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# ADULT RIGHTS AS THE ACHILLES' HEEL OF THE BEST INTERESTS STANDARD: LESSONS IN FAMILY LAW FROM ACROSS THE POND

*Margaret Ryznar\**

And the king said, "Bring me a sword." So a sword was brought before the king. And the king said, "Divide the living child in two, and give half to the one and half to the other." Then the woman whose son was alive said to the king, because her heart yearned for her son, "Oh, my lord, give her the living child, and by no means put him to death." But the other said, "He shall be neither mine nor yours; divide him." Then the king answered and said, "Give the living child to the first woman, and by no means put him to death; she is his mother."

— 1 Kings 3:24–27

## INTRODUCTION

Although reverence for King Solomon's wisdom is hardly ill-placed, his celebrated case of identifying a child's mother was admittedly simpler than those facing family law judges today.<sup>1</sup> There were

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1 For an astonishingly convoluted family law case, see *A v. C*, [1985] 6 Fam. L.R. 445, wherein a father sought access to a child born of a nineteen-year-old prostitute artificially inseminated with his sperm in a contract for the sale of a baby. After the child's conception, the father married his older, barren girlfriend with whom he cohabitated, content that he had a biological baby of his own. *Id.* at 447. The court sacked his plan, depriving him of custody after the prostitute decided to keep the baby. *Id.* at 453; see also *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988) (a woman

no grandparents or same-sex partners demanding shared custody.<sup>2</sup> No frozen embryos, eugenic sperm banks, or surrogate mothers awaiting judicial deliberation. But most conveniently, King Solomon did not labor under fierce cries of “due process!” or “equal protection!” Such sentiments, part of a growing clamor for parental and adult rights, provide much of the confusion and contradiction in family law jurisprudence today.<sup>3</sup>

Family law litigants have long searched for permutations of constitutional principles that gain access to federal courts and vindicate supposed constitutional rights in state family law cases.<sup>4</sup> In the process, even the venerable “best interests of the child” standard has been compromised, a standard under which judges can weigh competing claims in child-related cases by weighing the child’s interests most heavily.<sup>5</sup> Such cases pitting children’s interests against those of adults have been resolved relatively easily by federal courts in the United States to date, but more complicated cases may ensue if the introduction of family law cases to federal dockets continues accelerating.<sup>6</sup>

One legal system currently wrestling with this familiar clash between the rights of children and adults is that of England, which shares the United States’ deeply embedded commitment to the child’s

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changed her mind after having agreed, under a surrogacy contract, to be artificially inseminated with a man’s sperm and to surrender the baby to him and his wife).

2 The family unit in King Solomon’s time is no longer typical. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (plurality opinion) (“The demographic changes of the past century make it difficult to speak of an average American family.”); *Developments in the Law—The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 (2003) [hereinafter *Developments*] (“The ‘nuclear family’—still the archetype in American law and politics—for the first time describes less than one-quarter of all U.S. households.”).

3 When speaking of adult rights, this Note refers to both parental and nonparental rights regarding children.

4 See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment.” (citing *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923))).

5 For a useful background on the American best interests standard, see John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. MICH. J.L. REFORM 57, 64 n.23 (2006).

6 Thus far, the Supreme Court has carefully selected its family law cases. See, e.g., *Lehr v. Robertson*, 463 U.S. 248, 256 (1983) (“The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection *in appropriate cases*.” (emphasis added)).

best interests. This common value has hardly slowed parents on either side of the ocean from arguing that their rights should take priority over the court-construed best interests of their children. In England, the discord between the rights of parents and those of children has been aggravated by the recent passage of conflicting legislation—parents are now armed with the rights granted by the Human Rights Act of 1998,<sup>7</sup> while children's interests are given preference in an earlier act, the Children Act of 1989.<sup>8</sup>

England's strategy in dealing with this conflict has visible advantages and disadvantages, but more importantly, offers lessons to the United States that are examined in this Note. Part I considers the constitutional rights for American adults that implicate the best interests standard, particularly under due process and equal protection arguments. Part II explores the same conflict between adults' rights and children's best interests under recent English legislation incorporating the European Convention on Human Rights. Finally, Part III exacts lessons for the United States from England's similarly positioned situation. It concludes that American federal courts should be more hesitant to federalize family law as it relates to children if the best interests standard is to be preserved and argues that the standard is more effective in protecting children's interests than the Constitution.

#### I. THE ENCROACHMENT OF AMERICAN CONSTITUTIONAL RIGHTS ON THE BEST INTERESTS STANDARD

The Federal Constitution not only fuels the federalization of family law, but also serves as a fertility statue for conflict between the best interests standard and the rights potentially afforded to adults. The occasional Supreme Court stints in state family law issues have raised many eyebrows,<sup>9</sup> yet the Supreme Court defended its interference in *Lehr v. Robertson*<sup>10</sup>:

In some cases, however, this Court has held that the Federal Constitution supersedes state law and provides even greater protection for certain formal family relationships. In those cases, as in the state cases, the Court has emphasized the paramount interest in the

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7 Human Rights Act, 1998, c. 42 (U.K.).

8 Children Act, 1989, c. 41, § 1 (Eng.).

9 See, e.g., Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 361–69 (2002); Eric S. Lind, Note, *Interstate Collection of Child Support and Federalism: Why the States Have Authority and What They Need to Do to Keep It*, 11 BYU J. PUB. L. 103, 108–09 (1997).

10 463 U.S. 248.

welfare of children and has noted that the rights of the parents are a counterpart of the responsibilities they have assumed.<sup>11</sup>

This expansion of parental rights under the Constitution is one step in what some scholars have labeled the federalization, or constitutionalization, of family law.<sup>12</sup> But what of the best interests standard governing family law cases at the state level? Interestingly enough, the Supreme Court, in affirming adults' constitutional rights, relied on the presumption that the best interests of the child will inherently be guarded by parental responsibility to their children.<sup>13</sup> However, this presumption, often applied by courts toiling to protect a parent's liberty interest under the Due Process Clause, fails to address the doubtlessly recognizable scenario wherein adults' interests do not correlate with their children's best interests. This reality prompted the Supreme Court to restrict the best interests standard to custody and visitation proceedings, admitting that in other cases, the interests of adults may trump the interests of the child so long as minimum child

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11 *Id.* at 257.

12 For an insightful article on this phenomenon, see Jerome A. Barton, *The Constitutionalization of American Family Law: The Case of the Right to Marry*, in CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 257, 257-68 (Stanford N. Katz et al. eds., 2000) [hereinafter CROSS CURRENTS].

13 See, e.g., *Lehr*, 463 U.S. at 257. American family law operates on several presumptions that have been debated by academics. See Helen M. Alvaré, *The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective*, 40 HARV. J. ON LEGIS. 1, 3 (2003). Compare Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 271-79 (taking issue with Professor Wardle's suggestion that courts should adopt a rebuttable presumption that awarding parental rights to a person engaging in ongoing homosexual relations is not in the best interests of the child), with Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629, 637-40 (responding to the criticisms of adopting a rebuttable presumption regarding homosexual parents by arguing that his critics mischaracterized his position and that their criticism was not based on his arguments, but on preconceived notions). But see John Eekelaar, *Are Parents Morally Obligated to Care for Their Children?*, 11 OXFORD J. LEGAL STUD. 340, 351-53 (1991) (suggesting that parents may not owe a moral duty to their children in ethical theory).

English family law is also riddled with presumptions, but some English judges have been shying away from their use. See, e.g., *Payne v. Payne*, [2001] EWCA (Civ) 166, [2001] Fam. 473, [25] ("I was using the word presumption in the non-legal sense. But with the advantage of hindsight I regret the use of that word. Generally in the language of litigation a presumption either casts a burden of proof upon the party challenging it or can be said to be decisive of outcome unless displaced. I do not think that such concepts of presumption and burden of proof have any place in Children Act 1989 litigation where the judge exercises a function that is partly inquisitorial."). The presumption to which Lord Thorpe was referring favored the custodial parent as protecting the best interests of the child.

care requirements are met.<sup>14</sup> Even in this limited subset of child-related cases, however, adults' interests do not always suit those of their children, particularly if due process or equal protection arguments are used to counter the best interests standard.<sup>15</sup>

### A. Due Process Arguments

Adult parties to a family law case frequently raise due process claims in federal court. Due process arguments not only make federal courts accessible to parties bringing state family law issues, but also provide one of the few claims legally sufficient to offset the potent best interests standard.<sup>16</sup>

Litigants have raised both procedural and substantive due process claims as challenges to lower courts' findings of a child's best interests.<sup>17</sup> Substantive due process claims are more crippling to chil-

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14 *Reno v. Flores*, 507 U.S. 292, 303–04 (1993) (“The best interests of the child,” a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody. But it is not traditionally the sole criterion—much less the sole constitutional criterion—for other, less narrowly channeled judgments involving children, where their interests conflict in varying degrees with the interests of others.”); *id.* at 304 (“So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other children, or indeed even to the interests of the parents or guardians themselves.”); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *R.C.N. v. State*, 233 S.E.2d 866, 867 (Ga. Ct. App. 1977) (holding that a mother’s poverty and unstable living arrangement were insufficient to terminate her parental rights).

15 For an interesting examination of due process and equal protection in the context of the child-parent relationship, see Ruth-Arlene W. Howe, *Parenthood in the United States*, in *CROSS CURRENTS*, *supra* note 12, at 187, 190–92.

In addition to the Due Process and Equal Protection Clauses, the Constitution is ripe with grounds for overruling a child’s best interests if a court were to prioritize an adult’s rights instead. One can easily imagine First Amendment challenges to custody based on differences of religious beliefs within fragmented families. See generally Kelsi Brown Corkran, Comment, *Free Exercise in Foster Care: Defining the Scope of Religious Rights for Foster Children and Their Families*, 72 U. CHI. L. REV. 325, 344–53 (2005) (arguing that although courts have yet to decide a case involving a conflict between a biological parent and child on the issue of religion, this area is ripe for conflict in cases involving foster families, which inherently necessitates state action). Nonetheless, the Due Process and Equal Protection Clauses in the Fourteenth Amendment have caused the most interference with the child’s best interests standard to date.

16 If the parties fail to raise a due process argument, the Supreme Court can raise it *sua sponte*. See *Stanley v. Illinois*, 405 U.S. 645, 660 (1972) (Burger, C.J., dissenting).

17 Compare *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (“[S]tate intervention to terminate [a parental] relationship . . . must be accomplished by procedures meeting the requisites of the Due Process Clause.” (quoting *Lassiter v. Dep’t of Soc.*

dren because they create parental rights that are enforceable in federal court even if those rights conflict with the best interests of a child. Procedural due process claims are more neutral to children's interests because they simply allow courts to hear arguments from both parties and decide the case under the best interests standard.

A recent example of a splendid clash between a parent's substantive due process rights and the best interests standard occurred in *Troxel v. Granville*.<sup>18</sup> The Washington statute disputed in *Troxel* read: "Any person may petition the court for visitation rights at any time including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."<sup>19</sup> Under the statute, a set of grandparents attempted to obtain visitation rights with their grandchildren after the mother curtailed visitation. Prior to the mother's interference, the grandparents were regularly visited by the children before their son—the father of the children—committed suicide.<sup>20</sup>

The Superior Court found that visitation was in the children's best interests,<sup>21</sup> while the Court of Appeals reversed on the grounds that nonparents lacked standing to seek visitation under the statute unless a custody action was pending.<sup>22</sup> The Washington Supreme Court affirmed the Court of Appeals in denying the grandparents' visitation rights, but on the grounds that the statute was unconstitutional because it interfered with the fundamental right of parents to rear their children.<sup>23</sup>

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Servs., 452 U.S. 18, 37 (1981))), and *Stanley*, 405 U.S. at 660 (Burger, C.J., dissenting) ("[T]he Court holds *sua sponte* that the Due Process Clause requires that Stanley, the unwed biological father, be accorded a hearing as to his fitness as a parent before his children are declared wards of the state court . . ."), with *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("[W]e held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'" (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399, 401 (1923))).

18 530 U.S. 57.

19 *Id.* at 93 (Kennedy, J., dissenting) (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

20 *Id.* at 60.

21 *Id.* at 61; see also *id.* at 62 ("The court took into consideration all factors regarding the best interest of the children and considered all the testimony before it. The children would be benefitted [sic] from spending quality time with the Petitioners, provided that that time is balanced with time with the childrens' [sic] nuclear family." (second alteration in original)).

22 *In re Troxel*, 940 P.2d 698, 701 (Wash. Ct. App. 1997); see also *In re Wolcott*, 933 P.2d 1066, 1069 (Wash. Ct. App. 1997).

23 *In re Custody of Smith*, 969 P.2d 21, 27 (Wash. 1998).

Although the Washington Supreme Court struck down the statute because it was facially unconstitutional, the Supreme Court granted *certiorari* and validated, at length, the mother's due process claim.<sup>24</sup> The Court opined: "In light of . . . extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."<sup>25</sup>

The precedent invoked by the *Troxel* Court permitted parents broad authority over their children under the "liberty" principle of the Due Process Clause, including the right to make decisions concerning the companionship, care, custody, and management of their children.<sup>26</sup> As the Court reasoned, "More than 75 years ago, in *Meyer v. Nebraska*, we held that the 'liberty' protected by the Due Process Clause includes the right of parents to 'establish a home and bring up children' and 'to control the education of their own.'"<sup>27</sup> Thus, when parental rights are at stake in judicial cases, the court must accord the parent due process while pursuing the state interest of protecting the best interests of the child. Generally, the presumption that fit parents act in their children's best interests suffices to protect a parent's liberty interests in raising children.<sup>28</sup>

The plurality opinion in *Troxel*, however, glossed over the question of the best interests of the child.<sup>29</sup> Justice O'Connor, underscoring the presumption that fit parents generally act in their children's best interests, opined that a fit parent's decision of whom to give visitation rights is in the best interests of the children unless the parent is

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24 *Troxel*, 530 U.S. at 65. "In response to Tommie Granville's federal constitutional challenge, the State Supreme Court broadly held that . . . [the statute] was invalid on its face under the Federal Constitution. Despite the nature of this judgment, Justice O'Connor would hold that the Washington visitation statute violated the Due Process Clause of the Fourteenth Amendment only as applied." *Id.* at 81 (Stevens, J., dissenting).

25 *Id.* at 66 (plurality opinion).

26 *Id.* at 65-68. *But see* Michael H. v. Gerald D., 491 U.S. 110, 121-30 (1989) (plurality opinion) (noting that the liberty aspect of due process does not protect a father's parental rights to his biological child when that child was born into a woman's existing marriage to another person).

27 *Troxel*, 530 U.S. at 65 (citations omitted) (quoting *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

28 *Developments*, *supra* note 2, at 2054.

29 *But cf. id.* at 2055-58 (arguing that *Troxel* implicitly endorsed the state-wide trend of renewed dedication to the best interests of the child standard by only broadly supporting the presumption that parents act in the best interests of their children).



proven unfit.<sup>30</sup> Any infringement upon this parental decision violates due process.<sup>31</sup> In fact, Justice O'Connor concluded that *Troxel* was simply about the conflict between the state and the parent in regards to the child's best interests: "[T]his case involves nothing more than a simple disagreement between the Washington Superior Court and Granville concerning her children's best interests."<sup>32</sup>

However, *Troxel's* adverse impact on the child's best interests standard is more pronounced than the plurality opinion admits, catalyzing dissenting opinions from several Justices. First, the presumption that fit parents always act in their children's best interests can hardly characterize all litigating parents, particularly in tense divorce proceedings that pit the father against the mother. Second, the Washington statute simply granted a third party the procedural right to seek visitation with a child, allowing the court to weigh the circumstances under the best interests of the child standard.<sup>33</sup> Nonetheless, it was stricken, prohibiting courts from using the standard in permitting third parties to visit children over parental objections, even when it was in the children's best interests. Most importantly, by finding the statute unconstitutional, the Washington Supreme Court rejected the best interests standard in third-party visitation cases.<sup>34</sup>

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30 *Troxel*, 530 U.S. at 68; *see supra* note 13.

31 Justice O'Connor also suggested that the mother did not want to wholly restrict the grandparents' visitation: "Finally, we note that there is no allegation that Granville ever sought to cut off visitation entirely. Rather, the present dispute originated when Granville informed the Troxels that she would prefer to restrict their visitation with Isabelle and Natalie to one short visit per month and special holidays." *Troxel*, 530 U.S. at 71. Although this may be factually true in Granville's case, it is not difficult to imagine that giving a mother complete discretion in regards to third party visitation rights may result in the complete termination of those visitation rights.

32 *Id.* at 72.

33 *See id.* at 90-91 (Stevens, J., dissenting) ("Far from guaranteeing that parents' interests will be trammled in the sweep of cases arising under the statute, the Washington law merely gives an individual—with whom a child may have an established relationship—the procedural right to ask the State to act as arbiter, through the entirely well-known best-interests standard, between the parents' protected interests and the child's.").

34 By finding the statute unconstitutional, *Troxel* undermined the best interests standard in all fifty states. *See id.* at 99 (Kennedy, J., dissenting) ("Indeed, contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases, as the Washington court has done. The standard has been recognized for many years as a basic tool of domestic relations law in visitation proceedings. Since 1965, all 50 States have enacted a third-party visitation statute of some sort. . . . Each of these statutes, save one, permits a court order to issue in certain cases if visitation is found to be in the best interests of the child.").

Thus, although much scholarly attention regarding *Troxel* has focused on the denial of grandparents' rights, this case also prioritized the mother's due process rights over the best interests of her child in the context of third-party visitation.<sup>35</sup> The result caused Justice Scalia concern regarding the federalization of family law:

I think it obvious . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.<sup>36</sup>

Justice Souter also cautioned in his concurrence that *Troxel* did not necessitate "turning any fresh furrows in the 'treacherous field' of substantive due process."<sup>37</sup>

Although due process has thus interfered with the child's best interests standard, the equal protection clause has also tipped several family law cases onto the Supreme Court's docket, to which this Note turns next.

### B. Equal Protection Claims

Equal protection is another popular constitutional claim used by family law litigants in federal courts. Although winning a family law case on an equal protection argument may be difficult,<sup>38</sup> success is not

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35 States rebelled against this decision. See *infra* notes 124–28 and accompanying text.

36 *Troxel*, 530 U.S. at 93 (Scalia, J., dissenting).

37 *Id.* at 76 (Souter, J., concurring) (quoting *Moore v. E. Cleveland*, 431 U.S. 494, 502 (1977)); see also *Moore*, 431 U.S. at 544 (White, J., dissenting) ("That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will.").

38 The Supreme Court has allowed the rights among family members to differ, but only if such distinctions "serve important governmental objectives and must be substantially related to achievement of those objectives." *Caban v. Mohammed*, 441 U.S. 380, 388 (1979) (quoting *Craig v. Boren*, 429 U.S. 190, 197 (1976)). Compare *id.* at 391 (holding that equal protection was violated by the New York Domestic Relations Law provision that allowed an unmarried mother, but not an unmarried father, to block her child's adoption because the sex-based discrimination advanced no important state interest), with *Lehr v. Robertson*, 463 U.S. 248, 267–68 (1983) ("If one parent has an established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a state from according the two parents different legal rights."), and *Stanley v. Illinois*, 405 U.S. 645, 665 (1972) (Burger, C.J., dissenting) ("The Illinois Supreme Court correctly held that the State may constitutionally distinguish between unwed fathers and unwed mothers. Here, Illinois' different treatment

rare enough to discourage litigators from invoking it. The Equal Protection Clause, for example, was successfully used to override a lower court's determination of a child's best interests in *Palmore v. Sidoti*,<sup>39</sup> wherein the Supreme Court prioritized the Fourteenth Amendment and society's interest in not tolerating racism.<sup>40</sup>

In *Palmore*, the lower court determined that keeping a three-year-old in the custody of her Caucasian mother, who had cohabitated with an African American before marrying him, was not in the child's best interests.<sup>41</sup> The court therefore granted the child's biological father full custody, placing part of its judgment on the cohabitation factor:

It is of some significance, however, that the mother did see fit to bring a man into her home and carry on a sexual relationship with him without being married to him. Such action tended to place gratification of her own desires ahead of her concern for the child's future welfare.<sup>42</sup>

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of the two is part of that State's statutory scheme for protecting the welfare of illegitimate children.").

English courts determine parentage and the legal rights afforded to parents by virtue of the definitions embodied in certain legislation. When denying fatherhood to a woman's ex-partner, although during their relationship she was implanted with an embryo composed of another man's sperm so that they could raise a child within the relationship together, the Appeal Court explained, "We agree that the term 'parent' includes a person who is to be treated as a parent by virtue of section 27 or 28 of the [Human Fertilisation and Embryology Act 1990]." *In re R (A Child) (IVF: Paternity of Child)*, [2003] EWCA (Civ) 182, [2003] Fam. 129, [31]. However, the court was quick to mention the Children Act of 1989, "Of course, findings of parentage can be made in the course of other proceedings, for example under section 4 of the Children Act 1989." *Id.* at [33]. In this particular case, however, the court conceded that the best interests of the resulting daughter may require visitation from the ex-partner despite his lack of parental legal status. A court order is pending while the former couple attempts to come to a voluntary agreement regarding visitation. *Id.* at [35].

39 466 U.S. 429 (1984).

40 *Id.* at 433. *But see* *Quilloin v. Walcott*, 434 U.S. 246, 254-55 (1978) (holding that the adoption of a child by the stepfather according to the best interest of the child standard did not violate the biological father's due process rights, when he made no effort to legitimize the child). For an examination of the issue of race and adoption in English law, see Michael Freeman, *Disputing Children*, in *CROSS CURRENTS*, *supra* note 12, at 441, 467-68.

41 *Palmore*, 466 U.S. at 431.

42 *Id.* English courts also use a mother's sexual gratification as evidence that she does not prioritize a child's best interests. *See, e.g., In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 814 (H.L.) (appeal taken from Eng.) ("[The mother] was, however, very immature and there were a number of occasions upon which she allowed her interest in going out and meeting boyfriends to take priority over the interests of her child. She formed an association with a rather unsatisfactory young man and in June 1983 became pregnant again.").

The Supreme Court granted certiorari and reversed, returning the child to the full custody of the mother and stepfather, over the biological father's objections. Admitting that child custody cases raise state issues, the Court emphasized the best interests standard, "The goal of granting custody based on the best interests of the child is indisputably a substantial government interest for purposes of the Equal Protection Clause."<sup>43</sup> Ultimately, however, the Court held that the lower court's judgment regarding the best interests of the child catered to private prejudices and interfered with the Equal Protection Clause.<sup>44</sup> By doing so, the Court prioritized the principle of equal protection over the lower court's determination of the best interests of the child, noting that the child may suffer negative consequences as a result.

Although *Palmore* rests on particularly sensitive facts that dramatically invoke an equal protection claim,<sup>45</sup> the constitutional argument makes less controversial but equally successful appearances in cases involving the changing roles and rights of men and women in family law today.<sup>46</sup> Thus, the rise of both equal protection and due process arguments has provocatively challenged the place of the best interests standard in American family law.

## II. THE CLASH BETWEEN ADULTS' AND CHILDREN'S RIGHTS IN ENGLAND

The same conflict between adults' rights and children's best interests surfaced most recently—and most powerfully—across the pond in England. The problem has continued to intensify there and teeters on irreconcilability unless the English courts can reach a satisfactory resolution. Given that this conflict is immortalized in contradictory English legislation, a solution is hardly simple.

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43 *Palmore*, 466 U.S. at 433.

44 *Id.*

45 The presence of race in *Palmore* has not affected the precedential value of the case, which has been invoked by several subsequent litigants. *See, e.g.*, Marlow v. Marlow, 702 N.E.2d 733, 736 (Ind. Ct. App. 1998). Unsurprisingly, however, state courts have declined invitations by litigants to expand *Palmore's* scope, instead prioritizing the best interests standard. *See, e.g.*, Phelps v. Phelps, 446 S.E.2d 17, 22 (N.C. 1994); Jones v. Jones, 542 N.W.2d 119, 123 (S.D. 1996).

46 *See supra* note 38.

### A. *The Statutory Basis for Conflict*

#### 1. The Children Act of 1989<sup>47</sup>

Although English law regarding children is steeped in common law,<sup>48</sup> this Note will focus on children's rights following the legislative recognition of such rights in the Children Act of 1989. The 1989 Act has been held to be "the most comprehensive piece of legislation which Parliament has ever enacted about children."<sup>49</sup> The Act reformed substantive law, procedures, the duties of government agencies, the responsibilities of parents, and the structure and authority of the courts that deal with children.<sup>50</sup>

The subject of this Note, and the equivalent of the American best interests standard, is the welfare principle embedded in section 1 of the Children Act of 1989: "When a court determines any question with respect to (a) the upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration."<sup>51</sup> Section 1 also provides several other general principles for courts to use in child-related cases:

[1.] the courts shall have regard to the general principle that any delay in determining questions with respect to the child's upbringing is likely to prejudice the child's welfare;

[2.] the courts shall have regard to certain specific matters when applying the welfare principle in contested 'family proceedings' (defined by § 8(3) of the Act); and

[3.] the court shall not make an order unless doing so would be better for the child than making no order at all.<sup>52</sup>

While the welfare principle is not unique to this Act,<sup>53</sup> the legislation underscores the significance of the welfare principle in English family

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47 Children Act, 1989, c. 41 (Eng.).

48 For a history of the welfare principle in England since feudal times, see KERRY O'HALLORAN, *THE WELFARE OF THE CHILD* 9-35 (1999). Previous legislation on children did exist as well, namely, the Children Act of 1948 and Children Act of 1975. It is worth noting that the Children Act of 1989 formulated a more modern, updated view of the family. Whereas historically, English law and policy viewed the family as a two-parent household headed by the father, the Children Act of 1989 made no such assumptions.

49 Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 245 (1992).

50 *Id.*

51 Children Act, 1989, c. 41, § 1(1) (Eng.).

52 *Id.* § 1(2)-(5).

53 See *supra* note 48.

law: The children's best interest is paramount in a court's decision, even at the expense of other family members' rights.<sup>54</sup>

The child's welfare is defined neither by this legislation nor by any other. The Act's novel contribution to family law, however, derives mostly from its introduction of a checklist of factors that guides courts to respect the paramountcy of a child's best interest. These include a child's needs and wishes.<sup>55</sup> Any result of the welfare inquiry should benefit the child the most.

The welfare principle of the Children Act of 1989 therefore reflected common law, in addition to providing formal guidelines for courts in their efforts to protect the children's best interests. The Act has been a major influence on family law judges, remaining the golden rule for child-related cases to date.<sup>56</sup>

## 2. The Human Rights Act of 1998<sup>57</sup>

There are two major sources of rights for English adults: domestic common law and European law. Domestic common law overwhelm-

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54 Opining on the welfare principle, the House of Lords repeated Lord MacDermott's sentiment, "[the welfare principle allows] a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices and other circumstances are taken into account and weighed the course to be followed will be that which is most in the interests of the child's welfare as that term has now to be understood. That is the first consideration because it is of first importance and the paramount consideration because it rules upon or determines the course to be followed." *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 821 (H.L.) (appeal taken from Eng.).

55 The exact checklist is as follows:

- a. the ascertainable wishes and feelings of the child concerned (considered in the light of his age and understanding);
- b. his physical, emotional and educational needs;
- c. the likely effect on him of any change in his circumstances;
- d. his age, sex, background and any characteristics of his which the court considers relevant;
- e. any harm which he has suffered or is at risk of suffering;
- f. how capable each of his parents, and any other person in relation to whom the court considers the question to be relevant, is of meeting his needs;
- g. the range of powers available to the court under this Act in the proceedings in question.

Children Act, 1989, c. 41, § 1(3) (Eng.).

56 See, e.g., Stephen Gilmore, *Contact/Shared Residence and Child Well-Being: Research Evidence and Its Implications for Legal Decision-Making*, 20 INT'L J.L. POL'Y & FAM. 344, 345 (2006) (noting that the British Government concluded that no change was needed to the fundamental principles in the Children Act of 1989).

57 Human Rights Act, 1998, c. 42 (U.K.).

ingly prioritizes the welfare principle over parental rights, buttressed by the Children Act of 1989. European law, on the other hand, more seriously considers parents' rights, particularly those created by the European Convention on Human Rights.<sup>58</sup>

English courts often have opined that neither European law nor European conventions have the force of law because of Parliamentary sovereignty, which allows England's domestic legislation to take precedence over any national or international law created by other bodies.<sup>59</sup> Thus, although the United Kingdom had ratified the European Convention on Human Rights, it was unenforceable by the English courts until the Human Rights Act of 1998 incorporated it into English domestic law.<sup>60</sup> Prior to 1998, any Englishman wronged under the Convention had to bring his case to the European Court of Human Rights in Strasbourg.<sup>61</sup>

The Human Rights Act of 1998, in bringing human rights home by facilitating their enforceability in English courts, has been touted as a milestone in English law and the near equivalent of the United States Constitution.<sup>62</sup> At a minimum, the Human Rights Act provided England with a written, enforceable document containing "a comprehensive statement of individual, fundamental rights."<sup>63</sup>

The introduction of such legislation into the legal system, however, confused the English judiciary's traditional role. One court wrote, "It is now plain that the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary."<sup>64</sup> However, courts have exhibited noticeable hesitancy in integrating the European Convention on Human

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58 Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention on Human Rights].

59 See, e.g., *In re C. (A Child) (H.I.V. Testing)*, [2000] Fam. 48, 61.

60 Human Rights Act, 1998, c. 42 (U.K.).

61 See HUMAN RIGHTS LAW AND PRACTICE 23 (Lord Lester of Herne Hill & David Pannick eds., 2004).

62 The Human Rights Act of 1998 conveys certain rights that are even more generous than those provided by the U.S. Constitution. For a specific example of the Act's uniquely broad understanding of a human right (the procreative freedom of convicted criminals), see Elaine E. Sutherland, *Procreative Freedom and Convicted Criminals in the United States and the United Kingdom: Is Child Welfare Becoming the New Eugenics?*, 82 OR. L. REV. 1033, 1042-50 (2003).

63 DAVID HOFFMAN & JOHN ROWE, HUMAN RIGHTS IN THE UK 17 (2003).

64 *R. v. DPP, ex parte Kebilene*, [2000] 2 A.C. 326, 375 (H.L.) (appeal taken from Eng.).

Rights.<sup>65</sup> This resistance to the Convention surfaced in family law as well, particularly when English judges were confronted by Article 8.<sup>66</sup>

Article 8 of the European Convention on Human Rights has bound the English family law courts since 1998—when Parliament passed the Human Rights Act.<sup>67</sup> The Article provides extensive rights to litigious adults:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.<sup>68</sup>

Article 8 of the Convention thus prohibits governmental interference with people's family rights except when all three of the following conditions are met: the interference 1) is in accordance with the law, 2) pursues one of the aims enumerated in Article 8(2), and 3) is necessary in a democratic society. These conditions were subsequently formulated into a three prong test.<sup>69</sup>

The European Court of Human Rights, the international court for the enforcement of the European Convention on Human Rights, has had the opportunity to interpret the terms of Article 8 in various cases. The Court has interpreted the phrase "in accordance with the law" to mean that the impugned measures should have a basis in domestic law.<sup>70</sup> The expression also regards the quality of the law in

65 See, e.g., David Bonner et al., *Judicial Approaches to the Human Rights Act*, 52 INT'L & COMP. L.Q. 549, 572 (2003) (arguing that the Human Rights Act has been met with suspicion from English judges).

66 See generally *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806 (H.L.) (appeal taken from Eng.) (holding that the welfare of the child is the paramount consideration and that parental rights, whatever those may be under the Convention, become immediately subservient to it).

67 David Hoffman and John Rowe underscore the impact of the Convention on England:

It will be necessary for the courts of the United Kingdom to consider whether the Convention increases the rights of individuals who may assert a right to be consulted about the life of the family or members of it. But the Convention has a much wider effect; it will impose an obligation on public authorities to take into account a family which may be affected by a decision.

HOFFMAN & ROWE, *supra* note 63, at 194.

68 European Convention on Human Rights, *supra* note 58, art. 8.

69 See, e.g., *Yousef v. Netherlands*, 2002-VIII Eur. Ct. H.R. 249, 259–60.

70 *L. v. Finland*, App. No. 25651/94, 31 Eur. H.R. Rep. 737, 738 (2001).



question, requiring accessibility and foreseeability to prevent a government's arbitrary interference.<sup>71</sup>

The aims enumerated in Article 8(2) include national security, public safety, the economic health of the country, the prevention of disorder or crime, the protection of health and morals, and the protection of the rights and freedoms of others. The European court may classify children as "others" for the purpose of this clause, which allows it to pay some attention to a child's rights in the process of weighing the adults' rights.<sup>72</sup>

Finally, the expression "necessary in a democratic society" requires that the interference "corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued; in determining whether an interference is 'necessary in a democratic society,' the Court will take into account that a margin of appreciation is left to the Contracting States."<sup>73</sup>

Significantly, the European Court of Human Rights has interpreted the fundamental right of Article 8 to be access of a family member to children, opining, "the mutual enjoyment by parent and child, as well as by grandparent and child, of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by Article 8 of the Convention."<sup>74</sup>

In sum, Article 8 of the Convention on Human Rights and the attendant European case law create equal rights to privacy for both children and adults. These equal rights to privacy of all family members directly conflict with the Children Act of 1989.<sup>75</sup> This is particularly true under the interpretation of Article 8 by the European Court of Human Rights.<sup>76</sup> With the advent of the Human Rights Act of

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71 *Id.*

72 *See infra* notes 78-79 and accompanying text.

73 *Olsson v. Sweden*, 130 Eur. Ct. H.R. 7, 32 (1989); *see also* *W. v. United Kingdom*, 121 Eur. Ct. H.R. 8, 27 (1988) (noting that governments have some discretion in deciding which measures are "necessary in a democratic society").

74 *L. v Finland*, 31 Eur. H.R. Rep. at 757-58; *see, e.g.*, *Andersson v. Sweden*, 226 Eur. Ct. H.R. 6 (1992); *W. v. United Kingdom*, 121 Eur. Ct. H.R. at 27. *But cf.* *Troxel v. Granville*, 530 U.S. 57, 70 (2000) (plurality opinion) (denying grandparents' access to the child); *A v. C.*, [1985] 6 Fam. L.R. 445, 451 (arguing that access to a child is an opportunity, not a right).

75 *See* Shazia Choudhry & Helen Fenwick, *Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle Under the Human Rights Act*, 25 OXFORD J. LEGAL STUD. 453, 457 (1998).

76 *See id.* at 454 ("[T]he [European] Court [of Human Rights] affords weight to the Article 8 rights of parents to respect for family life so that in the case of a clash of rights those of the child will not invariably win out and therefore the inception of the

1998, all of this law became integrated into English domestic law—laying the foundation for conflict between the rights of children and those of adults.

### 3. The Ensuing Conflict Between Adults' and Children's Rights

The clash between the interests of English adults and children therefore results from the distinct but conflicting rights endowed by the Children Act of 1989 and the Human Rights Act of 1998. Between these two acts, the most significant source of tension is the amount of weight each places on the best interests of the child.<sup>77</sup>

In endowing equal rights to all family members, the Convention on Human Rights treats children as legal equivalents of adults. Thus, if a court wanted to prioritize the child's interests, it can only do so by including the child as an exception to the parent's rights under Article 8(2), which allows governmental interference in the family "for the protection of the rights and freedoms of others."<sup>78</sup> The child, in other words, needs to become the "other" to have his rights and freedoms protected. This exception is the only means for the European Court to align its judgments with England's welfare principle.<sup>79</sup> However, although identifying a child as an "other" fulfills the "legitimate aim" prong, the interference must also be both in accordance with the law and necessary in a democratic society. The European Court easily and often finds a violation of one of these three prongs, enabling it to rule in favor of a parent despite the best interests of her child. And hence, European family law inherently conflicts with English family law, which is complicated by the English courts' insistence on the welfare principle.<sup>80</sup>

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Human Rights Act has called the current [English] domestic approach into question.").

<sup>77</sup> See *id.* at 457 ("Article 8 [of the European Convention on Human Rights], in encapsulating the rights of both parents and children to private and family life, appears on its face to come into clear conflict with the [Children Act of 1989], which renders the child's interests paramount.").

<sup>78</sup> European Convention on Human Rights, *supra* note 58, art. 8.

<sup>79</sup> Compare *Yousef v. Netherlands*, 2002-VIII Eur. Ct. H.R. 249, 262 ("[I]n judicial decisions where the rights under Art. 8 of parents and those of a child are at stake, the child's rights must be the paramount consideration. If any balancing of interests is necessary, the interests of the child must prevail."), with *Choudhry & Fenwick*, *supra* note 75, at 467 (noting that English courts rely on a narrow subset of European jurisprudence to find in favor of children's best interests, neglecting the remainder of European case law).

<sup>80</sup> See *A v. C.*, [1985] 6 Fam. L.R. 445, 450 ("In some cases it is said there has been talk of access [to a child] as being the . . . right way of approaching the question. I

In *Johansen v. Norway*,<sup>81</sup> for example, a mentally and physically ill mother who entered abusive relationships with men challenged the placement of her second child into foster care with a view toward adoption.<sup>82</sup> She argued that her Article 8 rights were violated, prompting the European Court of Human Rights to apply the three prong test. The Court was able to satisfy itself that the Norwegian government's interference with the mother's Article 8 rights was legitimate because it intended to safeguard the development of the child.<sup>83</sup> Furthermore, the Court agreed that the interference was in accordance with domestic law.<sup>84</sup> However, the Court imposed strict legal scrutiny on permanent restrictions on a parent's right of access to her child. Permanent deprivation of an adult's rights to a child can only be necessary under Article 8(2) if there are compelling reasons and exceptional circumstances.<sup>85</sup> According to the Court, the mother's track record of significant instability, not to mention the problems she encountered in raising her first child with the help of welfare authorities, were not enough to deprive her of permanent access to her child under Article 8.<sup>86</sup>

The result in *Johansen* is nearly inconceivable in the English legal system, which would prioritize the welfare of the child over a parent's right of access to the child. If a mother exhibited the same amount of instability and incompetence in an English court, she would be unable to access her child because the welfare principle opposes such parenting.<sup>87</sup>

English law prioritizes children's rights through both a strict adherence to the welfare principle and separate legislation. Legisla-

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think the right way of approaching it is that the child's interests are paramount and the court must do what it thinks is in the interests of the child.").

81 (No. 13), 1996-III Eur. Ct. H.R. 983.

82 *Id.* at 991-96.

83 *Id.* at 1003.

84 *Id.* at 1002.

85 *Id.* at 1008.

86 *Id.* at 1007-10. It was only the second expert called in the case, at the mother's request, that had any hope for the mother's ability to raise her child. The first expert expressed a view in harmony with the stance of English courts, "It is of decisive importance for [the child's] personal development that she now gets the opportunity to attach herself to persons whom she may regard during her adolescence as stable and secure parents." *Id.* at 987. This expert's view was subsequently rejected by the Human Rights Court. *Id.*

87 See, e.g., *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 813-20 (H.L.) (appeal taken from Eng.) (holding that a mother's access to her child, who was placed in foster care toward the view of permanent adoption, can be restricted if in the best interests of the child).

tively separating children's rights from those of adults favors children's interests in two ways. First, it allows a government to recognize the priority of children's rights over conflicting adults' rights. Second, children's legislation serves as a tie breaker among the litigants: Should a conflict arise between the rights of children and those of adults, the court can invoke the paramountcy of the welfare principle.

It is a mistake, however, to conclude that the English courts have been completely averse to adult interests. However, adult interests were considered *privileges* instead of rights. As Shazia Fenwick and Helen Choudhry explain, "In the pre-[Human Rights Act of 1998 era], then, it is clear that while the parents' interests were not ignored, and might be viewed as privileges, they were not characterized as rights and the paramountcy principle was the determining factor."<sup>88</sup> Furthermore, according to one scholar,<sup>89</sup> courts were mindful of adult interests much before the Human Rights Act of 1998, guarding them through various other means, such as loosely enforcing the welfare principle, artificially aligning the interests of children and their parents,<sup>90</sup> and outright denying jurisdiction to avoid messy family law issues.<sup>91</sup> Following the Human Rights Act, however, English courts must consider adults' interests as rights instead of privileges—an uncomfortable proposition.

This means, of course, that English adults in child-related cases can invoke certain protections under the Human Rights Act to counter the welfare principle, giving rise to the present conflict. One commentator succinctly paraphrased the resulting task for English courts, "But in the light of the Human Rights Act and the centrality of

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88 Choudhry & Fenwick, *supra* note 75, at 462; see also *A v. C.*, [1985] 6 Fam. L.R. 445, 451 ("As I understand it, the law is that, prima facie, the parents shall have access to his or her child and that that shall be unless there is very good reason to the contrary. *It is not a right, it is a privilege. It is always up to the judge to decide what is the best interests of the child.*" (emphasis added)).

89 Jonathan Herring, *The Human Rights Act and the Welfare Principle in Family Law—Conflicting or Complementary?*, in *HUMAN RIGHTS FOR THE NEW MILLENNIUM* 133 (Frances Butler ed., 2000).

90 *In re T. (A Minor) (Wardship: Medical Treatment)*, [1997] 1 W.L.R. 242. The court decided not to force life-saving medical treatment on a child whose parents resisted the treatment, reasoning, "this mother and this child are one for the purpose of this unusual case and the decision of the court to consent to the operation jointly affects the mother and son and it also affects the father." *Id.* at 251.

91 *Re E (Residence: Imposition of Conditions)*, [1997] 2 Fam. L.R. 638, 643 (C.A.) (denying the court's jurisdiction in a case where a mother's relocation was contested because she merely wanted to relocate *within* the U.K.). *But cf.* *Payne v. Payne*, [2001] EWCA (Civ) 166, [2001] Fam. 473, [2]–[26] (allowing a mother to emigrate with her child from England to New Zealand over the objections of the child's father, who lived in England).

the welfare principle in the Children Act, the courts are going to be forced to develop some kind of synthesis between the two approaches if at all possible.”<sup>92</sup>

### B. *Judicial Attempts at Resolving the Conflict in England*

Having been entrusted with the delicate task of integrating Article 8 of the European Convention on Human Rights with the welfare principle, English judges have slowly begun adjudicating cases within the new legal framework. The best way to classify the courts’ reaction to Article 8, however, is awkward resistance, particularly when it comes to compromising the welfare principle.<sup>93</sup>

The courts have not yet justified their continued departure from the Convention that binds them. Despite attempting several reconciliations of Article 8 with the welfare principle, no clear resolution has emerged. Instead, the courts have used several methods of entirely avoiding the invariable problems posed to adults’ Article 8 rights by the welfare principle.

#### 1. Denying the Existence of a Conflict

One strategy the English courts have adopted toward the conflict is to deny its existence.<sup>94</sup> To this end, the House of Lords has often either narrowly interpreted the Convention so that it overlaps with English law, or broadened its interpretation to the point that it speaks of universal truths.<sup>95</sup> Either way, the conflict between Article 8 and

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92 Herring, *supra* note 89, at 135.

93 See generally Choudhry & Fenwick, *supra* note 75, at 462–69 (arguing that English courts have resisted the Human Rights Acts because courts are too attached to the welfare principle as currently conceived—that children’s welfare automatically prevails over the rights of other family members).

94 Section 3 of the Human Rights Act of 1998 has imposed on English courts an obligation to interpret any British legislation as compatible with Convention Rights, or else declare an incompatibility so that legislators can remedy it. See Lady Justice Arden, *The Interpretation of UK Domestic Legislation in the Light of European Convention on Human Rights Jurisprudence*, 25 STATUTE L. REV. 165, 166 (2004). However, there is a significant difference between favorably viewing English legislation as compatible with Article 8 and turning a blind eye to conflict in lieu of declaring an incompatibility. By declaring an incompatibility, English courts would compel Parliament to remedy the conflict between Article 8 and the welfare principle, perhaps by legislatively weakening the Children Act of 1989. Such a result is unacceptable to English judges who have long prioritized the welfare principle over adults’ rights. For the proposition that English family law courts have been hostile to the Human Rights Act of 1998 from its beginning, see Bonner et al., *supra* note 65, at 572.

95 See, e.g., *Re C (A Child) (Immunisation: Parental Rights)*, [2003] EWCA (Civ) 1148, [24], [77]–[80] (focusing so narrowly on Article 8 that the case’s discussion of

the welfare principle artificially disappears because the differences between them are wholly avoided.

Two judicial opinions in *In re K.D.*<sup>96</sup> exemplify both the narrow and broad interpretations of the Convention that English courts have embraced in their efforts to minimize the conflict between Article 8 and the welfare principle. Although the case was heard well before the Convention's integration into English law, it is significant because the House of Lords tried to reconcile Article 8 with English common law, mostly by denying the conflicts between the two legal systems.

Lord Templeman began his opinion by focusing on the subset of principles from English common law and the Convention that overlapped, as well as rehearsing their similar histories.<sup>97</sup> He narrowed his interpretation of each to the point that any conflict between the two legal systems was circumvented:

My Lords, English common law and statute require that in all matters concerning the upbringing of an infant the welfare of the child shall be the first and paramount consideration. . . . The English rule was evolved against an historical background of conflict between parents over the upbringing of their children. The [European] Convention [on Human Rights] rule was evolved against an historical background of claims by the state to control the private lives of individuals. Since the last war interference by public authorities with families for the protection of children has greatly increased in this country. In my opinion there is no inconsistency of principle or application between the English rule and the Convention rule. The best person to bring up a child is the natural parent.<sup>98</sup>

From this narrow interpretation of Article 8, Lord Templeman extracted the proposition that a biological parent is the best person to raise a child. This is indeed true of English common law as well.<sup>99</sup> The problem, however, with using this singular similarity to reconcile English common law with Article 8 is that it does not address the most litigated issues where the welfare principle and Article 8 diverge. It is practically inconceivable to imagine a jurisdiction that keeps children away from their fit, biological parents. But, what happens if the par-

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the medical condition of tetanus is longer and more extensive than its analysis of Article 8).

<sup>96</sup> *In re K.D.* (A Minor) (Ward: Termination of Access), [1988] A.C. 806 (H.L.) (appeal taken from Eng.).

<sup>97</sup> *Id.* at 811.

<sup>98</sup> *Id.* at 811-12.

<sup>99</sup> Section 1 of the Children Act of 1989 provides guiding principles for English courts, one of which prevents them from entering an order unless doing so is better for the child than not. Children Act, 1989, c. 41, § 1(5) (Eng.); see *supra* text accompanying note 52.

ents are unfit? Furthermore, how should a court handle a case wherein one parent wants to emigrate with a child over the objections of the other parent? It is on these issues that Article 8 and English common law diverge, creating conflicts that Lord Templeman neglected by invoking a common but misrepresentative subset of the two legal systems.

In the same case, another judge in the House of Lords, Lord Oliver of Aylmerton, also attempted to reconcile Article 8 with common law, but by generalizing both legal systems to the point of discussing universal truths. He opined:

Such conflict [between Article 8 and English law] as exists, is, I think, semantic only and lies only in differing ways of giving expression to the single common concept that the natural bond and relationship between parent and child gives rise to universally recognized norms which ought not to be gratuitously interfered with and which, if interfered with at all, ought to be so only if the welfare of the child dictates it.<sup>100</sup>

Although Lord Oliver's argument is similar to Lord Templeman's, he managed to broaden the interpretation of the Convention in order to reach a universal truth that is undeniable: Governments should not interfere with universally recognized norms. However, Lord Oliver proceeds further with his argument to suggest that such interference may be legitimate if in the best interests of the child.<sup>101</sup> Although this last argument perfectly suits English common law and the Children Act of 1989, it ignores the equality of rights granted to all family members by Article 8.

Even though both Lord Templeman and Lord Oliver proclaim the similarities between European and English law in *In re K.D.*, the case probably would have been decided much differently by the European Court of Human Rights, illustrating the conflict between English common law and Article 8. Because *In re K.D.* was decided prior to the Human Rights Act, however, only the European Court of Human Rights in Strasbourg could have vindicated the mother's Article 8 rights—an opportunity she failed to pursue.<sup>102</sup> If the subsequent case of *Johansen* is any indicator, though, the European Court would have likely opposed the English court.<sup>103</sup> The facts were similar in both cases—centering on an incompetent mother whose access to her

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100 *In re K.D.*, [1998] A.C. at 825.

101 *Id.*

102 *In re K.D.* illustrates the reasoning behind the Human Rights Act of 1998—poor litigants could not afford to take their case to Strasbourg, so their Convention rights had to be enforceable in English courts so as to be truly protected.

103 See *Johansen v. Norway*, (No. 13), 1996-III Eur. Ct. H.R. 983.

child was threatened by adoption, which would have been in the child's best interests. However, the European Court of Human Rights prohibited any restrictions on the incompetent mother's rights to her child in *Johansen*, a result to the contrary of the one reached by the English court in *In re K.D.*<sup>104</sup>

Both the narrowing and broadening of the interpretation of the Convention thus misses the point of Article 8 and glosses over the details that conflict with English law—significant details that create the grounds on which cases in each jurisdiction are decided. Whatever similarities the English courts cite, then, cannot be representative of a harmony between Article 8 and the welfare principle, which inherently diverge on central issues.

## 2. Misapplying European Law

To deny that the Human Rights Act and the Children Act entitle children and adults to conflicting rights is either to avoid the Convention or to misunderstand it. Given the European Court's extensive explanations and interpretations of Article 8,<sup>105</sup> the resulting implication is that the English courts are deliberately avoiding the consequences of the Convention on the welfare principle.

*Payne v. Payne*<sup>106</sup> provides an example of the English courts' reformulation of European law to find in the best interests of the child. In *Payne*, a child's mother was allowed to permanently move with her child to New Zealand from England, despite the father's argument that decreasing contact with their child would infringe his Article 8 rights. The court reasoned that the relocation would make the mother happier, thereby increasing the welfare of her child.<sup>107</sup>

The English court in *Payne* dismissed the father's Article 8 claim by selectively quoting the decision of the European Court of Human Rights in *Johansen* to argue that the European Court shared England's preoccupation with the welfare principle.<sup>108</sup> In *Payne*, the English Court of Appeals opined: "Accordingly the jurisprudence of the European Court of Human Rights inevitably recognises the paramountcy

104 *Id.* at 1010.

105 *See supra* text accompanying notes 70–74.

106 *Payne v. Payne*, [2001] EWCA (Civ) 166, [2001] Fam. 473. For an excellent discussion regarding the sloppiness of *Payne's* treatment of Convention law, see Bonner et al., *supra* note 65, at 549.

107 *Payne*, [2001] EWCA (Civ) 166 at [30] ("Logically and as a matter of experience the child cannot draw emotional and psychological security and stability from the dependency unless the primary carer herself is emotionally and psychologically stable and secure. The parent cannot give what she herself lacks.").

108 *Id.* at [39]; *see infra* note 112. *But see supra* Part II.A.2.



principle, albeit not expressed in the language of our domestic statute."<sup>109</sup> It concluded so because, "In *Johansen*, the court held that: 'the court will attach particular importance to the best interests of the child, which . . . may override those of the parent.'"<sup>110</sup> As one scholar underscored, however, the exact language of *Johansen* conveys an entirely different sentiment: "'[T]he court will attach particular importance to the best interests of the child, which, *depending on their nature and seriousness*, may override those of the parent.'"<sup>111</sup> The English court's intentional omission of a vital phrase in *Johansen* distorts the message of the European Court, which only prioritizes the best interests of a child in certain, undefined circumstances.<sup>112</sup> Otherwise, according to Article 8, the right to family privacy is shared *equally* by children and adults, without any priority given to children's best interests.

Furthermore, the *Payne* court made an unwarranted distinction between families fragmented by divorce and traditional ones, a distinction that simply does not exist in the case law interpreting Article 8 of the European Convention.<sup>113</sup> When it came to the traditional family, *Payne* suggested that English law and European law were well aligned because "[i]n a united family the right to family life is a shared right."<sup>114</sup> However, according to *Payne*, there was a void in European law that English law completed in regard to fragmented family life, "But once a family unit disintegrates the separating members' separate rights can only be to a fragmented family life. Certainly the absent parent has the right to participation to the extent and in what manner the complex circumstances of the individual case dictate."<sup>115</sup> And thus, *Payne* concluded that the Convention did not impact English domestic law and should not alter its course, which

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109 *Payne*, [2001] EWCA (Civ) 166 at [38].

110 *Id.* at [39] (citations omitted) (quoting *Johansen v. Norway*, 1996-III Eur. Ct. H.R. at 1008).

111 Choudhry & Fenwick, *supra* note 75, at 463 (quoting *Johansen*, 1996-III Eur. Ct. H.R. at 1008). *But see* *Yousef v. Netherlands*, 2002-VIII Eur. Ct. H.R. 249, 261-62 (allowing a child's interest to weigh more heavily in the balancing approach).

112 The argument frequently used by the English courts—that the European Court similarly respects the best interests standard—is based on a very selective subset of European jurisprudence, which nonetheless requires a serious consideration of adults' rights. *See* Choudhry & Fenwick, *supra* note 75, at 467.

113 *Payne*, [2001] EWCA (Civ) 166 at [35].

114 *Id.*

115 *Id.*

prioritizes the child's welfare in adjudicating fragmented family members' rights.<sup>116</sup>

Article 8, however, makes no such distinction between fragmented and traditional families. Article 8 leaves no void for English law to fill in cases involving fragmented families—it applies equally to all family members, without any preference to children's best interests. Furthermore, the European Court has interpreted a parent's or grandparent's access to his children as constituting the fundamental element to the protection of family.<sup>117</sup> Permanently depriving a father of access to his child without compelling reasons is subject to strict scrutiny according to the European Court of Human Rights.<sup>118</sup> Thus, *Payne's* interpretation of Article 8 as excluding fragmented family members is pure legal fiction.

Finally, the *Payne* court blatantly refused to compromise English precedent that conflicted with Article 8 when the father challenged the result stemming from the English case *Poel v. Poel*,<sup>119</sup> which formulated a test permitting one parent to emigrate with a child when reasonable.<sup>120</sup> Although a reasonableness test would not satisfy the European Court's strict scrutiny for cases that deprive one parent of access to his child,<sup>121</sup> the *Payne* court diverged even further from European case law by stating that the fundamental question in the case actually regarded the best interests of the child.<sup>122</sup> The judge concluded that a happy mother would benefit the child and, "[i]t is true that it means cutting the child off to a large extent—almost wholly perhaps—from the father; but that is one of the risks which have to be run in cases of this kind."<sup>123</sup>

Thus, *Payne's* selective and misleading quotation of European law, in addition to its blatant denial of any conflict between Article 8 and English law, underscores English courts' resistance to Article 8 and illustrates their methods of avoiding any potential conflict with the welfare principle.

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116 The court opined that "each member of the fractured family has rights to assert and that in balancing them the court must adhere to the paramountcy of the welfare principle." *Id.* at [37].

117 See *supra* text accompanying note 74.

118 See *supra* notes 81–86 and accompanying text.

119 [1970] 1 W.L.R. 1469 (C.A.).

120 *Id.* at 1473–74.

121 See *supra* notes 81–86 and accompanying text.

122 *Payne v. Payne*, [2001] EWCA (Civ) 166, [2001] Fam. 473, [16], [39].

123 *Id.* at [18] (quoting *A v. A* (Child: Removal from Jurisdiction), [1980] 1 Fam. L.R. 380, 381–82 (C.A. 1979)).

### III. LESSONS FROM ENGLAND

Having abided by the paramountcy of the welfare principle for centuries, only within the last ten years have English courts faced adults armed with explicit individual rights from across the Channel. It is unsurprising, then, that the reaction of English courts to forced prioritization of adult rights has been peppered with resistance.

The development of the conflict between adults' rights and children's best interests in England has paralleled the problems resulting from the federalization of family law in the United States as the Supreme Court opened its docket to abortion, adoption, and child custody issues. As *Troxel* and *Palmore* illustrate, Americans may rely on due process and equal protection arguments to curtail the reach of the best interests standard. However, before the best interests standard becomes a vestigial organ of a formerly state-controlled issue, England's experience offers several ominous warnings for the American family law system.

#### A. *The Case Against the Federalization of American Family Law*

Perhaps the most significant lesson from the friction between English domestic law and European law warns against American federalization of family law, particularly in regards to cases involving children. Not only would the best interests standard be weakened, but states may also exhibit England's determination to resist prioritizing adults' rights.

This possibility exists because the similarities between the trends on both sides of the Atlantic permit such an analogy: A mandatory legal system is setting precedence for the lower courts to ensure that adults' rights be taken more seriously. Although England's legal system has always prioritized children's welfare, European law has unsuccessfully attempted to diminish the importance of the welfare principle in England by reducing it to a mere factor in the balance of family members' rights. Similarly, American federal law attempts to dilute the best interests standard on the state level, thus recreating the effect of European law on English family law.

Just as the European Court of Human Rights is sympathetic to children's rights, the Supreme Court theoretically accepts the principle on which state family law operates in cases involving children—that the children's welfare should be prioritized. In practice, however, the Supreme Court cannot resist entertaining and occasionally legitimizing constitutional arguments regarding adults' rights in cases of conflict with the children's best interests standard. By doing so, the

states' best interests standard has been compromised by federal law, as it has been in England by European law.

In addition to weakening the best interests standard, federal law strengthening adults' constitutional rights under the guise of due process and equal protection will probably encounter resistance from lower courts. While states are bound by adults' constitutional rights, as England is bound by Article 8 of the European Convention, they are likely to follow England's path of resistance. Following the Supreme Court decision in *Troxel*, for example, the states scrambled to reformulate grandparents' visitation statutes to protect the best interests of children when such interests depended on access to grandparents.<sup>124</sup> New Jersey was representative of other states when its Supreme Court continued to uphold grandparent visitation by altering the original statute slightly:

We hold that grandparents seeking visitation under the statute must prove by a preponderance of the evidence that denial of the visitation they seek would result in harm to the child. That burden is constitutionally required to safeguard the due process rights of fit parents. Finally, we hold that, in this case, the grandparents have met that burden.<sup>125</sup>

The court then granted visitation to the grandparents post-*Troxel*, who were very involved in the children's lives before the dispute arose. These facts could not be distinguished enough from *Troxel* to suggest that the states were significantly impacted by the Supreme Court case.<sup>126</sup>

Thus, if England is to serve as a guide, the American Supreme Court should be wary of federalizing family law regarding children, particularly when doing so implicates the best interests standard.

#### B. *Equal Treatment of Adults and Children Under the Constitution*

In the United States, it is not uncommon to argue that children's constitutional rights may sufficiently protect their interests.<sup>127</sup> In

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<sup>124</sup> See, e.g., TENN. CODE ANN. § 36-6-306 (West 2005); UTAH CODE ANN § 30-5-2 (West Supp. 2006).

<sup>125</sup> *Moriarty v. Bradt*, 827 A.2d 203, 205 (N.J. 2003).

<sup>126</sup> Both cases involved a couple with two children, whose relationships with their grandparents were compromised by one parent's death. The remaining parent had developed a hostile relationship with the grandparents, causing the severance of the grandparents' intimate relationship with the children despite the best interests standard, which indicated that maintaining the relationship would be beneficial. *Troxel v. Granville*, 530 U.S. 57, 60-63 (2000) (plurality opinion); *Moriarty*, 827 A.2d at 203.

<sup>127</sup> See, e.g., *Sec'y of Pub. Welfare of Pa. v. Institutionalized Juveniles*, 442 U.S. 640, 652 (1979) (Brennan, J., concurring in part and dissenting in part) ("Pennsylvania

*Troxel*, Justice Scalia suggested a potential First Amendment right of association or free exercise on behalf of the children, allowing them to visit with their grandparents against the mother's wishes.<sup>128</sup> In another Supreme Court case, it was argued on behalf of a child, albeit unsuccessfully, that a restriction on her right to access a presumed parent violated both her due process and equal protection rights.<sup>129</sup>

However, granting children constitutional rights equivalent to those of adults in order to protect their interests in lieu of the best interests standard is ineffective. Families finding themselves in court are already fragmented—treating each member equally under the Constitution is slow to resolve any issues, let alone to result in a judgment favorable to the child's best interests. This observation emerges as the primary lesson from the European Court of Human Rights, which frequently finds against children's traditional best interests by endowing them with rights equal to those of adults under Article 8. England, on the contrary, has always decided in the best interests of the children by virtue of having separate legislation protecting them, which forces the courts to consider the children first in adjudicating family law cases.

As Lord Oliver of Aylmerton observed in the English case *In re K.D.*, rarely does adjudicating an adult's rights have a neutral effect on the child:

My Lords, if it is possible to envisage a case in the real world in which there is such a perfect equilibrium that the effect of access by a parent on a child of full mental capacity and in a normal state of health can be truly said to be absolutely neutral, I can see an argument for saying that the natural bond between parent and child may dictate a resumption or continuation of access. But that is not,

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must assign each institutionalized child a representative obliged to initiate contact with the child and ensure that the child's constitutional rights are fully protected. Otherwise, it is inevitable that the children's due process rights will be lost through inadvertence, inaction, or incapacity.”)

128 *Troxel*, 530 U.S. at 93 n.2 (Scalia, J., dissenting). *But see* *Goss v. Lopez*, 419 U.S. 565, 591 (Powell, J., dissenting) (“Even with respect to the First Amendment, the rights of children have not been regarded as ‘co-extensive with those of adults.’” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 515 (1969) (Stewart, J., concurring))).

129 *Michael H. v. Gerald D.*, 491 U.S. 110, 130–32 (1989) (plurality opinion) (rejecting the argument that a child's liberty interest in maintaining a filial relationship with her natural father and her equal protection right to rebut the presumption of her legitimacy were violated by the lower courts).

in my judgment, this case nor is it any case that I can reasonably envisage.<sup>130</sup>

If, then, adjudicating an adult's rights indeed impacts a child's best interests, those best interests must be afforded extra protection in determining the adult's rights—at least in a jurisdiction that adheres to the welfare principle, such as the United States. Without this added protection of the welfare principle, children's interests become just one factor in a balancing act that will likely fail to protect the child.

Thus, granting equal rights to adults and children in the United States would weaken the best interests standard and lead to the problems encountered by the English legal system after the adoption of the Human Rights Act. If there is *any* attachment to the welfare principle in a society, children must specially be protected in separate legislation on the state level, or at least by strict faithfulness to the best interests standard.

#### CONCLUSION

While the familiar conflict between adults' rights and children's best interests has slowly been intensifying in the United States on the heels of the federalization of family law, it has recently exploded in England following the passage of conflicting legislation. The adult rights enshrined in the European Convention on Human Rights were immediately met with reluctance from English judges when children's best interests, prioritized by the Children Act of 1989, were threatened. The English courts have continued to exhibit fierce loyalty to the children's welfare principle, either by denying any conflict with European law or mischaracterizing the Convention by which they are bound. This resistance, coupled with the visibility of the advantages and disadvantages of England's experience, offers several lessons for the United States.

Most importantly, this Note has argued that federal courts should be wary of granting and expanding constitutional relief for adults in child-related cases. Not only is the best interests standard compromised by this, but states' enthusiasm for the standard will doubtfully wane. Furthermore, the courts should be cautious in relying on the Constitution to protect children's interests, which would be analogous to treating children as the legal equivalents of adults under Article 8 of the European Convention. Judgments of the European Court have

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130 *In re K.D. (A Minor) (Ward: Termination of Access)*, [1988] A.C. 806, 820 (H.L.) (appeal taken from Eng.).

greatly differed from those of English and American courts because of the European Court's inability to openly favor children's interests without the aid of explicit support from the Convention. Therefore, if the states remain committed to the best interests of the child, then the most effective way to achieve protection of those interests is to explicitly accept the paramountcy of the standard. Moreover, federal courts must not counter this effort by constitutionalizing child-related family law. Fortunately, before federal courts continue dipping their proverbial feet into the choppy waters of family law, lessons from across the pond can help prevent a hurricane in the field of American family law.