A COMPARATIVE STUDY OF ADOPTION LAW

Adoption, whether legal or illegal, is a dysfunction of kinship ... the adoptee perceives people in his world as strangers ... the adoptee's specific loss of the most elementary biological kinship, in the process known as adoption, may cause "paleo-psychological regression" experienced as uncontrollable rage from deep within his/her own ancient history.[1]

1 Systems Theory and Australian Adoption Law

i Introduction

I propose to use systems theory[2] for a comparative structural analysis of the operation of law as a (global) legal system operating in different social settings and developing over time, in the specific research area of infant adoption. Within the Anglo-American legal family[3] adoption law is entirely the product of legislation: the common law does not allow parents to voluntarily relinquish guardianship and custody rights of their children during their lifetimes.[4] A comparative examination of the Western history of illegitimacy, adoption in Australian systems and the recognition of the rights of the child in international law will throw into light the role of adoption law in precipitating and perpetuating dysfunction in organic (life), personal (consciousness) and social (communication) systems, pathologising the person concepts (psychological, emotional, identity and status) of adoptees within familial, social and cultural, national and international systems. Such a comparative study should indicate a future for adoption law that will ensure it fulfils its professed function: to provide legal outcomes in the best interests of children.

ii The Australian closed records adoption system

[1] Kent G. Bailey, PhD, "Human Paleopsychology: Application to Aggression and Pathological Process," Lawrence Eribaum Associates, 1987. Cf. Lori Carangelo *Chosen Children 2012; Billion Dollar Babies in America's Failed Foster Care, Adoption and Prison Systems,* Americans for Open Records (AmFOR), Access Press, Palm Desert, California, 68. http://www.amfor.net/ebooks/chosenchildren2012.pdf accessed 14 February 2013.
[2] Niklas Lumann, *Das Recht der gesellschaft.* Frankfurt: Suhrkamp, 1993, Engl: *Law as a Social System.* Transl. K A Ziegert, Oxford University Press.
[3] K Zweigert, *Theory and method of Comparative Law*, 3rd edn, Oxford, Clarendon Press, 1988. "The legal Families of the World, the Style of Legal families," pp63-73.
[4] SM Cretney, *Principles of Family Law*, 5th edition, Sweet & Maxwell, 1990, 657. Community Affairs Reference Committee *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (February 2012) Commonwealth of Australia 2012 [1.40] fn 19.

In contrast to Australian celebrity pro-adoption advocates[5] who promote adoption as an ancient practise and therefore legitimate,[6] adoption law is a relatively recent phenomenon. Its introduction across Australia in the 1920s provided a legal way in which infants could be removed from their mostly young and single mothers and placed in an unrelated and unconnected family. Private adoption had come to Australia with white settlement but its association with baby farming and its lack of any basis in law had always made it a disreputable business. It is only after the Great War, with artificial feeding much more fully developed, that legal adoption came to be seen as a way of placing ex-nuptial children in childless homes.[7]

Until the introduction of legislation in the mid-1970s that declared all Australian children equal in law, whether ex-nuptial or not,[8] the children of parents who were not married were considered in law as illegitimate.[9] Adoption legislation to "legitimate" such children by removing them from their mothers and families and placing them in the homes of married couples was first passed in New South Wales in 1923. When it was added to the statute books of the Australian Capital Territory in the 1930s the new legislation had became available throughout Australia.[10] Over the next thirty years all the Acts were subject to minor amendment but the basic common features remained little altered and, in the 1960s, more or less uniform adoption legislation was introduced throughout Australia. In New South Wales, 'between the time adoption legislation was first passed in 1923 until the 1965 Act more than 58,000 children had been adopted, echoing a similar growth in other states.'[11]

An apparent ambivalence about the effects of adoption was expressed in varying approaches to the questions of rights of inheritance.[12] Gradually secrecy was emerging as an issue as the various states moved from preserving the rights of inheritance from the birth parent, and

[5] Led by Deborra-Lee Furness wife of Hugh Jackman.
[6] http://www.adoptionawarenessweek.com.au accessed 14 February 2013.
[7] Audrey Marshall and Margaret McDonald, *The Many-Sided Triangle; Adoption in Australia* Melbourne University Press Victoria 2001, 38.
[8] E.g. NSW *Children (Equality of Status) Act 1975*; the *Family Law Act 1975*.
[9] Marshall and McDonald, 4.
[10] Ibid 31.
[11] Ibid 6.
[12] Ibid 31-2.

excluding the adopted child from automatic inheritance from the adoptive parents, to reversing the situation entirely. The production of the new adoptive situation was to be represented in the legal substitution of the birth certificate. By the 1960s 'official' advice was given in regard to the 'telling of the secret of adoption' to the adopted, the replacement birth certificate became more imitative of the original, and the adoption certificate was also adapted to make it as similar as possible to the birth certificate.[13] These legislative developments removed the identities of "illegitimate" infants and replaced them with artificial but "legitimate" identities: the second birth certificate had the names of the biological parent(s) replaced by the adoptive ones and the original birth certificate was secreted, along with all information about the family of origin, away from the adoptee for the duration of their life. Parliamentary debates had, at the time, expressed an anxiety that adoptees might "double-dip" in the estates of both their natural and adoptive families, thereby profiting from their own illegitimacy for which they were, to all intents and purposes, being punished by the loss of their mothers, families and identity.

However, after the introduction of these uniform adoption laws and their secrecy provisions in the 1960s, adoption only continued to increase for five years or so as a prelude to a very steep decline. "In 1972 there were 9,798 adoptions, which declined to only 576 in 2006. From today's perspective the 1972 adoption "peak" represents an astonishing statistic. 'Ironically, as it appears in retrospect, the legislative changes that took place throughout Australia during the 1960s were bringing adoption practice under effective control on the cusp of massive social change.'[14] A report by the Australian Bureau of Statistics attributes this rapid and dramatic decline in local adoption to the introduction of welfare for single mothers, increased legal access to termination of pregnancy, family planning services, access to child care and improved participation of women in the workforce. As a result, sexual relationships outside marriage became more tolerated, unmarried pregnant women faced far less censure, and their children

[13] Ibid 38.
[14] Australian Institute of Health and Welfare (AIHW) 2006. *Adoptions Australia 2005–06*. Child welfare series no. 39. Cat. no. CWS 27. Canberra, AIHW vii.

"in theory at least no longer bore the stigma of being illegitimate."[15] In adoption law during the 1970s the status of 'illegitimacy' for children born outside of wedlock largely disappeared, the term itself replaced by 'ex-nuptial.'[16] Recognition of the damaging effects of previous adoption policies had burgeoned and, beginning in the mid-1970s, all Australian states and territories reviewed adoption legislation, embarking on initially cautious reversals of previous secretive practices throughout the 1980s. The 1990s saw the beginning of the dismantling of the closed-records adoption system across Australia when records were opened for adoptees over 18 years of age to access.

The thirty years between the 1970s and the 90s, then, has been the period of greatest change in the law and practice of adoption during the past century[17] and had dramatic consequences, ending the era of adoption secrecy long practised and expressly confirmed by the uniform adoption legislation of the 1960s. As a result there has been a 17-fold decrease in adoptions since the 1970s which can largely be attributed to a decline in adoptions of Australian children. In contrast, the number of intercountry adoptions has tripled over the last 25 years with a dramatic proportional increase over this period from 4% of all adoptions in 1980–81 to 73% in 2005–06.[18] The invention, development and demise of the closed records adoption system was not the beginning and end of adoption in Australia, as international adoption from predominantly third world countries rapidly expanded in the wake of the reduction of local adoption to supply an increasing first world demand for babies.

iii Evidence from the recent enquiry into the Australian Commonwealth contribution to former forced adoption policies and practices

The impact of the invention of adoption law in Australia was revealed in 2012 when, following an eighteen-month inquiry, the Australian Senate Committee's Final Report on

[15] Marshall and McDonald, 9-10.
[16] Ibid 39.
[17] Ibid xii.
[18] Australian Institute of Health and Welfare, vii.

"Commonwealth Contribution to Former Forced Adoption Policies and Practices"[19] was tabled in the Australian parliament.[20] The report confirmed that "the primary objective of 20th century adoption legislation was to legalise child abandonment."[21] It found that an estimated 150,000 Australian babies born between the 1950s and 1970s were taken from their mostly young and single mothers and a "widespread" policy of forced adoption was "sanctioned by governments, churches, hospitals, charities and bureaucrats."[22] The Enquiry unearthed stories of young mothers who were tied to beds while their babies were induced, who had pillows placed over their faces or who never saw their babies before they were taken away, who were drugged or sedated and given lactation suppressants. Women told of signing adoption papers under heavy sedation when they didn't understand what they were doing, others that they were browbeaten over days, their signatures forged or not even collected, who were told lies that their babies had died only to discover years later they were alive.[23] The Enquiry was largely the result of the activism of mothers who had lost their children to the closed records adoption system but it has also thrown into light the issue of "infant rights:" to the new born infant *all* adoptions are forced adoptions whether their mothers feel they were forced to consent or not.[24]

The reality of babies' experiences of the permanent loss of their mothers at birth, and their subsequent experience as adoptees in the families of strangers, do not in any way accord with the shallow but widespread public conviction that adoption is a social good of mild effect. In

[19] Community Affairs Reference Committee, *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (February 2012) Commonwealth of Australia.
[20] Thomas Graham, "Breaking the Silence – Adoption Revisited" (Speech delivered at the University of the Third Age, Hughes Community Centre 17 July 2012), (2012) 4(1) *Australian Journal of Adoption,* 4: http://www.nla.gov.au/openpublish/index.php/aja accessed 14 February 2013.
[21] Origins Inc Supporting People Separated by Adoption: http://www.originsnsw.com/id60.html accessed 14 February 2013.
[22] Doug Conway, AAP Senior Correspondent "NSW says sorry for forced adoptions" (September 20, 2012): http://www.news.com.au/breaking-news/national/nsw-govt-to-apologise-for-forced-adoptions/story-e6frfku9-1226477703705#ixzz27B4YoT9o or http://www.news.com.au/breaking-news/national/nsw-govt-to-apologise-for-forced-adoptions/story-e6frfku9-1226477703705 accessed 14 February 2013.
[23] Ibid. See also Community Affairs Reference Committee *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (February 2012) Commonwealth of Australia.
[24] Parliaments of WA, SA, ACT, NSW; Catholic, Uniting, Anglican Churches and Salvation Army; and individual hospitals. The Victorian, Tasmanian and Queensland parliaments have flagged an apology to come with only the NT making no acknowledgment. Thomas Graham, editorial "Apology Season" (2012) 4(1) *Australian Journal of Adoption*, 1: http://www.nla.gov.au/openpublish/index.php/aja accessed 14 February 2013.

1958 John Bowlby published "The Nature of the Child's Tie to his Mother" in which the precursory concepts of "attachment theory" were developed.[25] He proposed that babies have an inbuilt need from birth to make emotional attachments because this increased their chances of survival[26] and the maternal bond was the strongest bond with its beginnings in pregnancy and the production of oxytocin during lactation "increasing parasympathetic activity, reducing anxiety and fostering bonding."[27] Claims for the effect of breastfeeding on the psychic development of infants were made in the 1930s by Margaret Ribble, a champion of "infant rights"[28] and breastfeeding has been reported to foster the early post-partum maternal bond via touch, response, and mutual gazing.[29] But such theories of infant attachment, including those of Anna Freud,[30] have been significantly distorted by pro-adoption "science." Anna Freud, in her study of post World War II orphans, had documented the benefits for babies who were allowed to attach to a single caregiver over time as opposed to those babies with absent or interrupted attachments so characteristic of the barracks system of orphanages. However, such studies came to be used by adoption advocates to support the idea that, as long as the attachment is secure over time, there is no difference between infant attachment to its own mother and infant attachment to *any other woman* who steps forward in her place.[31] In reality, infant attachments formed to strangers in lieu of the known mother are formed within an

---

[25] John Bowlby, "The nature of the child's tie to his mother" (London: 1958) 39 *International Journal of Psycho-Analysis* 350-73. http://www.psychology.sunysb.edu/attachment/online/nature%20of%20the%20childs%20tie%20bowlby.pdf accessed 14 February 2013.

[26] John Bowlby, *Attachment and Loss* New York: Basic Books 1969; John Bowlby *The Making and Breaking of Affectional Bonds* London Routledge 1990; Glenn Wilson and Chris McLaughlin, *The Science of Love* Fusion Press 2001.

[27] J Winkler, "Development of the Maternal Bond during Pregnancy" (January 19 2000) *Cas Lek Cesk* 139(1) 5–8: http://www.ncbi.nlm.nih.gov/pubmed/10750284 accessed 14 February 2013.

[28] Margaret Ribble, "The significance of infantile sucking for the psychic development of the individual" (1939) 90 *Journal of Nervous and Mental Disease,* 455–463.

[29] Nicole M Else-Quest, Janet Shibley Hyde and R Clark, "Breastfeeding, bonding, and the mother-infant relationship," October 2003, 49(4) *Merrill-Palmer Quarterly* 495-517. http://130.102.44.246/login?auth=0&type=summary&url=/journals/merrill-palmer_quarterly/v049/49.4else-quest.pdf accessed 14 February 2013.

[30] D Burlingham and Anna Freud, *Infants without families* Oxford, England, Allen & Unwin, 1944, 108; Joseph Goldstein, Anna Freud, and Albert J. Solnit, *Beyond the Best Interests of the Child* New York: Free Press, 1973, 17-20, 31, 40, 49, 105-106. http://pages.uoregon.edu/adoption/archive/FreudBBIC.htm accessed 14 February 2013.

[31] The Senate Report itself is the most relevant example of the distortion of the work of Freud and his daughter directly linking it with the "clean slate theory" used in the promotion of adoption. See Community Affairs Reference Committee *Commonwealth Contribution to Former Forced Adoption Policies and Practices* (February 2012) Commonwealth of Australia 2012 [2.16 - 2.17].

infant experience of grief and despair and are characterised by fear, insecurity and a desperate desire to avoid further loss or abandonment:

> Babies know more than they are supposed to know. Minutes after birth, a baby can pick out his mother's face – which he has never seen – from a gallery of photos ... The newly discovered truth is that newborn babies have all their senses and make use of them just as the rest of us do. Their cries of pain are authentic. Babies are not unfeeling; it is *we* who have been unfeeling.[32]

Nancy Newton Verrier argues that adoptees' subjectivity are marked by separation trauma, by what she has termed the 'primal wound:'[33]

> Our current understanding of prenatal psychology has made many realize that the environment in utero is an important part of a baby's well being. Yet, when it comes to adoption there 'seems to be a blackout in awareness. There seems to be a reluctance to recognise that at the moment of birth and the next few days, weeks, or months in the life of a child, when he is separated from his mother and handed over to strangers, he could be profoundly affected by this experience. What does it mean that we for so long have wanted to ignore this?[34] Perhaps the strength of this primal relationship has been underestimated because of the apparent adjustment many children make to the new environment. As adults we believe what we want to believe, and we want to believe that a child not causing any trouble is well- adjusted... Adjustment often means shutting down - creating a 'false self'... With the compliant adoptee, the problem is what *isn't* happening, rather than what is."[35]

[32] David Chamberlain, *Babies Remember Birth* Ballantine Books New York 1988.
[33] Nancy Newton Verrier, *The Primal Wound: Understanding the Adopted Child* Baltimore Gateway Press, 1993, 70. http://nancyverrier.com/the-primal-wound/ accessed 14 February 2013.
[34] Ibid 13.
[35] Ibid 33-34.

However such social and sscientific studies that find that the permanent removal of infants from their mothers after birth are traumatic for those infants and may have a life-long impact on their physical and mental health[36] subvert the dominant discourse surrounding adoption and are popularly suppressed in the broader community even to this day.[37]

2 Adoption Law and Systems Disjunction

i The gap between legal and biological systems

The impact of adoption legislation on the lives of specific individuals highlights a "gap" between legal and biological systems. Adoption law fails entirely to recognise the nature of the bond between a mother and her child after birth, and fails entirely to understand the nature of human attachment and identity. The history of illegitimacy reveals just how the "legal" violation of human rights known as adoption has been delivered so successfully on such a widespread and continuing scale to Western societies and, with its particular variation, to Australian society. Because the opposition to illegitimacy functions covertly as a support for its binary opposite, legitimacy, it also functions to actively and energetically create various illegitimacy problems, thereby defining what constitutes a legitimate culture.[38] It must be remembered that the concept of legitimacy is not a universal principle but a particular historical product of western intellectual culture.[39]

Philosopher Jenny Teichman argued in 1982 that what was needed to be investigated were not the causes of illegitimacy but 'the institutions that give rise to the legitimate/illegitimate distinction.'[40] The primary institutions that gave rise to the legitimate/illegitimate distinction were the institutions produced by the differentiation of political and economic systems but it is

[36] Verrier; See Dr. Dan Siegel *The Developing Mind: How Relationships and the Brain Interact to Shape Who We Are* 2nd edn Guilford Press 2012: http://drdansiegel.com/home/ accessed 14 February 2013.
[37] For example as part of the actress Deborah Lee-Furness' current pro-adoption campaign the impact on pro-adoption policies on pressuring women in third-world countries to abandon their children, in exploiting the poverty of women who place their children temporarily in orphanages, and in traumatizing women and children via separation is consistently downplayed: Adoption Awareness Week http://www.adoptionawarenessweek.com.au/Home accessed 14 February 2013.
[38] Gail Reekie *Measuring Immorality; Social Inquiry and the Problem of Illegitimacy* Cambridge University Press Cambridge 1998 183.
[39] Ibid.
[40] Jenny Teichman, *Illegitimacy. A Philosophical Examination* Basil Blackwell Oxford 1982, 10, 184.

the legal system, eventually autopoetic,[41] which had the primary function of declaring itself by the third party observer declarations of what is illegitimate, and therefore, legitimate. How positive law came to be applied to infants is revealed by the history of illegitimacy.

ii The invention of adoption Law as a solution to illegitimacy

From the sixteenth through the nineteenth century "bastard" children had to bear some sort of stigma or the mother would be insufficiently punished for straying outside the religious/economic/legal systems of patriarchal blood relations. The law clearly demarcated illegitimate children as having no natural connection to the social order[42] as in the United Kingdom's Poor Law of 1576, for example, where the bastard child was characterised not only as "an offence against God's lawe and man's lawe" but as "filius nullius," or 'nobody's child.' Classified as illegitimate in law the "permanent handicap of illegitimacy [was] primarily configured by the impossibility of inheriting land or wealth. Someone might choose to provide for the bastard, but the bastard had no legal right to demand anything more than the basics needed to survive."[43] In its attempt to exercise social control over the reproductive activity of women and secure the succession of land and wealth within strict patriarchal legal systems, the legal rendering of illegitimate infants as having no recognisable family connection created a different kind of economic problem: being 'filius nullius' effectively made illegitimate children wards of the state and a burden on local taxes which "was sure to make the unwed mother the target of financially driven, as well as moral, disdain."[44]

Legal systems may have operative closure but their impact is felt in multiple systems beyond its periphery, specifically, in the person system of the bastard in history who, as a consequence of their legal rendering, have a paradoxical relationship to the law: clearly outside of it and yet, at the same time, helping to maintain its hegemonic force by exemplifying the unenviable fate of defying the law of God and humanity in favour of anarchic passion. Born outside the rules,

[41] See Klaus A Zweigert, *Theory and method of Comparative Law: Towards a General Theory of Comparative Law* City University of Hong Kong law Review, 2013, p 9.
[42] Garry Leonard, 'The Immaculate Deception; Adoption in Albee's Plays' in *Imagining Adoption; Essays on Literature and Culture* ed. Marianne Novy University of Michigan Press Michigan 2001, 112.
[43] Ibid 112.
[44] Ibid.

bastards were feared because they seem to be in a position to make their own rules in defiance of the accepted order and may have no choice but to do so, since their connection to the accepted order is highly conditional. The paradox for the law, then, is that illegitimacy must be taken account of and must be subject to socially sanctioned rules, but not in a way that legitimates it.[45] "Texts which speak out in favour of illegitimacy do so with a consciousness of how useful it could be and with the imposition of clear conditions so as to channel its energy in support of the status quo.'[46]

What was needed, therefore, understood as early as the Renaissance but never institutionalised, was some process for reintegrating bastards into the legitimate community as a way of containing their subversive power. A way for society to force the bastard to accept his role as victim and accept the very laws that persecuted them, for a figure thus brainwashed would consolidate the legitimate hegemony. The solution was, eventually, disempowerment of the bastard by the removal of personal identity. While the bastard may be excluded from the legal order by a law that recognizes them only to the extent it delegitimises them, nonetheless their knowledge of their situation can embolden them to act in defiance of a law that says, technically, they do not exist. But what if a bastard has no knowledge of their biological origins? What if the people who raised them were, from a biological point of view, strangers?; what if the people who raised them had no knowledge of the their origins?; what if their biological relatives likewise had no knowledge of the their present whereabouts; and what if all of this information were kept somewhere under lock and key, with all three parties legally barred from having access? Then we would have the process of the closed-record adoption system.[47]
"we find little to fear from the biologically decontextualised adoptee, whose body, in the absence of any known - or, rather, any legally knowable – origin, can be chopped until it fits a Procrustean fantasy space, the dimensions of which are shaped by other people's self-delusions."[48]

[45] Ibid.
[46] Alison Findlay, *Illegitimate Power; Bastards in Renaissance Drama* Manchester University Press Manchester, 41.
[47] Leonard, 113.
[48] Ibid 116.

iii The rise of the nuclear family as (the only) normative value for family structure

This solution to the problems of ex-nuptial illegitimacy had a particular application in Australian law. In Australia, the nuclear family, "both as an ideal and as a partially-accomplished reality for large numbers of people, is of comparatively recent origin," developing into an idealised institution less than two hundred years ago, since the white colonisation of this country, and evolving in order to fulfill 'fairly discernible social and economic functions.'[49] The ability of prospective families to fulfill the nuclear ideal was made more possible by advances in artificial feeding which diminished the importance of the mother to the survival of the child for the growing Australian nation. 'Where the infant life protection campaigns at the turn of the century highlighted the role of the single mother in preserving the life of her much needed child, the principles of scientific mothering, which were so heavily promoted in the inter war years, effectively broke this bond.'[50] The effort which went into developing artificial substitutes for human milk 'made it possible for institutions devoted to the preservation of infant life to keep babies alive without their mothers' care.'[51] It is only after the Great War, with artificial feeding much more fully developed, that adoption came to be seen as a way of placing ex-nuptial children in childless homes.[52] Artificial feeding, while breaking the link between the single mother and her child, made it possible for other women to take over this role and as 'the demand for babies increased, the status of the single mother declined. No longer the 'poor, unfortunate', she came to be seen as 'unfit'.[53]

The post World War II closed-records adoption system developed as a "solution" to the three "social problems" of the single mother, the illegitimate infant and the infertile married couple, that so transgressed the rise of the nuclear family as a normative value. Until then, the predominant fate of illegitimate children may well have been the reincorporation of the child

[49] Ann Summers, *Damned Whores and God's Police; The Colonisation of Women in Australia,* Allen Lane London 1975, 168. See also Philippe Ariés *Centuries of Childhood: A Social History of Family Life* transl. Robert Baldick, New York Vintage Books 1962 and Eli Zaretsky 'Capitalism, the Family and Personal Life' Part 1 *Socialist Revolution* January-April 1973 69-125.
[50] Renate Howe and Shurlee Swain 'Single Mothers and the State 1912-1942' in *Journal of Australian Studies; Women and the State; a special edition,* 1993, 37.
[51] Ibid 37.
[52] Marshall and McDonald, 38
[53] Ibid 39.

into the family: the child brought up by married aunts or grandparents or some other relative that could preserve appearances. But from the first days of settlement in Australia until the first legislation on adoption in the 1920s, poverty, shame and disgrace also led some single pregnant women to desperate measures such as the use of "back-yard" abortionists, infanticide, the anonymous abandonment of their new-born babies or the use of the infamous baby famers.[54] However, instead of introducing measures in the best interests of mother and child by providing legal and financial support for unmarried mothers who did not have family support, measures finally introduced in 1973 much to the impairment of the adoption system, adoption law was introduced and developed to supposedly provide a safer, more humane and socially responsible solution to the problem of illegitimacy. The minimal income support provided by the state in the period between the wars meant single mothers were increasingly less able to care for their own children[55] and so the effect of the legalisation of adoption was not to legalise a practice in the best interests of the child but to entrench child-laundering, legitimating the separation of mothers and children.

iv Australian adoption law: the substitution of the "blood tie" with a legal bond

The creation of the legal norm of "adoption" has permeated Australian society to such an extent as to impact on the very foundation of familial systems. In Australia in the 1920s there had been some resistance to the trivialization of the importance of blood ties intrinsic to the adoption system and even by the 1960s this 'breaking of the blood tie creating instead a new legal bond required a conceptual and practical leap'.[56] But as adoption legislation became entrenched even families with the economic wherewithal to provide for an illegitimate child were convinced child abandonment to the adoption system was in the child's best interests. Despite the cognitive dissonance created by any instinctual awareness we may have that an infant's mother has been their whole world for nine months and her loss would be, to the infant, the loss of the entire world, and despite evolutionary studies suggesting that separated newborns experience their situation as life-threatening because that has always been the fate

[54] Ibid 2.
[55] Howe and Swain, 31-46, 34.
[56] Marshall and McDonald, 19.

of abandoned children in evolutionary history[57] (despite the odd "wolf-child" phenomenon), adoption discourse retains its power in the public imagination as advocating a social "good." Cognitive dissonance is reduced, not by sympathy toward the separated babies, but by the professed conviction that "babies don't remember."

This unrealistic public perception of adoption can be attributed to the modern rise of the epistemological theory of *Tabula rasa,* the "clean-slate" theory, which was used in the implementation of 19th-century racial theory positing a hierarchy of races based on skin color as justification for the removal of children under colonialism, the zenith of its use by the Nazi's in their *Lebensborn* program.[58] In Australia in particular such ideology holds sway in a history that has downplayed the importance of blood ties in the context of infant bonding in its enthusiasm for the removal of children from Aboriginal families which was backed from 1909 to 1969 by official government policy.[59] By the post-war period removing a child from its mother came to be seen as something that could easily be in the child's "best interests" merely because their mother was unmarried and despite families being in an economic position to bring up the child themselves.

v The legitimisation of Australian national culture

The legitimisation project also extends far beyond the individual family. Martine Spensky's[60] account of homes for unmarried mothers in 1950s England suggested that their adoption programmes were designed to produce socially legitimate children, marriages and families. It helped in the establishment of 'legitimate' culture and was packaged and presented as acceptable to community via, among others, the discourse of illegitimate birth. In this way the ideology that "babies don't suffer from separation, or if they do, don't remember" has been packaged and fed wholesale to the Australian public via, among others, the discourse of

[57] Bruce D Perry Md PhD and Maia Szalavitz, *The Boy Who Was Raised as a Dog and Other Stories from a Child Psychiatrist's Notebook: what traumatized Children can teach us about loss, love, and healing,* Basic Books New York 2006.
[58] Richard Grunberger, *The 12-Year Reich; A Social History Of Nazi Germany 1933-1945* Da Capo Press 1995, 246.
[59] The ReconciliACTION Network, "Stolen Generations Fact Sheet:" http://reconciliaction.org.au/nsw/education-kit/stolen-generations/#forced accessed 14 February 2013.
[60] Martine Spensky 1992. Cf. Gail Reekie, 181.

illegitimate birth. Jennifer Rutherford, in *The Gauche Intruder; Freud, Lacan and the White Australian Fantasy*,[61] terms such incidents of national cognitive dissonance the 'Great Australian Good:' the tendency to proffer a banner of 'caring' over the instigation of its opposite:

> This identification with the power to do good underpins the numerous attempts at social engineering that have characterized Australia's shady history of black/white relations: relations that have deprived Aboriginal Australians, at every turn, of their good. The intent to do good is the alibi that is called upon whenever this history of deprivation momentarily registers in the national consciousness."[62]

In analysing Australian national fantasies Rutherford claims 'we can see the way such fantasies disguise a lacuna, a trauma, that is foundational' in the Australian moral code at the heart of white Australian identity.[63] It "may be that there is some analogy between the ancient phrase of "filius nullius" applied to "bastard" children and "terra nullius" used in the context of Aboriginal land claims. As the legal category of 'filius nullius' has no basis in the biological reality of the infant, 'terra nullius' has no basis 'in ecological or cultural reality'.[64] Both legal namings are fantasies that simply deny the way the world was or is.[65]

3 The Lacuna in Adoption Law: The impact of the gap between legal text and illegitimate bodies on multiple adoptee systems

i Adoption: from legal fiction to normative reality

Of the parties in the "trifecta" of adoption: the "relinquishing" single mother, the (married) adoptive parents and the illegitimate infant, it was stated in adoption law that adoption prioritised the interests of the child. Yet adoption law not only clearly prioritised the best

[61] Jennifer Rutherford, *The Gauche Intruder; Freud, Lacan and the White Australian Fantasy* Melbourne University Press Melbourne, 2000.
[62] Ibid 26-7.
[63] Ibid 53.
[64] Kay Torney Souter, 'Babies in the Deathspace: Psychic Identity in Australian Fiction and Autobiography' *Southerly* Summer Vol 56 No 4 1996-97, 20.
[65] Marshall and McDonald, 4.

interests of the adoptive parents, but it also operated in direct contradiction to its professed purpose in the interests of the child, by imposing a normative system of infant cruelty via systems violence. The adoptee suffers trauma to organic and biological systems via permanent removal from the mother's body immediately after birth, trauma to identity systems via the "genealogical confusion" caused by the secreting and replacement of all identity information, and finally, emotional and psychological trauma from placement within a family of strangers which imposes yet another set of unpredictable traumas for the adoptee.

In the 1960s the 'enforcement of secrecy provisions was aimed at completely severing any connection [legal, physical, psychological and emotional] between the child and the natural family.'[66] The idea of a 'clean break' or a 'fresh start' was promoted as in everyone's interests, including the infants, and the biological demands of the infant body simply could not compete with the socio-historical-legal demands of the society that produced it. Here was the modern manifestation of that lacuna in the legal system begun with the categorisation of "filius nullius." However now the child was no longer simply "nobody's child" in name only, a child who was no-ones at law but who would likely have remained with their mother after birth to be surreptitiously provided for by their own family, but underwent an actual removal from its mother: the legal severance from biological parents had became a very real and permanent separation, no longer just a legal fiction.

As a result, the kind of adoption dominant in the mid-twentieth century... adoptees could learn little or nothing about their heredity. Closed adoption – its symbol the birth certificates that replaced the original names with the adoptive parents' name – went virtually unchallenged. Often, adoptees and their parents were expected to be silent about the very fact that they were an adoptive family. If adoption agencies succeeded in their ideal of matching the appearance of new parents and children, the adoption might well be invisible.[67] The "myth of

[66] Marshall and McDonald, 37.
[67] Marianne Novy, ed., *Imagining Adoption; Essays on Literature and Culture,* University of Michigan Press Michigan 2001, 5.

sameness"[68] under which adopted children were raised in this era had its direct expression in legislation: 'When an order of adoption has been made, *the adopted child shall, for all purposes… be deemed in law to be the child born in lawful wedlock of the adopting parents.*"[69] With small variations this form of wording was to be used in all the State and Territory Adoptions Acts, including that of South Australia in 1925, and in the adoption provisions of the New South Wales Child Welfare Act.[70] This declaration that the adopted child was the same as a biological child "for all purposes" extended so far into the culture surrounding adoption that many adoptees were not even informed they were adopted and remain ignorant to the fact to this day, at least on a conscious level. In many cases the adopted child was *expected* to be the same as a biological child. And of course, there seems to be no word of protest from adoptees themselves: The real power of the removal of children as a force of social control can be found in the extent to which communities can be inculcated into accepting it predominantly because the primary object of the adoption has not yet acquired language. The infant does eventually acquire language, but the trauma lies in the subconscious mind, and the familial and cultural systems do their work on educating the adoptee into accepting their own oppression. One consistent feature of the debates about the Poor Law Amendment is that while a great deal is said about the bastard, the bastard never speaks.'[71]

ii The international legal system, infant rights and the future of adoption law

The creation, development and dismantling of the closed records adoption system in Australia by Australian law has produced a demographic of adult adoptees who now have a voice. Coinciding with the disintegration of the damaging legal imposition of the illegitimate/legitimate binary upon the systems of ex-nuptial infants, international law has been acknowledging the rights of the child to be raised by their mother. The "Declaration of the Rights of the Child" drafted by Eglantyne Jebb in 1923 and adopted by the League of Nations in 1924 was the first effective attempt to promote children's rights on an international level. But it was not until the 1940s formation of the United Nations and its acceptance of the Declaration

[68] Leonard, 111.
[69] *West Australian Adoption of Children Act 1896* S7.
[70] Marshall and McDonald, 25
[71] Reekie, 115.

that the Children's Rights Movement has become global in focus concerned with the welfare of children targeted for forced labour, genital mutilation, military service, kidnapping and sex trafficking among other infringements of children's rights. When the Declaration was finally updated and adopted by the United Nations in 1959, Article 6 declared: "a child of tender years shall not, save in exceptional circumstances, be separated from his mother."[72]

The Declaration, of course, was not binding in Australian law but it was soon followed by the "Convention on the Rights of the Child"[73] which attempts to bind states to its terms. The Convention now guides international best practice in relation to working with and for children and since its adoption in 1989 has been ratified more quickly and by more governments than any other human rights instrument,[74] with the only two countries abstaining being the United States of America and Somalia. The reluctance of the US may have something to do with its multi-million dollar adoption system still in place today. Australia ratified the CRC in December 1990 and the Australian closed records adoption system would appear to be in violation of Articles 7, 8 and 9 if it were operating today.

Contrasting this move in international law to recognise a child's right to be with its mother is the *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*" which entered into force in 1995[75] and seeks to regulate international adoption. The Hague Convention came into force in Australia on 1 December 1998, implemented by the *Family Law Act 1975*[76] and the *Family Law (Hague Convention on Intercountry Adoption) Regulations 1998*. This convention further reinforces the norms of adoption on the international stage despite reminding governments in its preamble that "each State should

[72] United Nations *Declaration of the Right of the Child*, adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959: http://www.un.org/cyberschoolbus/humanrights/resources/child.asp accessed 14 February 2013.
[73] United Nations *Convention on the Rights of the Child* Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with article 49: http://www.hcch.net/index_en.php?act=conventions.text&cid=69 accessed 14 February 2013.
[74] Plan International Australia "Child Rights" 2010: http://www.plan.org.au/ourwork/child_centred_community_development/childrights accessed 14 February 2013.
[75] Hague Convention on Intercountry Adoption accessed 14 February 2013.
[76] *Family Law Act 1975* accessed 14 February 2013.

take, as a matter of priority, appropriate measures to enable the child to remain in the care of her or his family of origin."[77] The schizophrenic approach of international law to adoption reflects the domestic situation in many Western countries to this day. As adoptees the world over fight for their rights to information regarding their identity and access to their biological families, the myth of the clean slate theory persists and adoption discourse continues to be framed in benevolent terms. Yet scandal after scandal and the closure of various countries international adoption systems such as those of Russia and Ethiopia evidence the fact that the Australian experience of forced adoption as a solution to illegitimacy is not isolated but has parallels in the legal and social systems of other countries such as Ireland and South Korea and that the bright light of social enquiry has not yet shone quite so piercingly on international adoption systems.

Further, in Australia, the *Australian Citizenship Act 2007*, which simplified the process of obtaining Australian citizenship for children who were adopted overseas in accordance with the Hague Convention, has provided a brand new loophole for the laundering of children. Whereas the permanent separation of children from their families via adoption was introduced as a solution to the problem of "unwanted" children already conceived, surrogacy arrangements have suddenly arrived as the culmination of the clean-slate theory and all that is wrong in the mythology that an attachment to a stranger is just as good for an infant than attachment to its own mother. As Australians exploit the poverty especially of women in India, the children they obtain can be adopted and then brought into Australia without mention of the surrogacy arrangements. The lacuna in law in recognizing the fundamental life-giving bond between a mother and her own natural child has culminated in the acceptance by Australians that it is legitimate to *conceive* of a child in the full intention that it will be traumatised by the permanent removal from their mother after birth. The lacuna in the Australian legal system that denies the bond between a mother and her own biological child allows such practices to

[77] Hague Conference on Private International Law, *Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption*, 29 May1993, 33. http://www.unhcr.org/refworld/docid/3ddcb1794.html accessed 14 February 2013.

flourish even in the face of the law's own declaration that surrogacy, except for the rare cases of altruistic surrogacy not for financial reward, is illegal.

Where adoption is the ethically dubious product of the legal system's legitimate/illegitimate dichotomy applied to infant bodies, legalised surrogacy is the entirely unethical result of the myth that this legal system has created: that babies need no longer be members of the post-natal mother/child body - modern, yes, but dehumanising to say the least. It is of great urgency that society re-orientates itself back toward the acknowledgement of our reliance on biological systems: whether it be the post-natal mother/child body or the ecological system of the human environment suffering under the climate change impacts of modernisation. It seems the process of modernisation has been liberating in many respects but, taken to the extreme, 'liberation could be so relentlessly modernising as to cut people off from the ways of their ancestors and take away their reasons for living.[78] The only way forward is for all law, Australian domestic and international law, to expressly recognise the particular unique characteristics of a mother's bond with her own biological child and in this way, re-orientate societal norms that have so drifted away from the needs of the biological systems of infants. This is best achieved by an explicit acknowledgement of the rights of a child to remain with and be brought up by their own mother.

[78] Declan Kiberd *Inventing Ireland The Literature of the Modern Nation* Vintage London 1995, 295.