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International Adoption & International Comity: When Is Adoption “Repugnant”?

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INTERNATIONAL ADOPTION & INTERNATIONAL COMITY: WHEN IS ADOPTION “REPUGNANT”?

Malinda L. Seymore[†]

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I. INTRODUCTION

The email message flowed onto one of the adoption list-servs:

To: Adoption List
From: Adoptive Parent

I just got off the phone with Judge [Smith] in [Jones] County. He is no longer going to sign any orders recognizing adoptions from China or allow any re-adoptions from China. He said if he could he would go back and undo the ones he has previously done. His reasoning is he is not educated enough about Chinese Law and the Adoption Process. He says he will continue researching it. But due to long term problems, he in good conscious [sic], can no longer grant relief until he knows for sure that these adoptions are valid according to U.S. Treaties, U.S. Law, and Texas Law.¹

[†] Professor of Law, Texas Wesleyan University School of Law. I dedicate this Article to my daughter, Zoe Elisabeth YiLing, who was adopted from China in 2001. Special thanks to Eunice Kim, my invaluable research assistant. Thanks also to my colleague, J. Paul George, who helped me to understand international comity. I also wish to thank the participants of the International Adoption and Cultural Transformation Conference held at Texas Wesleyan University School of Law on November 7, 2003, where I presented a version of this paper.

1. Posting of Adoptive Parent (private membership group website), at <http://groups.yahoo.com/group/FCC-NorthTexas/message/2654> (on file with the Author).

Do judges have the authority to recognize decrees of foreign adoption? Since 1989, over 167,000 parents of children adopted in other countries have needed to know the answer to that question.²

Adoption creates a parent-child relationship that is not legally different from a biologically created parent-child relationship.³ Parents are entitled to the same rights and owe the same obligations to adopted children as they do to biological children,⁴ and adopted children are entitled to the same benefits as biological children.⁵

Adopted children are entitled to the financial support of their parents to the same extent as biological children.⁶ Thus, in the event of a divorce, parents who adopted their children are responsible for the payment of child support to the same extent as parents who birthed their children.⁷ Adopted children are treated identically to biological children for purposes of inheritance.⁸ So, if children inherit under a

2. According to the Department of State, 167,420 immigrant visas have been issued to foreign orphans coming to the United States since 1989. The number of international adoptions has been steadily increasing since 1989, reaching a high of 20,099 in the year 2001. *Immigrant Visas Issued to Orphans Coming to the U.S.*, U.S. Dep't of State, at http://travel.state.gov/orphan_numbers.html (last visited Feb. 24, 2004) (on file with the Texas Wesleyan Law Review).

3. See, e.g., *Hurt v. Noble*, 817 P.2d 744, 746-47 (Okla. Ct. App. 1991); B.C.S. v. D.A.E., 818 S.W.2d 929, 930 (Tex. App.—Beaumont 1992, writ denied); UNIF. ADOPTION ACT § 1-104, 9 U.L.A. 23 (1999); UNIF. PROBATE CODE § 2-114, 8 U.L.A. 91 (1998 & Supp. 2003); Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 149-50; 2 AM. JUR. 2D *Adoption* §§ 178, 180, 183 (1994).

4. See, e.g., 2 AM. JUR. 2D *Adoption* §§ 178, 180, 183 (1994).

5. See, e.g., *id.*

6. See, e.g., *id.* § 179 (“Generally speaking, upon the adoption of a child, the primary duty of support of the child is imposed upon the adopting parent. The new parent’s obligation is the same as if he were a natural parent, and the adopted child is entitled to the same support and maintenance and the same humane treatment to which he would be entitled if he had been born to the adopting parent in lawful wedlock.”).

7. See, e.g., *Sims v. Sims*, 62 S.W.2d 495, 495-96 (Tex. Civ. App.—Galveston 1933, writ dismissed).

8. See ALA. CODE § 43-8-91(1) (1975); ALASKA STAT. § 13.12.114 (Michie 2002); ARIZ. REV. STAT. § 14-2114(B) (2001); ARK. CODE ANN. § 9-9-215(a)(2) (Michie 1987); CAL. PROB. CODE § 6450 (West 2004); COLO. REV. STAT. ANN. § 15-11-114(2) (West 2003); CONN. GEN. STAT. § 45a-731 (1958 & Supp. 2003); DEL. CODE ANN. tit. 12, § 508(1) (1974); D.C. CODE ANN. § 16-312(a) (2001); FLA. STAT. ANN. § 732.108(1) (West 1995 & Supp. 2004); GA. CODE ANN. § 19-8-19(a)(2) (1999); HAW. REV. STAT. § 560:2-614 (1999); IDAHO CODE § 15-2-109(a) (2001); 755 ILL. COMP. STAT. ANN. 5/2-4 (West 1992 & Supp. 2003); IND. CODE ANN. § 29-1-2-8 (West 1999); IOWA CODE ANN. § 633.223 (West 1992 & Supp. 2003); KAN. STAT. ANN. § 59-2118(b) (1994); KY. REV. STAT. ANN. § 199.520(2) (Michie 1998); LA. CIV. CODE ANN. art. 214 (West 1993); ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (West 1964); MD. CODE ANN., EST. & TRUSTS § 1-207(a) (2001); MASS. GEN. LAWS ANN. ch. 210, § 7 (West 1998); MICH. COMP. LAWS ANN. § 700.2114 (West 2002); MINN. STAT. ANN. § 524.2-114 (West 2002); MISS. CODE ANN. § 93-17-13 (1972); MO. ANN. STAT. § 474.060 (West 1992); MONT. CODE ANN. § 72-2-124(2) (2003); NEB. REV. STAT. ANN. § 30-2309 (Michie 2001); NEV. REV. STAT. 127.160 (2001); N.H. REV. STAT. ANN. § 170-B:20(IV) (2002); N.J. STAT. ANN. § 9:3-50(b) (West 2002); N.M. STAT.

state's intestate succession scheme, then adoptive and biological children both inherit. Adopted children are entitled to the same benefits as biological children under a parent's life or health insurance⁹ and under government entitlement programs like Social Security.¹⁰ In addition, the Family Medical Leave Act gives the same benefits to parents who add to their families by birth and those who add to their families by adoption.¹¹

ANN. § 45-2-114(B) (Michie 1978); N.Y. DOM. REL. LAW § 117(1)(c) (McKinney 1979); N.C. GEN. STAT. § 29-17(a) (2003); N.D. CENT. CODE § 30.1-04-09 (1996); OHIO REV. CODE ANN. § 3107.15(A)(2) (Anderson 2003); OKLA. STAT. ANN. tit. 10, § 75 05-6.5 (West Supp. 2004); OR. REV. STAT. § 112.175(1) (1993); 20 PA. CONS. STAT. ANN. § 2108 (West Supp. 2003); R.I. GEN. LAWS § 15-7-16 (1956); S.C. CODE ANN. § 62-2-109(1) (Law. Co-op. 1976); S.D. CODIFIED LAWS § 29A-2-114(b) (1997); TENN. CODE ANN. § 31-2-105(1), § 36-1-126(b) (2001); TEX. PROB. CODE ANN. § 40 (Vernon 2003); UTAH CODE ANN. § 75-2-109(1) (1993); VT. STAT. ANN. tit. 15a, § 1-105 (2002); VA. CODE ANN. § 64.1-5.1(1) (Michie 1950); WASH. REV. CODE ANN. § 26.33.260 (West 1997); W. VA. CODE § 48-22-703 (2001); WIS. STAT. ANN. § 854.20(1) (West 2002); WYO. STAT. § 2-4-107 (Michie 2003).

9. *Mut. of Omaha Ins. Co. v. Walsh*, 395 F. Supp. 1219, 1222 (D. Mont. 1975) (explaining that the word "stepchildren" in group life policy provided for payment to designated beneficiary and, if no designation was effective, payment to lawful children of insured, including stepchildren and adopted children, includes child born to insured's first wife prior to her marriage to insured and children adopted by insured's second wife prior to their marriage, without regard to death of wives); *Deveroex v. Nelson*, 517 S.W.2d 658, 662 (Tex. Civ. App.—Houston [14th Dist] 1974), *aff'd*, 529 S.W.2d 510 (Tex. 1975) (holding that even though the son of decedent's wife was not formally adopted by decedent in accordance with provisions of statute, inasmuch as wife's son was effectively adopted by estoppel, son qualified as a "relative" entitled to receive proceeds from decedent's life policy, the wife being precluded from receiving proceeds by reason of having killed decedent); *Chancellor v. Chancellor*, 23 S.W.2d 761, 763-65 (Tex. Civ. App.—Fort Worth 1929, writ *ref'd*) (illustrating that an adopted child is entitled to proceeds of fraternal insurance policy naming divorced wife as beneficiary); *see Clayton v. Supreme Conclave Improved Order of Heptasophs*, 99 A. 949, 951-52 (Md. 1917) (explaining that where the insured in a fraternal order had no nearer relatives than children named as beneficiaries, who were virtually, though not legally, adopted, then the insurance must either go to them or lapse).

10. The Social Security Act defines "child" to include the "legally adopted child of an individual." 42 U.S.C. § 416(e) (2000). A number of courts have approved adoptions, reasoning that the child benefits by access to the adoptive parent's Social Security benefits. *See, e.g., In re Hart*, 806 A.2d 1179, 1185-86 (Del. Fam. Ct. 2001); *In re Adoption of Caitlin*, 622 N.Y.S.2d 835, 840 (1994).

11. 5 U.S.C. § 6382 (a)(1) (1994) reads in part:

Subject to section 6383, an employee shall be entitled to a total of 12 administrative workweeks of leave during any 12-month period for one or more of the following:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.

There is, however, one oddity in the Family Medical Leave Act with regard to adoption. The Act allows an employee to take leave to care for a parent. 5 U.S.C. § 6382(a)(1)(C). But parent, as defined in the Act, does not include adoptive parents, "The term 'parent' means the biological parent of an employee or an individual who stood in loco parentis to an employee when the employee was a son or daughter." 5

A legally valid adoption is a necessary precursor to recognition of the legal benefits just mentioned. With regard to adoptions that occur in countries outside the United States, under the laws of those foreign countries, the issue becomes whether those adoptions are valid in creating the legal parent-child relationship in the United States. Must state courts recognize the validity of a final decree of adoption from a foreign country? What would be the ramifications if courts did not recognize the validity of the foreign adoption? Should adoptive parents return their children to their native lands where often, but not always, economic and political conditions might threaten their well-being? Or should adoptive parents raise the children as their own, but with few or no legal rights for either the parents or the children?¹² Rather than struggle with issues of varying common law rules, disparate state statutes, international treaties, and traditional versus non-traditional families, courts should adopt a child-centered approach for recognition of foreign decrees of adoption, focusing on the best interest of the child.

Part II of this Article will examine the doctrine of international comity, traditionally thought to give courts the power to recognize foreign decrees, as it applies to international adoption. First, the ability of courts to recognize foreign decrees of "status" generally will be discussed. Next, the focus will be on courts' authority to recognize the parent-child status created by foreign adoptions. This subpart will also review treaties and statutes that touch on the recognition of foreign adoption decrees. Part III will consider a traditional limitation on comity—that courts need not accept judgments that are "repugnant" or against the public policy of the state—as it applies to international adoption. The Article concludes that courts find "repugnant" those international adoptions that fail to mimic American notions of a nuclear family. Finally, Part IV will suggest a child-centered approach to replace the "repugnance" limitation on international comity.

II. INTERNATIONAL COMITY

A. *In General*

Legal scholars trace the origins of international comity to the writings of a 17th century Dutch scholar, Ulrich Huber.¹³ Writing at a

U.S.C. § 6381(3) (1994). Black's Law Dictionary defines "in loco parentis" as "[a]cting as a temporary guardian of a child." BLACK'S LAW DICTIONARY 791 (7th ed. 1999). While an adoptive parent would qualify as one who "stood in loco parentis," it is offensive to think that I am not a real parent to my child. I am, instead, someone who acted in lieu of a parent! So, the Act creates quite a conundrum—my daughter is my child but I am not her parent!

12. See discussion *infra* Part III.B.

13. Gary B. Born, Remark, *International Comity & U.S. Federal Common Law*, 84 AM. SOC'Y INT'L L. PROC. 326, 326 (1991); Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference is Due to the Restaters or "Who Are These Guys, Anyway?"*, 75 IND. L.J. 541, 545 (2000);

time of strict notions of territorial sovereignty,¹⁴ Huber created the idea of comity "to explain how a country's laws or judgments could have force outside [its] own territory."¹⁵ For Huber, comity was "courtesy among political entities . . . involving mutual recognition of legislative, executive, and judicial acts."¹⁶ Thus, Huber did not believe that sovereigns were required to apply foreign law, but that they did so as a matter of international courtesy.¹⁷

Joseph Story adopted the same approach as Huber in his influential treatise, *Commentaries on the Conflicts of Law*.¹⁸ For Story, it was out of comity, or deference to the interests of other states, that the courts in one nation would give effect to the laws or judgments of another nation.¹⁹ Story went one step beyond Huber—rather than viewing comity as a discretionary courtesy, Story envisioned it as at least a moral obligation.²⁰

International comity received approval from the United States Supreme Court in *Hilton v. Guyot*:²¹

International law, in its widest and most comprehensive sense—including not only questions of right between nations; governed by what has been appropriately called the law of nations, but also questions arising under what is usually called private international law, or the conflict of laws, and concerning the rights of persons within the territory and dominion of one nation, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.²²

The Court calls this "the comity of nations."²³ While there is no absolute right to comity, the Court makes clear that courts ought to recognize foreign decrees in at least some situations.²⁴ The Court further noted that in deciding whether and what effect should be given to foreign decrees:

The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case

Joel Richard Paul, *Is Global Governance Safe for Democracy?*, 1 CHI. J. INT'L L. 263, 266–67 (2000); Susan L. Stevens, *Commanding International Judicial Respect: Reciprocity and the Recognition and Enforcement of Foreign Judgments*, 26 HASTINGS INT'L & COMP. L. REV. 115, 119–20 (2002).

14. See Maier, *supra* note 13, at 545.

15. Stevens, *supra* note 13, at 119 (citations omitted).

16. *Id.*

17. *Id.* at 119–20.

18. Paul, *supra* note 13, at 266 (citations omitted).

19. *Id.*

20. Born, *supra* note 13, at 327.

21. 159 U.S. 113 (1895).

22. *Id.* at 163.

23. *Id.*

24. *Id.* at 163–64.

here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them.²⁵

The Court first required that “[e]very foreign judgment, of whatever nature, in order to be entitled to any effect, must have been rendered by a court having jurisdiction of the cause, and upon regular proceedings and due notice.”²⁶ The Court further stated that a foreign decree must be untainted by fraud.²⁷ In assessing whether the French decree met those requirements, the Court was untroubled by the fact that the French decree was from a commercial court “whose judges were merchants, ship captains, stockbrokers and persons engaged in commercial pursuits.”²⁸ Nor was the Court troubled by the fact that witnesses testified without an oath, that the defendants were not allowed to cross-examine them, or that hearsay evidence was admitted.²⁹ Nor was the Court persuaded that comity was inappropriate because the defendants only appeared to prevent property in France from being seized for their failure to appear.³⁰

Although the Court ultimately held that the French decree in that case was not entitled to comity, it was decided on the ground that France did not accord United States’ decrees comity.³¹ The requirement of reciprocity from *Hilton v. Guyot* is no longer followed,³² but the doctrine of international comity is alive and well.³³

B. *International Comity & “Status”*

The Supreme Court in *Hilton v. Guyot* also addressed foreign decrees affecting status:

A judgment affecting the status of persons, such as a decree confirming or dissolving a marriage, is recognized as valid in every country, unless contrary to the policy of its own law. It was of a foreign sentence of divorce, that Lord Chancellor Nottingham, in the House of Lords, in 1678, in *Cottington’s Case*, . . . said: “It is against the law of nations not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the form, of those countries wherein they were given. For what right hath one kingdom to reverse the judgment of another? And how can we refuse to let a sentence take place till it be

25. *Id.* at 163.

26. *Id.* at 166–67.

27. *See id.* at 167.

28. *See id.* at 116.

29. *See id.* at 204–05.

30. *See id.* at 204.

31. *Id.* at 210.

32. Stevens, *supra* note 13, at 126–27.

33. Born, *supra* note 13, at 327 (“[C]omity has not in fact been superceded, it is alive and if anything far healthier than it ever was.”).

reversed? And what confusion would follow in Christendom, if they should serve us so abroad, and give no credit to our sentences.”³⁴

The Restatement (Third) of Foreign Relations also notes that foreign judgments affecting status are recognized in United States courts: “[A] final judgment of a court of a foreign state . . . establishing or confirming the status of a person . . . is conclusive between the parties, and is entitled to recognition in courts in the United States.”³⁵ The *Reporters’ Notes* make clear that courts in the United States recognize a great variety of judgments, including judgments of “divorce, custody, adoption, and other incidents of family status.”³⁶

C. International Comity & International Adoption

Recall that the Supreme Court, in *Hilton v. Guyot*, stated that authority for recognition of foreign decrees could rest on treaties, statutes, or on common law.³⁷ All three sources have addressed foreign decrees of adoption.³⁸

1. Common Law

The validity of comity of nations, with regard to foreign decrees of adoption, is sufficiently well recognized to merit inclusion in the legal encyclopedias.³⁹ *Corpus Juris Secundum* states:

As a general rule, the status of adoption created under the law of a state *or nation* by a court having jurisdiction to create it will be recognized and given effect in another state, unless the foreign adoption is inconsistent with, or repugnant to, the laws or policy of the other state. Such status will be given the same effect as given in the forum state to an adoption status created by its own law. Recognition of a foreign adoption is accorded on principles of comity, or on the theory that full faith and credit must be given to the foreign judgment.⁴⁰

Even absent statutory authority, numerous state courts have recognized decrees of adoption issued by foreign nations.⁴¹

34. *Hilton*, 159 U.S. at 167–68 (citations omitted).

35. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 148(1) (1987) [hereinafter THIRD RESTATEMENT].

36. THIRD RESTATEMENT, *supra* note 35, § 481 reporters’ note 2 (1987). In addition, §§ 484–486 deal specifically with foreign decrees of divorce, support, and custody. See *id.*, §§ 484–486.

37. *Hilton*, 159 U.S. at 163.

38. See discussion *infra* Parts II.C.1–3.

39. See, e.g., 2 AM. JUR. 2D *Adoption* § 195 (1994); 2 C.J.S. *Adoption of Persons* § 139 (2003).

40. 2 C.J.S. *Adoption of Persons* § 139 (2003) (emphasis added).

41. See, e.g., *Corbett v. Stergios*, 137 N.W.2d 266, 272 (Iowa 1965) (deciding, prior to enactment of Iowa statute, to recognize that a Greek adoption was valid for inheritance and did not offend the public policy of Iowa); *Stellmah v. Hunterdon Coop. G. L. F. Serv., Inc.*, 219 A.2d 616, 624–25 (N.J. 1966) (holding Canadian adoption valid,

Most of the foreign adoption cases relying on international comity involve questions of inheritance.⁴² For example, in *Martinez v. Gutierrez*,⁴³ several children sued for inheritance of Texas realty based on a Mexican adoption.⁴⁴ Quoting from *Wharton on Conflicts of Laws*, the court announced the general rule: "There is, however, no doubt as to the general principle that the status acquired by adoption in a state or country having jurisdiction will be recognized."⁴⁵ The court recognized the Mexican adoption despite considerable differences in procedure between Texas adoptions and Mexican adoptions.⁴⁶

2. Statutes

Twenty-seven states have statutes that deal with recognition of foreign decrees of adoption.⁴⁷ A handful of states, while not having statutes that allow for recognition of foreign decrees of adoption, allow for simplified adoption procedures for foreign-adopted children's re-adoption.⁴⁸ Fourteen of those twenty-seven states have statutes that mirror the common law doctrine of comity.⁴⁹ A good example is the New Hampshire statute:

entitling adopted child to workmen's compensation death benefits on death of adoptive father); *Zanzonico v. Neeld*, 111 A.2d 772, 776 (N.J. 1955) (holding an Italian adoption by a U.S. couple valid under state law for inheritance tax purposes); *In re Estate of Christoff*, 192 A.2d 737, 740 (Pa. 1963) (recognizing Greek adoption in adopted son's claim on estate).

42. See, e.g., *Corbett*, 137 N.W.2d at 272 (holding Greek adoption valid for inheritance); *Stellmah*, 219 A.2d at 624-25 (holding Canadian adoption valid, entitling adopted child to workmen's compensation death benefits on death of adoptive father); *Zanzonico*, 111 A.2d at 776 (holding an Italian adoption by a U.S. couple valid under state law for inheritance tax purposes); *In re Estate of Christoff*, 192 A.2d at 740 (recognizing Greek adoption in adopted son's claim on estate).

43. 66 S.W.2d 678 (Tex. Comm'n App. 1933, holding approved).

44. *Id.* at 679.

45. 1 FRANCIS WHARTON, A TREATISE ON THE CONFLICT OF LAWS §251a (3d ed. 1905).

46. *Martinez*, 66 S.W.2d at 680.

47. See *infra* notes 49-53, 69-72 (including Alaska, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Montana, New Hampshire, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, Vermont, and Wisconsin).

48. For example, Illinois modifies the requirement of post-placement investigation for the adoption of a foreign-born child adopted in its home country. 750 ILL. COMP. STAT. ANN. 50/6-B (West 1999 & Supp. 2003) ("The requirements of a post-placement investigation shall be deemed to have been satisfied if a valid final order or judgment of adoption has been entered by a court of competent jurisdiction in a country other than the United States . . ."); see also N.C. GEN. STAT. § 48-2-205 (2003) (stating that where a child has been previously adopted in a foreign country, "the adoption order entered in the foreign country may be accepted in lieu of the consent of the biological parent or parents or the guardian of the child to the re-adoption").

49. ALASKA STAT. § 25.23.160 (Michie 2002); ARK. CODE ANN. § 9-9-218 (Michie 2002); FLA. STAT. ANN. § 63.192 (West 1997); IND. CODE ANN. § 31-19-28-1 (West 1999); MASS. GEN. LAWS ANN. ch. 210, § 9 (West 1998); MONT. CODE ANN. § 42-1-101 (2003); ME. REV. STAT. ANN. tit. 18A, § 9-312 (West 1964); N.H. REV. STAT.

A decree of court terminating the relationship of parent and child or establishing the relation by adoption issued pursuant to due process of law by a court of any other jurisdiction within or without the United States shall be recognized in this state and the rights and obligations of the parties as to matters within the jurisdiction of this state shall be determined as though the decree was issued by a court of this state.⁵⁰

Nine states have statutes that provide for recognition of foreign adoptions so long as the United States Immigration and Naturalization Service has placed its imprimatur on the adoption.⁵¹ For example, Minnesota law provides:

The adoption of a child by a resident of this state under the laws of a foreign country is valid and binding under the laws of this state if the validity of the foreign adoption has been verified by the granting of an IR-3 visa for the child by the United States Immigration and Naturalization Service.⁵²

Ohio has a similar restriction,⁵³ which became crucial in the case of *Walsh v. Walsh*.⁵⁴ Mr. Walsh was an American citizen, and Mrs. Walsh was a citizen of Honduras.⁵⁵ Prior to the marriage, Mrs. Walsh had a child, Andres, who was admittedly not the biological child of Mr. Walsh.⁵⁶ Three days before the Walshes married, Mr. Walsh completed a "certification of birth certificate" in Honduras; as a result, Andres obtained a Honduran birth certificate listing Mr. Walsh as his father.⁵⁷ Mr. Walsh admitted at trial that the reason he "register[ed] himself as Andres's father was to obtain a birth certificate so that a passport could be issued to bring Andres to the United States . . ."⁵⁸ Andres and Mrs. Walsh came to the United States, and the Walshes later divorced.⁵⁹ Mr. Walsh sought to avoid paying child support for

ANN. § 170-B:24 (2002); N.M. STAT. ANN. § 32A-5-39 (Michie 1978); N.D. CENT. CODE § 14-15-17 (1997); OKLA. STAT. ANN. tit. 10, § 7502-1.4 (West 1998); OR. REV. STAT. § 109.385 (2001); TENN. CODE ANN. § 36-1-106 (2001); VT. STAT. ANN. tit. 15A, § 1-108 (2002).

50. N.H. REV. STAT. ANN. § 170-B:24 (2002). Alaska, Arkansas, Florida, New Mexico, and North Dakota use virtually identical language. See ALASKA STAT. § 25.23.160 (Michie 2002); ARK. CODE ANN. § 9-9-218 (Michie 2002); FLA. STAT. ANN. § 63.192 (West 1997); N.M. STAT. ANN. § 32A-5-39 (Michie 1998); N.D. CENT. CODE § 14-15-17 (1997).

51. COLO. REV. STAT. § 19-5-205 (West 2003); CONN. GEN. STAT. § 45a-730 (1958 & Supp. 2003); GA. CODE ANN. § 19-8-8 (1999); IDAHO CODE § 16-1514 (Michie 1997); KAN. STAT. ANN. § 59-2144 (1994); MD. CODE ANN., FAM. LAW § 5-313.1 (1999); MINN. STAT. § 259.60 (2002 & Supp. 2003); MO. ANN. STAT. § 453.170 (West 2003); OHIO REV. CODE ANN. § 3107.18 (Anderson 2003).

52. MINN. STAT. § 259.60.

53. See OHIO REV. CODE ANN. § 3107.18 (Anderson 2003).

54. 764 N.E.2d 1103 (Ohio Ct. App. 2001).

55. See *id.* at 1105.

56. *Id.*

57. *Id.*

58. *Id.* at 1108.

59. *Id.* at 1105.

Andres by denying that he was Andres's father.⁶⁰ Mrs. Walsh presented to the court a sworn affidavit from a Honduran attorney, stating that according to Honduran law, Mr. Walsh had adopted Andres.⁶¹ The trial court refused to recognize the foreign adoption, however, because the Ohio statute required a foreign adoption to be approved by the INS before it could be recognized in Ohio courts.⁶² Thus, Mr. Walsh was relieved of the responsibility of supporting Andres.⁶³

The case presents a number of issues. First of all, it seems anomalous to declare that Mr. Walsh is not the father of the child because of his own failure to secure INS approval. It appears that Mr. Walsh committed a fraud in acquiring a U.S. passport for the child, which is why Andres's immigration had no INS approval. To reward him for the fraud by discharging his child support obligations is odd, indeed. Second, the court clearly recognized the foreign marriage because it required the couple to divorce.⁶⁴ The court was willing to accept the foreign state's status of marriage, but not the foreign state's status of parent-child. Third, the requirement of USCIS (formerly the INS) approval does not exist under most statutes dealing with the recognition of foreign decrees of adoption.⁶⁵ If Mrs. Walsh had sought recognition of the adoption in New Hampshire, for example, it would likely have been granted.⁶⁶ Then, under full faith and credit, Ohio would have had to recognize the New Hampshire decree that recognized the Honduran decree.⁶⁷ So, the happenstance of state residency determined the acceptability of the foreign decree. Fourth, and perhaps most importantly, Andres was deprived of parental support because of the actions of adults over which he had no control. One would be hard pressed to argue that it was in the best interest of Andres to lose the parental support of the man who declared himself Andres's father by having his name placed on Andres's birth certificate.⁶⁸

60. *See id.*

61. *Id.* at 1106.

62. *Id.*

63. *Id.*

64. *See id.* at 1105.

65. *See* statutes cited *supra* note 49 and *infra* note 69.

66. *See* N.H. REV. STAT. ANN. § 170-B:24 (2002) (containing no requirement of INS approval).

67. *See* U.S. CONST. art. IV, § 1. The Walsh court noted that the Constitution required full faith and credit be given to judicial acts of other states, noting further that "[f]ull faith and credit does not operate between Honduras and the United States." *Walsh*, 764 N.E.2d at 1110.

68. Professor Gilbert Holmes argues that U.S. family law and constitutional law ignore the best interest of children by focusing on the rights of parents rather than on the rights of children. *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 361 (1994) [hereinafter Holmes, *The Tie That Binds*]:

[The courts] failed to recognize that children have an independent right to maintain or sever family relationships. The courts . . . achieved results ar-

The remaining states that have statutes addressing foreign decrees of adoption impose a variety of other requirements before the foreign decree will be recognized.⁶⁹ Wisconsin, for example, requires that resident adoptive parents must obtain official approval of the placement before foreign adoptions will be recognized.⁷⁰ Delaware grants recognition only if "the child was not brought into this State until after the finalization of the adoption."⁷¹ Texas requires that the foreign adoption not violate fundamental principles of human rights.⁷²

3. Treaties

A treaty to which the United States is a signatory may require recognition of foreign decrees of adoption. For example, in *Corbett v. Stergios*,⁷³ the United States Supreme Court reversed and remanded the case because the lower courts failed to consider the effect of a treaty between Greece and the United States when they refused to recognize a Greek adoption decree.⁷⁴

The United States has signed,⁷⁵ though not yet implemented,⁷⁶ the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption.⁷⁷ The Hague Convention provides:

guably consistent with the 'best interests of the child' doctrine, but the individual decisions, in reality, were inconsistent with that doctrine because each focused on the adults'—rather than the child's—status and rights in the relationship. As a result, the courts . . . in many respects victimized, rather than protected, the children by denying them a voice in resolving questions of and access to relationships with important parent figures.

Id. at 380 (citations omitted).

69. DEL. CODE ANN. tit. 13, § 927 (1974 & Supp. 2002); TEX. FAM. CODE ANN. § 162.023 (Vernon 2002 & Supp. 2004); WIS. STAT. ANN. § 48.97 (West 2003). South Carolina has the most draconian requirements for recognition—while it does not speak in terms of adoption, but rather in terms of recognition, that recognition seems to require most of the steps of an adoption, including a home study "which evaluates the adjustment and progress of the child and family since adoption." S.C. CODE ANN. § 20-7-1795 (Law. Co-op. 1985 & Supp. 2003).

70. WIS. STAT. ANN. § 48.97 (West 2003).

71. DEL. CODE ANN. tit. 13, § 927 (1974 & Supp. 2002).

72. TEX. FAM. CODE ANN. § 162.023.

73. 381 U.S. 124 (1965) (per curiam).

74. *Id.* at 124.

75. The United States signed the Hague Convention on March 31, 1994. Hague Conference on Private International Law, *Full Status Report Convention #33*, at <http://www.hcch.net/e/status/stat33e.html#us> (last visited Mar. 18, 2004) (on file with the Texas Wesleyan Law Review).

76. The United States has gone so far as to pass the International Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2001), but the State Department is still formulating regulations for the implementation of the Hague Convention. For the proposed regulations, see Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96). The last comment period for those proposed regulations ended December 15, 2003.

77. See Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in

"An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States."⁷⁸ This provision in the treaty, which takes precedent over individual state's laws, will allow for recognition of foreign decrees of adoption in U.S. state courts.⁷⁹

The Hague Convention provides, however, that when a contracting state determines that an "adoption is manifestly contrary to its public policy, taking into account the best interests of the child," it may refuse to recognize a Convention adoption.⁸⁰ The treaty offers no explanation as to when an adoption manifestly contravenes a state's public policy. It seems, though, that this proviso grants courts the power to invalidate adoptions similar to the power that the "repugnance" exception in international comity gives them.⁸¹

Furthermore, the Convention applies only to adoptions between the sixty-six signatory countries.⁸² When United States citizens adopt from non-Hague Convention countries, recognition will not be governed by the Hague Convention, but by statute⁸³ or by the common law doctrine of international comity.⁸⁴ This is also the case for the thousands of families who have been formed through international adoption, long before the United States implemented the Hague Convention.⁸⁵

III. WHEN IS INTERNATIONAL ADOPTION "REPUGNANT"?

One limitation placed on international comity in the adoption area is that:

[T]he local forum need not recognize a status of adoption created under foreign law contrary to its own public policy, or adhere to or enforce incidents which, as to adoptive status created by a foreign jurisdiction are repugnant to the local forum's laws or policy. The

Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1139 [hereinafter Hague Conference].

78. *Id.* at 1142.

79. It is well-established law that federal treaties take precedence over state laws. U.S. CONST. art. VI, cl. 2.

80. Hague Conference, *supra* note 77, at 1142. One commentator argues that this proviso grants considerable discretion to states to relitigate the adoption, even allowing inquiry into the child's availability for adoption and the validity of the birth parents' relinquishment of parental rights. Rosanne L. Romano, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT'L LAW. 545, 581-82 (1994).

81. See *supra* text accompanying notes 34-46; *infra* text accompanying notes 82-91.

82. Treaties cannot bind countries that have not signed them. See also Romano, *supra* note 80, at 572-73 ("[T]he Hague Convention will only obligate those countries whose governments have individually ratified it.").

83. See *supra* text accompanying notes 39-52.

84. See *supra* text accompanying notes 39-46.

85. The treaty was clearly inapplicable before it came into existence.

fact that an adoption judgment entered by a court of another state could not have been entered by a court in the state of the forum, because in violation of its laws or policy, does not permit the court of the forum to deny it full faith and credit.⁸⁶

But when, precisely, is a foreign adoption repugnant to a state's laws or policy?

The law makes clear that an adoption is not repugnant merely because the adoption violates the laws and policy of the state; there has to be something more.⁸⁷ One court described that "something more" as follows: "There must be something which offends by shocking moral standards, or is injurious or pernicious to the public welfare."⁸⁸ Justice Cardozo stated:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.⁸⁹

Perhaps not surprisingly, courts tend to accept foreign adoptions that mirror United States' norms of the nuclear family⁹⁰ and have found repugnant those that do not.⁹¹ This has been the case with U.S. adoption law in general. As Professor Richard Storrow says, "The law seeks to shape the adoptive family according to the nuclear family model":⁹²

The history of adoption regulation in this country is one of "biologism," a biologic bias holding "that what is 'natural' in the context of the biologic family is what is normal and desirable in the context

86. 2 C.J.S. *Adoption of Persons* § 139 (2003).

87. In *Loucks v. Standard Oil Co.*, 120 N.E. 198, 201 (N.Y. 1918), Justice Cardozo stated, "Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary. It is not to be exalted into an indispensable condition."

88. *In re Schultz Estate*, 348 P.2d 22, 28 (Or. 1959) (citation omitted).

89. *Loucks*, 120 N.E. at 202.

90. See *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 n.15 (2003) [hereinafter *Developments in the Law*] (explaining that "[a]nthropologist George Murdock coined the term 'nuclear family' in 1949 to describe a married man and woman living together with their offspring") (citation omitted). "More pointedly, Murdock observed that in American society, the nuclear family was 'the type of family recognized to the exclusion of all others.'" *Id.*

91. See discussion *infra* Parts III.A–B.

92. Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 606 (2001); see also Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1080 (2003) ("Early adoption law confronted the formation of families without blood ties by relying on the paradigm of the nuclear family The law continues to use the nuclear family paradigm rather than welcome the multiple configurations of relationships between adults and children."); Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 19 (1995) ("The law embodies pictures of family that focus singularly on the patriarchal marital family.").

of adoption.” As such, the law does its utmost to fashion adoption in imitation of procreation by, above all, promoting secrecy in the process. As a result, adoption law has been complicit in valorizing the nuclear family.⁹³

This desire to replicate the nuclear family in adoption law has had implications for “nontraditional” forms of family—single parents seeking to adopt, and gay men and lesbians seeking to adopt. That same pattern of nuclear family replication is presented in cases involving recognition of foreign decrees of adoption.⁹⁴ While it is safe to say that courts recognize most foreign decrees of adoption, that is because most who adopt internationally are two-parent, heterosexual families, replicating the nuclear family with their adoption.⁹⁵ For single adopters, and for gay and lesbian couples seeking to adopt, there is some question of whether courts will recognize those foreign adoption decrees.

A. *Single Adoption*

In *Tsilidis v. Pedakis*,⁹⁶ the Florida court rejected the Greek adoption of an adult by a single man.⁹⁷ Demetrius Tsilidis was age 25 and a Greek citizen when he was adopted in the courts of Greece by Constantine Prassas, a citizen of the United States and a resident of Florida.⁹⁸ When Constantine died, Demetrius sought to inherit from his estate as his son.⁹⁹ The parties stipulated that the Greek adoption decree “was procedurally perfected in accordance with all requirements of Greek law of adult adoption, and is valid and effectual under the law of Greece.”¹⁰⁰ A Florida statute provided that “an adopted child, whether adopted under the laws of Florida or of any other state or country, shall be an heir at law, and for the purpose of inheritance, shall be regarded as a lineal descendant of his adopting parents.”¹⁰¹ As the court noted, at first blush, the statute would allow Demetrius to inherit from Constantine’s estate.¹⁰²

93. Storow, *supra* note 92, at 605–06 (citing ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION 93 (1999)) (other citations omitted). *See also Developments in Law, supra* note 90, at 2065–66 (“State prospective parent review processes almost universally prefer traditional families—heterosexual married couples—over less traditional adoptive parents (single parents and homosexual parents, for example).”).

94. *See* discussion *infra* Parts III.A–B.

95. *See* discussion *infra* Parts III.A–B.

96. 132 So. 2d 9 (Fla. Dist. Ct. App. 1961).

97. *Id.* at 13.

98. *Id.* at 10.

99. *Id.*

100. *Id.* at 13.

101. *Id.* at 11 (quoting FLA. STAT. ANN. § 731.30 (West 1985 & Supp. 1995) (repealed 1974)).

102. *Id.*

The court ruled, however, that the Greek decree of adoption was repugnant to the laws and policy of the state of Florida.¹⁰³ Interestingly enough, it was not the fact that Demetrius was an adult that prevented recognition of the adoption; it was, instead, the fact that Constantine was single and never married.¹⁰⁴ Florida allowed adult adoptions: "Any adult married couple, or the survivor thereof, residing in the state and wishing to adopt another adult, may apply . . . for permission to adopt."¹⁰⁵ The court concluded:

The very fact that the legislature restricts the right to adopt an adult to a "married couple, or the survivor thereof" establishes by exclusion the right of a single person to adopt an adult and implies that such is repugnant to the laws and policy of this state. We need proceed no further than the clear limitation of the statute in holding that the appellant is not entitled under the laws of Florida to share in the estate of Constantine Prassas.¹⁰⁶

Being violative of Florida law should not be enough for "repugnance."¹⁰⁷ It seems clear that the decree was rejected because the court did not see a single, never-married man adopting an adult as fitting the nuclear family model.¹⁰⁸

Single parenting is no longer an unusual family model. The 2000 U.S. Census revealed that single parents now constitute nearly one-third of all households with children.¹⁰⁹ And, there has been considerable growth in adoptions by singles, both domestic and international.¹¹⁰ Nonetheless, there remains a stigma associated with single parenthood. As one commentator puts it: "A remarkably consistent view of single-parent families dominates popular culture as well as academic writing. 'Single-parent family' is a euphemism . . . for 'problem family,' for some kind of social pathology. Single-parent families

103. *Id.* at 13.

104. *See id.*

105. *Id.* at 10 (quoting FLA. STAT. ANN. § 72.34 (West 1987) (renumbered as 63.241 by Laws 1967, ch. 67-254, § 18) (repealed 1973)).

106. *Id.* at 13 (citations omitted).

107. *See supra* notes 39–46 and accompanying text.

108. The author reaches this conclusion because there are no other apparent reasons for the court's decision. Admittedly, the case was decided in 1961, and perhaps would be treated differently today. But it is also possible that the subtext of the opinion was the court's concern that an adoption of an adult man by an adult man is an attempt to give legal status to a homosexual relationship. If that was the true purpose of the court's ruling, the Florida court might have reached the same conclusion today. For a discussion of Florida's ban on homosexual adoption, see discussion *infra* Part III.B. and text accompanying note 116.

109. Single mothers make up twenty-six percent of families with children; single fathers make up five percent. *See Developments in the Law, supra* note 90, at 2001 n.19.

110. *See, e.g.,* Sharon Ann Dougherty, *Single Adoptive Mothers and Their Children*, 23 SOC. WORK 311, 311 (1978); Kathryn Rose Gertz, *Single Parenthood*, HARPER'S BAZAAR, Aug. 1981, at 127, 127; *see also* MARLENE PIASECKI, WHO ADOPTS CHILDREN WITH SPECIAL NEEDS? 69 (1988).

are characterized as the 'underclass'; broken and deviant as compared to the nuclear, traditional, patriarchal family."¹¹¹

Professor Dowd notes that this stigma is used to justify restrictions on single persons' access to reproductive technology and to adoption to create families.¹¹² Many states and private adoption agencies still maintain an adoption policy that prefers married adoptive parents over singles.¹¹³ Perhaps the Florida court's *Tsilidas* decision is justified by the preference for married, nuclear families over singles.

B. Adoption by Gay and Lesbian Couples

The Author is not aware of any country involved in international placement of children that openly allows gay and lesbian couples to adopt. Gay and lesbian couples adopting internationally usually have one member of the couple adopt the child as a single person.¹¹⁴ Then, the other parent seeks a domestic "second-parent" adoption.¹¹⁵ However, it is conceivable that a foreign country will approve such adoptions in the future. Thus, U.S. courts may eventually be faced with whether to recognize foreign decrees of adoption allowing gay and lesbian couples to adopt.

Consider the following hypothetical:

Brad Davis enters a committed, long-term relationship with Christopher Martin, and they decide to adopt a child. The country of Gayswana has recently opened its doors to adoption by gay couples. Brad and Christopher adopt Maya, carefully following all the laws

111. Cahn, *supra* note 92, at 1160 ("The condemnation of single-parent families is based on a view of such families as 'deviant' and 'bad' for children."); Dowd, *supra* note 92, at 24-25 (citations omitted).

112. Dowd, *supra* note 92, at 19.

113. See Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem?*, 18 HASTINGS CONST. L.Q. 487, 520 (1991). Although every state permits single parents to adopt, the National Committee for Adoption has found that "[m]ost adoption agencies place babies only with married couples." *Id.* at 518, 520 n.180 (citing NATIONAL COMMITTEE FOR ADOPTION, 1989 ADOPTION FACTBOOK 162 (1989)); Karla J. Starr, *Adoption by Homosexuals: A Look at Differing State Court Opinions*, 40 ARIZ. L. REV. 1497, 1504 (1998) ("Statutes, while they provide for adoptions for single parents, generally show a preference for two legal married parents.") (citing Note, *Joint Adoption by Gay and Lesbian Couples: A Proposal for Legislative Reform*, 11 PROB. L.J. 328 (1993)); Note, *Joint Adoption: A Queer Option?*, 15 VT. L. REV. 197, 201 (1990) (citing COMM. FOR SINGLE ADOPTIVE PARENTS, THE HANDBOOK FOR SINGLE ADOPTIVE PARENTS 1 (Hope Marindin ed., 4th ed. 1987)). *But see* Cahn, *supra* note 92, at 1080 (citing Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers*, 2 GEO. J. GENDER & L. 57, 59 n.6 (2000) (noting that "more states are allowing single parents and gay and lesbian couples to adopt" and that "[n]o state restricts the availability of single-parent adoption. . . . Although certainly some adoption agencies employ such preference, others do not.")).

114. See Nancy D. Polikoff, *Recognizing Partners but Not Parents/Recognizing Parents but Not Partners: Gay & Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 731 (2000).

115. *Id.*

and regulations of Gayswana. They then return to the state of Utopia, where they have resided together for five years. After parenting Maya for five years, Brad and Christopher seek to enroll her in public school. The school questions Maya's Gayswana birth certificate and looks askance at the foreign adoption decree. So, Brad and Christopher decide to go to state court in Utopia and seek a state court decree recognizing the Gayswana adoption decree.

Should Utopia recognize the judicial decree of adoption from Gayswana, or is it repugnant to the law and policy of the state? Incidentally, Utopia adoption statutes recite bluntly, "No person eligible to adopt under this statute may adopt if that person is a homosexual."¹¹⁶

If Utopia were to follow the ruling in *Tsilidis*,¹¹⁷ where a state statute limiting adult adoption to married couples justified invalidating an adult adoption by a single man in Greece, Maya's adoption from Gayswana would be repugnant to the laws and policy of the state. In fact, it would appear to be a stronger argument that the adoption was repugnant where the statute explicitly prohibited the adoption under Utopia law. Perhaps the Utopian court would take more seriously the language of Justice Cardozo: a foreign decree is not repugnant and will be recognized unless doing so "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common wealth."¹¹⁸

Thus, the action to recognize the foreign adoption decree places the court of Utopia squarely in the middle of the debate about gay and lesbian families.¹¹⁹ Is it moral? Is it in the best interest of children? "Courts today generally use the two-parent, biological family as the

116. Florida law expressly prohibits homosexuals from adopting. FLA. STAT. ANN. § 63.042 (West 1997 & Supp. 2004). Until its statute was amended in 1999, New Hampshire also had an explicit prohibition against homosexuals adopting. N.H. REV. STAT. ANN. § 170-B:4 (2002) (amended in 1999). A Connecticut statute provides that a child placement agency need not place a child for adoption with homosexual or bisexual adoptive parents. CONN. GEN. STAT. ANN. § 45a-726a (West 1993 & Supp. 2003). At least four states prohibit adoptions by same-sex couples without mentioning homosexuality per se. See ALA. CODE § 26-10A-5 (1992 & Supp. 2003); CONN. GEN. STAT. ANN. § 45a-726a (West 1993 & Supp. 2003); MISS. CODE ANN. § 93-17-3 (1972 & Supp. 2003); UTAH CODE ANN. § 78-30-1(3)(b) (2002).

117. *Tsilidis v. Pedakis*, 132 So. 2d 9 (Fla. Dist. Ct. App. 1961); see also discussion *supra* text accompanying notes 103-06.

118. *Locks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918).

119. See *Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS IN REV. 339, 339 (2002) (advocating for same-sex adoption); William Saletan, *Adopting Premises: The Sneaky Debate Over Legalizing Adoptions By Gay Couples*, SLATE MAGAZINE, Feb. 7, 2002, at <http://slate.msn.com/?id=2061789> (on file with the Texas Wesleyan Law Review); Glenn T. Stanton, *Examining the Research Literature on Outcomes From Same-Sex Parenting*, at http://family.org/cforum/pdfs/fosi/marriage/examining_research_on_ss_parenting.pdf (last visited Feb. 26, 2004) (on file with the Texas Wesleyan Law Review) (from the Focus on Family website, arguing against same-sex adoption); *Let Him Stay*, at <http://www.lethimstay.com> (last visited Feb. 20, 2004) (a website dedicated to ending Florida's ban on gay adoption).

template against which to measure, and to conform, other families.”¹²⁰ Naturally, the “biological family” model requires one male parent and one female parent. If the court uses this model, Maya’s family doesn’t “fit.”

But unlike *Tsilidis*, which involved the adopted son’s right of inheritance from the adoptive father’s estate after his death,¹²¹ Maya’s family is intact. And unlike *Tsilidis*, Maya is not an adult—she is a 6-year-old child. Is it in her best interest for the court to refuse recognition of the foreign decree of adoption? Professor Cahn argues that the law’s use of the nuclear family paradigm fails to take account of the “settled expectations of those living within [so-called alternative] families.”¹²² She notes that early adoption law “cabined by the traditional significance of blood relationships,” nonetheless “struggled to accord respect to functioning parent-child relationships with settled expectations.”¹²³

Having named the state Utopia, one can hope that the court will recognize the foreign decree of adoption that created Maya’s family. If it failed to do so, what would the court do with Maya? Should Maya be removed from the home of the only parents she has known to be placed with a married, heterosexual couple? Does the family have to return to Gayswana to be recognized as a family? Will the court refuse to recognize the decree, but otherwise refrain from interfering with the family?

There may be support for the last option—at least one court has distinguished between the status of adoption and the incidents of adoption, refusing to allow inheritance but stating that their refusal did not depend on the status of the adoption.¹²⁴ So, this last option seems the best of many bad options if a court refuses to recognize a foreign decree of adoption. But consider all the rights and duties of parents, discussed previously—all the incidents of adoption.¹²⁵ Who can consent to surgery or other medical treatment for Maya? Who is responsible for providing financial support? From whom can Maya inherit, receive Social Security benefits, insurance death benefits? Who can enroll her in school? Who can be punished for failing to enroll her in school? Without judicial recognition as parents, neither Brad nor Christopher can act as Maya’s parents. What is clearly called for is a child-centered approach to judicial recognition of foreign decrees of adoption.

120. Cahn, *supra* note 92, at 1162 (citations omitted).

121. *Tsilidis*, 132 So. 2d at 10; *see also supra* text accompanying notes 96–108.

122. Cahn, *supra* note 92, at 1080.

123. *Id.* at 1081.

124. *See Tsilidis*, 132 So. 2d at 13.

125. *See discussion supra* text accompanying notes 3–11.

IV. A CHILD-CENTERED APPROACH

Andres does not have a father.¹²⁶ Demetrius does not have a parent.¹²⁷ Our fictitious Maya does not have a family.¹²⁸ Because their adoptions were “repugnant,” courts have concluded that these children’s adoptions need not be given legal force or effect in the United States.¹²⁹ In what way is the best interest of these children served by divesting them of parents? Andres no longer has a father who must contribute to his support.¹³⁰ Demetrius cannot inherit from his father’s estate.¹³¹ Our hypothetical Maya may have no family at all. These children are penalized because of legal errors committed accidentally or purposefully by their adoptive parents, or by their adoptive parents’ ignorance of the laws and policies of the state where they resided. Wholly innocent, the children suffer.

What is needed, rather than a hyper-technical legality, is a child-centered approach to recognition of decrees of foreign adoption. One commentator describes a child-centered approach to adoption policy as follows:

A child-centered approach to adoption, as well as to other areas of the law which affect children, incorporates the “best interest of the child” doctrine and uses the child as the focal point of analysis. A child-centered approach, however, differs from the traditional “best interest of the child” doctrine. The best interest doctrine attempts to meet the needs of the child as perceived by adults. A child-centered approach attempts to recognize as much of children’s reality as possible and fashion flexible doctrines geared to address that reality. Under a child-centered approach, children’s rights emerge from both the general and specific variations in their needs.¹³²

Professor Holmes also discusses a series of cases—some of which involve adoption—and concludes that courts fail to focus on the rights of children to maintain family relationships.¹³³ Instead, they determine the rights of the parent—or those claiming to be parents—without regard to any right of the child.¹³⁴

Professor Holmes discusses, for example, the case of *Michael H. v. Gerald D.*¹³⁵ Victoria was the biological child of Michael, who was involved in an adulterous affair with Victoria’s mother.¹³⁶ Her

126. See *Walsh v. Walsh*, 764 N.E.2d 1103 (Ohio Ct. App. 2001); *supra* Part II.C.2.

127. See *Tsilidis*, 132 So. 2d at 13; *supra* text accompanying notes 69–77.

128. See discussion *supra* Part III.B.

129. See discussion *supra* Part III.

130. *Walsh*, 764 N.E.2d at 1106.

131. *Tsilidis*, 132 So. 2d at 13.

132. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1670–71 (1995).

133. Holmes, *The Tie That Binds*, *supra* note 68, at 370.

134. See *id.* at 370–72.

135. 491 U.S. 110 (1989).

136. *Id.* at 113.

mother's husband, Gerald, was recognized as Victoria's father because of an evidentiary presumption of legitimacy of children born during a marriage.¹³⁷ The United States Supreme Court rejected Michael's attempt to maintain a relationship with Victoria, his child, because his claim did not seek to protect a relationship "deeply rooted in this Nation's history and tradition."¹³⁸ After all, Michael was an adulterous father.¹³⁹

Professor Holmes argues that courts subordinate the child's rights to the adult's rights, reducing "the child to an object instead of treating the child as a person."¹⁴⁰ He concludes:

The real tragedy of these cases, however, is that the rationale used for denying the claim of the 'nonlegal' parent . . . usually is irrelevant to a child's interest in protecting important family relationships. A child takes no part in creating the 'legal' barriers that prevent a parent-like adult from maintaining the relationship. Victoria did not commit the adultery that ultimately precluded her relationship with her biological father.¹⁴¹

While repugnance might be a valid limitation on international comity when the issue involves collection of a money judgment obtained abroad,¹⁴² it does not serve the interest of children in international adoption. Because an adoption decree affects a child in a way completely outside the control of the child, courts should be protective of maintaining the parent-child relationship created by the decree of adoption. International comity is, at bottom, a doctrine of deference—one country's deference to the legal judgments of another country.¹⁴³ In family-creation, that deference should be greater in light of the consequence of a lack of deference—family destruction.

V. CONCLUSION

The United States does not hold a monopoly on defining family. When American citizens form families by adopting children from foreign countries in accordance with the laws of those countries and then return to the United States, they are essentially importing that foreign country's definition of family. Current United States law concerning

137. *Id.* at 115.

138. *Id.* at 124.

139. *See id.* at 120, 127 n.6, 130. As Justice Brennan noted in dissent, the plurality opinion refers to Michael H. "no fewer than six times" as the "adulterous natural father." *Id.* at 144 (Brennan, J., dissenting).

140. Holmes, *The Tie That Binds*, *supra* note 68, at 381.

141. *Id.* at 382-83 (citations omitted).

142. As was the issue in *Hilton v. Guyot*, 159 U.S. 113 (1895), discussed *supra* Part II.B.

143. *See Stevens, supra* note 13, at 120 (quoting legal scholar Friedrich Juenger, who described comity as "deference to foreign law," and further quoting him as saying, "It is presumptuous for the courts of one country to review the judgments of another.") (citations omitted).

recognition of those foreign decrees of adoption, however, appears to discount definitions of family that do not mirror American norms. The law leaves children and families at the mercy of varying common law rules, disparate state statutes, uncertain international treaties, and differing judgments of when a foreign adoption is repugnant to public policy. This uncertainty can be corrosive to the parent-child relationship, with neither parents nor children clear on what the legal status of their family might be in the jurisdiction in which they live. Thus, traditional notions of international comity, with its amorphous repugnance exception, seem particularly unsuited to determining family status where permanence is paramount. Courts should, instead, adopt a child-centered approach focusing on what is best for families.

Professor Cahn provides persuasive support for the fact that non-traditional families can help us expand the meaning of family without destabilizing families.¹⁴⁴ She argues that comparing nontraditional families to the nuclear family is inherently problematic:

If the law defines families as two parents (one man and one woman) with their child(ren), then legal actors will try to change the new families to fit into this image. If families are defined as intimate arrangements for the protection of adult intimacy and/or nurturing of children, then there is an obvious need for protecting and promoting such arrangements.¹⁴⁵

International adoption, in connecting us to the wider world, holds the promise for an expanded definition of family, but if U.S. courts refuse to recognize these families created under foreign law, we are left with our narrow, parochial view. A new standard for recognition of foreign decrees of adoption would require courts to recognize those decrees, giving due deference to judgments of foreign courts in creating these families, and protecting and promoting functioning families with settled expectations.

144. See Cahn, *supra* note 92, at 1080–82.

145. *Id.* at 1087.