some governments. As long as resources are limited, choices must be made as to which rights take priority. Taxation of income encroaches on the absolute right to private property yet such taxation is clearly "a prerequisite for the provision of social services" (and indeed all services provided by government, including the courts and police protection, which are fundamental to civil and political rights).<sup>68</sup> In her view, the fact that a claim cannot be met immediately and in full does not preclude its recognition as a human right.<sup>69</sup>

In a detailed analysis of the basis for Cranston's rejection of second generation rights as human rights, Henry Shue concludes that the Cranston human rights criteria provide no basis either for rejecting second generation rights as human rights or for affording them a lower priority than first generation rights.<sup>70</sup> Shue refers to first generation as security<sup>71</sup>

68. *Id.* at 246.

69. *Id.* at 246, 247. With respect to Cranston's tests of practicability and universality, Professor Okin contends:

Several writers have argued along these lines that the objection that welfare rights are impracticable can be met by the acknowledgment that states must do everything they can, including redistributing wealth, to fulfill their correlative obligations. Most have assumed, however, that the obligation to meet persons' economic and social needs rests solely with the state of which those persons are citizens. Interestingly, the covenant as quoted above manifestly does not imply acceptance of this limitation of responsibility. It suggests, rather, that any state that is a party to the covenant undertakes to the maximum of its available resources, both individually and through international cooperation, to take steps to meet the needs of every human being. Moreover, it has recently been very cogently argued that, because of the extent of contemporary global economic interdependence and division of labor, the reallocation of resources from richer to poorer states, and not only within states, is required by egalitarian principles of distributive justice. If this argument is correct, it has radical implications for the issue of the practicability of the welfare rights, since clearly a global reallocation of resources would be far more capable of meeting the needs of the world's poorest peoples than redistribution within each state alone.

*Id.* at 247.

70. H. SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* (1980). The following excerpts set forth the framework of Shue's analysis:

The ordinarily implicit argument for considering rights to subsistence to be secondary would, then, appear to be basically this. Since subsistence rights are positive and require other people to do more than negative rights require—perhaps more than people can actually do—negative rights, such as those to security, should be fully guaranteed first. Then, any remaining resources could be devoted, as long as they lasted, to the positive—and perhaps impossible—task of providing for subsistence. Unfortunately for this argument, neither rights to physical security nor rights to subsistence fit neatly into their assigned sides of the simplistic positive/negative dichotomy. We must consider whether security rights are purely negative and then whether subsistence rights are purely positive. I will try to show (1) that security rights are more "positive" than they are often said to be, (2) that subsistence rights are more "negative" than they are often said to be, and, given (1) and (2),

and second generation as subsistence rights.<sup>72</sup> Professor Shue summarizes the argument against parity of first and second generation rights as follows:

The alleged lack of priority for subsistence rights compared to security rights assumes:

(3) that the distinctions between security rights and subsistence rights, though not entirely illusory, are too fine to support any weighty conclusions, especially the very weighty conclusion that security rights are basic and subsistence rights are not.

. . . But it is impossible to *protect* anyone's rights to physical security without taking, or making payments toward the taking of, a wide range of positive actions. For example, at the very least the protection of rights to physical security necessitates police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards; and taxes to support an enormous system for the prevention, detection, and punishment of violations of personal security. . . .

. . . A demand for physical security is not normally a demand simply to be left alone, but a demand to be protected against harm. It is a demand for positive action. . . .

. . . Insofar as any argument for giving priority to the fulfillment of "negative rights" rests on the assumption that actually securing "negative rights" is usually cheaper or simpler than securing "positive rights," the argument rests on an empirical speculation of dubious generality.

. . . A demand for the fulfillment of rights to subsistence may involve not a demand to be provided with grants of commodities but merely a demand to be provided some opportunity for supporting oneself. The request is not to be supported but to be allowed to be self-supporting on the basis of one's own hard work.

. . . From these cases it is now, I hope, quite clear that the honoring of subsistence rights may often in no way involve transferring commodities to people, but may instead involve preventing people's being deprived of the commodities or the means to grow, make, or buy the commodities. Preventing such deprivations will indeed require what can be called positive actions, especially protective and self-protective actions. But such protection against the deprivation of subsistence is in all major respects like protection against deprivation of physical security or of other rights that are placed on the negative side of the conventional negative/positive dichotomy. I believe the whole notion that there is a morally significant dichotomy between negative rights and positive rights is intellectually bankrupt. . . .

[T]he common notion that *rights* can be divided into rights to forbearance (so-called negative rights), as if some rights have correlative duties only to avoid depriving, and rights to aid (so-called positive rights), as if some rights have correlative duties only to aid, is thoroughly misguided. This misdirected simplification is virtually ubiquitous among contemporary North Atlantic theorists and is, I think, all the more pernicious for the degree of unquestioning acceptance it has now attained. It is duties, not rights, that can be divided among avoidance and aid, and protection. And—this is what matters—every basic right entails duties of all three types. Consequently the attempted division of rights, rather than duties, into forbearance and aid (and protection, which is often understandably but unhelpfully blurred into avoidance, since protection is partly, but only partly, the enforcement of avoidance) can only breed confusion.

*Id.* at 37-40, 51, 53 (emphasis in original; footnotes omitted).

71. *Id.* at 20-22.

72. *Id.* at 22-29.

1. The distinction between subsistence rights and security rights is (a) sharp and (b) significant.
2. The distinction between positive rights and negative rights is (a) sharp and (b) significant.
3. Subsistence rights are positive.
4. Security rights are negative.<sup>73</sup>

Professor Shue undertakes a detailed examination of so-called negative, or first generation, and so-called positive, or second generation, rights. His analysis demonstrates that protection of first generation rights typically involves positive governmental action requiring substantial expenditures, whereas protection of second generation, or subsistence, rights often does not involve "transferring commodities to people."<sup>74</sup> He concludes that the "dichotomy between negative rights and positive rights is intellectually bankrupt. . . ."<sup>75</sup> His analysis also reveals that it is duties, not rights, that can be divided among avoidance, aid and protection.<sup>76</sup> All basic rights, both first and second generation, entail duties of each of these three types. Hence, the attempt to rank first generation rights as superior to second generation rights based upon the purported negative character of the former and positive character of the latter "can only breed confusion."<sup>77</sup>

Shue's analysis seriously undermines the purported logic of the negative-positive distinction between first and second generation human rights. This defective logic has been heavily relied upon by the Reagan Administration and other opponents—on philosophical grounds—of the inclusion of second generation rights within the definition of human rights.

#### *F. A Middle Ground*

A middle ground in the human rights debate would recognize both first and second generation rights as human rights but would acknowledge the latter as being weaker than the former. Thus, Johannes Morsink, commenting on the Universal Declaration, observes that "social and economic rights, though very important, do not quite have the same status as the civil and political rights."<sup>78</sup>

Professor Raphael addresses the historical, philosophical underpinnings of the human rights set forth in the Universal Declaration. With respect to the Cranston three-fold test of universality, practicability and paramountcy, he states:

I agree with Mr. Cranston that these are appropriate tests, but they do not in fact draw a clear line between the earlier and the

73. *Id.* at 36 (footnote omitted).

74. *Id.* at 51.

75. *Id.* at 51.

76. *Id.* at 52.

77. *Id.* at 53.

78. Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309, 331 (1984).



later concepts of human rights. Tom Paine evidently understood the natural right to life as implying not only laws against homicide but also laws to provide a bare subsistence. Will anyone say that he was wrong in terms of paramount importance? . . . Importance, like practicability, is of course a matter of degree, and no doubt the prevention of murder is of more paramount importance than the prevention of starvation. Yet the degrees of paramountcy do not place all the rights of liberty before all the economic and social rights. If a man is subject to chronic unemployment in a depressed area, he will not thank you for the information that he has the basic rights of liberty. Locke's right of freedom to amass property is of little interest to such a man when it goes along with "freedom to starve." J.S. Mill's plea for absolute freedom of expression cuts little ice with labourers who do not know whether they will have a job next month.<sup>79</sup>

With respect to practicability, Raphael comments: "No amount of criminal legislation or of police forces will be able to prevent all homicides; but that is no reason for saying that the right to life must be struck out of our list of human rights as not being universally practicable."<sup>80</sup>

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79. Raphael, *Human Rights, Old and New*, in *POLITICAL THEORY AND THE RIGHTS OF MAN* 54, 63 (D. Raphael ed. 1967). In this compendium of human rights essays, Professor Raphael summarizes his differences with Cranston as follows:

I have argued that Mr. Cranston's tests of practicability and paramount importance do not afford a criterion for distinguishing the rights of liberty from economic and social rights. There is a sense, however, in which it is correct to say that the rights of liberty are universal moral rights while political, economic, and social rights are not. The expression "a universal moral right" may be used in a stronger sense or in a weaker sense. In the stronger sense it means a right of all men against all men; in the weaker sense it means simply a right of all men, but not necessarily against all men. In the weaker sense, all men may have a right which is, for each of them, a right against some men only. An example or two will make this clear. Every man has a moral right against every man not to be killed; i.e., every man has a duty to every man not to kill him. This is a universal right in the stronger sense. By contrast, every man has a right, when a child, to parental care, but this is not a right against every man; i.e., it is not the duty of every man to give to every child the care of a parent. Now the economic and social rights, and likewise the political right of participation in government, are universal rights in the weaker sense. When the Universal Declaration says that every man has the right to work, or the right to subsistence, it does not imply that the corresponding responsibility to provide any particular man with work or subsistence rests on every other man or every group of men; it implies that this responsibility rests on the members of his own State, and that the government of that State has a duty to carry out the responsibility on behalf of all its members. We do of course speak of a responsibility to help people who are in need in other parts of the world, but such help is an act of benevolence or charity, and not a matter of implementing a right. Similarly, the political right of participation in government applies only within one's own State. . . .

*Id.* at 65-66.

80. *Id.* at 64.

Professor Raphael recognizes a genuine difference between rights of liberty and political, economic and social rights. He nevertheless rejects Cranston's tests of practicability and paramountcy as a basis for distinguishing rights of liberty from economic and social rights. Raphael elaborates on his perception of the difference between the two categories of rights as follows:

[The difference] is well expressed by the French distinction between "the rights of man" and "the rights of the citizen." One has the rights of liberty simply as a member of the human race, and they are rights which link every man with every other man. One has political, economic, and social rights as a member of a particular civil society, and these rights link each man with all the other members of his society. . . .

. . . .

My view is, then, that the rights of the citizen are human rights in that, like the rights of liberty, they are based upon human qualities and the human condition. I distinguish them from the original "rights of man" simply because the "rights of man" are universal in the strong sense, rights against all men. It is practicality that determines whether a particular set of rights belongs to the one category or the other. The criminal and civil law of any State can give to the alien, as easily as to the citizen, protection of life, liberty, and possessions, and consequently a man is morally entitled to such protection from interference by others wherever he may be. Political rights are confined to citizens for reasons of convenience and of national security. Economic and social rights are in many countries similarly confined because it is thought that a wider application would be economically or politically unacceptable.<sup>81</sup>

The debate over the proper definition of human rights will no doubt continue. There is scholarly support for both the view that human rights should embrace economic, social and cultural rights and the view that human rights should not embrace such rights. Personal perceptions of distributive justice will ultimately determine which viewpoint one embraces as a philosophical matter.

At least since 1948, the world community has included economic, social and cultural rights within the definition of human rights. The United States participated in the drafting of, and voted for, the Declaration. Until 1981 the United States had not repudiated the economic, social and cultural provisions of the Declaration. The United States ratified the American Convention and the Protocol of Amendment to the OAS Charter,<sup>82</sup> which give recognition to second generation human rights. The United States is

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81. *Id.* at 66, 115.

82. *See supra* note 49 and accompanying text (discussing Protocol).

also one of thirty-five states that signed the Final Act of the Helsinki Conference.<sup>83</sup> The Final Act is not a legally binding treaty but constitutes an important statement of the intent of the signatories. Article VII of the Final Act provides that the participating states "will promote and encourage the effective exercise of civil, political, economic, social, cultural and other rights and freedoms all of which derive from the inherent dignity of the human person and are essential for his free and full development."<sup>84</sup>

While one side of the human rights debate gave rise to the philosophical arguments used by the Reagan Administration in repudiating second generation rights as human rights, scholarly philosophical proponents of such rights are at least as numerous, prestigious and persuasive as the second generation opponents. The philosophical dimension of the issue does not lend any significant weight to the United States repudiation of second generation rights.

### G. Rights of Children

The three philosophical perspectives summarized above relate generally to first and second generation rights as they apply to adults. All three recognize first generation human rights which accord to adults the right of full political participation and, hence, the opportunity to secure second generation interests through political means. An astute advocate of children's rights has questioned the relevance to children of the first generation-second generation human rights dichotomy. In his words, it is an

adult dichotomy: it raises to paramount importance rights (*e.g.*, speech) that are generally only available to or useful to adults; it places secondary importance on rights (*e.g.*, subsistence) in part because of a belief that the legal entitlement to first generation rights affords an opportunity to secure second generation benefits through political rather than legal means, but this is an adult model of political participation. . . . And it ignores the effect that the current denial of second generation rights has on children's future exercise of their first generation rights (*i.e.*, denying food for a month to a baby will dramatically curtail his eventual speech and voting rights).<sup>85</sup>

The magnitude of child poverty in America necessitates that effective steps be taken to improve the economic status of children in our society.

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83. *Conference on Security and Cooperation in Europe: Final Act*, 73 DEPT ST. BULL. 323 (1975).

84. *Id.*

85. Letter from James D. Weill, General Counsel of the Children's Defense Fund (May 15, 1991). Mr. Weill's comments are especially relevant to the views discussed above under "The Narrow Definition" and "A Middle Ground." Advocates of "The Broad Definition" would equate first and second generation rights and therefore presumably would agree with Weill's position.

The problems confronting legal recognition of the rights of children in the United States have been pointed out by Marian Wright Edelman, President of the Children's Defense Fund, and its General Counsel, James D. Weill.<sup>86</sup> They note that, given the current composition of the Supreme Court, there is little prospect

for the judiciary to lead the way to protective doctrines for children. . . . The traditional doctrine is that the Court scrutinizes with particular care legislative judgments that interfere with fundamental rights or that involve suspect classifications. All the fundamental rights that the Court has identified . . . are rights of political participation or liberty from governmental interference. Most of them are rights for adults. They do not respond to the needs for governmental assistance that children have. . . .

. . . .  
. . . The Constitution has been developed by judicial interpretation into a shield for the powerless. That is the primary justification for judicial interference with majoritarian rule, and for rebutting the presumption of the validity of decisions made in the political marketplace. But the courts have developed no consistent method of applying such analysis to children. As a result, the Supreme Court simply assumes the validity of legislation which injures children, as the Court assumes the validity of most legislation, and accepts the societal assumptions of the need for such injuries, although those assumptions have evolved through a process in which children cannot participate. The Court has no constitutional doctrine about children that crosses substantive lines. Rather, it has substantive doctrines for adults that are applied on an *ad hoc* and grudging basis to children. As a result, children, unlike other groups shut out of the political process, lose rather than gain a level of judicial intervention. . . .

. . . .  
. . . When it comes to the status of family poverty, however, the Court is unwilling to act on the innocence of the child's status. The Court's failure here merely reflects a much broader unwillingness in our society to make the needs of poor children paramount to stigmatizing their parents. The President epitomizes an attitude which holds that drastic consequences must ensue from adult economic failure in order to keep the economic engine running. This belief misapprehends the nature of our society, misunderstands the barriers to success, and mischaracterizes poor adults. It also ignores the impact on helpless children. Many of those who hold this view presumably also believe that innocent children should not suffer, but that becomes a meaningless sentiment for those who fear to

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86. Edelman & Weill, *supra* note 33.

help children because they fear the effect on the parents. As a result, we have health and welfare systems designed more to discipline poor adults than to help indigent children. The Court, no less than the President, is victimized by unthinking adherence to a formula that punishes children for the actions of their parents.<sup>87</sup>

United States ratification of the CRC would be a meaningful step toward recognition of the economic rights of children.

#### IV. THE RIGHTS-ENTITLEMENTS DICHOTOMY

Opponents of inclusion of second generation rights within the definition of human rights sometimes justify their position as an unwillingness to elevate to the level of fundamental rights various economic interests that, under our form of government, are merely entitlements. This succeeds only in shrouding the issue in a semantic fog. Surely no one would dispute that the laws establishing social security, medicaid and aid to families with dependent children create legal rights. It is equally clear—at least to those recipients whose subsistence is dependent upon these programs—that such rights are fundamental. Yet these are the very programs frequently described as “entitlements” that are somehow to be accorded a lesser status than rights.

When the fog is penetrated, the entitlements-based opposition to second generation human rights is nothing more than an assertion of the obvious. Economic, social and cultural entitlements are not enshrined in the United States Constitution. Therefore, in terms of their constitutional status, such entitlements are inferior to, and not to be equated with, first generation rights such as freedom of speech, press and religion, which are expressly proclaimed in the Bill of Rights. This may have been part of the reason for Peter Teeley’s comment that education is a “benefit,” rather than a right.

Unquestionably, the United States Constitution evolved from a *laissez faire* tradition and a desire to constrain government encroachments on the rights of the individual. But the Constitution patently is not the sole source of the rights to which our society affords legal protection. Otherwise, social security, education, medicaid and aid to families with dependent children would be mere charity, importing no duty on the part of government and no right on the part of the intended recipients.

That the Constitution did not create economic, social and cultural rights does not negate or foreclose their status as human rights. Indeed, when originally adopted, the Constitution was silent on the subject of speech and religion, which were embodied in the first amendment, adopted four years later. The recognition of a right in, or its absence from, the text of the Constitution is important in terms of the degree of judicial scrutiny to which a recipient of the right is entitled under our legal system in the event

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87. Edelman & Weill, *supra* note 33, at 147-48, 150-52.

of claimed infringement. However, such presence or absence cannot serve as a litmus test for inclusion in or exclusion from the category of human rights. Nevertheless, the fact that the United States Constitution embodies many first generation, but no second generation, rights has proven to be a major obstacle to sustained acknowledgement of the latter as human rights. Under the traditional right-privilege dichotomy, rights such as speech and religion were embodied in the First Amendment to prevent government from encroaching on the freedoms of the governed.<sup>88</sup>

The Constitution and Bill of Rights were formulated in a time of abundant natural resources. These documents addressed issues which were uppermost in the minds of the founding fathers, such as establishment of a system of representative government and safeguards against encroachments by such government on the vital interests of the governed. The Constitution has proven to be a marvelously flexible framework for government to address the problems of the governed in evolving economic, scientific and demographic circumstances. As a consequence, many of the economic, social and cultural rights contained in the CRC have long been firmly enconced in United States federal and state law and have the status of legal rights under our system of government. The argument for recognition of certain additional economic, social and cultural rights which would result from United States ratification of the CRC is not necessarily an argument to

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88. For a concise explanation of the right-privilege distinction in United States constitutional law, see Smolla, *Preserving The Bill of Rights in the Modern Administrative-Industrial State*, 31 WM. & MARY L. REV. 321, 326-27 (1990). Smolla observes:

In contrast to rights, "privileges" are interests created by the grace of the state and are dependent for their existence on the state's sufferance. Privileges may take virtually any form. They may be economic interests, such as a public job, welfare benefits, a license to operate a business, an offer of admission to a state university, or permits to dump pollutants into a river. Privileges may also be noneconomic. . . .

The right-privilege distinction in American constitutional law operated on the simple premise that government is not normally entitled to restrict the enjoyment of rights, and that whenever it attempts to do so, it must justify its efforts with the strongest of reasons. In the official parlance of constitutional law, the curtailment of rights will be sustained only if it can survive the "strict scrutiny" test in a judicial challenge; the test requires the government to demonstrate first, that its infringements are necessary to serve "compelling" ends, and second, that the infringements are "narrowly tailored" to achieve those ends.

When the government attempts to restrict enjoyment of a privilege, however, an entirely different analysis was traditionally applied. The government, it was said, could grant citizens privileges on the condition that they surrender or curtail the exercise of constitutional freedoms they would otherwise enjoy. . . . The distinction between "right" and "nonright" is implicit in the very existence of a legal system. Privileges are not rights, the theory went, but rather are public charity. Government, through the political process, generates privileges as a form of public largess. In private transactions, the homespun wisdom is that beggars cannot be choosers and gift horses are not to be looked in the mouth; the giver may attach any conditions he pleases to the gift.

confer constitutional status on such rights.<sup>89</sup> Nor would their recognition unreasonably constrain the power of federal or state governments to define reasonable procedural safeguards accompanying such rights.

Under the entitlements concept which has evolved during the 1970s and 1980s, government services or benefits are sometimes called "interests in largess."<sup>90</sup> Subject to certain limitations, such interests may be established with such procedural accoutrements as Congress or a state legislature sees fit to bestow. These accoutrements are defining characteristics of the interest itself. Under the entitlements concept, the recipient must accept such an interest in largess with all its warts. Indeed, the conditions to an interest in largess may even include the surrender of a constitutional right which the recipient would possess had she not chosen to accept the government largess. According to this theory, the recipient contractually agrees to accept the largess with only such procedural protections as are spelled out in the statute or regulations creating and defining the largess. It is important to note that such interests in largess create rights on the part of the recipients. But such rights have principally the legal safeguards specifically embodied in the law creating the largess.

This entitlements theory, sometimes referred to as the "new federalism,"<sup>91</sup> is a return to fundamental conservative values that include deference to legislative and administrative decision making and exalt majoritarian sovereignty over individual claims to procedural fair play. The interest in largess is a privilege enjoyed by the grace of, and at the sufferance of, the state. Such privileges may be withdrawn or modified by the state without the same level of procedural due process normally attaching to the taking of a property right or to encroachment on other constitutional rights. Such entitlements stem not from the Constitution but from other nonconstitutional sources of law such as statutes, regulations or contracts.

Perhaps the high water mark of due process protection accorded recipients of public benefits was *Goldberg v. Kelly*.<sup>92</sup> In that 1970 case the Supreme Court held that a welfare recipient is entitled to an evidentiary hearing prior to termination of benefits. Since 1970 the Supreme Court has sought to curtail what has sometimes been referred to as the due process explosion.<sup>93</sup> In *Board of Regents v. Roth*,<sup>94</sup> a state university professor without tenure challenged his dismissal, contending that it was done "to punish him for certain statements critical of the University."<sup>95</sup> He also

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89. Rights embodied in treaties ratified by the United States are not immutable. They may be overridden by subsequent act of Congress. See *infra* note 107 and accompanying text.

90. For an analysis of the entitlements doctrine, see Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 73-75 (1982).

91. *Id.* at 88.

92. 397 U.S. 254 (1970).

93. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1268 (1975).

94. 408 U.S. 564 (1972).

95. *Board of Regents v. Roth*, 408 U.S. 564, 568 (1972).

contended that the failure to afford him a hearing or give a reason for his dismissal violated his right to procedural due process. The Court held that interests entitled to due process protection are limited to deprivations of life, liberty or property. Because Roth had no vested interest in continued employment under Wisconsin law, his dismissal had not deprived him of a property interest entitled to due process protection.

Prior to *Roth* there had been a trend toward ever increasing due process safeguards surrounding individual rights to benefits conferred by the state. After *Roth* the pendulum has swung sharply away from further expansion of due process safeguards. In fact, significant contraction has occurred.<sup>96</sup> It is this evolution which has given birth to the entitlements theory.<sup>97</sup> The procedural restrictions attached to such entitlements ordinarily will be judicially relaxed only if there is no rational basis for the challenged condition attached to the entitlement by Congress or the state legislature. Under this approach, the recipient of the governmental largess has recourse for its deprivation under the due process clause only if the government has flagrantly broken its promise, without any rational basis for so doing.<sup>98</sup> Encroachment upon constitutional rights, on the other hand, may invoke the close scrutiny standard of judicial review when violations of due process or equal protection are asserted.

Notwithstanding the post-1972 erosion of property rights entitled to due process protection, a few United States Supreme Court decisions offer some basis for claiming due process protection for entitlements beyond those procedural safeguards expressly provided for in the statute or rule establishing the protected interest.<sup>99</sup> Hence, in appropriate circumstances the minimal requirements of procedural due process may extend beyond the statutorily mandated procedures. In *Logan v. Zimmerman Brush Co.*,<sup>100</sup> Logan was discharged because of a physical impairment allegedly interfering with performance of his duties. Logan filed a timely claim under an Illinois statute barring employment discrimination because of a physical handicap. The Illinois Fair Employment Practices Committee was required to conduct a hearing within 120 days. The Commission inadvertently failed to hold the hearing within that time. The Illinois Supreme Court held that the time limit was jurisdictional and denied relief. Its rationale was that the legislature had attached a reasonable limitation to the entitlement—that a hearing be held within 120 days. Because the hearing did not occur, Logan's state-

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96. For an analysis of the post-1972 Supreme Court decisions narrowing, and ultimately eroding, the types of vested interests protected by procedural due process, see TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 10-10, 10-11 (2d ed. 1988).

97. Smolla, *supra* note 90, at 88.

98. See, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

99. For an analysis by Professor Smolla of Supreme Court decisions since *Bishop v. Wood*, 426 U.S. 341 (1976), which he characterizes as doctrinal deviations that impose certain limitations on the entitlements theory, see Smolla, *supra* note 90, at 102.

100. 455 U.S. 422 (1982).



created and conditioned interest lapsed, leaving no property interest entitled to due process protection. Reversing the Illinois Supreme Court, the United States Supreme Court concluded that Illinois could not create an entitlement and simultaneously permit it to be summarily extinguished. The interest, once conferred, was entitled to appropriate procedural safeguards.<sup>101</sup>

This brief summary of the entitlement theory is an oversimplification of a complex, and by no means consistent, evolutionary process of interpretation of the Fourteenth Amendment by the United States Supreme Court, in the context of rights or interests other than Constitutional rights. It may nevertheless help to explain one basis for objection to second generation human rights by the Reagan Administration and other staunch adherents to the *laissez faire* tradition. Such opponents of economic, social and cultural rights are essentially saying that such rights are not recognized by the United States Constitution and, hence, cannot be regarded as fundamental rights. They are entitlements which were bestowed, and can be extinguished or modified, by government. Some opponents of second generation rights also may tend to view such rights as being aligned with socialism and the welfare state.<sup>102</sup>

Opponents' concern also may be premised on the fear that recognition of second generation rights such as those contained in the CRC may somehow create constitutionally protected substantive property rights. Charles Reich developed the theme that various forms of government created wealth—largess—deserve recognition as legally protected property interests.<sup>103</sup> In a similar vein, Peter Edelman has recently contended that a "survival" income should be a legally protected right.<sup>104</sup> While containing challenging insights as to distributive justice, these arguments for the recognition of new constitutional rights have yet to achieve any widespread judicial acceptance.<sup>105</sup> There does not appear to be any significant basis for concern that

101. For an analysis of the *Logan* case and three other "doctrinal deviations" from *Bishop v. Wood*, see Smolla, *supra* note 90, at 102. These cases suggest that egregious circumstances or irrational conditions attached to interests in largess may call forth greater due process protection than that which the legislature or administrative agency sought to establish.

102. *Treaties Hearings*, *supra* note 22, at 325 (statement of Oscar Garibaldi). Garibaldi commented:

I strongly oppose this treaty, because of its philosophy, its content and the danger of misconstruction. First, it is largely the historical product of the Marxist ideology expounded by the Soviet bloc, coupled with the non-communist world's postwar infatuation with various forms of democratic socialism. In other words, however worthy its general goals may look, this is largely a document of collectivist inspiration, alien in spirit and philosophy to the principles of a free economy.

*Id.*

103. Reich, *The New Property*, 73 YALE L.J. 733 (1964); *cf.* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 443 (1982) (Powell & Rehnquist, JJ., concurring).

104. Edelman, *The Next Century of our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987).

105. *But see* *Goldberg v. Kelly*, 397 U.S. 254 (1970) (citing Professor Reich's article with approval). The *Goldberg* decision treated the right to welfare benefits as similar to a property

a treaty recognizing certain second generation rights would "constitutionalize" such rights.<sup>106</sup>

When the semantic fog is cleared away, entitlements rhetoric sheds little, if any, useful light on the issue of whether to acknowledge, or establish as domestic law, the second generation rights contained in the CRC. Many of these rights are already firmly embedded in United States federal and state law. Since treaty law may be superseded by act of Congress, such second generation rights would acquire no immutable character as a result of treaty ratification.<sup>107</sup> Nor would they acquire any different or greater procedural accoutrements, under the due process clause, than those requirements expressly conferred by the domestic laws embodying such rights—assuming such laws meet the test of rationality.<sup>108</sup> Many of our most highly valued rights—social security, free public education, medicaid, aid to families with dependent children—are based solely upon nonconstitutional legal sources. Under the rights-entitlements dichotomy, these are entitlements. Yet they also are basic rights accompanied by legally enforceable obligations. They are not enshrined in our Constitution, but this does not detract from their fundamental importance and efficacy. Nor are they immutable, but the interests they serve are of such paramount importance that they are not likely to be lightly swept away by representative governments.

right that could not be withdrawn without due process. Shortly after *Goldberg*, the shift to greater deference to legislative and administrative decisions began. This trend has continued with few exceptions to the present. See *supra* notes 86-101 and accompanying text (describing contraction of due process protections and increased deference to government-ordained procedural protections).

106. Any residual concern on this issue would be laid to rest by including in the CRC treaty package a non-self-executing reservation that would deprive the treaty of any effect for purposes of domestic law beyond that specifically contained in federal and state laws embodying such second generation rights. While ratification of the CRC would not create constitutionally protected rights not previously embodied in the Bill of Rights, such ratification nevertheless would impose certain obligations on the United States. Thus, the reporters' notes to the Restatement of Foreign Relations Law state:

By adhering to this covenant (*International Covenant on Economic, Social and Cultural Rights*), the United States would be obligated to take legislative, executive, and other measures, federal or State, generally of the kind that are already common in the United States, "to the maximum of its available resources" "with a view to achieving progressively the full realization" of those rights. Since there is no definition or standard in the Covenant, the United States would largely determine for itself the meaning of "full realization" and the speed of realization, and whether it is using "the maximum of its available resources" for this purpose.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 701 reporters' note 8 (1987).

107. See HENKEN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 163-64 (1972) (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) and other cases which have held that federal legislation superseded treaty provisions). Henken comments that "in the area of jurisdiction common to both, the treaty power and the legislative power are distinct but equal. Either may enter the field but may be superseded by the other." *Id.* at 410. The "last expression of the sovereign will" controls. *Id.*

108. See *supra* notes 90-91 and accompanying text (discussing due process requirements of entitlements theory).

All this would be equally true of the second generation rights contained in the CRC. Indeed, the evolution of our constitutional law reducing the due process safeguards afforded to legal rights not embedded in the Constitution (interests in largess) should allay the fears of those who favor minimalist government involvement in the economic interests of the people. The second generation rights can be crafted with minimal procedural safeguards and broad discretion on the part of the dispensers if that is the wish of the sovereign majority. Those whose sense of distributive justice demands that society's goods be distributed only to those who have earned them presumably oppose not only those CRC second generation rights not yet embodied in United States law but also existing entitlements such as social security, medicaid, free public education and aid to families with dependent children. Hopefully they represent a small minority of the body politic.

The basic issue of whether to acknowledge those CRC second generation interests not already embodied in United States law should be addressed in terms of an evaluation of the merits of such interests. This issue is one of achieving a proper balance between economic interests which should be provided by government and those which must be achieved, if at all, through individual effort. Whether or not an interest is already enshrined in our Bill of Rights cannot be a proper litmus test for such a determination. To resolve this issue it is necessary to confront the age old tension between liberty and justice. Entitlements rhetoric only serves to confuse this issue. Even those who oppose welfare benefits generally must acknowledge that children present a different issue. Enlightened self interest dictates that responsible government afford subsistence rights to children.

#### V. PAWN IN THE COLD WAR

Geopolitical considerations have been more influential than either philosophical or economic factors in shaping United States human rights policy in the last decade. Indeed, it can be stated without undue cynicism that geopolitical factors have dominated United States posturing on human rights almost since the inception of the United Nations and the adoption of the Universal Declaration. Thus, as a tactic to defeat passage of the Bricker Amendment, in 1953 Secretary of State John Foster Dulles made a pledge that the United States would not become a party to any human rights treaty.<sup>109</sup> At the same time, in what has been seen as an effort to compensate for the Dulles exercise in political expediency, the United States supported a United Nations General Assembly resolution addressed to the Economic and Social Council urging establishment of a system of annual reports on human rights by United Nations member states.<sup>110</sup>

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109. SENATE JUDICIARY COMM., REVIEW OF THE UNITED NATIONS CHARTER, A COLLECTION OF DOCUMENTS, S. DOC. No. 87, 83d Cong., 2d Sess. 295-96 (1954).

110. Farer, *The United Nations and Human Rights: More than a Whimper Less than a Roar*, 9 HUM. RTS. Q. 550, 573 (1987). In another forum, Professor Farer has stated in response to a question from Senator Claiborne Pell concerning the reasons for opposition by

The United States is not unique in having relegated human rights to the role of a pawn in world politics. Thus, Professor Farer has observed:

I think it is fair to say that, except during the Carter years, not one of the large Western democracies (as opposed to the Dutch and the Swedes) has been a leader in the United Nations or regional fora either in efforts to strengthen the machinery of human rights protection or to marshal pressure against non-communist villains. France, for example, was among the last members of the Council of Europe to adhere to the treaty provisions granting individuals the right to petition for enforcement of their rights under the European Human Rights Convention. Throughout the history of the United Nations, the British government has looked with little sympathy on efforts to strengthen the enforcement machinery. And the United States, during the Reagan era, has often stood virtually alone in opposing condemnation of Chile, South Africa, and other delinquents with whom we share, among other things, secret intelligence.

. . . .

[The issue of human rights] certainly seems to be fixed on the agenda of superpower diplomacy. Reluctantly planted there by Nixon and Kissinger, it has now survived through another two and one-half administrations.<sup>111</sup>

In a statement to the Senate Committee on Foreign Relations, Senator Claiborne Pell, speaking in his capacity as Co-Chairman of the Helsinki Commission, strongly supported ratification of four human rights treaties signed by President Carter and transmitted to the Senate in 1978 but not yet ratified by the United States.<sup>112</sup> After arguing forcefully for the second generation rights embodied in those treaties, Senator Pell observed that “[c]onservatives believed that U.S. adoption of the economic, social and cultural treaty would make ‘Marxism and socialism the supreme law of the land.’”<sup>113</sup>

Perhaps the ultimate in political cynicism was the attempt by President Reagan early in 1981 to appoint Ernest Lefever, an outspoken opponent of an active human rights policy, as Assistant Secretary of State for Human Rights and Humanitarian Affairs. The Senate Foreign Relations Committee rejected the nomination and Lefever requested that his name be withdrawn from consideration.<sup>114</sup> The President then appointed Elliott Abrams to the

the United States to human rights treaties, “I think that race relations have been one factor, if we will be perfectly frank. A lot of opposition came from representatives of States where law or practice were crudely discriminatory.” *Treaties Hearings*, *supra* note 22, at 102.

111. Farer, *supra* note 110, at 583-84, 582 (footnote omitted).

112. *Treaties Hearings*, *supra* note 22, at 60 (statement of Senator Claiborne Pell, Co-Chairman of the Helsinki Commission).

113. *Id.* at 63.

114. Reese & Whitmore, *A Fight Over Human Rights*, *NEWSWEEK*, Mar. 30, 1981, at 32.

position. In another major setback to the cause of human rights, Secretary of State Alexander Haig declared in his first press conference that "international terrorism will take the place of human rights"<sup>115</sup> in United States foreign policy.

Still another indication of the role of human rights as a pawn in the cold war during the Reagan Administration was contained in an internal State Department memorandum leaked to the press and reported in the New York Times on November 5, 1981.<sup>116</sup> The Times article stated:

In a memorandum, which Secretary of State Alexander M. Haig Jr. has approved as the basis for a human rights policy, the State Department says that the United States cannot hope to offer a credible alternative to either the Soviet example or what it sees as a rising tide of neutralism unless it takes a strong position on political freedom and civil rights. . . .

The Carter Administration, by contrast, made rights considerations a major part of foreign policy. The Reagan Administration, in legislation now before Congress, is seeking to remove restrictions on military assistance to Chile and Argentina, which had been deprived of some assistance because of what the Carter Administration saw as systematic violations of human rights. . . .

The memorandum says that attempts to match or challenge Soviet military power must be complemented by efforts in international organizations to portray the Soviet Union as repressive and show its contrast to free societies. "Our ability to resist the Soviets around the world depends in part on our ability to draw this distinction and persuade others of it," it says. . . .<sup>117</sup>

The quoted memorandum continues:

Congressional belief that we have no consistent human rights policy threatens to disrupt important foreign policy initiatives. Human rights has been one of the main avenues for domestic attack on the Administration's foreign policy.

"Human rights"—meaning political rights and civil liberties—conveys what is ultimately at issue in our contest with the Soviet bloc. The fundamental distinction is our respective attitudes toward freedom. Our ability to resist the Soviets around the world depends

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115. See *1988 Review Hearings*, *supra* note 32, at 187 (statement of J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*).

116. N.Y. Times, Nov. 5, 1981, at A1 (city ed.).

117. *Id.*

in part on our ability to draw this distinction and to persuade others of it. . . .

We desire to demonstrate, by acting to defend liberty and identifying its enemies, that the difference between East and West is the crucial political distinction of our times.<sup>118</sup>

The redefinition of human rights by the Reagan Administration in 1981, carving out economic, social and cultural rights, has been discussed previously.<sup>119</sup> The Introduction to the 1981 Country Reports on Human Rights Practices<sup>120</sup> prepared by the State Department explicitly acknowledges the influence of world politics on the United States human rights policy:

The attempt to make foreign policy serve human rights confronts several specific problems that must be faced in developing a policy. . . .

The world after 1945 has been characterized by competition between two adverse ideologies, one represented by the United States and one by the Soviet Union. The United States is the nation that has most vigorously undertaken the effort to make human rights a specific part of its foreign policy. The Soviet Union, on the other hand, is ruled by a very small elite through a massive bureaucratic and police apparatus. Its regime inherits in a modified form the Marxist tradition that reacted against the philosophic ideas on which the original human rights concept was based, and superimposes this on a heritage of absolute monarchy. . . .

Thus a world in which several major powers were in theoretical agreement over human rights has given way to a world in which the two great powers are fundamentally divided over this issue. This Administration believes that human rights is an issue of central importance both to relieve suffering and injustice and to link foreign policy with the traditions of the American people. . . .

A consistent and serious policy for human rights in the world must counter the USSR politically and bring Soviet bloc human rights violations to the attention of the world over and over again.<sup>121</sup>

The goal of a consistent human rights policy, applicable to friend and foe alike, proclaimed by the State Department is indeed laudable. Yet the

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118. *Id.* at A10.

119. *See supra* notes 54-57 and accompanying text.

120. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1981 SUBMITTED TO THE SENATE COMM. ON FOREIGN RELATIONS AND THE HOUSE COMM. ON FOREIGN AFFAIRS, 97TH CONG., 2D SESS. (Joint Comm. Print 1982).

121. *Id.* at 7-9.

actual implementation of this policy reveals gross inconsistencies tilting in favor of friends and against foes. Thus, the Director of the Center for International Policy commented on the 1981 Country Reports:

Certainly, the report on El Salvador betrays an effort to dodge the persistent evidence of the government's responsibility for appalling human rights violations. . . .

I would like to talk a bit about the implications for policy. The real issue about these reports is how are they factored into the formulation of foreign policy, not the philosophical underpinning that appears in the introduction, nor the relative accuracy of the country reports. Here it seems clear that there is such a divergence as to raise serious questions as to intention and value.

Regrettably, it seems to me, the State Department is as guilty of the use of double standards as are those that it seeks to blame for similar bias. . . .

How in the name of evenhandedness can the Reagan administration certify that human rights have improved in El Salvador when facts point otherwise?. . . .

There is a wide gap between what these reports say and what the administration does to bring about human rights improvements. My suspicion is that they are intended to serve as a screen on which to project moral criticism behind which our Government continues to indulge, for reason of "national security," repressive acts by so-called friendly governments.<sup>122</sup>

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122. *1981 Review Hearings, supra* note 32, at 73-77 (prepared statement of Donald L. Ranard). Another commentary on the evenhandedness of United States human rights policy was made by Raymond D. Gastil, Director, Comparative Survey of Freedom, Freedom House. Mr. Gastil concurred with the Administration's redefinition of human rights to exclude economic, social and cultural rights. Nevertheless, Mr. Gastil commented:

The introduction mentions the suppression of freedom by Moscow within the U.S.S.R., in Eastern Europe and now Afghanistan. But if we are to be evenhanded in this respect, we must be concerned also with many other unsolved claims for a larger degree of self-government by suppressed peoples, particularly in Africa and Asia.

The introduction's remarks on the relation of foreign policy and human rights is instructive. Yet in saying that effectiveness should be the test of human rights policy, the discussion seems to go too far in asking for short-term effectiveness and not far enough in recognition of the symbolic value of even ineffective advocacy. We could, perhaps, have done little about the crimes of Pol Pot while they were occurring, but it eroded respect for all human rights when too many sat for so long in stony silence.

Appropriately, there should have been a discussion here, if we are discussing the relation of human rights to foreign policy, of what actions by the U.S.

A skeptic might conclude that rather than attempting to make foreign policy serve human rights, the Reagan Administration sought to mold human rights policy to serve foreign policy objectives, particularly the ideological conflict between the United States and the Soviet Union.

Thus, in a speech to the Trilateral Commission in the spring of 1981, Secretary of State Haig made clear that if human rights were to play any role in foreign policy, that role should be to serve as a weapon against hostile communist regimes.<sup>123</sup> Tamar Jacoby commented in a 1986 article that

having given up its effort to downgrade the [human rights] issue, the Administration now sought, in effect, to co-opt the idea and use it for its own geopolitical purposes, rather narrowly defined. . . . [T]o use it in battle not only against communist regimes but also . . . against domestic opponents of its human rights policy. It was a brilliant strategy, no more than half cynical, and it almost worked.<sup>124</sup>

The Administration's early embrace of the Jeanne Kirkpatrick distinction between authoritarian and totalitarian regimes is further evidence of this subordination of even first generation human rights to foreign policy objectives. In her view, the central issue of foreign policy was the East-West conflict. This preoccupation—if not obsession—with the Evil Empire was the basis for her opposition to the Carter Administration human rights policy, which she viewed as a “predilection for policies that violated the strategic and economic interests of the United States.”<sup>125</sup> Heinous human rights violations by friendly authoritarian regimes such as Guatemala and El Salvador were to be accepted while similar or less outrageous violations by Marxist dictators were severely castigated. Her position represented the

Government might hurt the cause of human rights.

For example, when government officials give the impression of not caring as much about what goes on in Haiti or Ethiopia or Saudi Arabia as in Afghanistan or Poland, this weakens our support for human rights in several ways. Above all, it blunts the propaganda value of our denunciations of the actions of Communist tyrannies. We are in a long-term struggle of systems of freedom with systems of organized tyranny in the name of justice. In the minds of many, we suffer defeat when we seem to be less interested in freedom than in political issues of the contest itself important though they are.

1981 Review Hearings, *supra* note 32, at 65-66 (statement of Raymond D. Gastil, Director, Comparative Survey of Freedom, Freedom House); see also Scoble, *Review of the Country Reports on Human Rights Practices*, HUM. RTS. INTERNET REP. (raising further questions about evenhandedness and consistency of United States human rights policy as reflected in Country Reports).

123. Jacoby, *The Reagan Turnaround on Human Rights*, FOREIGN AFF., Summer 1986, at 1066, 1069.

124. *Id.* at 1071.

125. *Id.* at 1068.



ultimate in end-justifies-the-means subordination of human rights policy to an overriding geopolitical objective.

As Jacoby points out, Elliott Abrams, head of the State Department human rights bureau during the first Reagan Administration, clearly believed that human rights are necessarily subordinate to the United States larger geopolitical concerns. According to Jacoby, Abrams believes that

the very purpose of a human rights policy should be to convey to the public, at home and in Europe, just what the difference was between East and West. From the beginning, Abrams encouraged the President to use human rights as a rhetorical weapon against Moscow. And, like Secretary Haig and Ambassador Kirkpatrick before him, he harbored great reservations about the geopolitical consequences of a policy that threatened to destabilize our "friends."<sup>126</sup>

In a 1982 report, leading human rights monitoring groups, The Lawyers Committee, Americas Watch and Helsinki Watch, also commented that Deputy Secretary Abrams had developed a human rights policy which complemented and justified Administration policies, thereby compromising the integrity of his bureau.<sup>127</sup>

Irving Kristol is an impassioned spokesman for the Kirkpatrick totalitarian-authoritarian distinction and the narrow human rights definition adopted by the Reagan Administration. In his view, the cold war between the liberal democracies and the new totalitarian states is the central focus around which everything else revolves. Kristol comments:

The "human rights" movement is decidedly political. Its need to obfuscate the totalitarian-authoritarian distinction flows from its political intentions, its desire to deny that the "cold war" is anything but a paranoid fantasy of a bourgeois-capitalist establishment, to minimize the totalitarian threat to liberal-democratic nations, to unnerve American foreign policy by constantly espousing the "immorality" of its relations with authoritarian allies, etc.<sup>128</sup>

Kristol castigates the Universal Declaration of Human Rights for its recognition of economic, social and cultural rights and exalts "individual rights" and traditional political rights as the only true human rights.<sup>129</sup> In his view, economic and social rights were imported into the Universal Declaration by persons with a hidden agenda to accomplish the moral disarmament of the West by establishing "a moral equivalence" between liberal capitalist democracies and communist or self-styled socialist regimes.<sup>130</sup>

126. *Id.* at 1078.

127. *1981 Review Hearings*, *supra* note 15, at 70-71 (statement of Donald L. Ranard).

128. Kristol, *Human Rights: The Hidden Agenda*, NAT'L INTEREST, Winter 1986-87, at 3, 8.

129. *Id.* at 5.

130. *Id.*

Kristol contends that proponents of human rights are either "naive innocents" or sophisticated professionals pursuing a diabolical plot to "delegitimize the market economy."<sup>131</sup> Thus, he observes:

It has been documented—though little notice has been taken of this—that many of the same people who are among the leaders of "human rights" agitation are also active in anti-nuclear agitation, arms control agitation, extremist environmentalist agitation, unilateral disarmament agitation, anti-aid-to-the-contras agitation, radical feminist agitation, as well as all sorts of organizations that sponsor "friendship" programs with left-wing regimes. Since these are not only energetic people but very intelligent as well, they have been very successful in giving the issue of "human rights" a special "spin" in a certain direction.<sup>132</sup>

While Kristol's position on human rights is extreme, it may afford some insight into the "philosophical" underpinnings of the Reagan-Haig-Abrams human rights position.

It is time to reassess the United States definition of human rights. The paramount importance of opposing Soviet aggrandizement in the forty-five year period following World War II cannot be denied. But a human rights policy so patently molded to serve the single objective of opposing the Evil Empire must be reevaluated in the light of recent developments in United States-Soviet relations. Perhaps second generation rights can now be evaluated on their merits in terms of their consistency with and contribution to the goals of our society.

The record is replete with evidence corroborating the fact that, even with respect to first generation human rights, the Reagan Administration subordinated principle to the strategic interest of prevailing in the cold war.<sup>133</sup> The United States redefinition of human rights to eliminate the

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131. *Id.* at 6.

132. *Id.*

133. A number of human rights experts have noted that United States human rights policy is heavily influenced generally by foreign policy considerations and particularly by the ideological cold war between the United States and the Soviet Union. See, e.g., Lillich, *A Human Rights Agenda for the New Administration: Some Preliminary Observations*, 28 VA. J. OF INT'L L. 827, 829 (1988); Buergenthal, *U.S. Human Rights Policy: A Modest Agenda For the Future*, 28 VA. J. INT'L L. 845, 847 (1988); Alston & Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 156, 181-83 (1987); Alston, *supra* note 32, at 386; Shestack, *supra* note 32, at 196-204. A brief survey of some of these authorities' comments is instructive. Professor Lillich has stated: "Yet, as Hannum rightly concludes, 'U.S. credibility in the field of human rights has suffered significantly during the Reagan years because the pursuit of 'human rights' has been viewed primarily as an anti-Soviet weapon rather than as an end in itself.'" Lillich, *supra*, at 829 (quoting Hannum, *A Human Rights Agenda for 1989 and Beyond*, 28 VA. J. INT'L L. 867, 867-68 (1988)). Professor Buergenthal has commented:

It also smacks of hypocrisy for the United States to adopt domestic legislation designed to ensure the enforcement by other nations of internationally recognized

second generation rights embodied in the Universal Declaration was patently

human rights, when it is not prepared to ratify the very treaties that proclaim the rights the legislation purports to enforce. The contradiction inherent in that position weakens the effectiveness of the legislation because it reinforces the argument of some governments that the United States is in fact pursuing selfish political goals having nothing to do with the advancement of human rights.

Our identification in the past with the Shah of Iran, Marcos, the Somozas, the Duvaliers, and others of like ilk has cost us dearly in terms of our long-term national interest. In the ideological struggle between East and West, human rights plays a vital role, which has not been fully appreciated by the United States. Rather than seeing the promotion of human rights as an instrument capable of advancing our strategic interests, the United States has tended to view human rights as a purely humanitarian concern to which we must pay lip service, but only after taking care of our "real" national interests.

Buergethal, *supra*, at 847-48. Alston and Quinn have stated:

. . . [I]n connection with the economic and social rights provisions of the draft of the Universal Declaration— . . . the government of the Union of South Africa took particular exception. It argued that if [second generation] rights were to be taken seriously

it would . . . be found necessary to resort to more or less totalitarian control of the economic life of the country. To declare them to be fundamental human rights, would therefore amount to an injunction by the United Nations to State members to move to the left, by assuming greater and greater economic control, an injunction, in fact, to move nearer to the communistic economic system, under which, in practice, many essential human rights are being denied.

This argument has been pursued with some gusto by U.S. opponents of the Covenant. Thus Ernest Lefever, the Reagan administration's unsuccessful first nominee for the post of Assistant Secretary of State for Human Rights and Humanitarian Affairs, told a 1979 congressional hearing that "so-called economic rights . . . cannot be guaranteed by governments unless they are totalitarian."

In so far as such criticisms rest upon a strict libertarian philosophical analysis, according to which any redistributive action on the part of a government is unacceptable (including taxation for any purpose other than ensuring the essential physical security of the nation and its citizens) they may, on their own terms, be defensible. It might be observed, nonetheless, that it seems rather bizarre and detached from reality to condemn even limited governmental involvement in economic and social planning when it is so universally accepted in practice. However, the criticisms cited above go beyond such theoretical libertarian arguments to suggest that the Covenant itself explicitly or implicitly dictates a particular form of government as well as an overwhelming degree of governmental intervention in the economy. Indeed the argument is that economic rights are synonymous with "totalitarianism." Despite its often loose and unhelpful usage the latter term seems to imply at least a comprehensive system of centralized economic planning with a concomitant loss of individual freedom. . . . [S]uch arguments have been consistently and decisively rejected by the governments of all the Western European and market economy (i.e., mixed capitalist) Third World states that have ratified the Covenant. Not a single such government has even raised the issue in any report submitted in connection with the Covenant, nor has the issue been debated by the ECOSOC Working Group. It is clear therefore that the Covenant has never been interpreted by any governmental or intergovernmental body in such a way as to lend even the least bit of credence

motivated by cold war strategic considerations. In comparison with the

to the assertions cited above.

Moreover none of the provisions of the Covenant would seem to confirm such a thesis. The preamble to the Covenant begins by noting the essential interrelationships between the two sets of rights, thus effectively condemning any strategy for the realization of one set of rights that is predicated on the destruction of all or part of the other set. In addition, the carefully nuanced obligation phrases analyzed above are structured in such a way as to provide governments with a considerable degree of discretion to determine for themselves how best to promote realization of the relevant rights within the circumstances prevailing within their societies.

Finally, the argument that a particular system of political economy is dictated by the Covenant is bluntly contradicted by the *travaux préparatoires*.

....

... [I]t is nevertheless clear from both the text of the Covenant and the preparatory work that arguments positing the inherent incompatibility of particular economic and social systems with economic rights cannot be sustained.

Alston & Quinn, *supra*, at 181-83. In another forum, Professor Alston has stated:

Nevertheless, while the United States has used the Helsinki Accords, quite correctly, as grounds for calling the Soviet Union and other Eastern European countries to account for their human rights violations, it has done so on the basis of a highly selective, legally insupportable and ethically dubious denial of the legitimacy of the economic, social and cultural rights it formally endorsed in signing the Accords.

Alston, *supra* note 32, at 386. Mr. Shestack has commented:

The Administration's arguments reveal its misunderstanding of human rights jurisprudence. From a moral perspective, civil and political rights and economic and social rights are grounded in imperatives of justice. Justice requires liberty and equality. Civil and political rights accommodate the principle of liberty; social and economic rights accommodate the principle of equality. . . . The Reagan Administration ignored these principles. Its reasons for rejecting economic and social rights were grounded in the ideology of the Chicago School of Economics which exalts free market forces and discourages government involvement in economic and social planning. When applied to the foreign policy area, these theories perceived the encouragement of central economic planning and redistribution of resources as a feature of a totalitarian political structure.

....

But pursuing the realization of economic and social rights does not necessarily place a nation on the road to a communist system of government. Economic and social planning has been part of the political structure of many European states and of the United States, and has enhanced the economic and social status of citizens of these states without any embrace of a Marxist system. Nevertheless, in some instances, a nation that wants to provide economic and social rights to its citizenry may have to make major transformations in its distribution structure. This is especially true in many Third World states that have gross inequalities in the distribution of land and other wealth. The likelihood is that satisfying economic and social needs in these states requires, at least, a social-democratic or welfare type of system. This prospect arouses the hostility of free market and anti-welfare conservatives.

....

However, internally the Administration conceived its human rights policy primarily as an "ideological response" to the Soviets—a political weapon in the fight between East and West. And it applied this realpolitik vision in practice. Thus, human rights initiatives frequently appeared to stem not from the pronounced,

Soviet Union, the United States could profit from its exemplary law and practice with respect to civil and political rights. It was, however, unwilling to enter into competition with the Soviet Union with respect to economic, social and cultural rights such as education, health care and a subsistence standard of living for the disadvantaged. Presumably, the reason for this unwillingness was that governmental action in this sphere was viewed as somehow inconsistent with our free enterprise system.

#### VI. PAST STRATEGY FOR RATIFICATION OF COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Philip Alston offers a perceptive analysis of the CESC. According to his analysis, proponents of ratification have incorrectly portrayed the covenant as not significantly altering rights already embodied in United States law and have urged that second generation human rights are not significantly different from first generation rights. According to such proponents, second generation rights contained in the CESC are a "toothless tiger" devoid of any practical or legal significance to the United States.<sup>135</sup> Therefore, the United States undertakes no meaningful new obligations as a consequence of ratification. Viewed in these simplistic terms, ratification confronts only two obstacles: (i) The necessity of formulating suitable reservations, declarations and understandings to assure that ratification does not impose any material obligation not already embodied in the United States legal system; and (ii) the preference for unilateralism, or abhorrence of multilateralism, by the Administration and certain Senators.

Alston expresses strong skepticism that the Senate will give its advice and consent to ratification on this basis.<sup>136</sup> He views the second generation rights contained in the CESC as different than the rights set forth in other human rights treaties. Consequently, he expresses doubt that a strategy to "smuggle it through as a part of a package" with first generation rights treaties will succeed.<sup>137</sup> He does not suggest that second generation rights are incompatible with our traditional values. Instead he concludes that the acceptability to the American people of second generation rights cannot readily be assumed.<sup>138</sup>

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shared aspirations for world order based on human rights values but from the Administration's confrontational policy toward the Soviet Union.

1988 Review Hearings, *supra* note 32, at 203-04, 196-97 (statement of J. Shestack, *An Unsteady Focus: The Vulnerabilities of the Reagan Administration's Human Rights Policy*).

134. Alston, *supra* note 32, at 366.

135. Alston, *supra* note 32, at 366. The "toothless tiger" approach was embraced by two Administration witnesses in the 1979 hearings before the Senate Foreign Relations Committee on the CESC. *Treaties Hearings, supra* note 22, at 24-32 (statement of Roberts B. Owen, Legal Adviser, Department of State), 35-41 (statement of Jack Goldklang, Attorney Adviser, Office of Legal Counsel, Department of Justice).

136. Alston, *supra* note 32, at 366.

137. Alston, *supra* note 32, at 366, 377.

138. Alston, *supra* note 32, at 384.

Gaining public acceptance of CESCRC second generation rights for all people will be an arduous task. The stigma which has long attached to the "undeserving poor" poses a formidable obstacle to the establishment of broad subsistence rights for all.<sup>139</sup> But children are different. Whatever one's views of the welfare issue, there is a growing awareness that all children are deserving. In this regard altruism goes hand-in-hand with enlightened self-interest. "The future of America depends on the abilities of its people. Business has an abiding interest and a critical stake in ensuring that today's children grow up to be tomorrow's literate, skilled, adaptable adults who can work more effectively and productively."<sup>140</sup>

Recognizing the important difference between second generation rights for children and such rights generally does not negate Alston's strategy. It suggests that his proposal to confront the issues directly, on their merits, has a substantially greater opportunity for early success with respect to the CRC than the CESCRC.

#### VII. A NEW DIRECTION FOR CHILDREN'S SECOND GENERATION HUMAN RIGHTS

Having concluded that United States recognition of second generation human rights cannot be achieved by stealth, Alston contends that the best prospect for ratification lies in confronting the hard issues, on their merits.<sup>141</sup> One fundamental issue is whether achievement of economic, social and cultural rights results in a loss of individual liberties which is unacceptable to the American public.<sup>142</sup> In pursuit of ratification, Alston would not finesse this issue. He would enlist the support of constituencies dealing with related issues such as women's rights, homelessness, child abuse, malnutrition and education. The issue should be viewed in terms of domestic, rather than foreign, policy. Under this premise, proponents of ratification would acknowledge that significant new obligations would be undertaken by the United States as a consequence of becoming a party to the CESCRC. Shifting the focus of ratification away from the foreign policy implications of human rights to the well-being of Americans, as suggested by Alston, is a more promising and forthright approach.

Alston's argument for a new ratification strategy was addressed to the CESCRC, not the CRC. However, there is little reason to believe that the

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139. See Handler, *The Transformation of Aid to Families with Dependent Children: The Family Support Act in Historical Context*, 16 REV. L. & SOC. CHANGE 457, 470 (1987-88) (tracing history of United States welfare laws, which "distinguish classes of poor in terms of moral blameworthiness").

140. COMMITTEE FOR ECONOMIC DEVELOPMENT, THE UNFINISHED AGENDA: A NEW VISION OF CHILD DEVELOPMENT AND EDUCATION 89 (1991).

141. Alston, *supra* note 32, at 392.

142. Alston, *supra* note 32, at 380.

“stealth” or “toothless tiger” approach would succeed for the CRC when it has been unsuccessful for the CESC. Furthermore, Alston’s argument is more compelling today than when he propounded it in 1990. Events in Europe have moved so swiftly that there may not yet be widespread recognition of the recent demise of the Cold War. Nevertheless, the struggle for geopolitical and military ascendancy between the United States and the Soviet Union is over.<sup>143</sup> With its conclusion, the major underpinning of Reagan Administration opposition to second generation human rights has disappeared. Now, as never before in recent decades, the United States is in a position to consider second generation human rights solely on their merits, devoid of the cold war rhetoric and objectives which have long obfuscated the issues. Support for such rights no longer carries the taint of siding with or being a dupe of the Evil Empire.

This is not to imply that the ratification battle will be quickly or easily won. It suggests only that the battle can now be waged on a level playing field. The United States legal system already embodies numerous supports for and financial commitments to social security, education, health care and a subsistence standard of living. A modest expansion of these supports and commitments *with respect to children* would be mandated by ratification of the CRC. The ratification debate is basically over whether such an expansion is compatible with our free enterprise, market driven system of government. This is a debate which proponents of ratification can win on the merits in the forum of United States public opinion. A strategy of stealth is both counterproductive and demeaning. It is no more feasible for CRC ratification than it has been in the thus far unsuccessful effort to ratify the CESC.

The end of the cold war has removed a formidable obstacle to United States recognition of second generation human rights. In the wake of the 1990 geopolitical upheaval, a shift to multilateralism is not improbable.<sup>144</sup> Proponents of the CRC should seize this opportunity to persuade the Administration, the Senate and the American people of the importance of recognizing second generation human rights for children and the compatibility of such rights with traditional American values.

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143. See, e.g., *Brzezinski on War*, WORLD MONITOR, Dec. 1990, at 1 (stating that “The U.S. is the victor in the Cold War and this is more important than most people realize”); Lewis, *Bringing in the East*, FOREIGN AFF., Fall 1990, at 15; Tucker, *1989 and All That*, FOREIGN AFF., Fall 1990, at 101; Hoffman, *A New World and its Troubles*, FOREIGN AFF., Fall 1990, at 120; McNeill, *Winds of Change*, FOREIGN AFF., Fall 1990, at 152, 161.

144. The importance of multilateralism in the aftermath of the Cold War was stressed by several contributors to a recent *Foreign Affairs* symposium. See, e.g., McNeill, *Winds of Change*, FOREIGN AFF., Fall 1990, at 152, 170; Kahler, *The International Political Economy*, FOREIGN AFF., Fall 1990, at 139; Keller, *Science and Technology*, FOREIGN AFF., Fall 1990, at 123; Hoffmann, *A New World and its Troubles*, FOREIGN AFF., Fall 1990, at 115, 119.