The Rights of the Child - What Can an International Body of Catholic Jurists Do?

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Introduction

It is self-evident that the commonweal of the world is contingent upon the welfare of its children. Not evident, however, are the ways and means to maximize child development and the human potential for goodness. Those interested in human rights must earnestly and continuously strive for this kind of knowledge, a quest which will occupy the minds and lives of philosophers—and lawyers.

The unique rights of children have been acclaimed in several international instruments.\(^1\) The Universal Declaration of Human Rights,\(^2\) for example, recognizes the importance to human society of the "special care and assistance to which children are entitled."\(^3\) The Declaration of the Rights of the Child\(^4\) is an even more sweeping recognition of children's rights. This instrument proclaims ten principles in appreciation of a child's peculiar needs, which are products of "his physical and mental

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\(^2\) Universal Declaration of Human Rights, supra note 1.

\(^3\) Id. at Art. 11, § (b).

\(^4\) Rights of the Child, supra note 1.
immaturity."

According to this Declaration, which in and of itself has no force of law, the child is entitled to the following: freedom from discrimination, developmental opportunities, a name and a nationality, health care, education, housing, affection, recreation, freedom from abuse

Principle 1

The child shall enjoy all the rights set forth in this Declaration. Every child, without any exception whatsoever, shall be entitled to these rights, without distinction or discrimination on account of race, colour, sex, language, religion, political or other . . . status, whether of himself or of his family.

Rights of the Child, supra note 1, at 19.

Principle 2

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.

Id. at 20.

Principle 3

The child shall be entitled from his birth to a name and a nationality.

Id.

Principle 4

The child shall enjoy the benefits of social security. He shall be entitled to grow and develop in health; to this end, special care and protection shall be provided both to him and to his mother, including adequate pre-natal and post-natal care. The child shall have the right to adequate nutrition, housing, recreation and medical services.

Principle 5

The child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his particular condition.

Id.

Principle 7

The child is entitled to receive education, which shall be free and compulsory, at least in the elementary stages. He shall be given an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.

The best interests of the child shall be the guiding principle of those responsible for his education and guidance; that responsibility lies in the first place with his parents. The child shall have full opportunity for play and recreation, which should be directed to the same purposes as education; society and the public authorities shall endeavour to promote the enjoyment of this right.

Id.

Principle 6

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the
and neglect, and exposure to an atmosphere of tolerance and friendship.

The Declaration of the Rights of the Child calls upon national governments to implement legislatively the ten principles. Each national government, with its own unique socio-economic system, should interpret these principles through their own culture. The specific content and force of these principles are effectuated through a legislature employing the dominant cultural values of that nation.

CULTURAL PLURALISM AND FUNDAMENTAL VALUES

A country’s legal system and its dominant legal principles both incorporate and expose the basic cultural postulates of a society. Certain differences in legal systems will flow from differences in basic concepts and values. A comparative view of family law, for instance, demonstrates that

Principle 8
The child shall in all circumstances be among the first to receive protection and relief.

Principle 9
The child shall be protected against all forms of neglect, cruelty and exploitation. He shall not be the subject of traffic, in any form.

The child shall not be admitted to employment before an appropriate minimum age; he shall in no case be caused or permitted to engage in any occupation or employment which would prejudice his health or education, or interfere with his physical, mental or moral development.

Principle 10
The child shall be protected from practices which may foster racial, religious and any other form of discrimination. He shall be brought up in a spirit of understanding, tolerance, friendship among peoples, peace and universal brotherhood, and in full consciousness that his energy and talents should be devoted to the service of his fellow men.

laws flow from varying societal concepts of "family." Family organization is a universal grouping of human society. The precise definition of "family," however, differs from culture to culture. Ask an American what is meant by "family," and you will be told that it consists of the mother, the father, and their children. The American concept of family is the nuclear family of procreation, and American laws concerning marriage, adoption, inheritance, and support of dependents flow from this understanding of family.

The American concept of a nuclear family is by no means the universal mode for dealing with the reproductive, economic, sexual, and educational functions commonly served by the family unit. As reported by ethnographers, the forms of family seem to exhaust the logical possibilities. The Nuer had a legally recognizable institution of woman-to-woman

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26 See note 20 supra.


28 The nuclear family of procreation is to be distinguished from the nuclear family of orientation, which consists of the individual and his or her siblings and parents. The family of orientation is the nuclear family into which one is born, while the family of procreation is the nuclear family that one helps create.


31 See, e.g., ILL. REV. STAT. ch. 3 (1977).


33 One commentator considers these functions to be the universal functions of the nuclear family. MURDOCK, supra note 20, at 1-22. Another commentator has offered a more specific list of the functions of marriage:

1. To establish the legal father of a woman's children.
2. To establish the legal mother of a man's children.
3. To give the husband a monopoly in the wife's sexuality.
4. To give the wife a monopoly in the husband's sexuality.
5. To give the husband partial or monopolistic rights to the wife's domestic and other labour services.
6. To give the wife partial or monopolistic rights to the husband's labour services.
7. To give the husband partial or total rights over property belonging or potentially accruing to the wife.
8. To give the wife partial or total rights over property belonging or potentially accruing to the husband.
9. To establish a joint fund of property — a partnership — for the benefit of the children of the marriage.
10. To establish a socially significant 'relationship of affinity' between the husband and his wife's brothers.

Leach, Polyandry, Inheritance and the Definition of Marriage, 54 MAN 182 (1955), reprinted in MARRIAGE, FAMILY, AND RESIDENCE, supra note 20, at 76.

34 Supra note 20. Even incest, a universal taboo, occasionally provided the basis for a pre
The Nayars practiced a form of group marriage, and polyandrous polygamy was characteristic of the Todas. While these seem to be extreme examples of divergence from the American concept, polygamy has been the form of marriage practiced by the largest number of human societies. The extended family consisting of persons related in various ways is universally quite common, yet rarely seen in the United States. The American might experience great difficulty in accepting—let alone appreciating—these alien systems of kinship. The temptation to view one's own basic notions as the ideal or universal is almost irresistible, and kin and family are such basic notions. The nature of our world and our sense of human dignity, however, demands that the validity of these foreign systems be respected.

It can be seen that even the most basic of human institutions can vary widely so as to be adaptive to the needs of the adopting society. If an institution as basic as the family is subject to such diversity, then so too will be the legal manifestations of a society. Basic cultural differences underscore the need for legislatures to interpret, according to their own cultural systems, the guidelines contained in the Declaration of the Rights of the Child. To give concrete form to these guidelines in a uniform way across different cultures is nearly impossible. To do so would invite cultural dominance by one system or another. It is far better to grant a kind of comity to the different systems.

It appears that a national interpretation of the ten principles can well be in conformity with the spirit and letter of the Declaration. For perhaps the best example, education, the Declaration states that “the child is entitled to receive . . . an education which will promote his general culture, and enable him, on a basis of equal opportunity, to develop his abilities, his individual judgment, and his sense of moral and social responsibility, and to become a useful member of society.” It should not be difficult for a country to agree to provide such an education.

Courts in the United States have shown a sensitivity to the cultural-educational needs of certain minority groups. In Wisconsin v. Yoder,
the United States Supreme Court provided an illustration of cultural accommodation which superceded the fundamental prescriptions of a legal system. It is common in America for the individual states to impose compulsory school attendance through at least a portion of secondary education. In Yoder, the Supreme Court held that to require such attendance of Amish children, whose religion opposed high school education, would violate the Free Exercise Clause of the first amendment. The State of Wisconsin, in enacting the education law, was concerned with the mental and physical health of its school children. The needs of the Amish community, in contrast, foreclosed extensive formal education in favor of informal training in their way of life of manual farm labor in rural seclusion. The Amish religion, at its core, prohibited high school attendance. The Court's holding was supported by expert testimony which emphasized the danger of psychological damage to Amish children due to conflicts between the Amish religious community and American secular society, with such a clash eventually resulting in the obliteration of the Old Order Amish church community. Further testimony elicited indicated that the Amish preparation of their high school children allowed for "learning through doing the skills directly relevant to their adult roles in the Amish community . . . ."

The Amish way of life is obviously at variance with the typical American mode, and its emphasis on formal education. Yet the Supreme Court upheld the right of the Amish to pursue their peculiar form of education in accordance with their religious beliefs. It was not the American tolerance for cultural pluralism that led the Court to this conclusion. Rather, it was the Constitutional guarantee of freedom of religious exercise. A cultural conflict permitting an exemption from enforcement of a


77 406 U.S. 205 (1972).
79 406 U.S. at 213-15. The First Amendment to the Constitution of the United States provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacefully to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.
81 Id. at 215.
82 Id. at 215-16.
83 Id. at 212.
84 American emphasis on education is evidenced by the fact that the average adult completes a median of 12.3 years of school. The CBS News Almanac 765 (S. Westerman & M.A. Bacheller eds. 1977). See also Information Please Almanac 745 (A. Goldenpaul ed. 1976).
85 Supra note 39.
state statute would not be countenanced by the Supreme Court if it were merely based on ideology. The Yoder Court required a demonstration of "the sincerity of [the Amish] religious beliefs [and] the interrelationship of belief with their mode of life [as well as] the adequacy of their alternative mode of continuing informal vocational education in terms of precisely those overall interests that the State advances in support of its program of compulsory high school education."

The Yoder decision is an illustration of how a nation's cultural differences can be accommodated according to the constitutional (and cultural) principles of the country. Since Yoder, the right of legitimate religious groups to pursue their culturally unorthodox practices is now viewed in American law as more fundamental than the right of the state to insist upon higher education. To be sure, Yoder analogies can be made in the international context. If the Supreme Court had found itself bound by the Declaration of the Rights of the Child, it would have been simple to uphold the peculiar education promoting the general culture of the Amish children. Such an unusual kind of training is different from, yet as valid as, the required secular education. The Constitution, with its incorporation of the Declaration's principles, provided the Yoder Court with an

46 406 U.S. at 235.

47 Query whether international conventions actually cause nations to incorporate fundamental principles or agreed-upon principles into municipal law, or whether the principles most significant in municipal law are simply restated in international agreements. See e.g., Friedmann, The Role of International Law in the Conduct of International Affairs, 20 Int'l J. 158 (1965). Friedmann provides examples of the supremacy of national policies over international law. The author, however, maintains that "the meaning of 'national interest' . . . today includes universally binding rules against aggression as an aspect of national survival." Id. at 17. It is nonetheless clear that not all nations view their national interests in that light. See also 1 A Treatise on International Criminal Law xii (M.C. Bassiouni & V. Nanda eds. 1973). The major obstacles to the effective establishment of public international law are "the adamant refusal of nation-states to surrender or share their power with an international organization . . . [and] the apparent impossibility of nation-states to agree on common goals . . . ." Id. See also Schwarzenberger, Sovereignty: Ideology and Reality, 4 Y.B. Int'l Affairs 1 (1950).

There are those who dismiss the idea of international law as hopelessly theoretical and question its legitimacy due to the lack of sanctions. One commentator retorts that international law does have means for securing its observance, but the sanctions, not being centralized, "are precarious in their operation." J. Briely, The Law of Nations 101 (6th ed. Waldock 1963). Those who accept the existence of international law generally fall into two camps. According to the monist view, "law" is a discrete, unitary entity, and international law occupies a higher strata than does municipal law. In contrast, the dualist perspective maintains that international law and national law constitute two separate and distinct systems. See generally, McDougal, The Impact of International Law upon National Law: A Policy-Oriented Perspective, 4 S.D. L. Rev. 25 (1959); Sinha, The Position of the Individual in an International Criminal Law, in A Treatise on International Criminal Law xii, at 122, 130 (M.C. Bassiouni & V. Nanda eds. 1973).

One researcher undertook an anthropological attempt at understanding international
acceptable solution.

Just as Yoder refined America's concept of fundamental values, so might another nation, by implementing the principles contained in the Declaration, find itself voluntarily transforming its concepts of fundamental rights. This would be the preferred—and the most effective—method of transmission or modification of cultural values. International law's reliance upon "higher principles" of public order creates a basic tension between cultural pluralism and those "higher principles." How are those higher principles to be discovered and applied? How do we go about identifying life's most fundamental values? How are these values to be achieved? Is such a search inherently ethnocentric? Does cultural relativism lead to moral nihilism? We must turn to these crucial questions, retaining both a thirst for truth and a humility in our ability to adequately recognize fundamental values.

Having indicated my theoretical biases, and having acknowledged my limitations, I will make two limited proposals as to what an international body of Catholic jurists can do to further real recognition of the rights of children. On the municipal level, Catholic lawyers must attempt to eliminate all distinctions based on the status of bastardy. On the transnational level, agreement on the recognition of foreign adoption decrees must be achieved. Each of these proposals will be discussed in turn.

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* Bohannan, The Differing Realms of the Law, 67 American Anthropologist 33 (1965). Bohannan posited that "it is the essence of 'law' to present a double institutionalization of norms." Id. at 37. Bohannan proffered that norms of a society or community must be reinsertionalized within a legal institution to constitute law. In his view, law need not be associated with a unicentric power system. International law, representing a multicentric and multicultural system, can be effective only in its compatibility with the cultural norms of the world community. Bohannan noted that international law requires not mere double institutionalization but treble institutionalization: "once at the level of custom, once at the level of the legal institutions of states, and again at the level of bicentric, bicultural 'international' accord." Id. at 41. This version of international law seems to stand somewhere between the monist and dualist view. Bohannan discusses the definition of international law and questions its existence, finding that "[T]he most sophisticated scholars . . . have been driven to realize that, in relation to a noetic unity like law, which is not represented by anything except man's ideas about it, definition can mean no more than a set of mnemonics to remind the reader what has been talked about." Id. at 33. It is submitted that functional explanations are more useful than mere definition.

48 I would like to argue that cultural relativism does not presume the absence of universal moral norms. However, that argument is beyond the scope of this paper.

49 A basic tenet of Catholicism is that children deserve special care and concern. See generally Pius XII, Aid to Youth in the World Crisis (Encyclical Letter), 44 Catholic Mind 129 (1946); see also Pius XII, The Christian Education of Youth (Divine Illus Magistri), reprinted in R. Fullam, S.J., The Popes on Youth 5 (1956).
MUNICIPAL LAW:
THE ELIMINATION OF BASTARDY DISTINCTIONS

I submit that distinctions on the basis of bastardy are inherently evil and violative of fundamental human rights, regardless of the cultural context in which the distinctions emerge. Even where there is a deeply held cultural belief that the status of illegitimacy places the illegitimate child in a position socially and legally inferior to that of the legitimate child, these beliefs must surrender to a higher principle. This particular principle, contained in the Declaration of Human Rights and the Declaration of the Rights of the Child, mandates that the child shall be free from discrimination based on birth status. The child has the basic right to be free from all social and legal distinctions based upon its status at birth. It is inherently obnoxious to penalize a child for circumstances over which it had no control, especially the child’s conception. It is sheer vindictiveness to burden a child with the sins of the parents.

The rationale for distinctions based upon illegitimacy centers upon protection of the institution of the family. This is a tenuous proposition. Laws that prevent an illegitimate from inheriting or claiming the support of paternal kin protect only those paternal kin and clearly do not protect the illegitimate and its mother, who do constitute a form of family. If the fathers who beget children with mindless abandon are deemed to owe the out-of-wedlock child the same duties as those born in wedlock, then careless procreation would be severely discouraged. It is true that bastardy disabilities protect the wife and children of an errant husband from the claims of his illegitimate child. However, the innocent child who had the misfortune of existence via an illicit union should not suffer. This innocent child has the right to and the need for physical and emotional support from both its parents.

Notwithstanding the recent public outcry for recognition of the rights of the illegitimate, bastardy distinctions remain pervasive. The United States Supreme Court in recent years has recognized that discrimination on the basis of illegitimate status is invidious and barred by the equal protection clause of the Constitution. The illegitimate child, however, still does not have equal claims upon the father. Our immigration policy presents a striking example of existing bastardy disabilities. An American

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50 Rights of the Child, supra note 1, Principles 1, 3, 6. See also Universal Declaration of Human Rights, supra note 1, arts. 11 & 22.
52 Id.
53 See also text accompanying notes 56-60 infra.
woman's illegitimate alien child may gain preferred immigrant status by virtue of being the Act's definition of "child," while an alien mother may gain preferred immigrant status by virtue of being the "parent" of an American illegitimate child. These preferences do not extend to the relationship between the illegitimate child and the father. In Fiallo v. Bell, the Supreme Court held that such a distinction was a valid exercise of Congress' power over immigration, in light of the "problems of identification, administration, and the potential for fraud."

To eradicate incidents of discrimination due to bastardy, all children must be deemed legitimate. The pursuit of this particular course is hindered by the difficulty of establishing paternity. With present medical technology it is usually impossible to determine paternity with certainty. Nonetheless, it must be recognized that there can be — and in many societies is — a distinction between biological paternity and legal or social paternity, and while the rights of a putative father are not to be unduly minimized, the primacy of the illegitimate child's requirements of physical and emotional nourishment must be assured.

At least two steps can be taken to resolve the problems of bastardy distinctions. One is the rather obvious but amorphous step of pursuing all available avenues to eradicate the consequences to the child of distinctions based on the sexual conduct of the parents. Additionally, a more concrete step is for attorneys to seek the advice of geneticists on the state of the art of establishing paternity. An international multi-disciplinary attack on the problem should be made by jurists, behavioral scientists, and geneticists with the legal, social, and biological ramifications of eliminating bastardy distinctions seriously studied.

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9 Id. at § 1101(b)(1)(D).
10 Id. at § 1101(b)(2).
12 Id.
13 Id. at 795 n.6.
14 See, e.g., Leach, supra note 28. The need for consultation among real experts is shown by this stinging comment:

A recent reprint from the Family Law Quarterly entitled Joint AMA-ABA Guidelines: Present Status of Serological Testing in Problems of Disputed Paternity was gratuitously circulated recently to many general pathologists, serologists and lawyers. Although it is specifically stated in the preface that there are limitations to the current state of capabilities, the report, nevertheless, goes on to include more than the acceptable and proven blood group tests, those involving HLA systems, serum protein systems, and erythrocyte enzyme systems.

The response of less-than-expert individuals such as general pathologists, lawyers and even litigants to this pamphlet has led to a rash of consultations and requests for these tests, demonstrating the confusion and lack of understanding that has been created.
Nations of the world should be guided by the principles contained in the Declaration of the Rights of the Child in honestly and earnestly striving to protect and nourish their children. As noted, the most appropriate source of legislation will be municipal law, but where the rights of the child have transnational aspects and implications, multilateral arrangements are necessary. Few of our responsibilities to children are truly international, with significant exceptions such as traffic in children, national identity of children of parents of mixed nationality, and intercountry adoptions. It is submitted that there is a need for an inter-
national instrument on the recognition of foreign adoption decrees. The theory that the interests of the adopted child are well-served by the stability implicit in such an agreement will be developed below.\footnote{7}

In 1964, the Hague Conference on Private International Law drafted a Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption.\footnote{6} A relatively unsuccessful convention,\footnote{6} it expressly applied only to transnational adoptions. Thus, in instances where the child has a different nationality or habitual residence than the adopting parent(s),\footnote{7} jurisdiction vests in the country of the adopting parent(s)’ nationality or habitual residence.\footnote{7} The choice of law rule is the \textit{lex fori}.\footnote{7} Where jurisdiction is by virtue of habitual residence, however, the law of the nationality of the adopting parent or parents shall apply as to the impediments to adoption,\footnote{7} and the law of the adopted child’s nationality shall apply as consent to the child’s adoption.\footnote{7} The forum state is to initiate an inquiry into the social circumstances of all parties, the best interest of the child being the paramount goal.\footnote{7} Adoptions granted pursuant to the dictates of the Convention “shall be recognized without further for-

\begin{footnotesize}
\begin{enumerate}
\item See text accompanying notes 82-104 infra.
\item Reprinted in 4 Int’l Legal Matters 339 (1965); 14 Int’l & Comp. L.Q. 558 (1965) [hereinafter cited as Hague Adoption Convention].
\item Hague Adoption Convention, supra note 68, art. 3. The term “habitual residence” was used since it is not as susceptible to varying legal interpretations as “domicile,” while nevertheless a means of asserting jurisdiction over children residing with parents abroad. Additionally, since its determination is purely factual its resolution cannot be reviewed by the courts of other countries. 1964 Hague Conference, supra note 70, at 226. See also Glick, Adoption in the Conflict of Laws: Australia Joins the Hague Conference on Private International Law, 49 Austl. L.J. 181 (1975). Glick argues that using habitual residence as a basis of jurisdiction fetters the discretion to protect the child. Id. at 185.
\item Hague Adoption Convention, supra note 68, art. 4.
\item Id. The Hague Adoption Convention requires that impediments be formally declared by the signatories. Id. at arts. 4 & 13.
\item Id. at art. 5.
\item Id. at art. 6.
\end{enumerate}
\end{footnotesize}
mality in all contracting States." All contracting states are to be bound by the findings of fact on which a State bases its jurisdiction. 

Impediments to adoption listed in the Convention expressly recognize cultural diversity. Accordingly, the internal law of a contracting State may prohibit adoption. This clause was a compromise between those nations which consider impediments to adoption to be inherently obnoxious, and those which consider the impediments to be very important.

Additionally, the Convention contains an equitable provision permitting broad discretionary action. The Convention may be disregarded when its observance "would be manifestly contrary to public policy." The Convention is an excellent work and should be reconsidered by those nations not adopting it. However, it does need some modification, as will be discussed below.

To the extent possible in a multicultural world, international consideration of transnational adoptions must place foremost emphasis on the best interests of the child. It is difficult enough to discover what is in the best interests of the child in a single culture. For example, a great

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11 Id. at art. 8.
12 Id.
71 Art. 13 provides in part:

Any State may . . . make a declaration specifying the provisions of its internal law prohibiting adoptions founded upon —

(a) the existence of descendents of the adopter or adopters;
(b) the fact that a single person is applying to adopt;
(c) the existence of a blood relationship between an adopter and the child;
(d) the existence of a previous adoption of the child by other persons;
(e) the requirement of a difference in age between adopter or adopters and the child;
(f) the age of the adopter or adopters and that of the child;
(g) the fact that the child does not reside with the adopter or adopters.

70 1964 Hague Conference, supra note 70, at 227.
71 Hague Adoption Convention, supra note 68, art. 15. The question of whether this clause could be legitimately used by a forum state whose citizen father lost his rights to his acknowledged child because of a foreign abandonment decree, arose before a Tennessee state court. Taylor v. McElroy, 522 S.W.2d 345 (Tenn.), cert. denied, 423 U.S. 1024 (1975). The American father of a Korean child, whose mother he married sometime after the child's birth, intervened in a proceeding by an American couple to adopt the child. 522 S.W.2d at 346-47. According to Korean law, the child had been abandoned. Id. at 347-48. The Tennessee court refused to be bound by the foreign decree. Id. at 348-49; see Breckenridge, Non-Recognition of Foreign Abandonment Decrees in United States Adoption Proceedings, 18 Harv. Int'l L.J. 137 (1977).
13 See text accompanying note 109 infra.
amount of research by American and British scholars concerning the needs of the child and the effects of adoption yields contradictory findings on determining the child's needs and on the effect of adoption. However, there are definite indications in the psychiatric literature that children who are adopted are more prone to emotional disturbances than are non-adopted children. The Schecter study maintained that adopted children are thirteen times more likely to be referred to psychiatrists than are non-adopted. The Goodman report criticized the original Schecter study for failing to account for differences in geography and income. Since it is primarily the middle and upper classes who adopt formally through the legal system, it is to be expected that adopted children would be over-represented in a psychiatrist's private practice. Goodman found that 1.7% of the American population was extrafamilially adopted, that is, adopted by nonrelatives. The Goodman research was conducted from 1956 through 1962 at the Staten Island Health Center, where it was found that 2.4% of those patients were extrafamilially adopted. According to the Goodman study the adopted were almost twice as likely to seek psychiatric care. While Goodman believed that this difference was significant, it is less


See notes 84-101 infra.

The author's review of the literature focused solely on research that is expressly empirical, a theoretical bias which is a recognition of the fragile nature of psychiatric thought.


alarming than earlier studies show.87 Other researchers generally found a
greater percentage of adopted children in psychiatric settings than did
Goodman, but the figures are also lower than Schecter's original 13.3%.88

There is some evidence that the avoidance of emotional disturbances
varies with the age of the child at placement and with the type of place-
ment. However, the research and findings in this area are inconclusive
and contradictory. One researcher found that children adopted after the
age of 6 months are more likely to later evidence psychiatric distur-
bances.9 The results of another study indicated that children adopted af-
fter the age of 6 years fared no worse than those adopted in infancy.90 It
is particularly striking that the older children in the latter study had been
placed in several foster homes prior to adoption. The number of such fos-
ter home placements averaged 2.3, and in all cases court action had ter-
minated parental rights.91

It is generally unquestioned that institutionalization of the child is
the least desirable alternative and that even poor parenting is preferable.92
While psychopathology and affectionless behavior are often associated with institutionalization and severe parental deprivation, some children nonetheless have displayed a surprising degree of resiliency. In any event, it cannot be said with certainty that severe deprivation, whether caused by institutionalization, foster care, or poor parenting, commonly causes psychopathy or affectionless behavior.

The evidence that adoption itself presents special problems for the child can be partially explained by the child’s reaction to the loss of the natural parents and by the adopting parents’ reaction to the child. Initially, the child feels rejected from the natural parents and it appears to be immaterial that the decision of the biological mother to relinquish the child was made for altruistic reasons. Evidence of other similarly situated parents who have kept their children serves to substantiate the child’s sense of abandonment. Even in cases of death or institutionalization of the parent, the child may experience feelings of rejection. Additionally, the child may feel that he or she is a second choice for the adoptive parents, since the decision to adopt in most instances stems from reproductive difficulty. Therefore, adoption is second to the choice of procreation. Furthermore, it is not uncommon for adoptive parents to blame the child’s behavioral problems on heredity. Such an attitude could easily place stress on the parent-child relationship, emphasizing the natural separateness of the adopted child.

What emerges from American and British adoption studies is that it is difficult to conclude, even within one or two cultural contexts, just what the adopted child needs. While American adoption laws commonly call

94 Bowlby, supra note 93.
95 That children view death as a rejection of the child by the deceased is a common psychoanalytic interpretation. See, e.g., J. GOLDSTEIN, A. FREUD & A. SOLINT, BEYOND THE BEST INTERESTS OF THE CHILD (1973).
96 A common assumption is that infertile couples are more likely to adopt. See, e.g., Kirk, Dilemma of Adoptive Parenthood: Incongruous Role Obligations, 21 MARR. & FAM. LIVING 316 (1959); Kadushin, Study of Adoptive Parents of Hard-to-Place Children, 43 Soc. CASEWORK 227, 229 (1962). Concern over the population explosion may also lead couples to seek adoption.
98 See generally D. KIRK, SHARED FATE: A THEORY OF ADOPTION AND MENTAL HEALTH (1964). Kirk analyzes the problems that occur when both adopter and adoptee try to believe that they are a natural, biological family.
for "the best interests of the child" to be served,\textsuperscript{99} it is not particularly clear what truly are the "best interests." One study contended that the term itself is an exercise in authoritarian delusion.\textsuperscript{100} The report noted that adoption and custody situations are inherently detrimental to the child and that a more appropriate standard would be "the least detrimental available alternative for safeguarding the child's growth and development." Emphasizing the need of the child for relative permanence and stability in the familial relationship, the authors argued that a child should rarely be separated from a family — of whatever kind or form — with which the child had established a continuing relationship.\textsuperscript{101}

It is reasonable, logical, and probably in the best interests of children to apply this theory in the international sphere. The child's need for stability and the differing cultural contexts defining family values, are strong factors for permitting foreign adoption decrees to have effect in all nations. This is particularly so where the foreign adoption was made in the best interests of the child, as that best interest is interpreted in that nation's cultural context.

I wish it were enough to state that the best interests of the child will be served by international agreement to give final effect to all foreign adoption decrees and that nations would be compelled by higher principles, by fundamental values, or by public order to implement this need. As a practical and legal matter, however, it will not be nearly enough. The practical matter is an issue of power politics and parochialism, which must give way to the needs of the world's children, and that should be of little political significance. Legal theories will intrude if we attempt to resolve the problem by an international treaty or convention. One question that will arise, at least in federalist nations, will be the treaty power of the federal government over matters of family law.\textsuperscript{102} However, since the question of transnational adoptions is clearly a matter of international concern, the treaty power of federal governments should be exercisable.\textsuperscript{103}


\textsuperscript{100} Goldstein, Freud & Solnit, supra note 95. The major problem with the Goldstein, Freud & Solnit study, albeit an important effort by a lawyer and two child psychiatrists, is that it explains little of the empirical or clinical facts on which the guidelines are based.

\textsuperscript{101} Id. at 53-65, 71-105.


\textsuperscript{103} RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 117 (1965) which provides in part:

(1) The United States has the power under the Constitution to make an international agreement if
Even if it were argued that a United States treaty concerning adoption would contravene the rights of the several states, there is evidence that the principles of a resulting adoption treaty would be in conformity with the existing laws of the several states. The laws of the several states typically declare that the paramount concern in adoption proceedings is the best interests of the child. The international agreement will be in furtherance of the child’s best interests: in its recognition of foreign decrees, thereby emphasizing the stability of established family relationships; and in its tying to a foreign law of adoption, presumably giving its own interpretation to “the best interests of the child.” The United States could conceivably ratify the Convention with the understanding that the ratification is a recognition of the rights of the respective states over matters of family law. Decisions of foreign courts in matters of child custody have received recognition by at least one state court. In In re Lang, the New York Supreme Court, Appellate Division, confronted an international kidnapping-custody situation. Justice Breitel, writing for a unanimous court, sought a general solution to the problem of conflict in custody laws. Under the traditional approach, the forum court would reopen the foreign decision and question the custody decision anew. By so doing, the ultimate custody decision is based on the court’s interpretation of the best interests of the child. Justice Breitel sought a more general rule of deference to the original foreign custody decree, and he based this deference both on respect for the adjudication of the matter by the foreign tribunal and the welfare of the child. Justice Breitel observed that “even in child custody matters there is no reason to doubt that the law, if it is to be law and not some uncontrolled discretion, necessarily functions rationally through the application of general principles.” The result in Lang is aligned with one commentator’s view that “[a]dherence to the prior decree . . . ac-

(a) the matter is of international concern, and
(b) the agreement does not contravene any of the limitations of the Constitution applicable to all powers of the United States.


This is precisely what was done by the United States in ratifying the United Nations Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages:

In view of our Constitutional system my government, in considering ratification of the Convention, will do so with the understanding that the ratification . . . will be regarded as constituting a recognition and not an impairment of the constitutional rights of the respective states of the United States to regulate marriages within their jurisdictions.


9 App. Div. 2d at 408, 193 N.Y.S.2d at 770.
cords with the child's interest in the unperturbed continuity of his established home." While Lang concerned a custody battle between parents, its *ratio decidendi* is equally applicable when giving deference to foreign adoption decrees. Furthermore, the Uniform Child Custody Jurisdiction Act incorporates the Lang principles into international custody law.

Attempts have been made to require American states to enforce sister state custody decrees and to recognize foreign nation custody judgments as well. Again, the same principles apply in the adoption arena. The federal government should be able to arrive at a satisfactory adoption treaty. Problems that will surface include the treaty's impact on municipal immigration law and conflict of law difficulties. But some agreement must be reached, and the Hague Convention on Adoption is a good beginning. Any international agreement should contain the following proviso:

> The best interests of the child are given paramount consideration in the internal law of all Contracting States. The child's need for the stability and relative permanence in family relationships is acknowledged. It is recognized that disruptions in continuing relationships are detrimental to the child. The provisions of the present Convention may be disregarded in Contracting States only when their observance would be manifestly contrary to the public policy of the forum state and when the provisions would clearly result in immediate or irreparable harm to the child.

The international agreement must have, as its continual benchmark, the welfare of children. Although deference to the foreign decrees must be nearly automatic, it will be necessary nonetheless to include a clause allowing discretion in the forum state where technical adherence to the Convention could result in clear abuse of the child.

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111 If an international agreement fails, ethical jurists must still work for the enactment of municipal laws that give deference to foreign adoption decrees. One possibility would be to employ the Act of State doctrine, the principle that the courts of one nation will not judge the validity of foreign government acts committed within that foreign government's territory. For a criticism of the application of this theory to foreign adoptions, see Breckenridge, *Non-Recognition of Foreign Abandonment Decrees in United States Proceedings*, 18 Harv. Int'l L. J. 137 (1977). Breckenridge argues that the Act of State doctrine should not be applied to judicial proceedings, *id.* at 143, and that the purposes of the doctrine — to prevent affronts to foreign governments and to leave the conduct of foreign affairs to the executive branch — would not be served in the adoption context. *Id.* at 144. Breckenridge posits that since the forum state has jurisdiction over the conduct involved, the Act of State doctrine is inappropriate. *Id.*