

**LEGAL STUDIES**  
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## RIGHTS, AUTHORITY, AND WORKABILITY: AN EXAMINATION OF UNIVERSAL JURISDICTION

SRDAN DURICA

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### Abstract

*In this paper, I conceptualize 'universal jurisdiction' along three axes: rights, authority, and workability to reduce the compendium of scholarly work on the subject into three prominent focus areas. I then review the longstanding debates between critics and supports, and ultimately show the vitality of this debate and persuasiveness of each side's sets of arguments. By using these three axes as a sort of methodological filter, one can develop a richer understanding of universal jurisdiction, its theoretical pillars, practical barriers, and the core areas of contention that form the contemporary state of knowledge.*

### Introduction

With the creation of the International Criminal Court (ICC) the global community gained its first permanent multinational criminal tribunal. Today, the number of nations party to the *Rome Statute of the International Criminal Court* has risen to 126 countries, with the notable exception of the United States. To supporters, the increasing number of party-nations may represent a great leap towards international justice. While critics, the other hand, may lament the same growing support for universal jurisdiction among the global community as an ill-advised trend with potentially calamitous consequences. An examination of universal jurisdiction through three core areas, notably rights, authority, and workability, highlights its theoretical pillars and practical barriers, reveals how despite growing support this concept remains bitterly contested, and allows for a brief evaluation of the set of arguments advanced by each side.

Normally, a state's authority over criminal matters is limited by territory and nationality. Territorial jurisdiction, as outlined by Win-Chiat Lee (2010), refers to the authority, "a state may exercise over a crime if the crime is committed on its territory" (p. 17). By far the most familiar form of jurisdiction, territorial jurisdiction is a core function of state sovereignty, invoking all forms of domestic and international criminal law. Limits of national jurisdiction, on the other hand, are broader, encompassing crimes committed outside a nation's territory (Lee, 2010, p. 17). Active national jurisdiction, the first branch of this wider authority, Lee (2010) describes as "the jurisdiction

that a state may claim over a crime if the perpetrator of the crime is a national of the state” (p. 17). Passive jurisdiction, the second branch of national jurisdiction, occurs “when the victim(s) of the crime is the state’s national” (Lee, 2010, p. 17). Whether territorial or national, both forms of traditional jurisdiction limit the authority of a state’s criminal law by requiring some link between either the state and its territory, the state and the perpetrator, or the state and the victim(s) (Strapatsas, 2002, p. 2).

In contrast to traditional boundaries of territory and nationality, universal jurisdiction is limitless, demanding no connection between the state, perpetrator, or victim. Universal jurisdiction refers to the authority of domestic and international institutions to hold wrongdoers responsible for certain crimes regardless of where the crimes were committed or the nationality of the wrongdoer or victim (Giudice & Schaeffer, 2012, p. 234). Generally, as Nicolaos Strapatsas (2002) explains, universal jurisdiction is exercised when the perpetrator enters a state’s territory and is eventually arrested, at which point “the detaining state may have the option of either prosecuting this individual or extraditing him or her to another state” (p. 12). When this occurs, universal jurisdiction can take three, sometimes overlapping, forms: unilateral, delegated, or absolute (Strapatsas, 2002). Unilateral universal jurisdiction occurs when a state establishes jurisdiction over a crime without having a link to that crime by applying domestic law within its territory (p. 3). Unilateral universal jurisdiction, Strapatsas notes, was applied by the State of Israel during its prosecution of Adolf Eichmann, despite claims by the accused that “Germany was solely competent to try him given the fact that the acts of which he was accused were committed in the course of the Nazi regime” (2002, p. 4). The second form, delegated universal jurisdiction, occurs when states invoke universal jurisdiction pursuant to bilateral or multilateral treaties (Strapatsas, 2002, p. 4). The *Torture Convention*, for example, delegated authority to party states to establish jurisdiction over torture when the offender is present in their territory (p. 10). Alternatively, delegated universal jurisdiction can also take the form of a state renouncing, yielding, or delegating its own jurisdiction in favour of the state where the perpetrator is found (p. 7). This usually occurs through bilateral agreements.

The third form of universal jurisdiction is absolute universal jurisdiction. The broadest of the three, absolute jurisdiction is applied when a state “exercises jurisdiction over a crime, the nature of which affects the interest of all states” (Strapatsas, 2002, p. 7). Absolute universal jurisdiction is distinguished from the other two forms in that states may exercise such jurisdiction even against the wishes of the state with primary territorial jurisdiction (p. 11). Referred to as ‘core crimes,’ offences under this form, including genocide, crimes against humanity, and war crimes, are regarded as universal concerns, “deserving condemnation in themselves” (Broomhall, 2003, p. 107). Unsurprisingly,



absolute universal jurisdiction is the most contentious of the three forms. Most often, when debates on legal, philosophical, and operational aspects of universal jurisdiction occur, they centre on issues most closely associated with absolute universal jurisdiction.

The origins of universal jurisdiction as a principle of international law flow from the experience of piracy centuries ago. As the use of international waterways increased during the sixteenth and seventeenth centuries, the threat of piracy materialized as a major concern among nations (Casey & Rivkin , 2005, p. 15). In response, universal jurisdiction emerged as a practical solution to the challenge of enforcing and combating piracy on the high seas. As even critics of the concept such as Lee Casey and D.B. Rivkin (2005) note, in Britain, for example, claims to a universal criminal jurisdiction over pirates were made as early as the seventeenth century. Not long after, pirates earned the customary designation of ‘common enemies of mankind’ or *hostis humani generis* in Latin, at which point all states were lawfully entitled to punish the offenders (p. 138).

Following the Second World War, customary practices of universal jurisdiction entered a process of codification and expanded to include further areas of international concern. During the post-War period, advocates of universal jurisdiction who were energized by the successes of the Allied trials of Nazi Officials in Nuremburg, which they regarded as a triumph of principles of universal jurisdiction despite critics who retort that the Nuremberg Trials were never claimed under universal jurisdiction (p. 171), pushed for the ratification of existing norms into conventions (Hajjar, 2004, p. 599). The mid-to-late twentieth century saw the codification of numerous conventions backing universal jurisdiction. As Kenneth Roth (2001) outlines, the *Torture Convention* of 1984, for example, ratified by 124 states, including the U.S., “required parties to prosecute any suspected torturer found on their territory, regardless of where the torture took place” (p. 151). The *Geneva Conventions* also relied upon universal jurisdiction, particularly through the codification of the capacity for violators to be prosecuted in any competent legal system (Hajjar, 2004, p. 596).

The general increased reliance on international criminal law is not without criticism. According to Tor Krevier (2013), the main issue regarding international criminal law is its focus on individual actors at the expense of systemic force (p. 702). “Triumphalism surrounding international criminal law,” claims Krevier (2013), “ignores factors and forces that shape or even help establish the environment from which such conflict and violence emanate” (p. 702). While the internationalization of criminal law seems to advance “cosmopolitan ideals” (p. 720) and vindicate basic moral standards, the process masks an understanding of the role external political-economic forces like trade, shock

therapy, and structural adjustments contribute to the onset of violence. While nonetheless affirming the importance of holding individual actors culpable for crimes, for Krever (2013), the limitations of international criminal law is in its nature, particularly in that “the law is structured so as to address, through trial and judgment, individual acts of violence or individual disputes – never the structural whole from which those acts or disputes arise” (p. 706).

Despite some criticism, support for universal jurisdiction reached a peak with the establishment of the permanent International Criminal Court (ICC) in 2002. According to Lisa Hijjar (2004), during the 1990s, the enforceability of international law entered a new phase, called a “transition to justice” (p. 599), beginning with the creation of the United Nations (“UN”) ad hoc tribunals to prosecute perpetrators of gross violence in the former Yugoslavia (1993) and Rwanda (1994). This transition to justice culminated in 1998 when member nations of the UN, Canada among them, signed the *Rome Statute of the International Criminal Court*, outlining the establishment of the first permanent ICC in The Hague, Netherlands (2004, p. 600). As Hijjar (2004) notes, the ICC is intended for the prosecution of individuals charged with the “most serious human rights violations when national courts fail or are unable to bring them to trial” (p. 600). According to Article 5 of the *Rome Statute*, the crimes within the jurisdiction of the Court are limited to genocide, crimes against humanity, war crimes, and the crime of aggression (Schiff, 2008, p. 68). For both critics and supporters, the creation of the ICC marked a significant advancement for the principle, as for the first time an international institution, in addition to state domestic courts, could exercise universal jurisdiction.

### **Rights and Universal Jurisdiction**

The first core area of universal jurisdiction is rights. Universal jurisdiction implicates rights in many ways. Both advocates and opponents of universal jurisdiction rely on rights and their implications as arguments both for and against the concept. One of the major areas of contention arises from debates between supporters, who implicitly appeal to the rights of victims and critics who invoke the potential harmful effects of universal jurisdiction on the rights of defendants.

For advocates, the impetus of universal jurisdiction arises from the implicit right of victims to justice. As the history with piracy illustrates, traditional forms of jurisdiction can sometimes result in gaps where perpetrators escape prosecution by fleeing to nations with no territorial or national claim, or remain in a nation unwilling or unable to prosecute them. For Hijjar (2004), this gap problem, the “gap between codified principles of rights, and the enforceability of law,” is the paramount problem of human rights (p. 595). When this occurs, victims of some of the

most brutal crimes are denied a remedy. Bruce Broomhall (2003), echoes this point, viewing the elimination of “safe havens” (p. 108) as the major bases for universal jurisdiction. “Tyrants commit atrocities, including genocide,” Roth (2001) argues, “when they calculate they can get away with them” (p. 150). While not a direct appeal to the rights of victims *per se*, advocates nonetheless invoke victims in conjunction with the need to prosecute. For Roth (2001), by filling the jurisdictional gap with universal jurisdiction, international justice becomes “an increasingly viable option, promising a measure of solace to victims and their families” (p. 150).

Critics, on the other hand, direct their focus towards defendants, drawing attention to the potential harms likely to result when applying universal jurisdiction onto accused persons. According to Henry Kissinger (2001), arguably one of the most vocal opponents of the principle, when nations apply universal jurisdiction in their domestic courts by trying individuals for alleged acts committed in another country, defendants are often forced to craft a full defence in an unfamiliar legal system (p. 90). Additionally, cost and expense are another concern, as it would “force defendant[s] to bring evidence and witnesses from long distances” (p. 90) to their aid. For Kissinger (2001), the urgency of bringing perpetrators to account and maintaining the rights of victims are lesser concerns when compared with the rights of those accused to answer their accusers in full. Crimes under universal jurisdiction carry, in addition to severe punishment, damaging stigma. If there is an interest with rights, then such issues cannot be ignored.

### **Authority and Universal Jurisdiction**

The second core area of universal jurisdiction is authority. Issues of authority are most disputed as they arise from the tension between universal jurisdiction and the core principle of state sovereignty. Critics of the idea argue that it is incompatible with the principle of state sovereignty, questioning the authority of states and institutions to involve themselves in matters of which they have no claim. Supporters, on the other hand, promote a more balanced notion of state sovereignty, retorting that the current conception of universal jurisdiction adequately balances concerns over state integrity.

For critics of universal jurisdiction, issues of authority and state sovereignty centre around two core concerns. Dating back to the *Peace of Westphalia* signed in 1648, at the core of the principle of state sovereignty, as Kristen Hessler (2010) notes, is the “notion that states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behaviour” (p. 44). For critics like Casey and Rivkin (2005), the first concern is the obvious infringement on sovereignty and the clear lack of authority when states and the ICC adjudicate matters where

they lack territorial and national links. Michael Giudice (2012) characterizes this critique in the form of a question, by asking, “what right does nation X have to try an individual from nation Z, when nation X has no duty to the victims of nation Z” (p. 238)? Put differently, the question could be: under what authority can a defendant be answerable to a foreign community for matters unrelated to that community (p. 238)? The second major concern focuses on the effect exercising universal jurisdiction has on states where the crimes were alleged to have occurred. As Kissinger (2001) outlines, when states or the ICC invoke universal jurisdiction, they essentially deny the home state the right to reconcile their own shady histories (p. 90). Scoffing at the extradition request by a Spanish judge seeking to try Chilean former-Dictator Augusto Pinochet for crimes of torture committed during his time in power, Kissinger (2001) uses this example to criticize the irony of a Spanish magistrate’s involvement in a human rights matter of another country when Spain itself is not short of its own dark history during the era of General Francisco Franco (p. 91). Universal jurisdiction thus infringes on what Kissinger (2001) views as an entitlement of nations to reconcile their own historic wrongs without fears of interference from other nations (p. 91).

In response, advocates of universal jurisdiction promote a more balanced approach, arguing that no principle, neither state sovereignty nor universal jurisdiction, is absolute. For Kristen Hessler (2010), the view that sovereignty is an “impenetrable barrier to international criminal proceedings” (p. 39) is outdated and does not reflect current norms. Hessler (2010) criticizes these theorists “apparent assumption that state sovereignty should never be comprised” (p. 56). Instead, Hessler (2010) argues that sovereignty is subject to reasonable limitation. Far from an impermeable wall, Giudice (2012) argues that the current conception of state sovereignty in international law “is conditional on a state’s ability and willingness to protect basic human rights” (p. 236). From this foundational backdrop, the authority to exercise universal jurisdiction derives from what Giudice (2012) calls “an appeal to the community of humanity” (p. 239). Core crimes of genocide, crimes against humanity, war crimes, and crimes of aggression, are so egregious that they are regarded as offences against the universal community to which we all share a claim. Responding to concerns regarding the entitlement of nations to reconcile their own matters, supporters affirm that universal jurisdiction is also subject to reasonable constraints. Primary jurisdiction over criminal matters is always with the nation that has territorial jurisdiction, reflecting a recognition of the importance of sovereignty (Giudice & Schaeffer, 2012, p. 239). For Benjamin Schiff (2008), the *Rome Statute* of the ICC, “reflects states’ agreement over how to institutionalize a broad range of international criminal justice norms while protecting national sovereignty” (p. 68). As the preamble to the agreement outlines, the ICC “established under the statute shall be complementary to

national criminal jurisdictions” (p. 77). Exercises of universal jurisdiction, whether by states or the ICC, argues Giudice (2012), are triggered only by “efficiency and urgency” (p. 238). Only when the nation with authority is either unable or unwilling to exercise jurisdiction, then other institutions have the authority to exercise universal jurisdiction. Otherwise, nothing would ever be done.

### **Workability and Universal Jurisdiction**

The third core area of universal jurisdiction is workability. Workability of universal jurisdiction refers to the capacity of domestic and international institutions to overcome operational challenges. Workability is concerned with the challenges impeding domestic and international bodies from successfully exercising universal jurisdiction. Unlike other areas, there is consensus among advocates and opponents that workability remains a key challenge of applying universal jurisdiction.

Domestic problems of workability are highlighted by Canada’s experience implementing universal jurisdiction. Following its ratification of the *Rome Statute*, Canada became the first state to adopt legislation on universal jurisdiction with the passage of the *Crimes against Humanity and War Crimes Act (2000)* (Lafontaine, 2010, p. 270). As Lana Wylie (2009) notes, notwithstanding criticism from the United States, during the 1990s and 2000s, Canada became a leader in advocating for universal jurisdiction due to what she regarded as Ottawa’s goal to be “recognized as a good international citizen” (p. 117). This new legislation authorized Canadian intuitions to prosecute core international crimes, with the only limitation that the accused be subsequently present on Canada’s territory (Lafontaine, 2010, p. 270). Despite initial enthusiasm, implementing the legislation into the domestic legal architecture revealed workability challenges. According to Fianne Lafontaine (2010), challenges of reconciling international definitions within the Canadian context were apparent early on (p. 269). In *R. v. Munyaneza*, [2009] QCC 2201, the first time in which a person was convicted of crimes perpetrated outside Canada, Justice Andre Denis of the Superior Court of Quebec convicted Desire Munyaneza of seven counts of genocide, crimes against humanity, and war crimes for actions committed in Rwanda in 1994 (Currie, 2013, p. 168). While the conviction stood, Lafontaine (2010) argues that the significance of the case was Denis J.’s grappling with issues where definitions of core crimes under International law conflicted with *Criminal Code of Canada* equivalents, and which distinct standards of proof should be applied (p. 272). For Lafontaine, the issue remains to be fully resolved.

Workability challenges also effect the operation of the ICC. According to critics, the main workability obstacle impeding the success of the intuition is the potential for the politicization of prosecutorial discretion. For Casey, the likely possibility that that prosecutors of the Court will use their discretion to indict top state officials, such as when Belgian prosecutors indicted American generals for their involvement in the First Iraq War, both undermines the Court's long-term integrity and prevents the Court from impartially employing its power (Casey & Rivkin , 2005, p. 137). For advocates, however, these issues are over-shadowed by more practical problems. Potential for prosecutorial abuse, claims Broomhall (2003), is mitigated because, although the discretion may seem wide, it is in fact constrained by issues like the presence of the defendant and availability of resources to prosecute (p. 122). The foremost issue obstructing successful operation of the ICC is, by far, the availability of sufficient evidence (Broomhall, 2003, p. 121). No other workability challenge, according to Broomhall (2003), effects the function of the Court more than evidence gathering and mutual legal assistance (p. 121). Gathering evidence to pursue a charge is incredibly difficult, with challenges including access to onsite investigations, the protection of victims and witnesses, and the refusal of states to provide assistance when requested (p. 121). While some may characterize the ICC as a cynical political exercise by a "tyranny of judges" (Kissinger, 2001, p. 86), for Broomhall (2003), the effect of workability challenges suggests otherwise.

## **Conclusion**

These three filters present a sharp contrast between supporters' and critics' framing of rights, authority, and workability. However, it is those sets of appeals advanced by supporters that in the long run present a more persuasive argument. This is most evident during discussions regarding the issue of authority. There, the adaptability of the supporters' relatively recent reasonable justification for universal jurisdiction is elevated when then contrasted against critics' embrace of historic and absolutist conceptions of state sovereignty. While critics seem stale and outdated, advocates on the other hand embody a flexible approach able to bend with the shifting winds of public opinion and scholarly discourse. The same can also be said for discussions regarding rights and workability, albeit to a lesser degree. There again, the flexibility or the supporters' arguments outperform the rigidity of the critics. This adaptability is particularly important during a time where political volatility seems to be the norm. Arguments, whether supportive or critical, must fit the stormy political climate of the era if they are to survive the long term.

From this point, we see that debates regarding universal jurisdiction, its nature, and its consequences continue today and are likely to continue into the future. While supporters may claim higher ground from the growing consensus of the international community, critics hold to their criticism dearly and are arguably strengthened by the absence of support from states such as the U.S. A brief canvass of the three core areas of universal jurisdiction, rights, authority, and workability, has illustrated that despite widespread support among the international community, universal jurisdiction nonetheless still manages to elicit lively debate amongst supporters and opponents.

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**REDEFINING “FAMILY” AND RECONSTRUCTING CHILD CUSTODY IN CANADA****SUPRIYA SETHI**

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**Abstract**

*This paper examines the historical revolution of custody regimes in Canada, with an emphasis on the twentieth century to custody practices in courts today. The law has undergone numerous critical reforms to restructure what it means to be a ‘political family’ from a socio-legal perspective. The last decade we have seen a shift in the framework that is used to define the concept of family that has paralleled changes in cultural values, gender roles and parental responsibilities. The family model now largely focuses on the child as the centerpiece of the framework, which has been reflected in recent legal reform and ongoing revisions. The shared responsibility of raising a child as a married couple reflects both the slight shift in the gender roles defined by society and the changing configuration of family dynamic from the nuclear family norm (traditional) towards a “political family”. In the political family, whether the family is “traditional” or “alternative”, each family is understood as a product of collective decisions and values. As a result of the shift towards the understanding of intersectionality within families, and acceptance of the complexity of families, legal activism in family law studies are pushing for legislation that can provide an all-encompassing framework to better aid judges within the family courts to reduce the potential for bias in judicial review. Family law studies are challenging the language around rights and obligations within a family and pushing for a “responsibility framework”. Further, the field is emphasizing a child-centered approach to divorce cases, to assess what is ultimately in the best interest of the child. As we understand the role of the family in society, we need to emphasize the responsibility of a parent and what it means to be a parent to better understand what ‘custody’ of a child entails in today’s society.*

**Introduction**

The family is arguably society’s first and foremost important schools of justice, designed to provide youth with an initial value system to enter into society. Families ultimately function as a form of initial socialization. Within the family, youth are taught both psychological and legal foundations of society and relationships develop that allow the understanding emotional bond and ties to individuals. The legal foundation of family that is formed through

binding decisions (the institution of marriage) creates an ideological framework where a child can begin to learn the normative values of society (Triger, 2012).

As family law attempts to move away from the idealized nuclear normative structure, with patriarchal assertions, Critical Family Law encourages gender neutrality and establishing the importance of the child as the primary concern in custody battles through legislative codification. The reconfiguration of current legislation is essential to defining the primary objective of custody battles, emphasizing a parent's social responsibility to their child, and for courts to ensure the ultimate arrangement optimizes the child's socialization. Especially as the idealized, 1950's nuclear family norm is becoming increasingly non-existent, due to steady increasing divorce rates, out of wedlock births, the legalization of LGBT rights and marriage, legislation can no longer rely on marriage as the centrepiece of a family, as non-traditional living arrangements are becoming increasingly normalized. In fact, the Canadian Department of Justice confirms that divorce cases have contributed to 64% of the disputes in family court (Molotkow, 2009). Family law is a unique area of the law, due to its inherent intimacy, complexity, and the unique dynamic of every family, and therefore, a substantive law approach is required. In the liberal society Canada is shifting into, we are expected to accept intersectionality, while alternative living arrangements are still vulnerable to bias, as society is still ongoing this transition and this area is a fairly new area of study for legal theorists. As a result, as the nuclear family norm slowly fades, we need to create a standard framework for judges to work from, to improve the consistency of outcomes in custody battles, reduce the potential for bias and ensure fair trial.

The Canadian child best interest practice, which was cultivated by the *United Nations (UN) Convention on the Rights of the Child, 1989*, is based on the universal rights of children and is now becoming the central tenant to custody battles (OHCHR). To further develop this practice, in 1993 the Department of Justice began examining the parental "responsibility framework", acknowledging that the courtroom needs to emphasize the importance of parental responsibility. This ideology is definitive of the neoliberal society, where the core foundation of the 21<sup>st</sup> century political structure is to encourage accountability of all individuals and their duty to be contributing members of society.

### **Historical Context**

Over the last decade, family law has been under socio-legal reconstruction through a critical lens. As a result, the legislative framework of family has been redefined and the battle between parental rights versus responsibilities has been sparked. Specifically, questions have been raised on whether the law should promote the continued

involvement of both parents, or put a greater emphasis on securing support for the primary caregiver. The Canadian Justice system has adopted a ‘best interests’ model, which has attempted to standardize practices around what is best suited for the child. The system is now working towards establishing an objective practice towards custody, where one’s access to their child is not viewed as their ‘right’, or a matter of the individual’s gender, but instead as a responsibility to be fulfilled. Whether parents can fulfill their parental duty is based on objective standards that evaluate the level of responsibility the parent ought to be granted, dependant on their financial security, time spent with the child and caregiving abilities. Although this approach is theoretically ideal, the challenge becomes whether this approach can be effective when put into everyday practice. Due to the intimacy and complexity of a family and parent-child relationship, it is difficult to gauge one’s parenting abilities and potential benefit to their child through such standards. Family law is unique in its challenges in comparison to other fields of law due to its sensitivity, cultural influence, and substantive relationship to people’s everyday lives. Consequently, despite the theoretical legal developments of Critical Family Law and legislative reform initiatives, there will always be a limit to the courts’ regulation in this school of law.

The concept of family is an ideological framework that is evolving along with cultural values. Yet, it has never completely conforming to an ideal husband-wife-children model (Triger, 2012). Since Canada is historically a British colony, Canadians originally abided by British common law practices, where legal principles were based upon a patriarchal structure. A woman’s body was considered to be the carrier of a man’s honor, resulting in “the father...[as] the parent [who] naturally endowed...custody of children” (Millar & Goldenberg, 1998, p. 210). The women’s role was originally defined by the association of their husband and family, reserving the power to men in households. The original family dynamic consisted of a “stay at home” mother and the father as the financial breadwinner. Evidently before the nineteenth-century, females had few individual rights, which provoked the critical analysis of family and subordination of women.

Leading into the beginning of the nineteenth-century, the Canadian industrial revolution and post-war era significantly changed the way people lived, initiating a shift in gender roles due to the separation of parents in homes. The industrial revolution induced great political and economic change, where the neoliberalism framework emerged, where there was a shift from a welfare society towards a focus on economic liberalization and a laissez-faire political approach. This paradigm shift responsabilized individuals to earn their own success and happiness. Specific to the family dynamic, the war significantly changed the gender roles for women, as women were forced to take on the role

of both caregiver and breadwinner to support their families. The changing gender roles and periods of extended separation from fathers induced a significant legal development in Canada was the *Divorce Act of 1968*, allowing divorce on the basis of three-year separations (prior to this period formal divorce cases were extremely rare). The *Act* provoked the practice of the “tender rights doctrine”, encouraged physical caregiving custody with a maternal preference, left men with financial responsibilities in child support, and considered legal standards for fathers to be primarily monetary (Millar & Goldenberg, 1998). This development was instigated by the Women’s Rights movement promoting a “child saving” ideology, advocated by welfare feminists (Millar & Goldenberg, 1998 ). Although this movement is criticized for being sexist, the law is criticized for being created on the basis of a patriarchal system, and women felt that due to their historical oppression and subordination within the practices of the legal system, advocacy for their motherhood is justified (Millar & Goldenberg, 1998).

Notable philosopher and social theorist Michel Foucault explains that “education [is an] important social control in modern society”, therefore, “[if] we teach judges women are not treated equitably in divorce court, it would seem logical that judges would try to compensate for [its historical] ...imbalance” (Millar & Goldenberg, 1998 p. 223-224). His commentary can be used to explain the apparent bias in favour of women during custody battles in Canada during the nineteenth century. Although the tender rights doctrine can be viewed as sexist, one could argue that this bias is justified. If judges are being educated to understand the historical oppression of women, it is reasonable to assume that they may have an inherent bias towards compensating women in the matter of custody battles, as they are ultimately viewed as the primary caregivers to the child. New schools of thought endorsed by critical theory examined how equality would function within the framework of family law, and the consequences of biased gender-based regimes, thus encouraging a gender-neutral approach in family law (Boyd, 2004). A gender-neutral approach is given in the interest of optimal socialization for the child, recognizing that both parents contribute to the development of the child, both equally important to their upbringing. Furthermore, putting the responsibility on one parent alone diminishes the accountability of the other parent, where it is important to keep each parent liable to their duty to adequately contribute to their child’s social learning. The emergence of gender equality, for both men and women is reflected in the construction of the Canadian Charter of Rights and Freedoms in 1982, where each gender is given an equal benefit of the law, serving as a foundation in the shift towards a gender-neutral approach to family law in 1986. By inspiring gender neutrality in the law, the centrepiece in the battle of family law disputes started to shift away from

an issue of gender and move towards the “best interest” of the child, this movement seeks to construct laws that reflect practices to best provide for the needs of the child.

### **Paradigm Shift**

The change from maternal feminism to the best interests’ model is a product of both new psychological truths in regards to child care and father’s rights lobby groups, which have been advocating for equal child access. Initially, famous psychoanalysis theorists, Goldstein, Freud, and Solnit suggested that a child’s optimum benefit is achieved through stability in the home, which initiated the sole caregiver legal approach for post-separation regimes in court. However, through the late 1980s and early 1990s new psychological truths emerged claiming that children benefited utmost from ongoing relationships between both parents, as each parent provides an irreplaceable contribution to the child’s development (Boyd, 2004). This emergence in psychological study has been furthered by the initiatives of many fathers’ rights groups, who advocate for shared physical rights custody, as opposed to solely monetary responsibility. Kris Titus from the “Fathers 4 Justice Canada” lobbyist group explains that custody legislations ought to move away from the maternal feminism assumption, where women are identified as simply the nurturers. This perspective fails to account for the fact that majority of women are contributors to the labour force and are challenged with full responsibility of their child. Being challenged with the roles of both parents thus creates a volatile environment for a child’s upbringing, as it is extremely difficult to play the role of a caregiver while also providing monetary support. Further, by allowing sole custody, the system is allowing one parent to neglect their duty as a parent to contribute to their child’s upbringing. Women have surely fought for their legal rights throughout history, however allowing, or even encouraging, sole custody is allowing doing injustice to themselves. The upbringing and development of a child is a joint responsibility, for both the benefit of the child and parent, as the responsibility is historically meant to be divided between two individuals, and a child is supposed to benefit by learning from each parent, both who have equally as important contributions to their socialization. Thus leading into to the reconstruction of ‘family’, by diminishing the focus on marriage as a central feature of the family dynamic. Legislative reform ought to be re-written, focusing on the parental ties to the child, with a decreased emphasis on the preference of sole custody arrangements, instead encouraging the strength in maintaining both relationships and establishing the responsibility of being a parent.

### **Considerations**

With the socio-legal reconstruction of what legal parenthood ought to mean, parents' ability to fulfill their societal duties and responsibilities become primary factors in evaluating where the best interests of a child best fit (Boyd, 2004). In 1993, the Department of Justice circulated a discussion paper on child custody access creating a list of seven considerations to take into account for child custody practices, in an attempt to finalize the objectives and principles of child custody laws. It emphasized the importance of identifying the features of a child-focused approach to child access. Where ideologies associated with the language of 'custody' and 'parent' are questioned and examined, responsibilities become categorized and defined, resulting in suggestive reforms of terminology changes to the codification of the law accordingly.

When examining the child-centered approach, we need to redefine what it means to be a parent to better understand what custody of a child entails in today's society. Within an increasingly neoliberal society, instead of parental ties being based off biological rights, a responsibility framework should be adapted. The burden of successful development has been placed on the individual, and parental responsibility has been legally defined as "all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children" ("Reforming Child Custody and Access in Canada and Parenting after Divorce", 1998). This means both parents have both moral and legal obligation to adequately care for their children. Furthermore, the legal system is working to remove the connotation of ownership from the word custody and substituting it with child *access*, stressing the literal physical accessibility to one's child and further breaking responsibilities and access into four categories; residential arrangements, financial support, allocation of decision-making authority and the process of dispute resolution. Post-separation regimes have been categorized in an attempt to consider the factors that are deemed as being most influential and detrimental to a child's development.

### **Child Custody Legislations & Ramifications**

The Canadian best interest practice is modeled after the *United Nations (UN) Convention on the Rights of the Child, 1989*, specifically articles 9, 12 and 19, which state that a child's rights guarantee their contact to both parents, an opportunity to be heard and protection from violence, and article 18, which asserts that both parents have a shared responsibility for the "upbringing and development of their child" (OHCHR). Family law is relevant to an individual's upbringing and development and is thus a universal concern, where the legal division is on the central

basis of concern for a child's welfare. The current child custody provisions in the *Federal Child Support Guidelines*, 1997, an extension of the *Divorce Act*, asserts four primary objectives: 1) the fair financial standard support for children post-separation, 2) the reduction of tension between spouses by creating objective standards, 3) improving the efficiency of the legal process and 4) to ensure consistent treatment for similar circumstances (Government of Canada, 2011). With further legal amendments of child support provisions, shared custody arrangements are based on legislative provisions, lobbying efforts and the Supreme Court of Canada's decision in *Contino v. Leonelli-Contino* (2005, SCC 63), and changes in economic obligations with split custody agreements to reflect their monetary contribution accordingly (Grant, 2005).

Post-separation practices are catered towards the best possible outcome for the child, placing responsibility on both parties. In the examination of current custody laws, the "*For the Sake of the Children*" report was released in 1998, prompting numerous women's rights activists and father rights groups who have been advocating the reform process to vocalize their concerns about current practices and where they should go (Cross, 2004). These groups have raised concerns about the language of "custody and access", the best interests of the child model and a women's access to justice. As a response to concerns of gender discrepancies, Bill C-22 was introduced as an amendment to the *Divorce Act* in 2002, in regards to child support practices, based on a substantive law approach highlighting that "one size does not fit all" (Rhoades & Boyd, 2004, p. 125).

The purpose of family court systems is to reach the best possible outcome for the protection of the child. Current child support debates move towards a justice versus care dichotomy approach in order to restructure the role of the courts in parenting orders by developing a framework around parenting responsibilities to be assigned to ensure a successful outcome of family dispute, specifically taking into account the psychological interests of each individual child (Molotkow, 2009). According to a responsibility framework, each parent who has been given the right to their child has the duty to fulfill the upbringing of their child, thus being a joint effort between both individuals.

The initiation and examination of Bill C-22 is a step in the right direction for legal reform in family law. However, it was ultimately rejected due to overlooked areas in determining an all-encompassing legislation. For instance, the "best interest" standard and language of child "access" is criticized for being too vague. Consequently, its interpretation has the risk of being influenced by judicial biases, creating inconsistencies from moral, religious and social viewpoints rather than objective criteria in terms of responsibility provisions ("*Reforming Child Custody and Access in Canada and Parenting after Divorce*", 1998). It is proposed that, in conjunction with standardization of



courtroom rulings, the term “custody” should be replaced by a joint “parental responsibility” to help create a well-informed framework with specific parenting orders to provide a uniform model to function on a substantive law basis while still creating consistency in judicial outcomes (“Submission on Bill C-22, Divorce Act Reform”, 2003). Interestingly enough, it is said that inter-parental conflicts have a tendency to decrease as a result of joint custody agreements due to the reduced tension of losing a child in a courtroom battle. This is especially relevant in high conflict disputes where the current standards are built on idealized ideologies of cooperation between both parties.

Assuming cooperation between family members does not consider the further complexities between families that can complicate the process. For instance, violence against women and children in domestic cases poses several complexities in family dynamics. Pamela Cross from the Ontario’s Justice Network explains that current equal parenting policies do not consider domestic violence issues (Bailey, 2015). It is our duty to protect both children and women from the exposure of violence in their homes, as violence has detrimental consequences to their psychological well-being and development. There have been advancements in this realm, considering the *Coercive Control Offence* Act that came into effect in 2015. For the first time, domestic abuse was recognised as a “complex and sustained pattern of behaviour” (Bailey, 2015, par. 1). However, with a push towards joint custody practices, it is important to acknowledge when a relationship to a parental figure is toxic and does more harm than benefit to both primary caretaker and the child, especially considering how perpetrators can be manipulative to not only other family member, but professionals or agencies as well. As high conflict disputes are highly personal, there has been a push towards training legal professionals to understand how to identify common practices of deception used (“Reforming Child Custody and Access in Canada and Parenting after Divorce”, 1998). Although it is ideal to have both parents involved in a child’s life, we must consider how the legal system weighs the pros and cons between sole custody and joint custody. When considering legal reforms, it is important to consider special circumstances, discussing how to minimize the victimization of mothers and children.

Conversely, it is also important to consider the role of the family court system in relation to the sensitivity of family disputes, posing limits to how standardized and clear laws can be. Susan Boyd explains that “changing the language or process through which we construct custody issues will not fundamentally shift the power dynamics structured by gender relations” (as cited in Cossman & Mykitiuk, 1998, p. 21). The codification of gender neutrality is the formal acknowledgment of this necessary societal change that must occur in ideology. However, questions in regards to the line between family autonomy and state interference are consistently debated. She continues to explain

that it is “beyond the scope of family law [to] radically transform structural differences in child care” and “beyond the power of statutory language to make parents behave better or cooperate in child custody disputes” (as cited in Cossman & Mykitiuk, 1998, p. 21). Ultimately, legislative reforms can only go so far in reaching equality and pushing for an adequate access to justice. Accordingly, reforms must be accompanied by a welfare approach, increasing public services such as funded legal aid, community-based services, and training for legal practitioners and judges on violence against women.

The law cannot change society’s ideological framework – that must be a shift in political culture as a whole, towards a welfare society. Despite theoretical assumptions of how a family ought to function within an idealized framework, the political family is not only a legal construct but the presupposed version of what a functioning social unit should look like. As a result, substantive justice and judicial review are seemingly necessary in family law cases, due to the limits associated with changing the language and the codification of legislation.

## **Conclusion**

There has been a significant paradigm shift in conceptualizations of the family due to changing societal values, the diminishing nuclear family norm and the increase in alternative families, where the institution of marriage is no longer the central premises of the political family. As a result, Critical Family Law and legal theorists have challenged current legislation in order to shift away from the nuclear normative structure within our legal system and discouraging patriarchal assertions embedded into the law. These challenges have involved encouraging the legislative codification of gender neutrality and removing the emphasis on the institution of marriage. While current Canadian legislation undergoes legal reform, it is essential that legal practitioners, such as judges and lawyers, are well-informed in the intersectionality of families, as they will likely encounter individuals from every gender identity, sexual orientation, economic status, as well as both victims and perpetrators of violence. Creating a standardized framework allows the legal system to ensure the practices of universal rights of children are followed to ensure the best interest of the child takes precedence. Using neoliberal ideology as the underlying principle of the parental responsibility framework by stressing the importance of joint parental responsibility for optimal care.

As family law continues to evolve and is continuously reformed, the purpose of family must be redefined in the context of the modern family. The underlying principles of family must be emphasized to fulfil the psychological and legal duty to socialize the child. Ideally, such would be achieved by creating a healthy understanding of relationships

with others, by experiencing emotional ties to others, and structuring through rules and decisions to benefit a collective, inspiring a level of stability and predictability within one's life. Family law is one of the few sectors of the justice system that provides a critical foundation to individuals' socialization, as children's' experiences impact the way they learn how to build relationships and their respect for the importance of political structure where collective decisions are made to ultimately benefit society as a whole.

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## THE RACIALIZATION OF THE AFRICAN-AMERICAN AND ASIAN-AMERICAN CITIZEN: A COMPARATIVE LEGAL ANALYSIS

MALLORY YUNG

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### Abstract

*The perception of racial tensions in North American settler countries has historically been focused on the Black/White relationship, as has much of the theoretical legal discourse surrounding the concept of “race”. Accordingly, the scope of much critical race scholarship has been restricted such that it rarely acknowledges the racial tensions that persist between different racially-excluded minorities. This paper hopes to expand and integrate the examination of Black and Asian-American racialization that critical race scholars have previously revealed. It will do this by historicizing the respective contours of Black and Asian-American racialization processes through legislation and landmark court cases in a neo-colonial context. The defining features of racialization which have culminated in the ultimate divergence of each group’s racialization will be compared and contrasted. This divergence sees the differential labeling of Asian-Americans as the ‘model minority’ while Blacks continue to be subjugated by modern modalities of exclusionary systems of control. The consequences of this divergence in relation to preserving existing racial and social hierarchies will be discussed in the final sections of this paper.*

### Introduction

The United States has an extensive history of creating institutions and systems that served to subordinate and effectively “other” non-Anglo-American immigrants and citizens, especially through exclusionary immigration and legal practices. Institutions such as slavery and the Jim Crow laws in the South have helped lay the foundation of the Black/White paradigm that dominates discourse surrounding the relationship between racialized persons and the law (Bedi, 2003). Using a primarily critical race theory perspective, this paper will compare and contrast the way in which the law has differentially defined and separated Asian-Americans and Blacks such that Asian-Americans are now perceived to be a ‘model minority’, a concept that has worked to the detriment of modern Black civil rights movements.

Given the racial tensions between Whites and racial minorities in America and the resurgence of White supremacy movements in this historical moment, the discussion that this paper engages in is particularly important. This paper considers the mechanisms through which specific racial minority groups are co-opted to sustain their racial oppression by Whites as well as the racial oppression of others. Although the term ‘Asian-American’ is a generalization that encompasses a diverse group of ethnicities, it is important to address their racialization as a group in order to understand the critiques of the ‘model minority’. In the course of this comparative analysis, the space that Asian-American citizens inhabit both within and outside of the dichotomized Black/White paradigm of race will be considered. More specifically, I will be focusing on the historical utilization of exclusionary immigration and naturalization legislation as tools that fulfilled the purpose of constructing racial bodies, while including landmark Supreme Court decisions that have further shaped the contours of race. The example of affirmative action will then be used to explicate the relationships between Asian-American and Black/White citizens.

Critical race theory’s tendency to operationalize race as a variable within a dichotomous Black/White paradigm has been the subject of much critique in recent years (Gomez, 2004). However, in this paper, I argue that the Black/White paradigm actually represents a construct of ontological significance that must be contended with in order to fully understand why Asian-Americans and Blacks have become differentially racialized. Historian Patrick Wolfe’s post-colonial critique of the Black/White paradigm hinges on its inability to capture the combination of the pictures that each group’s racialization paints when visualized in relation to each other (Wolfe, 2016). Wolfe and Indigenous critical scholar, Jodi A. Byrd, also criticizes this paradigm for obfuscating the racialization of Indigenous people through assimilation and inclusion because it presents the only race-making process as one that is a process of exclusion (Wolfe, 2016).

Asian-American studies scholars Robert S. Chang and Iyko Day’s critique of the current racial paradigm cites its inadequacy in addressing the differences that exist between racially oppressed groups and relying on an “analogical dependency” (Day, 2016, p. 23) to articulate Asian-American racialization (Chang, 1993). In response to these critiques, I will borrow from Frank B. Wilderson III’s work studying the ontology of Blackness. For Wilderson, the condition of Blackness is framed as ontologically polar to Whiteness, reflected in the political relationship between Master and Slave (Wilderson, 2010). As such, Blackness represents the “absolute zero point of racialized existence” (Kline, 2017, p. 52), that is, the foundation upon which all racial conflicts and tensions are rendered possible.

Therefore, the Black/White paradigm is necessary for the purposes of this paper to holistically understand the mechanism through which Asian-American racialization preserves White supremacy in the racial hierarchy.

### **The Racialization of the Black Citizen**

The subjugation of Black citizens began with the institution of slavery, which was premised on an essentialist view of race. For proponents of slavery, the violent exploitation of their fellow man for economic gain was justifiable by assertions based on the stereotype that Africans were naturally an inferior class of human beings (Bedi, 2003). Furthermore, naturalization laws such as the Naturalization Act of 1790, denied citizenship to African-Americans and simultaneously increased the value of whiteness while further denigrating that of blackness (*Act of March, 1790*). In fact, the status of Blacks as non-citizens was decided in the case of *Dred Scott v. Sandford*, where the overwhelming majority of Supreme Court justices agreed that no persons of African ancestry had ever been considered citizens of the United States (Battalora, 2010; *Dred Scott v. Sandford*, 1856). The abolishment of slavery after the Civil War was followed by Reconstruction and subsequently the era of Jim Crow laws in the South. These laws codified the inferiority of Blacks and further cemented the racial ideology of White supremacy into the criminal justice system. In addition, the decision of the Supreme Court in *Plessy v. Ferguson* (1868) to uphold Jim Crow segregation and its agreement with the “separate but equal” doctrine reinforced the status of Blacks as second-class citizens, denying them full membership to American society (McKanders, 2010, p. 179).

Although the success of the civil rights movement in the 1960s helped African-American citizens gain full legal citizenship under the Civil Rights Act, implicit discrimination and White supremacy as racial ideology in the legal system remained. The abolishment of juridical exclusion extended the role of race such that it now became the main method for Whites to preserve inequities because they were no longer able to withhold legal citizenship from non-Whites (Wolfe, 2010). The criminal justice system is an example of a contemporary institution that has continued the work of shaping and redefining race (Bedi, 2003). Punitive policies such as the Reagan administration’s “War on Drugs” and the emergence of mandatory minimum sentencing has disproportionately affected Black citizens and resulted in their widespread over-incarceration (Wacquant, 2001, p. 96). In this way, the criminal justice system is an example of a modern exclusionary system of control that serves to suppress Blacks from retaining full citizenship and perpetuates an essentialist view of race and race relations (Bedi, 2003).



### **The Racialization of the Asian-American Citizen**

The trajectory of Asian-American racialization follows a similar path to that of African-American racialization, as both groups were historically racialized via the process of exclusion (Wolfe, 2010). During the Gold Rush in the mid-1800s, immigration from Asia began in earnest, with significant numbers of Asian migrants arriving in the United States seeking a new life under the promise of stable work that would allow them to send money home to their families (Chang, 1993). Thus, the initial subordination of Asian-Americans in White American society followed the same vein as that of Black subordination; that is, that they were economically exploited for cheap labour. In addition, the first naturalization case brought before the courts by an individual of Asian descent also served as a starting point for the racialization of Asian-Americans. *In re Ah Yup* was a landmark case decided in 1878 by a California federal district court which held that persons of the “Mongolian race” were distinct from the white persons who were exclusively considered in the Naturalization Act (*In re Ah Yup*, 1878). Although the Chinese plaintiff attempted to argue that Chinese people should be considered White, the dominant racial ideology of White supremacy at the time negated this contention and the argument was dismissed (Saito, 1997). The implementation of the Chinese Exclusion Act of 1882, which restricted the entry of additional Chinese labourers, became the first major piece of immigration legislation that restricted entry to migrants of a specific race. The exclusionary sentiment that was created by this new immigration policy was further reinforced in state laws that prohibited Chinese peoples from owning land or required non-citizen Chinese miners to pay an exclusive, exorbitant tax (Chew, 1994). Following the designation of Chinese immigrants as “aliens”, the attributions of foreignness were extended to other Asian groups such as the Japanese through the informal Gentlemen’s Agreement of 1907 and broadly throughout Asia as part of the 1917 Asiatic Barred Zone Act (*Asiatic Barred Zone Act*, 1917). The racialization of all immigrants of Asian descent created a lumping of all Asian ethnicities into the racial category of Asian-American. This conception allowed for further exclusion of Asian-Americans as a class through policies of anti-miscegenation and segregation in education (Chang, 2013). In particular, the internment of Japanese-Americans during World War II was a significant event that exemplified the continued racialization of Asian-Americans as alien residents, even for those that had been born in America (Chang, 1993, p. 1304). The Supreme Court decisions of *Hirabayashi v. United States* (1943), *Korematsu v. United States* (1944), and *Yasui v. United States* (1943) each upheld the exclusion of Japanese Americans from American citizenry during the wartime, which effectively legitimized the stripping of constitutional rights from

American citizens considered “foreign” and further reinforced the racialization of Asian Americans in American society (Saito, 1997, p. 76).

Throughout the course of American history, it is evident that the exclusionary nature of white American society has only recognized the legitimacy of Anglo-American and Caucasian citizenship. The extensive history of both African-American and Asian-American racial oppression that has been detailed above reflects the deep-rooted parallels that have shaped the contours of each minority group’s racial identity. This shared exclusion through race-based naturalization, immigration, and miscegenation laws is what initially racialized Asian-Americans by association with Blackness within the Black/White paradigm (Kim, 1999). There are many blatant examples of what Asian-American critical race scholars call the “negroization” of Asian-Americans, specifically those of Chinese descent. For example, in the case of *People v. Hall* (1854), George Hall was initially convicted by a jury for the murder of Ling Sing, an individual of Chinese descent. The jury’s decision to convict the defendant considered the testimony of three Chinese witnesses (Chang, 1993, p. 1291). However, the California Supreme Court overturned the conviction, nullifying the testimony of the Chinese witnesses and citing a law that prohibited “Blacks”, “Mulattos”, and “Indians” from testifying against “Whites” as also being applicable to the Chinese. This decision concretized the conceptualization of Blackness as encompassing all those that were “non-Whites” and defined the racialization of Chinese residents by association to the Blackness at this time (Kim, 1999, p. 2394). Hsu notes the divergent impact of this decision on Asian-Americans as a result of the compounding effects of the Foreign Miners’ Tax as evidence that their comparative racialization with African-Americans is untenable (Hsu, 2015). However, the uniform application of the cited law by the Justices is significant because it reflects a strategy of the ideology of White supremacy that considered all of the aforementioned racial groups to be formally equal to each other. By homogenizing these groups into undifferentiated categories, Whites effectively divided and encouraged conflict among minority groups, leaving the racial hierarchy untouched (Wolfe, 2010).

The “negroization” of Asian-Americans was also visible in that characteristics which were formerly attributed to Black slaves, such as moral inferiority and lustfulness, were also attached to Chinese workers. Sexual stereotypes that were being used to demonize African-American men and women as barbaric and heathens also increasingly became ascribed to Asian-Americans (Kim, 1999, p. 2396). This resulted in the proliferation of anti-miscegenation laws targeting Asian-Americans that prohibited them from marrying or engaging in sexual relations with white Anglo-Americans. Similar to the anti-miscegenation laws that targeted the perceived African-American

male's intense desire for white women, the marriage of Asian-American men to white women was considered a threat to "white racial purity" (Chou, 2012, p. 10). Moreover, the hyper-sexualization of foreign women's bodies in particular was a powerful tool of racialization that excluded Asian-American and African-American women from idealized gender roles. The view that these women were in some way inherently unfit to represent traditional gender roles resulted in a commodification of their bodies through underground industries such as Chinese prostitution rings, which were later used as justification to qualify claims that they were sexual "heathens" (Battalora, 2010, p. 22). As a result, the legal paternalization of minority groups' sexuality was another mechanism through which Asian-Americans became increasingly racialized by association with the African-American identity. In fact, this newfound association between Black and Asian-American citizens through the policing and demonization of their sexuality was so intertwined that the Chinese were eventually referred to as the "new barbarians" and "nagurs" because of the threat both groups posed to "white racial purity" (Chou, 2012, p. 10).

#### **An Unexpected Divergence in Racialization: Processes and Explanations**

Despite the considerable parallels that have been drawn when considering the racialization of African- and Asian-Americans, the historical legacy of Asian-American citizens has now manifested itself into their categorization as the 'model minority'. Japanese-Americans and eventually all Asian-Americans have been singled out among minority groups for their economic success in the post-World War II era. Their success has been attributed to their perceived ability to overcome the barriers of racism through their work ethic and culture (Chang, 2013). This construct of a 'model minority' has been highlighted by neo-conservatives and formal equality proponents as evidence of a minority group's achievement of the "American Dream", exemplifying the notion that all groups can succeed in America through hard work and dedication (Chew, 1994, p. 24). In addition, the 'model minority' stereotype has helped qualify claims of a racially equitable society where differences in the outcomes between groups reflect real differences rather than the legacy of past discrimination (Saito, 1997). The mere premise of the existence of a 'model minority' implies that other minority groups are inherently incompetent and should strive to emulate the success of Asian-Americans in a purely meritocratic society. Thus, Asian-Americans have increasingly become racialized by association to Whiteness in reaction to claims that systemic discrimination and implicit biases against Black Americans still exist in contemporary institutions.

Furthermore, the success of the Civil Rights movement in the 1960s and the tangible legislative outcomes that resulted are often cited as evidence that the current plight of Black citizens are of their own doing (Crenshaw, 1988, pp.1352). The synergistic effect created from the perceived success of Civil Rights in conjunction with the perceived economic and academic success of Asian-Americans as a class has created the notion of a colour-blind society that further subordinates Blacks and differentially racializes Asian-Americans with the attributes of “Whiteness” (Kim, 1999, p. 2395). In addition, this effect has situated Asian-Americans in a middle space in the Black/White paradigm of racialized legal discourse. As a result, they serve as a buffer for the racial and class tensions between Black and White citizenry, the manifestation of which is seen in the infighting between Blacks and Asian-Americans that upholds racial and class hierarchies (Saito, 1997). The most notable example of such infighting is the 1992 Los Angeles riots following the initial Rodney King trial verdict; Korean-American-owned stores were targeted during these riots by Blacks, illustrating the role of Asian-Americans as the buffer between Black/White tensions (Byrd, 2011). Despite the shifts in the racialization of Asian-Americans, they cannot be fully racialized to have their identities conflated with that of White America as closely as they historically were with Black America. The reason for this is that the historical legacies of legal exclusionary practices have shaped and created what it means to be Asian-American. Although there is much contention surrounding what constitutes the definitive Asian-American citizen outside of the Black/White paradigm, centuries of marginalization and exclusion have shaped an identity that can never be completely reconciled with “Whiteness” (Byrd, 2011, p. 208). Therefore, the identity, recognition, and designation that is afforded to Asian-Americans undergoes no substantive transformation and they continue to be co-opted by mainstream white society to further the myth of a colour-blind society (Kim, 1999).

An alternative explanation for the emergence of the ‘model minority’ phenomenon stems from the origins of Asian-American and African-American stereotypes. Firstly, the phenomenon of “Yellow Peril” is one with an extensive history that begins with the threat of European invasion by Genghis Khan and the Mongolians. In the United States, this term was primarily used to describe the cultural threat of Asian immigration as well as its associated economic, political, and military ramifications to White society (Kawai, 2005). In particular, the White working class was fearful that the cheap labour that Asian-Americans provided and their acceptance of poor working conditions would undermine not only their job stability but also the dominance of Whites in America. The corporations which continued to employ cheap Asian labour to maximize their profits also assumed a negative connotation as being enemies of the White working class and degrading the “value of white labour” (Hsu, 2015, p. 98). This increased

association of capitalism with Chinese bodies also generated fervent opposition to the continued immigration of Asian workers, resulting in exclusionary Asian immigration policies that attempted to stem the flow of Asian immigrants and provided rationale for U.S. colonization in Asia-Pacific regions (Hsu, 2015; Kawai, 2005). The resurgence of “Yellow Peril” at the onset of World War II was a product of fear that the status of Japan as an enemy of the United States would create insurgency among Japanese immigrants residing in America. Thus, the basis of the “Yellow Peril” phenomenon was not of inferiority, rather, this stereotype was invoked by American citizens because of their fear of the Asian race overtaking American society (Wu, 2016, p. 204). This is further exemplified in the description of Chinese labourers that were imported to replace slave labour following the abolishment of slavery by the 13th amendment. Chinese workers were described and “praised” as being more obedient and hard-working than the “negro” (Kim, 1999, p. 2400). In contrast, the historical racialization of African-Americans originated with the institution of slavery and the rationalization of African subordination as justifiable because they were “subhuman”. The Black/White relationship and the ensuing struggle is the paradigm upon which the United States was built, hence, African-Americans as a minority group also function to define the dominant race hierarchy of the status quo (Kim, 1999, p. 2403). As a result, the modern manifestation of the difference in stereotypic origin is the myth of the ‘model minority’ that is closely associated with Whiteness, while Black Americans continue to be racialized as “non-achieving” (Chang, 2013, p. 961).

The politicization of the ‘model minority’ myth has had particularly insidious effects on both Asian-Americans and African-Americans alike. Most notably, Asian-Americans have been weaponized to the detriment of other racial minority groups as victims of affirmative action policies to justify the eradication of such policies (Chang, 1993). The case *Students for Fair Admissions Inc. (SFFA) v. President and Fellows of Harvard Co.* (2014) best exemplifies this dilemma. In this case, SFFA, an anti-affirmative action organization, alleged discrimination against Asian-American applicants in Harvard admission policies’ consideration of race. It accused Harvard of employing racial quotas in its undergraduate admissions process, essentially forcing Asian students to fight for the limited number of spots allocated to them (Chan, 2016). Additionally, multiple Asian-American organizations submitted amicus briefs in support of the plaintiff in the affirmative action Supreme Court Case *Fisher v. University of Texas at Austin* (2013) (Inouye, 2016). In both cases, the view that highly qualified Asian-American applicants who do not receive racial preference are often passed over for less qualified applicants who do receive racial preference is used as a justification for removing affirmative action policies (Inouye, 2016; Chan, 2016). However, the consideration of race and

affirmative action admissions policies stand to benefit other disadvantaged racial minorities such as Blacks and Hispanic-Americans. Thus, the success of Asian-Americans in their progression through mainstream American society and their 'model minority' status has created a problematic notion that Asian groups no longer experience discrimination (Inouye, 2016, p. 154). This has resulted in Asian-American acceptance of the anti-affirmative action narrative and positioned them with Whites against other racial minority groups.

To conceptualize this ambivalent position of Asian-Americans within the Black/White paradigm, Asian-American legal scholars have posited the theory of racial triangulation as a visualization of the Asian-American relationship with Blacks and Whites. Historically, Asian-Americans have been racially triangulated as "foreigners" and "aliens" underneath White society, while at the same time being racialized as the threat of "Yellow Peril" that might overtake White society. As mentioned previously in this paper, Asian-Americans were considered to be "superior" to Blacks because of their perceived enhanced work ethic (Kawai, 2005, p. 110). Using the example of affirmative action, we can clearly visualize the evolution of the racial triangulation of Asian-Americans by association to Black/White identity. Initially, the shared history of racial oppression between Asian-Americans and other racial minorities placed them in opposition to Whites. However, the conceptualization of the 'model minority' and the conservatives' embrace of this characterization of Asian-Americans, which serves to reinforce the notion of a colour-blind society, has effectively re-positioned Asian-Americans on the same plane as Whites in opposition to other racial minority groups (Chang, 2013, p. 947). Supporters of affirmative action have attributed this evolution to the complicity of Asian-Americans in their co-optation by right-wing movements. In effect, Asian-Americans are explicitly reinforcing the status quo and the dominant racial hierarchy by allowing themselves to become increasingly racially associated with White identity (Kim, 1999). The ability of racial triangulation theory to differentially place Asian-Americans on opposite racial planes with relative ease exemplifies the fluidity and ambiguity of Asian-Americans within the Black/White paradigm. Thus, the case of affirmative action policies shows us that the acceptance of Asian-Americans by White society has facilitated their divergence from the historical experiences that are shared with African-Americans.

### **Conclusion and Future Steps**

Critical race theory tells us that law and race are mutually constitutive and that racial classifications cannot exist without the law explicitly defining its contours (Gomez, 2004). Therefore, the shared exclusionary experiences

of Asian-Americans and African-Americans in American history through immigration, naturalization, and anti-miscegenation policies should have shaped each group's identity in a parallel manner. However, the rise of the 'model minority' myth that characterizes Asian-Americans above Black Americans on the racial hierarchy while still being substantively unequal to White Americans shows us that this is not the case. In particular, the divergence of the Asian-American and African-American experience when explored through racial triangulation of affirmative action policies clearly presents the shift in racialization by association of Asian-Americans in the Black/White paradigm of racialization as well as the ambiguous nature of Asian-American identity. This paper offers two possible explanations for this divergence: the synergistic effect of the tangible success of the Civil Rights movement in conjunction with the construction of the 'model minority', and the fear of Asian superiority that created the "Yellow Peril" phenomenon. The first explanation explores the favourable outcomes for Black Americans that resulted from the Civil Rights movement and the way that this created the notion that racism was no longer present in American society. In addition to this, the relative success of Japanese-Americans in the post-Civil Rights era helped to further this notion of colour-blindness, which subjugated Black claims of persisting racism while increasingly associating Asian-American identity with 'Whiteness' (Kawai, 2005, p. 113). The second explanation posits that the premise of racialization of Asian-Americans was different from the premise that Black racialization relied on. In fact, the initial stereotypes of Asian-Americans that resulted in their legal exclusion from mainstream American society were ones of superiority not inferiority.

To summarize, this divergence of Black and Asian-American citizens as subordinated racial minorities is harmful to both parties. The use of the 'model minority' myth is problematic for Asian-Americans because it situates them within the Black/White paradigm in a position that makes them unable to self-actualize a citizenry that is separate from this paradigm. For Black citizens, the 'model minority' myth serves to further subordinate them in a society that still employs modified exclusionary practices that keep Blacks as a group from achieving full citizenship. Insofar as these groups continue to be unable to reconcile their differences, it will be difficult to subvert the dominant racial hierarchy predicated on the ideology White supremacy that has predominated racial stratifications since the conception of the United States.

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## **THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: THE GOOD, THE BAD, AND THE USELESS**

**MIDORI MATTHEW**

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### **Abstract**

The United Nations Convention on the Rights of Children (UNCRC), put forth in 1989, has generated a global movement in the direction of protecting and promoting children's rights, resulting in a paradigm change in how children are perceived under the law. While the UNCRC is the most widely ratified international human rights treaty in human history, children's fundamental right to protection continues to be violated through actions instigated by adults, such as neglect, physical, sexual, or emotional abuse, or being coerced into marriage, wartime activities, or slavery. This is largely a result of international law having no empirical legal binding; since countries are sovereign upon themselves, without domestic enforcement by each individual signatory country, there is no obligation to abide by the terms of international treaties. Applying both a philosophical and legal framework, this paper seeks to provide a critical analysis of whether or not treaties of international law, such as the Convention on the Rights of Children (UNCRC), have an unyielded potential to spark a tangible, beneficial change in the promotion of children's rights, or if such doctrines are nothing more than glorified pieces of lip service paid to bolster the signatory country's face value on a global level.

### **Introduction**

In the powerful words of the United Nations Declaration of the Rights of the Child, "mankind owes to the child the best it has to offer" (UNICEF, 1989, p. 164). At the core of this proclamation lies the moral imperative of the international community to protect the children of the world from the savagery and terrors which constitute armed conflict. A child, as defined by the United Nations Convention on the Rights of the Child, is a "human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" (UNHCR, 1989, p. 2). According to Brocklehurst (2003), this means that by application of this definition, almost half of the world's population can be conceptualized as children.

Despite the charm of this adage, the regrettable reality is that each day, in every country in the world, there are children living well below the standards that constitute a minimally good life with a lack of access to food, water, shelter, basic education, or health care. Additionally, children are trafficked as labour workers for unimaginably small wages to support their families, forced into prostitution, or, in some parts of the world, coerced into actively participating in armed conflict. Even domestically, conditions are nowhere near ideal: nearly 20% of Canadian children are projected as living below the poverty line (Kohut, 2015). Under section 43 of the Criminal Code of Canada, it is legally defensible to use corporal punishment to adjust a child's behaviour "if the force does not exceed what is reasonable under the [given] circumstances" (Covell and Howe, 2001, p. 70). In response to these ongoing injustices, the United Nations General Assembly proposed the Convention on the Rights of the Child and opened it for signature in 1989. The following year, the Convention came into full force, and was ratified by the required number of nations to adopt it as a body of international law. This paper uses a philosophical and legal lens to analyze whether international doctrines such as the UNCRC have an untapped potential to promote a rights-rich future for children, or if they are merely a piece of 'trophy law', and nothing more than a token of lip service paid to improve a country's international face value.

### **What is the UNCRC?**

The Convention on the Rights of the Child is to date the most widely ratified international human rights treaty in recorded history. It constitutes the "most comprehensive list of human rights created for a specific group" (Fortin, 2009, p. 53). The Convention has acted as a perspective-changing means for many of its signatory countries in forwarding the progression of the children's rights movement and plays a fundamental role in redefining the means in which children are viewed and treated. Although not explicitly encoded as part of many signatory countries' laws, it exerts powerful influence over the evolution of law, and is frequently used as an international template against which to measure domestic standards (Fortin, 2009). Through the articles laid out by the Convention, children, rather than being objects owned by their parents, as was the predominant perception of them for several decades prior to World War II, became acknowledged as human beings with distinct and real rights of their own. As countries ratified the UNCRC, they bound themselves through international law to comply with the articles and implement the rights of the child as specified. By accepting its terms, countries made the promise that every effort would be made to protect and preserve the rights of children through the availability and provision of appropriate legislation, policies, and programs.

Categorically, the UNCRC addresses the proper development of the child through establishment regarding substantive rights of provision, protection, and participation. Provision rights refer to providing appropriate conditions of basic welfare and nurture for the child. Included in this section are the child's right to survival and healthy development, health care accessibility, and the crucial right to education. Rights of protection reference the child's right to be safeguarded from acts of deliberate harm, including protection from abuse, neglect, sexual exploitation, or discrimination. The final grouping of articles under the UNCRC is the rights to participation. This entails the child's inherent right to express their opinions freely and without censorship. Some of the factors constituted by this body of rights are freedom of speech, conscience, and thought. Perhaps it is the words of legal philosopher, Ronald Dworkin, which most appropriately summarizes the predominant goal of the Convention: it is a firm commitment to "taking rights seriously" (Covell and Howe, 2001, p. 17).

#### **Development of the UNCRC and distinction from other agreements**

Initially, the UNCRC was unexpectedly challenging to develop. Even prior to any talk of developing a Convention, both the League of Nations (1924) and the United Nations (1959) adopted declarations that spoke on behalf of children's rights. So, what was the problem? The declarations were not legally binding, and had no means of enforcement, but were rather statements of general principles that *should*, but by no means *had*, to be followed (Concepcion, n.d.). Following the Universal Declaration of Human Rights (UDHR) of 1948, a piece of international law that became domestically codified into the constitutions of countless countries, a universal standard was developed by which all people should be treated in accordance with basic freedoms for all. It was at this point, following the atrocities and crimes of the Second World War, that the human rights movement came to the forefront, and, with it, the recognition of children as people with their own distinct needs and rights.

Prior to this development, children were either viewed as property of their parents, a view supported by legal philosophers such as Jan Narveson and Robert Nozick, or as 'not-yet' complete human beings that one day have the capacity to develop into adults with distinctive sets of rights, which originated from Aristotelian teachings (Blokhuys, 2016a). However, many aspects of the UDHR were vague, and thus, open to interpretation. It was during the 34<sup>th</sup> session of the UN Commission on Human Rights (CHR) in 1978, that the initial buds of the UNCRC began to blossom. Concern was expressed that children around the world continued to suffer the effects of "colonial rule and apartheid regimes," as well as racism and war, and thus, it was agreed that it was a necessity to strengthen international means

for safeguarding the rights of children (Concepcion, n.d.). That same year, in commemoration of the 20<sup>th</sup> anniversary of the Declaration on the Rights of the Child, the UN General Assembly established the year to follow as the International Year of the Child, and, ipso facto, the CHR commenced the first draft of a Convention on children's rights.

The establishment of the Convention was imperative in recognizing that youth have needs that are distinct from those of adults. It is vital to understand that children and adults by no means live in the same ways, and therefore cannot reasonably be accorded with the same rights and freedoms. Special consideration must be given to the safeguarding of children's future liberty interests. Foremost, children begin their lives with greater vulnerability, and they must rely on adults for protection and guidance, a social fact that is crucial towards their development into rational, competent agents of their own right. Both the actions and inactions of any government impact children more profoundly than any other group. As future members of society, any policy-making or legislation that does not consider the rudimentary 'best interests' principle of child protection will have long-term repercussions (UNICEF Canada, n.d.). Since children are viewed as 'not-yet' competent agents, they do not possess the right to vote, thus, their voices are almost never considered or acknowledged as valid during the political process. When special attention is not provided about decisions that will impact them, there is an inordinate risk of great harm occurring, therefore subverting children's best interests.

### **Dispute between children's rights advocates in shaping the UNCRC**

In the history of the children's rights movement, there have been two distinct groups of advocates: the liberationists and protectionists. The opposition between the two groups resulted in the framers of the Convention to ensure a statement of children's rights that would be based upon a compromise between the indispensable views of both groups. Liberationists and protectionists alike agreed with the point that children should have the status of independent people with rights rather than being reduced to dependent members of families (Covell and Howe, 2001).

Conversely, the difference in values arose when it came to the discussion of a child's 'right' to self-determination. Liberationists argue that for children to succeed in overcoming the effects of discrimination and learning to exercise their own autonomy, they should be granted the same rights as their adult counterparts. In defending their perspective, liberationists believe that just as exclusion based on the grounds of gender or ethnicity are unconstitutional in accordance with section 15 of the Canadian Charter of Rights and Freedoms, ageism should be

incorporated as well (Covell and Howe, 2001). In contrast, protectionists reject self-determination being a right for children. They argue that children are not yet autonomous agents, but rather, people currently in the process of development, with distinct limits on their own abilities to make rational choices for themselves (Government of Canada Department of Justice, 2015). With these drastically opposing viewpoints considered, the Convention had to be framed in a very specific way to gather enough support for its acceptance. The statement was created in such a way that it fulfilled enough common ground between the groups, as well as demonstrating aspects of both parties' arguments to maintain unity within the growing children's rights movement.

### **UN States sign and ratify the Convention, and 'the one that got away'**

As of 2018, 196 national parties have ratified the Convention. However, there is one significant hegemonic force missing from these signatory countries: the United States of America (Covell and Howe, 2001; UN News, 2015). To many, this appears to be a questionable inaction, as there appears to be no significant harm in signing a treaty that acknowledges the respect and understanding of the rights of children. However, what has been exceptionally problematic and an obstacle to the United States accepting the terms of the Convention is the Senate and its traditional structure.

The American Senate is a legislative body with two members from each of the fifty states, and thus consists of one hundred members in total. Before any international piece of legislation or treaty can be passed, the approval of two-thirds of the Senate must be obtained. As the political distribution in the United States is almost always perfectly divided between Republicans and Democrats, who are traditionally highly diametrically opposed, it is unlikely that such legislation will receive more than half of the Senate's approval on most issues. This partly stems from ideological differences among these two camps: the Republican base, such as the traditional tea-partiers, or Christian rights groups, are vehemently opposed to the United Nations in general, and are fiercely protective of American sovereignty (Blokhuis, 2016a). Many people belonging to these groups perceive the UNCRC as attempting to give children a disproportionate amount of rights, which does not align with the prevalent and very powerful parental rights movement that has dominated the United States for decades. These individuals believe that when there is a conflict of interest between parent and child, the wishes of the parent should be given paramount consideration regardless of the circumstance, which immediately renders the Convention null in their eyes. Thus, because of this ongoing debate between parties within the Senate, it is almost impossible that the United States will ever ratify the UNCRC.

**From 1990 and beyond: Children's rights violations following the Convention**

As with many bodies of international law, the Convention has been met with great skepticism whether it has made any difference in the lives of children. Much to the chagrin of UNCRC advocates, there have not been many significant reductions in harms that impact children worldwide, including child marriage, forced labour, prostitution, or, even more locally, corporal punishment. Violations of children's rights need not always fit into the severity of the categories or result in long-term physical harm. Neglect is one of the most ubiquitous forms of abuse and occurs worldwide to children from a vast spectrum of backgrounds and familial origins (Covell and Howe, 2001). Neglect, particularly emotional neglect, is a central feature in all forms of child maltreatment. Whether intentional or not, it may sometimes be visibly apparent, such as a child appearing malnourished, bruised, or unkempt, and sometimes it may be invisible until it is too late to resolve. While signs of physical abuse are more apparent and easily resolved, neglect does at least as much psychological damage to young victims (Myers, 2011).

Child marriage is a serious human rights violation that disproportionately affects young girls in developing countries. The impacts of such unions are long-lasting and pervasive and are severely detrimental to the physical health of girls. Such unions disable them from opportunities to education, equality, non-discrimination, and the foundational right to live free from any violence or exploitation. Article 16 of the UDHR stipulates that marriage shall be entered only with free and full consent of the intending spouses (Girls Not Brides, 2017). Child brides have little, or, more often, no say as to when or whom they will marry. If a child purportedly cannot make certain decisions on behalf of themselves, such as voting in federal elections, since they are not yet viewed as competent in the eyes of the law, they certainly cannot be expected to decide on marriage for themselves. Dishearteningly, the number of young girls being forced into marriage globally has not significantly decreased post-UNCRC (*A Path to Dignity*, 2012). Though there has certainly been educational initiatives made regarding the immorality of forcing young girls into marriage against their will, the fight against child marriage is far from over as it viciously persists to this day.

Contestably, corporal punishment is one of the least enforced articles of the UNCRC amongst signatory countries. In the developing world, it is difficult to push for the abolition of corporal punishment when violations such as child marriage or labour are still actively accepted. As a result, this section will focus on Canada itself. Under article 43 of the Canadian *Criminal Code*, it is acceptable to use physical force on a child if one is a teacher or parent so long that the force utilized is not excessive beyond what is considered reasonable. However, the fundamental question here

is what, exactly, constitutes ‘reasonable’? There is no simple answer to this lingering question. On a domestic level, the Canadian *Criminal Code* never directly states what kind of harm is reasonable, and whether a slap, kick, or punch, or under what circumstances it is acceptable to lay hands on a child. Essentially, it is entirely the Courts’ jurisdiction to determine what is reasonable on a case-by-case basis. In Canada, what has been viewed as acceptable is nothing short of abhorrent. In the past, actions such as “...slapping a child in the face hard enough to chip a tooth; and stripping teenage girls to their underwear, tying their hands to a clothesline, and strapping their buttocks have been deemed reasonable” (Covell and Howe, 2001, p. 71). These sorts of demonstrations by so-called ‘figures of authority’ are reprehensible when children need role models that teach them how to resolve problems peacefully, not with hatred or violence.

Psychological studies have proven many times that the usage of corporal punishment increases anti-social behaviours over time, creates aggressive natures in children, and significantly reduces IQ score. Research suggests that by the time of adolescence, children who have experienced these forms of violence have trouble trusting others and forming healthy relationships with peers. Even in instances where corporal punishment is defined as mild or moderate in nature and results in no physical harm, there is still a positive correlation with increased aggression in adulthood. Though it is inappropriate and invalid to make the sweeping generalization that all children who experience corporal punishment develop such propensities, the risk is high nevertheless. Another study demonstrated that the childhood experience of physical abuse more than doubled the risk of both domestic violence perpetration and victimization in adulthood (Whitfield, Anda, Dube, & Felitti, 2003). The Canadian government’s refusal to repeal section 43 of the *Criminal Code* has been a paramount failure, as well as one of every other country that accepts corporal punishment as ‘teaching a child a lesson’ rather than a crime against a child’s healthy development. In keeping with articles 7 (life, liberty, and security of the person), 12 (not to be subjected to cruel and unusual punishment), and 15.1 (equal protection under the law without discrimination based on age) of the *Canadian Charter of Rights and Freedoms*, it is clear that corporal punishment is unconstitutional, and abolition of such is cardinal in the protection of children.

This section concludes with the continuing problem of child neglect. Neglect, though it may not always result in visible harm or physical injury, is common and oftentimes ignored, whether by intentional or unintentional means. Landmark cases demonstrating some of the most horrific effects of neglect have been documented not exclusively in developing countries, but in affluent locations such as Canada, the United States, and England. In Canada, Toronto’s



infamous Jeffrey Baldwin case of 2002 chilled the city to the core: a five-year-old boy, who was being fostered by his own grandparents, was discovered to have starved to death in the kitchen of their house. Disturbingly, this was not even the most gruesome aspect of this case. Jeffrey's autopsy demonstrated that he had died of bacterial pneumonia, likely from breathing in his own feces for days on end (Blatchford, 2005). The degree to which he was neglected was beyond comprehension. Furthermore, the Catholic Children's Aid Society, despite having records of his grandmother's former abuses (two children had died in her care within the last two decades), allowed Jeffrey to be placed in her care. When later questioned, they admitted they had the files, and had merely failed to assign a social worker to preside and monitor over Jeffrey's fostering. Neglect, as with any other form of child abuse or exploitation, may take many forms of not providing a child with the care they need to merely survive, and entirely defies article 19 of the UNCRC to protect children from all forms of violence.

### **Has the UNCRC truly been worthwhile? Criticisms and recommendations**

Foremost, it would be entirely incorrect to state that the UNCRC has achieved nothing since it came into force. Arguably, despite having not significantly reduced the number of children exposed to compromising conditions on a worldwide scale, there are other aspects of equal importance that the Convention has given rise to. Though it has by no means been an immediate fix to the problems encountered by children around the world, it has certainly provided an internationally-recognized form of children's rights education. The optimal development of every child is crucial to the long-term success and flourishing of each society. Whatever they experience, whether good, bad, cruel, or inspirational, is formative to the person they will become as an adult, and what they will achieve. Quality of childhood is one of the greatest influences on what a child's eventual contributions to or costs on society will be (Atinc and Gustafsson-Wright, 2018; Young, 1996). When children are educated regarding the magnitude of their value as humans within their own right, and not merely as extensions of their parents or 'not-yet' fully developed people, they have the capacity to become some of the most innovative minds of the future.

Childhood, as the most vulnerable period in any individual's lifetime, is something that must be dutifully protected by competent adults. Unlike children, who tend to make decisions based upon what would provide the greatest happiness in the shortest amount of time, adults are capable of foresight in considering potential consequences of making any decision. By itself, this aspect is where the vitality becomes crucially apparent that adults must act in such a way that children may look up to their actions and see a person who is a strong role model for them. Children

are highly susceptible to the nature of the actions of the adults around them, which demonstrates the equal and utmost importance of adults becoming more strongly educated about children's rights. For instance, though there is rarely a direct causal pathway which leads to a guaranteed particular outcome as individuals actively mold their own social world, an adult who only resolves their problems through means of violence or aggression to others (i.e. corporal punishment rather than explaining a child's wrongdoing to them and teaching them how to better approach a situation the next time it occurs) has potential to yield children with similar temperaments, if not worsened, in response (Covell and Howe, 2001; Holt, Buckley, and Whelan, 2008). Therefore, in extending education about the distinct and unique rights children possess into the adult realm, a stronger future for all of society may be developed.

As well, in addressing the concerns of critics regarding the Convention, the United Nations did not attempt to claim it would be a magical resolution of children's crises, but rather a resounding advocacy that children's rights *should* be respected. It was almost always understood to be a piece of international law to provide a guideline by which domestic standards should be developed. Though there is no way that any country can explicitly be threatened with negative incentives for not abiding by the terms of the articles, there is a strong moral inclination from the fellow signatory countries to adjust domestic laws and policies in efforts to create a better future for children than what is currently available. If nothing else, the Convention on the Rights of the Child has been, similar to any other United Nations document, a primary form of important human rights education. As a treaty recognized by all United Nations bodies except for the United States, it is internationally understood and recognized as having a certain degree of validity, regardless of the extent to which it is upheld in domestic law. From this, it is an excellent foundation for governments and policies to appropriately recognize the distinctive needs of children across the globe. Knowledge creates a better future for all; however, it starts at an individual level. When people are taught about such Conventions, they ruminate on the nature of humanity, both in positive and negative terms. Concurrently, ideas may then be invoked as to creating a stronger society that recognizes these rights for the most vulnerable, which, in this instance, for children. Fundamentally, the UNCRC is an unparalleled form of human rights education that has the potential to reform the way children are treated, if it is given the opportunity to fulfill its potential.

Finally, the most important questions that must be considered with regards to the validity of the Convention is whether it withstands the criticisms it receives, and, if so, how may this be established. Primarily, the ever-debated concept of whether human rights truly exist, and if they are truly justified needs to be analyzed.

It is safe to assert that human rights, including those of children, certainly exist on a contemporary account rather than one based on non-robust metaphysical premises, unlike those philosophized through the natural rights doctrine (Orend, 2017a). In other words, there is a basis by which such rights have been asserted that is more than simply the concept that everyone is 'born' with rigid rights that cannot be refused or broken. Rather, rights are established through a contractual reciprocity agreement; one's rights are respected based on their respect for that of others, and that each human has their vital needs fulfilled in living a minimally good life (Orend, 2017b). Mutual respect for the peaceful existence of another proves to be a satisfying justification for the existence of human rights. The goal of the Convention on the Rights of the Child is consistent with both these proposals. Though children, especially infants, may not necessarily be able to appreciate the rights of others as they are not yet competent to do so, they certainly are not violating rights as such.

Additionally, by promoting the safeguarding of children having the means to live a minimally good life, the 'General Principles' of the Convention establish a framework by which the other articles may be interpreted. They are the rights to non-discrimination (article 2), upholding of the best interests of the child (article 3), life, survival, and development (article 6), and to be heard (article 12). In expansion of the 'minimally good life' requirement, a plausible understanding must be developed of what exactly entails such a life. The ultimate goal in any person's life is to live a good one. To fulfill this goal, there is a hierarchy of specifications that must be met.

First, objects must be identified: security, subsistence, freedom, equality, recognition, and democracy are the objects of such a rights-claim. Following this are individualized specifications for each object: this includes an assertion such as that enlisted in article 12, the right to be heard, which connects to the first-level objects of freedom and recognition. The final tier, the 'ground floor' specifications for each object. There are sometimes unique traits of individuals which calls for added objects to realize the previous levels. Vulnerable populations, such as children, may require the provision of different objects to realize the ultimate goal to the same degree as an adult. For instance, children require more attention to their physical security. What physical security of the person means for adults who are fully developed and competent to safeguard their own rights will inevitably be different from what a child requires to have security from violence to the same degree (Orend, 2017a). Moreover, this is pertinent to Dworkin's philosophy of 'making rights real': a right is only real when the right-holder possesses the object of that right. The object substantiates it. A right itself is only a theoretical moral or legal entitlement to something, while the object is the

‘something’ itself, which may be concrete or abstract. Without appropriate provision of the objects of rights, rights themselves will be deemed null, as there will be nothing material to fulfill the abstract claim.

Plausibly, the largest criticism the Convention received is that it is a body of international law, sometimes better known as ‘trophy law’, where the signatory country may not necessarily have any intention of upholding its conditions, but only signed for the purpose of making itself look committed to a cause without any real commitment. To overcome this denunciation, the Convention must not only become incorporated into domestic laws, but must go beyond them as well. Law is but one social institution and does not comprise the entire basic structure that upholds such rights. Other sources, such as bodies of government, police and military forces, social services, economy, and families, must all play their role in promoting the rights of children for its realization of such a Convention on a practical level. Contemporaneously, the United Nations itself is often accused of putting forth ideals rather than realities by providing lip service to serious human rights violations rather than tangible action, since many treaties do not account for the implementation or securing of such rights (Sengupta, 2017). Though it is not necessarily wholly negative to maintain an idealistic perspective on resolving international conflicts, it must be blended with equal parts realism to preserve credibility. In persevering through ongoing censure, it is important for the Convention to construct costs and reasonable duties for countries to uphold these articles in a reasonable manner.

Evidently, certain rights bear no fiscal cost, such as listening to a child’s opinion or respecting their right to basic survival. However, some rights are more demanding regarding the fiscal cost burden, such as the provision of rights entailed by article 24, namely the right to health care, adequate pre- and post-natal health for mothers, or the implementation of family planning education services. Though it is incontestable that these are rights deserved by all people worldwide, in developing countries where the GDP is low as is, these systems cannot be implemented with ease. Thus, perhaps in formulating a plan of action over the course of time and encouraging governments to gradually allocate funding to such causes, these terms of the Convention may be perceived as a real possibility rather than a mere ideal.

Subsequently, any Convention pertaining to human rights must be open to future growth as society progresses. Just as generations of human rights have expanded over time and evolved from civil and political rights, economic, social, and cultural rights, all the way to rights that entail environmental protections or affirmative action hiring programs, the children’s rights movement must be open to similar change. As time has passed, the Convention has written in optional protocols that the signatory states may *choose* to uphold, if they sign a second time. These

protocols include the involvement of children in armed conflict, the sale of children, child prostitution, and child pornography, and on a communications procedure (Childs Rights Connect, 2014).

The first optional protocol on children in armed conflict mandates that governments increase the minimum age that children can join the armed forces from fifteen years, and to ensure that members of their militia under age eighteen do not take a direct role in armed conflict. Accepting the terms of this protocol has been problematic in numerous developing countries, particularly those in Sub-Saharan Africa, as the use of children in armed conflicts is a battle far from conquered. The second optional protocol provides requirements for governments to cease the sexual exploitation of children and protects children from being sold for non-sexual pursuits such as forced labour or organ donation. Lastly, the optional protocol on a communications procedure enables children themselves to submit a complaint to the United Nations when their rights have been violated, and their own country's legal system was unable to reach a resolution (Childs Rights Connect, 2014). This most recent addition to the Convention is conceivably the most important in encouraging children to recognize the magnitude of their own rights. In compliance with the increasing prevalence of children's rights education, children are then better able to recognize when an infringement on their rights has taken place, and are further empowered to confront the situation personally, and resolve it accordingly. Therefore, from the time the Convention on the Rights of the Child was opened for signature, significant developments have occurred in the twenty-eight years since. Fundamentally, just as society is always advancing, rights will inevitably do the same.

### **Conclusions and final remarks**

In summation, the Convention on the Rights of the Child has been enormously influential, and asserted that children, once and for all, are people with their own inherent sets of rights. As the most widely recognized and ratified international treaty in history, it proves to be a powerful source of children's rights education. The contribution made through international human rights law in the promotion of the rights of children has been "...of inestimable importance" (Fortin, 2009, p. 73). All members of the United Nations except the United States have signed and ratified the Convention. It is unlikely the United States will ever take measures to do so for many reasons, including the division within their two-party system. Even though violations of children's rights, such as abuse, exploitation, militia initiation, prostitution, and neglect continue in high volumes around the world, progress, albeit small, is being made because of the Convention's gradual recognition. Though there are certainly miles to go regarding enabling the

UNCRC to be taken more seriously around the world, one thing is certain: competent adults must protect children dutifully. Fundamentally, children are the future of the world. As children learn they are bearers of rights and discover gaps between principle and reality, they will demand systematic change as they become adults, and commit to implement a rights-rich future.

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