Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters
by Lynn D. Wardle

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Promoting the Best Interests of Parent-Deprived Children Growing Up In A World of Diversity
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1Professor of Law, J. Reuben Clark Law School, 518 JRCB, Brigham Young University, Provo, UT 84602. Eliza Cicotti and Lanni Elaine Jones provided valuable research assistance, and Marcene Mason rendered valuable production assistance. Some parts of this paper were presented at 2001 World Congress on Family Law and the Rights of Children and Youth, 19-22 September 2001, in Bath, England, and at the European Regional Conference of the International Society of Family Law on The Role of Self-Determination in the Modernisation of Family Law in Europe, Tossa de Mar, Girona, Spain, October 9 – 10, 2003.
I. Introduction: Parentless in the World Today

A. Definition and Types of Parentlessness

Parentlessness is a great problem of global concern as well as of domestic interest. As we open this conference it is appropriate to briefly define and describe what is meant by “parentlessness.”

Parentlessness refers to the condition of children who lacks the present and long-term care and direction of their parents.\(^2\) Parents are the father and mother of a child who have and exercise legal and social responsibility for children – to support, educate, love, nurture, and rear them as members of their family.\(^3\) The most needy and vulnerable parentless children have neither mother nor father. Children growing up with only one parent are a second category of partially parentless children. While their vulnerability is generally less severe than that of children who have no living parent, children raised by just one parent are generally at significant disadvantage in terms of economic, educational, and social opportunity and well-being.

Children who are orphans, often the left-behind victims of war, famine or diseases that have killed one or both of their parents, suffer the most extreme form of involuntary parentlessness (their parents did not choose to leave them). While death causes the most permanent form of parentlessness, there are other causes of partial or total parentless including legal and social barriers that separate one or both parents from the child, and individual adult circumstances or choices that cause them to be unable or unwilling to provide consistently for the needs of a child. Social-choice partial parentlessness is a growing phenomenon in many

\(^2\)See infra note __ [Wong] and accompanying text. *

When relatives, communities (such as religious, tribal, ethnic, town, and other cultural subgroups) or nations do not provide some effective form of substitute parenting for parentless children, the children are at extreme risk. Often, they become “homeless persons” or “street children.” Groups of parentless children may provide some care and protection for the individual members, and “many street children feel that other children within their street child group are ‘like a family.’” Likewise, parentless children in refugee camps “[o]ften . . . band together to form new care groups in refugee camps led by an elder girl child for their protection and survival.”

B. Scope of Parentlessness

(1) Global Involuntary Parentlessness

The scope of global parentlessness today is staggering. While the exact number of parentless children today is not known, “UNICEF estimates about 100 million street children exist in the world today. About forty million are in Latin America, twenty-five to thirty million


in Asia, and ten million in Africa.”7 It is said that in Bogota, Colombia, 200,000 abandoned street children roam the streets.8 “The number of street children is predicted to grow by tens of millions as poverty in the Third World becomes increasingly urban-based . . . .”9 “In Mexico City . . . with a population of 23 million, . . . 13,000 children . . . live on the streets . . . .”10

The plight of parentless children is extreme. Many parentless children are unable to survive - they die, and often not tidily, not anaseptically, not with dignity, but horribly of starvation, with bloated bellies, listless, bony bodies, and huge pain-drenched eyes, with cries of hunger and fear. Their suffering and death stuns us and shames us. The U.N. estimates that approximately 50,000 human beings die every day as a result of poor shelter, water, or sanitation,11 and parentless children are especially vulnerable to these ravages.

Disease and starvation are not the only mortal threats that parentless children face. It is reported that in Colombia, “over 2,190 street children were murdered in 1994, an average of six

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7Susan O'Rourke Von Struensee, Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights, 18 Suffolk Transnat’l L. Rev. 589, 616-17 (1995). See also Seitles, supra, at 159. Actually, the 100 million figure is not just children, but is mostly women and children.


10Lopez, supra note __, at 619.

children per day.” 12 Likewise, the “U.S. State Department reports . . . that street children in Honduras are often tortured and killed by Honduran police officers.” 13 Similarly, Guatemalan street children often experience violence including beatings and sexual assault by private security guards who report to the Interior Ministry. These children are persecuted for their homeless status under the auspices of what the police deem to be "creating a public scandal.” “In December 1999, the Inter American Court of Human Rights ruled that two police officers were responsible for the 1990 deaths of five street youths and that the Guatemalan government had failed to protect the rights of the victims.” In Albania, children are exploited rather than protected by the police. “There are approximately 800 street children in Tirana. Trafficking in children for sex and, to a lesser degree, for begging rings was a serious problem . . . . Albania is a country of origin and a transit country for trafficking. Police corruption and involvement in trafficking was a problem.” Reports have been made of abuse of Brazilian, Colombian, Indian, Kenyan, Egyptian, and Sudanese street children. Human Rights Watch notes in some countries the “notion of social cleansing” is applied to street children even when they are not distinguished as members of a particular racial, ethnic, or religious group. Branded as “anti-social” or demonstrating “anti-social behavior,” street children are viewed with suspicion and fear by many who would simply like to


see street children disappear.14

Death is not the only danger facing parentless children. Somehow, millions of parentless children survive - but when deprived of security, of education, and of protection many parentless children join the illiterate masses who live only from day to day. Unable to develop skills, many are unable to provide more than subsistence for themselves and their families, much less to contribute to the strength and improvement of their nation and society. Parentless children are easy targets for exploiters, and often they are victims of child labor,15 According to the International Labor Organization, there are now approximately 250 million working children aged between five and fourteen, of which at least 120 million are involved in full-time work that is both hazardous and exploitative.16 In the year 2000, it was estimated that “111 million children [employed] in hazardous occupations were below fifteen years old, a majority of them boys. Beyond hazardous work, about 5.7 million children work in forced or bonded labor situations . . . .”17

Parentless children also are prey for child sexual exploitation (both prostitution and

14 Seugling, supra note __, at 885-86.


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They are the fodder of illicit enterprise, used, abused and discarded. The ILO estimates that about 1.8 million children world-wide work “in prostitution or pornography, and about 600,000 in other illicit activities. Of these, at least 1.2 million children were probably ‘trafficked,’ that is, sold into slavery as economic goods.” One study of street children in Guatemala reported that 93% of the street children surveyed had sexually transmitted diseases, and 90% of the children were drug users. Parentless children are also exploited in war.

A global survey conducted by the Coalition to Stop the Use of Child Soldiers reported that “more than half a million children were subject to recruitment into national armed forces, paramilitaries, or non-state armed groups in a total of eighty-seven countries, and at least 300,000 of these children were actively participating in armed conflicts in forty-one countries.”

In short, “[t]o be a poor child who lives with little or no family guidance or support is to live daily with the threat of murder, disease, malnutrition, physical and sexual abuse, prostitution, pornography). They are the fodder of illicit enterprise, used, abused and discarded. The ILO estimates that about 1.8 million children world-wide work “in prostitution or pornography, and about 600,000 in other illicit activities. Of these, at least 1.2 million children were probably ‘trafficked,’ that is, sold into slavery as economic goods.” One study of street children in Guatemala reported that 93% of the street children surveyed had sexually transmitted diseases, and 90% of the children were drug users. Parentless children are also exploited in war.

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\[\text{\footnotesize\textsuperscript{18}}\text{See generally Royce Bernstein Murray, Note,} \textit{Sex for Food in a Refugee Economy: Human Rights Implications and Accountability}, 14 Geo. Immigr. L.J. 985 (2000).\]

\[\text{\footnotesize\textsuperscript{19}}\text{Failinger,} \textit{supra} \text{note } \text{\footnotesize\textsuperscript{16}}, \text{at 1035, citing ILO data.}\]

\[\text{\footnotesize\textsuperscript{20}}\text{Seitles,} \textit{supra}, \text{at 163.} \text{In the United States, it is said that 75\% of street children are drug abusers. Marcia Johnson,} \textit{Juvenile Justice}, 17 Whittier L. Rev. 713 (1996), citing Mitchell Rosenthal,} \textit{In Opposition to Drug Legalization}, 24 U.C.DAVIS L.REV. 637, 640 (1991).\]

\[\text{\footnotesize\textsuperscript{21}}\text{Maria Bucci, Note,} \textit{Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States}, 30 New Eng. J. on Crim. & Civ. Confinement 275, 300 (2004). \text{See also id. (“The Democratic Republic of Congo presents one place where children are coerced into the military. The governments of Uganda and Rwanda support rebel groups, and the United Nations reported that between fifteen to thirty percent of new military recruits were under the age of eighteen, and many were under the age of twelve.”); Failinger,} \textit{supra} \text{note } \text{\footnotesize\textsuperscript{16}}, \text{at 1035, citing ILO data. (estimating 300,000 child soldiers).}\]
Tragically, in many countries, parentlessness is caused and perpetuated by government policies. One of the most memorable example of the plight of parentless children in our lifetime is the case of the horrible state-run institutions for unwanted children in Romania that came to light about 1990. One report summarized:

“Children here are filthy and unattended. They lie in their own waste, covered with flies. Young girls, their heads shaven, were kept in a giant cage like animals: wild-eyed, screaming, half-naked.” The New York Times made a similar report on the home in Plataresti, Romania. One room contained twenty-five children who wallowed in urine-sodden diapers and bedding, two to a crib, without a toy. There was one attendant for every twenty children, but the attendants were untrained. Because light bulbs were not available on the market, the light bulbs were all stolen out of the nursery, so that every night the children had to manage in the dark. The Washington Post reported on Romanian “warehouses for children”: “[F]ood is sometimes served by throwing it on the floor. Staffers hardly know their charges' names, much less their medical problems.” A visiting French medical team reported that the mortality rate among the children is very high: “[T]hey die of hunger, of very dirty environments, of nobody touching them and of never getting out of their beds.”

Many of these children die; others stay in the foster factory until they are old enough to venture out on their own (perhaps as "street children"), and some are

adopted.”

“The babies [found in the Romanian orphanages] d[id] not cry, however, because they ha[d] learned that noone will respond to them.”

“The psychological phrase for this condition is ‘reactive attachment disorder’ – a child with this disorder has an impenetrable resistance to bonding. [T]hese children have learned interaction styles that are appropriate in the institution but maladaptive outside it.”

The orphans found in the Romanian orphanages were “nearly all affected with reactive attachment disorder . . .”

Ironically, the response of outraged persons around the world to the shocking condition of orphans in Romania was so great that it generated a chaos of well-intentioned persons (mostly from America and Western Europe) attempting to personally provide protective removal of children without any effective adoption laws or legal system to provide order. Now, tragically, in counter-reaction, policies have been enacted in Romania that again perpetuate parentlessness by discouraging and excessively restricting legitimate, responsible international adoption.

The global crisis of children growing up with parents has many causes. Historically, one major cause of the tragedy of parentlessness has been untimely parental death - the parents have died from disease, war and crime. One of the most tragic evils of war is that so many children are left orphans or fatherless semi-orphans, and many others are separated from their families

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23D’Amato, supra, at 1240-41.


25D’Amato, supra, at 1240.

26D’Amato, supra, at 1240-41.

27** NCFA report.
and do not know how or where to find them. It is estimated that “[i] the last decade, armed conflict killed two million children, disabled four to five million children and left twelve million children homeless.” For example, it is estimated that most of the 500,000 refugees who fled Kosovo were children, and that one-fourth of all children in Uganda are orphans. “[T]here are more than 34 million refugees and internally displaced people worldwide; approximately 80% of them are women and children.” Ironically, not only does war leave many children orphans, it often turns orphaned children into soldiers. “[A]t least three hundred thousand children, some as young as eight years old, currently serve in armed conflicts around the world.” Children separated from their parents by war also are effectively orphans. According to a UNICEF report, The State of the World's Children 1996, during the decade prior to the report, a million displaced children were “unable to locate their parents.”

Parentless is also caused by poverty - the parents are so poor they are unable to provide

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28 Petar Sarcevic, *.

29 Amy Beth Abbott, Note, Child Soldiers - The Use of Children As Instruments of War, 23 Suffolk Transnat'l L. Rev. 499, 500 (2000). In 1995, UNICEF issued a report that portrayed an even more distressing picture. “Children have been the most tragic casualties during the past decade, with more than 1.5 million killed, more than 4 million wounded or disabled, and some 12 million left homeless. Ten million children are believed to suffer war-related psychological trauma.” UNICEF, Children Are Our Future: World Summit for Social Development 3 (Copenhagen Denmark, 1995), cited in Crystal J. Gates, 1999 Immigration Project, Working Toward a Global Discourse on Children’s Rights: The Problem of Unaccompanied Children and the International Response to their Plight, 7 Ind. J. Global Legal Stud. 299, 317 n. 132 (1999).

30 Hubing, supra, at A.1.


32 Abbott, supra, at 500.

or care for their child or children who are abandoned to the streets. For example, it is reported that in Brazil there are seven million (7,000,000) “meinos da rua” (children of the street) who constitute a serious problem for law and order. It is alleged that over 4,000 children sleep on the streets every night in Rio de Janeiro, and similar numbers can be found in other large cities throughout Latin America.

Sometimes other external circumstances that afflict the parents prevent or impede parenting. Parental illness, addiction, disability, or incarceration may leave children without any real parent. It is reported that there are “thirteen million children under the age of fifteen who have lost one or both parents to AIDS.” “Studies in Tanzania report that nearly 30% of street children cited being an "orphan" or "abandoned" because of AIDS as one of their reasons for being on the street.”

(2) Social-Choice Parentlessness in the USA

Parentlessness is not a just a problem of third-world countries. While disease, famine, poverty, and war are not the major causes of parentlessness in affluent western countries as they

34Margaret Liu, *International Adoptions: An Overview*, 8 Temp. Int’l & Compar. L. J. 187, 187 (hereinafter “Liu”). It is alleged that annually 1,000 of these street children are killed by “death squads of off-duty police officers who have been hired by shopkeepers to clean up the streets.” *Id.*

35Seitles, *supra*, at 162.


are in less-developed nations, there are parentless and partially-parentless children in even the most affluent nations. Ironically, parenthood in the United States of America is growing, despite the almost unparalleled affluence, health, education, economic and political advantages and resources. Social practices and adult lifestyle preferences in the United States have produced children who are totally and partially parentless.

Apart from death or disability of one parent, partial parentlessness may result from (1) birth out of wedlock, (2) divorce or separation of the parents, (3) other one-parent or one-gender childrearing arrangements. These “social choice” causes of partial parenthood account for a substantial amount of childrearing in America. One-third of all children born in the United States today are born out of wedlock – in the year 2000 alone, there were over 1.3 million children born out of wedlock.\(^{38}\) Approximately 1 million children (up to 1.5 million children) experience parental divorce each year in the United States,\(^{39}\) and “[p]arents with young children are the fastest growing segment of the divorcing population, presently constituting the majority of those who are divorcing in the 1990s.”\(^{40}\) Use of artificial procreation by same-sex couples is

\(^{38}\)U.S. Census Bureau, ___*; Statistical Abstract of the United States, ___*.


experiencing a mini-boom, and the most calculations using reliable Census data indicate that between 300,000 and 400,000 children are being raised by about 160,000 same-sex couples. Adoption by same-sex parents is not only increasing, but is a subject of ongoing legal policy debate and controversy.

Social-choice partial parentless in America does not present the immediate threat to life, health, and opportunity that war, famine, extreme poverty, and disease present to parentless children in third world countries. Nonetheless, the deprivation and disadvantage experienced by the child, and the impact of co-parental loss upon future generations is no small matter, either.

An interagency national government forum on children in America recently reported:

Family structure is associated with the economic, parental, and community resources available to children, as well as their overall well-being. On average, living with two parents who are married to each other is associated with more favorable outcomes for children both through, and independent of, higher income that characterizes these families.

The federal inter-agency report also noted that in 2003, only a little more than two-thirds,

\[\text{10-12 (in press).}\]

\[\text{42 Id. at 12-13 (estimating based on 2000 Census records that about 6,500 adopted children of same-sex couples among the 53,000 adopted children living with unmarried partners).}\]

\[\text{43 See, Lynn D. Wardle, Preference for Marital Couple Adoption – Constitutional and Policy Reflections, 4 J. L. & Fam. Studs. 345 (2003); ***}\]

specifically, “68 percent of children under the age 18 lived with two married parents, down from 77 percent in 1980. However, the percentage has remained stable since 1995, ending a long-standing downward trend.”46 In other words, nearly one-third of all children under age 18 in America are being raised partially parentless, by just a single parent, without the benefit of both a father and a mother.

Since social-choice parentlessness results from deliberate decisions made by at least one parent, sometimes both parents, to separate the child from the consistent, daily, parental influence of the other parent, to make one parent an absent, or infrequent parent, in some respects it is an even more poignant form of parentlessness than the parentlessness of war orphans, AIDS orphans, and the orphans left by famine. It connotes a form of direct parental rejection by the absent parent, or indirect parental rejection by the excluding parent (whose choice deprives the child without his or her consent of the parental involvement of the other parent). Thus, social-choice parentlessness may wound and undermine a child more deeply than the terrible forms of involuntary parentlessness that plague third-world countries.

Social-Choice Parentless is not the only form of parentless in the United States. Some children in the United States of America and other affluent countries are victims of involuntary parentless – the death or disability of one or both parents. Sometimes they are fully or partially parentless because of poverty or family breakup or dysfunction. For example, homeless youths are the most visible sign of a much larger problem.47 Homeless youths are defined as

46Id.

47Homeless children in America “are called street kids, runaways, throwaways, missing children, unaccompanied minors, and unaccompanied youths. [They are] separated from their parents or guardians because of conflicts, abuse, neglect, or other family or guardianship dysfunction.” John Wong, et al, The McKinney-Vento Homeless Assistance Act – Education for Homeless Children and Youths Program: Turning Good Law Into Effective Education, 11 Geo.
“individuals under the age of eighteen who lack parental, foster, or institutional care.” The McKinney-Vento Homeless Assistance Act's definition of unaccompanied youths includes a youth “not in the physical custody of a parent or guardian.”

It is estimated that 5% of young people in America aged 12-17 are homeless youths.

By the very nature of the phenomenon, it is difficult to estimate how many homeless youths there are. The National Runaway Switchboard estimates that there are 1.3 million runaway youths in the United States. In 1999, The U.S. Department of Health and Human Services estimates that from 500,000 to 1.5 million children and youths run away from home each year. Technically called "throwaways," approximately 3% of runaways are abandoned--expelled from home and kept away from home by the parents.

There are many causes of homelessness among youths. The Child Welfare League of America cites studies that indicate that “38% of runaway and homeless youth reported emotional abuse by a parent figure,” “46% had been physically abused, and 17% had been forced into unwanted sexual activity by a family or household member.” Many unaccompanied youths have unsuccessful experiences with foster care. Thirty-eight percent of homeless youth have had at least one
In 2001, the U.S. Conference of Mayor’s survey of homelessness in 27 cities found that children under the age of 18 accounted for 25.3% of the urban homeless population. This same study found that unaccompanied minors comprised 4% of the urban homeless population. Some studies of other areas, including rural locations, estimate higher rates of youth homelessness. “On a national level, approximately 39% of the homeless population are children (Urban Institute 2000).” In 2002, families with children accounted for 41% of the homeless population of approximately 2.3 million persons at any given time, according to the Child Welfare League of America. The CWLA also reports that approximately 12% of homeless children are eventually taken into the state foster care system. At any given time, more than 500,000 children in the United States are being raised in state-run foster care programs apart from their parents.

II. International Adoption As A Progressive Partial Solution to Global Parentlessness

Adoption provides a progressive, proven, at least partially-effective solution to the problem of global parentlessness. International adoption offers relief, and hope for many

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50 Wong, et. al., supra note __, at 288-89.


52 Id.


54 Id.

55 See infra, note __ and accompanying text. See also Forum, supra note __, at __; CWLA, supra note __.
parentless children in countries where circumstances limit the possibility for domestic adoption.

A. Definition, History, and Purpose of Adoption as a Remedy for Parentless.

Adoption is a legal procedure whereby a parent-child relationship is created between a child and non-parent adult(s) and whereby the parties are treated in law as if they were actually parent(s) and child. As the California Supreme Court put it: “The main purpose of adoption statutes is the promotion of the welfare of children ... by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child [.] ... which is attainable through actual adoption . . . .”

Historically, some form of adoption has been known since at least Biblical times. In Roman law, adoption was used primarily for the purpose of providing heirs for the adult adopters, or to provide for a particular political succession, and the adopted “child” was often an adult. Most European countries, whose laws were influenced by Roman law, continued to allow adoption primarily or exclusively to satisfy adult concerns about inheritance, continuity, and succession. In other countries, such as England

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57“Adoption as a practice is certainly as old as the human race. . . . Hammurabi's Babylonian code, the oldest set of written laws, spelled out guidelines for the adoption practice.” Brett S. Silverman, The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?, 39 Fam. & Conciliation Courts Rev. 85, 85 (2000). Reference to a form of adoption in the Bible is in Exodus describing how Pharaoh's daughter took Moses and raised him “and he became her son,” but Moses knew and never forgot that he was an Hebrew. Exodus 2:1-12. Greek mythology tells that Hercules was the adopted son of Hera, and that Oedipus was taken in and raised by King Polybus and Queen Merope of Corinth after he was abandoned by his father who had been warned by the Oracle at Delphi that he would be killed by his son.
where the common law prevailed, adoption historically was not known. 58

A profound re-orientation of adoption occurred in the middle of the nineteenth century beginning with the enactment of child-welfare-focused adoption laws in Massachusetts in 1851. 59 The primary, dominant, motivating purpose of adoption American-style was to provide parents for parentless children. Secondarily, but simultaneously, adoption also fulfilled the reciprocal aspirations of childless parents for children. 60 Thus, the heart of this child-centered model of adoption was the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and child(ren) in a birth (natural) family.

By the early part of the twentieth century, child-welfare-oriented, imitative adoption had become the dominant paradigm for adoption, replacing the old adult-centered, property- or status-transmission focus. By mid-century, this model of adoption was recognized, if not adopted, in most countries around the world. After World War II, when many service men or women and other citizens from affluent nations living abroad, saw the plight of parentless children, the use of adoption to provide homes for orphans took on an international dimension. 61


59See infra note __.

60Lisa K. Gold, Comment, Who’s Afraid of Big Government? The Federalization of Intercountry Adoption: It’s Not As Scary As It Sounds, 34 Tulsa L.J. 109, 110 (1998) (“Modern adoption and particularly international adoption, now serves a more reciprocal function of meeting the needs of children who would otherwise be without homes and families, as well as the adults who would otherwise be without children.”).

Because the countries where the crisis of parentless children was greatest and most obvious were poor (including then-war torn, defeated) countries, and the countries where parents were most able to provide parenting for needy children were in affluent countries, the flow of parentless children from third-world to post-industrial countries via adoption began. The number of intercountry adoptions rose from zero in 1940 to approximately 20,000 at the end of the twentieth century.

**B. The Value of Imitative Parenting Adoption.**

When a parentless child cannot be taken into the home of a responsible and loving relatives, adoption by other willing and able parents is the next best option. Placement of a child into an imitative family environment with legally-designated parents is proven and universally acknowledged to generally provide the best solution to protect the interests of the parentless child.

Studies have shown that transnational adoption has been extraordinarily successful in enabling even children who have suffered extremely severe forms of deprivation and abuse in their early lives, that could be expected to cause difficulties in development, to recover and flourish. For example, one major study of children caught up in the Vietnamese War who arrived in Norway for adoption at ages ranging from two to five, reported that when those children arrived, “‘[m]any could not walk. They were passive, apathetic, retarded and malnourished.’” [Fifteen-plus years later], those children were found to be in remarkably good

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62 Bartholet, supra, at 181; Hubing, supra, at 660-663.

63 Hubing, supra, at 660; Hillis, supra, at 239, n. 17; Bartholet, supra, at 183. Undoubtedly there were some incidental intercountry adoptions before the end of World War II, but those were not reported and there was no system or structure for transnational adoption.
shape: they were basically well-adjusted and strongly attached to their families.”64 Thus, imitative adoption is proven to provide maximum life-development benefits for parentless children.

Imitative adoption has been described as “the ‘perfect solution’ to the dilemma of parentless children and childless want-to-be parents . . . .”65 It is “perfect” for the child because it affords the parentless child a parent-led family environment which generally provides the child with the optimal, individualized, love-driven parenting. It provides the parentless child with the closest “cloned” relationships he or she would have had if intervening circumstances or failures had not led to parentlessness.

C. Alternative Remedies Are Less Beneficial to Parentless Children Than Adoption

Adoption is not the only possible response to the dilemma of parentless children. At least four other solutions historically have been practiced and must be considered. The first option is for the child to be taken in by members of his or her extended family. This is the preferred solution because it assumes an existing family connection to build upon, and if supported by some legal reinforcement (such as some form of adoption or legal guardianship) may provide the optimal affective and legal protection for the parentless child. Thus, in all international instruments,66 as well as in many national adoption laws, placement of the parentless child with


66See infra notes ___ to ___ and accompanying text.
relatives is the first and preferred step to provide for the child. But this solution is almost always unavailable for the parentless children of the world today. That is, since there are natural family ties between the child and the relatives, if those relatives exist, are known, and have resources sufficient to provide for the minimal needs of the parentless child, the child usually will be taken in as a natural matter of course, before and without intervention by governmental or private child-protection agencies; if extended family are available, the child will not become (or long stay) parentless. Thus, by definition, children who are parentless are generally without the first, preferred option of being raised in the parent-led home of family relatives.

Second, institutionalization of parentless children has been another alternative that has a long history. Institutionalization “is far more common than foster care in the poor nations of the world.” A Report of the Hague Conference on the condition of parentless children noted that institutions like orphanages are “often poorly staffed, managed and supervised, [yet] are a major, perhaps the major, ‘source’ of children being adopted abroad.” Institutional care has a dismal long-term record in improving the condition of parentless children. Experience in a variety of cultures – from Dicken’s England to the Romania of the 1990s – has shown that more than short-term institutionalization of parentless children frequently and quickly degenerates into institutionalized child abuse. For example, a recent report described the plight of children found in Romanian orphanages:

For the tens of thousands of Romanian children living in orphanages, . . . [the conditions in which they live are deplorable, while their chance of "escape" is limited by

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67 Bartholet, supra, at 196, n. 39.


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bureaucratic red tape and nationalistic beliefs. The 379 orphanages are often over one hundred years old and lack hot water, proper sewage facilities, and heat. The children “spend aimless hours in the dirt yard of their fenced institution, or roaming the peeling corridors of a dormitory that reeks of sewage and mold.”

In some Romanian orphanages, as many as half of the children died during the winter of 1989-1990. Yet, “[e]ach year, hundreds of thousands of children languish in foster or institutional care worldwide, while at the same time, thousands of adults, married and unmarried alike, are denied children because of ‘shortages.’” Orphanages may result from ill-considered government policies. That is in part the cause of the Romanian tragedy. China’s one-child policy is said to be responsible for approximately 100,000 Chinese orphans living in overcrowded state orphanages, and it is reported that ninety-eight percent of those orphans are girls. Thus, as a permanent or long-term general solution to the problem of parentlessness, institutional child-care generally is not very promising.

A third alternative is foster care. Foster care varies tremendously; in its best (but rare)


70 Bogard, supra at 571, citing Williams, supra, at A1.


72 Hubing, supra, at __, n. 52.

form, it is almost equivalent to adoption, involving a long-term placement of a child with a family, with parents to care for the child, who treat the child as their own, and who receive some form of government subsidy for the service. More often, however, foster care is a euphemism for cottage-industry-level institutionalization, with children being farmed out to live with a band of parentless children in a small-scale orphanage run by a small staff of under-resourced adults. In some cases, they are little better that “foster factories.”

Foster care does little to improve the childhood or adult life-prospects of parentless children. For example, foster care in the United States is a heavily-subsidized, heavily-regulated, state-run, long-established approach to providing for the needs of parentless children (most deprived of parents as a result of alleged abuse or neglect). But foster care is perpetually in need of reform, and operates as a perpetual-but-impermanent limbo for many parentless children. In 1998, 520,000 children lived in state-regulated out-of-home, family foster care programs in the U.S.A.. Forty percent of these children are never returned to their birth families. The average time that children remain in foster care is now 33 months and those children averaged 3.2 different foster placements during that time.

In 1998, approximately 37,000 children in foster care were legally available for adoption in the United States, but every year about 20,000 foster children exit the foster care system by

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74 D’Amato, supra, at 1240-41.


reaching the age of majority, without having been adopted.\textsuperscript{77} In 1996, 27% of homeless adults “reported having lived in foster care, a group home, or other institutional setting for part of their childhood.”\textsuperscript{78} Thus, even the best foster care is often a ticket to poverty and deprivation. As Harvard Law Professor Elizabeth Bartholet has observed: “Foster care is available only to a limited degree and sometimes results in little more than indentured servitude. . . . A permanent adoptive family is vastly preferable from the child's perspective to even the best foster or institutional care.”\textsuperscript{79}

A fourth response to the global problem of parentless children is to try to change the overall social, economic or political problems that cause the parentlessness – premature death, poverty, abandonment, and child-bearing out of wedlock, and irresponsible parenting system, or to alleviate the starvation educational and medical neglect and child labor and sexual exploitation of parentless children. This is a laudable approach to addressing some of the plight of parentlessness, and may hold some promise for reducing the numbers of parentless children in future generations, but it does not address the needs of millions of living parentless children for parents now. Providing resources to ameliorate a few specific needs (food, clothing, medicine, education) of parentless and other needy children is wonderful, but it is not and can never be sufficient.

Thus, the alternatives to adoption are not comparable in terms of potential and actual benefits delivered to parentless children. The alternatives to adoption are generally inadequate,

\textsuperscript{77}Mangold, \textit{supra}, at 839.


\textsuperscript{79}Bartholet, \textit{supra}, at 202, 206.
inferior, and often exacerbate some of the plight of parentless children. In some cases, they may be the best available option because adoption is not available, or may be useful as a temporary step toward adoption. But they do not provide a decent or satisfactory remedy for the parentless child or for the social problems of parentlessness.

Fortunately, adoption is not a demanding or an exclusive remedy. If linked to and directed toward ultimate placement for adoption, even temporary institutionalization and foster care can complement and be complemented by adoption. Other programs such as international aid to promote the well-being of parentless children in poor countries are not sacrificed, impaired or disadvantaged at all by simultaneously facilitating, encouraging and promoting intercountry adoptions. In fact, because cross-border adoptions are largely driven by private initiative, and often are fully self-supporting (the adopting parents can pay in fees and charges all of the public costs of the government agencies involved in regulating the adoptions), they need not (and generally do not) drain any resources from other programs to meet the needs of unadopted parentless children. And because intercountry adoptions call attention to the plight of parentless children in third-world countries, they a very positive public relations bonus for other government programs that address more broadly the needs of parentless children such as the needs for temporary care, food, housing, medical, and educational programs.

D. The Success and Failure of International Adoption

International adoption has tremendous potential to alleviate the global problem of parentless children, and over the past fifty years, it has proven beneficial and the process has developed. However, international adoption has not yet reached its potential and number of international adoptions is only a fraction of what they could or should be.

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80 Bartholet, supra, at 197.
(1) The Scope of International Adoptions Today

The exact number of international adoptions is not known. We know that the incidences of intercountry adoption varies from year to year, influenced primarily by shifting local politics and legal policies that open, expand, close or contract the prospects of Intercountry adoption in particular countries. By the mid-1990's it was estimated that approximately 20,000 international adoptions happened worldwide every year.81 The trend has been consistently upward, and since then the widespread adoption of the Hague Intercountry Adoption Convention has helped to facilitate international adoptions, so it is likely that the number of trans-national adoptions has continued to rise.

Families in America are the most likely to adopt parentless children from other nations, and the number of international adoptions in the United States is rising. American parents traditionally have adopted over one-half,82 and recently perhaps three-fourths of all of the parentless children who are adopted across borders in any given year.83 Last year (2003) the


U.S. State Department issued 21,616 foreign immigrant visas for children to come to the United States for adoption.84 The U.S. Immigration and Naturalization Service Statistical Report in 1998 showed that just a dozen years earlier, in 1991, the number of foreign children admitted for immigration into the United States for adoption was just 9,008.85 Thus, the number of international adoptions has risen by approximately 130% in a dozen years; today, approximately one out of every four unrelated children adopted in the United States is a child from a foreign country.86 By comparison, the number of domestic unrelated adoptions in America rose less 10% from 1986-1996;87 in 1996 there were 54,492 unrelated domestic adoptions and over 127,000 total adoptions (related and unrelated, domestic and international) in the USA.88

The comparative failure of other nations to support international adoption seems stunning. However, it must be remembered that adoption for the sake of children is an American invention; we have had 150 years of experience with it here. It fits in with the make-do, get-along character and family values of the American people. In most other nations, adoptions is a fairly recent innovation, and not well-known or widely-practiced. For example, Great Britain and Australia share common cultural and legal history with America. But adoption was not part of their culture. After all, they are only 150 years old.

84 See U.S. State Department, Immigrant Visas Issued to Orphans Coming to the U.S., <available at<http://travel.state.gov/family/adoption_resources_02.html> (seen October 7, 2004). The four countries to send the most children were China (6859), Russia (5209), Guatemala (2328), and South Korea (1790). Id.


86 Hubing, supra, at __, n. 24.

87 Paul J. Placek, National Adoption Data, in Adoption Factbook III at 24 - 32 (National Council for Adoption, 1999).

88 Id. at 39, Table 7.
of that common heritage; indeed, adoption was unknown in England until less than 80 years ago. Thus, it is not entirely surprising that in the U.K., with a population (60 million) one-fifth of the United States, there were only 5,459 adoption orders signed in 2002 (less than 4% of the number of adoptions in the USA, and one-fifth the rate-per-population);\textsuperscript{89} while in Australia, with a population (20 million) about one-fifteenth that of the USA, there were only 472 adoptions (including 278 intercountry adoptions) in 2002-03, less than 0.5% of the number in the USA (or one thirtieth the rate-per-population of US adoption).\textsuperscript{90} In some societies, adoption of children of strangers, especially those with different cultural or ethnic backgrounds, encounters ancient social or cultural taboos.

(2) The Failure of International Adoption to Meet the Global Needs

In one sense, 20,000 or more intercountry adoptions represents an extraordinary, unique, altruistic undertaking, and it certainly is laudable. Yet, given the scope of the suffering and need of parentless children abroad and the resources and couples who are willing to adopt (especially in America), it is far from adequate. For example, it has long been estimated that every year, between 1 million and 2 million Americans are able, willing and want to adopt an unrelated child or children,\textsuperscript{91} and more recent government statistics indicate that an even greater number of


\textsuperscript{91}Hubing, supra, at 659 (estimate 1 million); Bartholet, supra, at 182 n. 2 (upwards of 1 million); D’Amato, supra, at 1242 (two million American families want to adopt); Marsha Garrison, Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage, 113 Harv. L. Rev. 835, 891 n. 260 (2000) (estimates of more than a million); Crystal J. Gates, 1999 Immigration Project, China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?, 7 Ind. J. Global Legal Stud. 369 (1999) (estimated two million American


94See generally Adoption Factbook III, at 34, 36, Tables 1 & 2. Since the aforementioned study only questioned ever-married women who considered adoption, the numbers of potential adopters would be higher, and the percentages of potential adopters who actually adopt would be proportionately lower, if never-married women, and never-married men, growing segments of potential adopters, were also included.
children that die [world-wide each year].”95 Given the tremendous unmet need of parentless children suffering around the world for parents, families and homes, and considering the ability to provide such homes and the great unfulfilled desire and willingness to become adoptive parents that exists in just one country, the current level of international adoption is both unjustified and inadequate.

(3) Challenges to the Intercountry Adoption Today.

(a) Concerns About “Baby-Buying” and Financial Exploitation

“Controversy surrounds the topic of international adoption. To some, it presents in extreme form problematic issues they see at the heart of all adoption.”96 One major issue surrounding adoption is financial.97 Poverty and financial distress are among the major reasons why parents abandon children or relinquish them for adoption. Since the adopting parents generally must show that they have adequate financial resources to provide for the adopted child or children, there usually is a significant disparity in the financial circumstances of the resigning and adopting parents. (Thus, the flow of children from poor countries to richer countries is completely understandable, from an economic perspective. But these individual and national disparities presents opportunities for exploitation and greed. Wealthy prospective adopters (in the world economic sense) may be tempted to “buy” children from their poor parents, to “bribe” officials to expedite legal processes (take shortcuts), and thereby circumvent protections that would prevent exploitation and commercial trafficking in human children. Poor parents (in the subjective sense) may be tempted to sell their children. Thus, one major concern about

95D’Amato, supra, at 1241.

96Bartholet, supra, at 182-183.

97Hubing, supra, at 665; Bartholet, supra, at 199.
international adoptions is the potential for “black market” “baby-selling,” “kidnapping,” and “trafficking” in children. Moreover, the powerful pull of profit can draw attention away from the best interests of the child, displacing what should be the core concern of adoption.\(^98\) Also, intercountry is very expensive; in the mid-1990s it was reported to average between $15,000-20,000 per adoption, but to be as high as $30,000.\(^99\)

Concerns about baby-selling are serious and must be taken seriously, but they also are exaggerated. While undoubtedly there are actual instances of parents who offer to sell their children, and prospective adopters trying to buy children, and government officials who look the other way in return for a gratuity, those abuses existed long before adoption was invented. Moreover, stories of baby-selling, baby-napping, and “black market adoptions,” are given greatly exaggerated air time by the sensationalizing media. They sell newspapers and attract viewers, and thus are given excessive attention by profit-seeking media producers. As one authority, Professor Elizabeth Bartholet, noted: “[T]here is no evidence that these practices are widespread, and it is quite unlikely that they are. Current law makes it extremely risky for adoption intermediaries and would-be adopters to engage in baby buying or kidnaping.”\(^100\) There are . . . some documented instances of kidnaping and of improper payments to birth parents. But there is no evidence that these practices are widespread, and it is quite unlikely that they are. Current law makes it extremely risky for adoption intermediaries and would-be adopters to

\(^98\)Hubing, *supra*, at 665.


\(^100\)Bartholet, *supra*, at 199.
engage in baby buying or kidnaping.\textsuperscript{101} As one authority put it: “Some of the opposition to intercountry adoption is blindly nationalistic, oblivious to the interests of children, and armed with sensational exaggerations of the extent of illicit baby-selling operations.”\textsuperscript{102}

\begin{itemize}
\item \textit{(b) Objections to “Imperialism” and Loss of Cultural Assets}
\end{itemize}

International adoption “can be viewed as the ultimate form of exploitation, the taking by the rich and powerful of the children born to the poor and powerless. It does tend to involve the adoption by the privileged classes in the industrialized nations, of the children of the least privileged groups in the poorest nations, the adoption by whites of black-and brown-skinned children from various Third World nations, and the separation of children not only from their birth parents, but from their racial, cultural, and national communities as well.\textsuperscript{103}

Intercountry adoption is an easy target for cheap journalism and xenophobic politics. As an American official noted:

Many governments . . . seem to start out with the benevolent motive of placing refugee children in foreign families who want to adopt them, only to be criticized in the local media for "exporting human capital" and failing to take care of their own. The net result, invariably, is psychological trauma for the children as they are placed in underfinanced foster factories.\textsuperscript{104}

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\addcontentsline{toc}{section}{Notes}

\begin{itemize}
\item \textsuperscript{101}Bartholet, supra, at 199.
\item \textsuperscript{103}Bartholet, supra, at 182-183.
\item \textsuperscript{104}D’Amato, supra, at 1239-1240.
\end{itemize}
Romania and Korea are typical examples of developing countries' experience with intercountry adoption. For a while they open the doors to let unwanted children be adopted abroad, and then they slam the doors shut. They seem to prefer leaving their unwanted children to die in the warehouses.

The blame lies squarely with the media. . . . The pattern is discouragingly similar in every country like Romania. As soon as the media learns that local children are being sent abroad for adoption, headlines appear that the government is “exporting our precious human capital.” Rumors of bribery and corruption become media stories; government officials are accused of lining their own pockets by selling helpless infants and children to “greedy, wealthy foreigners.” Articles appear that the religion and cultural identity of these children will be wiped out by their transplantation into a totally different country with materialistic values. The children may be mistreated and abused by the adopting parents. The opposition party criticizes the government's child-care policy: they claim that by sending the children abroad the government is admitting its own failure to cope with the country's most precious resources.

. . . .

In every instance, the government predictably responds by closing down, completely or almost completely, the practice of intercountry adoption.105

I observed a blatant example of media intimidation of an entire government in connection with the 1988 Seoul Olympics. Some American television reporters took to the airwaves and criticized intercountry adoption by non-Korean parents of Korean children, suggesting that the South Korean government was less than competent and that the Korean people were less than

105 D’Amato, supra, at 1245-46.
caring because they were “exporting” so many parentless Korean children to America for adoption. It came no surprise that a short time later South Korea adopted new regulations that greatly curtailed Intercountry adoptions. What happened to the parentless Korean children who would have been placed in homes abroad, and raised by loving parents but for these new legal obstacles to Intercountry adoption? In a country in which the practice of adoption is culturally difficult, orphanages and “foster factories” are the only other solution.106

“The fact that [international adoptions] are built across lines of racial and cultural difference can be seen as a good thing, both for the parents and children involved and for the larger community. These are families whose members must learn to appreciate one another's differences, in terms of racial and cultural heritage, while at the same time experiencing their common humanity. And as discussed, the evidence indicates that they succeed in doing so.”107

It seems clear that the debate over international adoption has little to do with genuine concerns over risks to children. Children are being sacrificed to notions of group pride and honor. As Tizard has described:

It is argued that the practice is a new form of colonialism, with wealthy Westerners robbing poor countries of their children, and thus their resources. National pride is involved. However poor the country, they find the implication that they cannot care for their own children to be undignified and unacceptable. Thus poor countries feel pressure to hold on to what they term "their precious resources," and rich countries feel embarrassed to do anything that looks like

106 Institutionalization of parentless children is more common than foster placement in Korea. Bartholet, supra, at 196, n. 39.

107 Bartholet, supra, at 182-183.

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colonialist exploitation.

But there is no real conflict between the interests of the sending and those of the receiving nations. International adoption simply serves a symbolic function for those in power.108

Transnational adoption often involves placement of a child into a culture different that his or her own culture of origin. Thus, there usually is some loss of acculturation in the culture of origin. But the loss to the child should be distinguished from the politically more powerful rallying cry of alleged loss to the ethnic, racial, or cultural group. The loss to the child can be largely recovered by study and effort; strong minority cultural communities of foreign minorities exist in the countries where most international adoptees live. The ethnic group also stands to gain in the long run because the child who may grow up with only 50% or even 5% of the degree of acculturation in the culture of origins that he or she would have had without adoption will be in an immeasurably better position to assert the influence of that culture on life and to protect the interests of that culture in the world than he or she would have had if they had remained in an orphanage, foster factory, or on the street in the culture of origin. Moreover, the issue of acculturation does not arise in a vacuum. The dilemma is not simply whether to raise children in the culture of birth or not, all other things being equal. Rather, the issue is whether parentless children will be allowed to be raised in families, by loving parents, with stimulating opportunities and favorable conditions, or left to live in orphanages and foster factories. Certainly, death, disease, and the severe emotional deprivation of parentlessness and institutionalization are not necessary for cultural self-realization for any racial or ethnic group.

Why are so few parentless children from third-world countries adopted in other nations? Certainly, disparities in national economies and standards of living may partially explain why few foreign adoptions occur in many third world countries. In some countries, loving parents who want to care for parentless children simply lack the resources to provide adequately for their own, much less to provide for parentless children. The private and national economies are simply inadequate to provide adoptive homes for all or most of the parentless children in those countries.

Similarly, deeply-imbedded cultural, social and religious values may also explain some of the nonparticipation in adoption by families in other affluent countries. In many traditional cultures, the practice of adoption is essentially unknown. The kind of altruistic and family values that underlie the practice of adoption are not well-established in the history and culture of the people. Other social values may create significant obstacles to the emergence of a culture friendly to much less supportive of the practice of adopting unrelated parentless children. Often, these societies have strong family values and quasi-adoption of parentless family members is widely practiced, but the practice of taking unrelated parentless children into one’s home and treating them in all respects as one’s own children is not well-known. It may take several generations for those social and cultural values to expand to include adoption. Thus, there are significant economic and social barriers to adopting parentless children in many countries. That may explain some of the failure of adoption to fulfill its promise as a means of providing for the needs of parentless children globally.

However, as lawyers we must not overlook the fact that legal systems, both domestic and international, are not blameless in respect of the global tragedy of parentless children. One of
the unspoken causes of parentlessness is the failure of our legal systems. Legal impediments directly and significantly restrict and limit the incidence of adoption. Legal impediments are not a precipitating cause of the condition of parentless,109 but they are a major perpetuating cause of parentless.

Legal systems may enact rules or apply them in such a way that prevents implementation of remedies that would eliminate or alleviate for particular children the disadvantages and status of parentlessness. Legal systems have created substantive barriers (effective prohibitions) and procedural obstacles (bureaucratic impediments) to adoption, both domestic and international. Restrictive adoption laws, inhospitable immigration laws, and unfriendly tax laws in many countries also create obstacles for families who would be willing to provide homes for parentless children from other countries.110

As members of a moral-doing profession, lawyers cannot simply ignore the problems created and exacerbated by bad adoption laws, nor can we in good conscience fail to make an effort to improve the laws and to remove those obstacles, to make the world a little less unfair and prospects a little less bleak for parentless children. As legal professionals and scholars, as well as morally accountable individuals, we cannot ignore the obstacles to adoption created by the laws for which we have some professional responsibility. We must act to reform the laws which perpetuate the plight of global parentlessness today. For example, we might work to develop legal rules and policies that facilitate responsible, effective intercountry adoption.

109Parentlessness may be a state-imposed protective status, such as when child abuse or neglect is discovered and the state removes the child or children from the irresponsible parents. This usually is intended to be protective, a means of rescuing the child from a bad environment and placing the child into a better, at-least-minimal-standard child-rearing environment, or to be a temporary removal while the parents develop adequate parenting skills.

110D’Amato, supra at 1241-1242.
An Outline of the Case for International Adoption in International Law

The international legal community as well as virtually every national government recognizes the importance of protecting and providing for the special needs and vulnerabilities of children. International as well as national law recognized that a parent-led family environment is the best environment for child-raising; that is why placing parentless children with family members when that is possible is usually legally preferred. For more than fifty years, the international legal community has manifest consistent support and preference for imitative adoption. Indeed, a persuasive case can be made that the right of parentless children to have access to adoption (and, concomitantly and derivatively, of qualified parents to have reasonable access to adopt parentless children) is a fundamental human right recognized by international law.

Many instruments of international law provide foundational protection and support for imitative adoption including intercountry adoption. The United Nations’ Universal Declaration of Human Rights (1948), article 25(2), declares that “[m]otherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.” This recognizes that the state has a special duty of guardianship

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towards children and of trust to protect the vulnerability of their mothers who nurture and care for them. If the declaration that children born out of wedlock (usually without a residential father, and often abandoned by both parents) are entitled to “the same social protection” as children born into families with a mother and a father who are married to each other is more than an empty promise, it means that it is a duty of the state to try to provide an comparable family environment in which the child can receive the same social protection. Since adoption provides the closest (and some would argue the only truly comparable) environment to birth within a marriage, if this article does not mandate that states have an affirmative duty under the Universal Declaration to facilitate and promote adoption, it must at least mean that adoption to provide parents who will extend “the same social protections” for parentless or partially-parentless children must be permitted.

The U.N. General Assembly’s Declaration of the Rights of the Child (1959) declares in Principle 6, that

The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents, and, in any case, in an atmosphere of affection and of moral and material security; a child of tender years shall not, save in exceptional circumstances, be separated from his mother. Society and the public authorities shall have the duty to extend particular care to children without a family and to those without adequate means of support.\(^{114}\)

Concerning parentless children, this Declaration unequivocally establishes a duty of government

“to extend particular care to children without a family.” Read in conjunction with the emphasis upon the critical importance to children of “grow[ing] up in the care and under the responsibility of . . . parents,” this seems to obligate governments to create substitute families for parentless children where they can grow up under the care and guidance of parents, including especially the care of a loving and understanding mother from whom the child should not be separated. If this does not mandate adoption programs, it at least appears to obligate governments to permit and facilitate adoption.

The Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986) (herein “UNDSLP”), recognized the plight of children orphaned or separated from parents by war, and was particularly “[c]oncerned at the large number of children who are abandoned or become orphans,” and recognized “the need to proclaim universal principles to be taken into account in cases where procedures are instituted relating to foster placement or adoption of a child, either nationally or internationally.” Article 13 declares that “[t]he primary aim of adoption is to provide the child who cannot be cared for by his or her own parents with a permanent family.” Article 17 proclaims a preference for finding the child an adoptive family in the child's home country, but “[i]f a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a


116 Id. annex, cited in Hubing, supra at 675.

117 Id. art. 13, cited in Hubing, supra at 675.
family.”

At least seven articles provide guidelines for Intercountry adoptions. Thus, the UNDSLP endorsed and encouraged adoption, but reflecting the growing nationalism, gave priority to domestic placement or reasonable alternative care whenever that was available.

Three years later, the Convention on the Rights of the Child (1989) (herein “CRC”) was approved, and quickly became the most quickly-approved and most widely-ratified international instrument of all time. The CRC reiterates “the need to extend particular care to the child” established in the Universal Declaration and the Declaration of the Rights of the Child, obligates nations to “ensure to the maximum extent possible the survival and development of the child,” and emphasizes that “the child, for the full and harmonious development or his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.” Furthermore, recognizing that some children become parentless, the Convention declares that parentless children are “entitled to special protection and assistance provided by the State.” It obligates signatory nations to “ensure alternative care for such a child” and it specifies that “[s]uch care could include, inter alia, foster placement, kafala of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.” It further compels that “due regard shall be paid to the desirability of continuity in a

118 Id. art. 17, cited in Hubing, supra at 675.

119 Id. arts. 18-24, cited in Hubing, supra at 675.


121 CRC, id., at Preamble.

122 Id. CRC, art. 20.

123 Id. CRC, art. 20.

124 Id. CRC, art. 20.
child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”125

Sadly, the CRC is somewhat weak and compromised,126 and its surprising express endorsement of the institutionalization of orphans (fortunately qualified by “if necessary”) and general prioritization of reasonable domestic institutionalization over international adoption undeniably are a tragic steps backward in the protection of parentless children in international law.

Nonetheless, even this politically tepid provision of the CRC clearly obligates governments to provide special protection, assistance and alternative care for parentless children, and explicitly mentions adoption as one of the preferable methods of dealing with the plight of parentless children. Article 21 of the CRC further provides guidelines for adoption, including intercountry adoption. Most of the details of Article 21 concern due process - procedural and substantive protections to prevent exploitation, kidnaping, child selling, placement with incapable or abusive parents, and other abuses, and to ensure that the adoption truly is in the best interests of the child. It also obligates countries that have adoption to consider Intercountry adoption as an alternative when the child cannot be placed for adoption or foster care or otherwise properly cared for in the country of origin.127

In addition to these U.N. instruments, in 1993 the Hague Conference on Private International Law promulgated the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption,128 generally known as the Hague Convention on

125 Id. CRC, art. 20.

126 See generally, D’Amato, supra, at 1243; See also Bartholet, supra, at 193.

127 Id., CRC, art. 21.

Intercountry Adoption. This remarkable Convention provides a method of enhancement and implementation of the principles of the foregoing U.N. instruments, and goes even further to promote and facilitate international adoption. The Preamble to the Hague Intercountry Adoption Convention “[r]ecognize[s] that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,” and that international “adoption may offer the advantage of a permanent family to a child” who is parentless, and provide for “the best interests of the child . . . with respect for his or fundamental rights . . . .”129 The Hague Convention is designed to facilitate and regulate international adoption in order offer parentless children the opportunity of family life, to be raised in a parent-led home environment. Contracting nations are obligated to seek this objective first by "appropriate measures to enable the child to remain in the care of his or her family of origin." If preservation of the family of origin is not possible or appropriate, and "a suitable family cannot be found in his or her State of origin," then intercountry adoption "may offer the advantage of a permanent family" for the child.130 In contrast to the CRC (art. 21) which “has been interpreted as placing intercountry adoption at the end of the list of possible methods of care for children without families-- after adoption in its country of origin or foster care or other suitable care (deemed to include institutional care) in that country,”131 the Hague Intercountry Adoption Convention give preference to intercountry adoption over any form of impermanent

129 Hague Intercountry Adoption Convention, Preamble, in Pfund, Intercountry Adoption, supra, at Appendix, ¶ 1. See also Bartholet, supra.


care available within the child's country of origin, including foster or institutional care. While the U.N. Convention subordinates intercountry adoption to placement that reflects the child’s “ethnic, religious, cultural, and linguistic background,” the Hague Convention emphasizes the “advantage of a permanent family,” and gives that placement priority over less permanent or institutional options, even if adopting couple does not share the child's cultural background. “Under the Hague Convention, intercountry adoption is considered preferable even to foster care options available in the child's native State.” Thus, the Hague Conference and the States that have signed the Intercountry Adoption Convention explicitly recognize that “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin.” The bulk of the Hague Convention provisions provide basic procedural protections for facilitating and regulating Intercountry adoptions.

The Hague Intercountry Adoption Convention is represents a huge step forward in international law for protection of parentless children because it formally and explicitly acknowledges that children do best when raised in permanent, private families, because it

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133 CRC, supra, 28 I.L.M. at 1434.

134 Hague Convention, supra, 32 I.L.M. at 1139.

135 Hillis, supra, at 240, n. 32.

136 Hague Intercountry Adoption Convention, id., cited in Hubing, supra, at 676.

137 However, the Hague Intercountry Adoption Convention “does not purport to create uniform substantive laws for intercountry adoptions; it merely institutes uniform processes to carry out these adoptions.” Hillis, supra, VI, at 245.
recognizes that institutional and transitory foster home alternatives do not provide what parentless children most need and deserve -- namely, to be raised in a family by parents, and because it commits nations to substantive and procedural standards that will facilitate international adoption. “The overarching importance of the Convention lies in its endorsement of intercountry adoption when there is compliance with its internationally agreed minimum standards. . . . These standards, and the procedural framework for ensuring that they are complied with, are designed to safeguard the interests of the child . . . .”138 As of August, 2001, fifty-seven (57) nations had signed (15), ratified (31), or acceded to (11) the Hague Convention on Intercountry Adoption -- an astounding outpouring of support in just eight years since the Convention was promulgated.139

In addition to these global instruments, a number of regional international instruments recognize, facilitate, encourage and promote adoption as a means of providing for the welfare of parentless children. These include the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953),140 the American Convention on Human Rights (1969),141 the


Additionally, there are other legal documents.

The consistent thread running through these international instruments is support for raising children in homes with parents. Adoption with its imitative model of parenting, is repeatedly and specifically endorsed. These international instruments reflect and reinforce the belief that it is in the best interests of all children whenever possible to be raised in a private home by a man and woman who are acting as and with full legal authority and responsibilities of mother and father. The child-rearing environment to which these instruments aspire matches the imitative model of adoption.

All of these U.N. Declarations are regarded as evidence of *opinion juris*, and, if ratified by a large majority of Member States, are considered significant evidence of customary law. Likewise, the Hague Convention, especially one as widely endorsed as the Intercountry Adoption Convention, manifest widely-accepted international customs and standards. Additionally, conventions are binding upon states that have ratified them, although the power behind the obligation still remains largely that of world opinion. Thus, there is substantial documentary authority to support the assertion that the parentless child’s right to be raised in a

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144 Check Linda J. Olsen Comment and summarize - refer **

145 Hubing, *supra*, at 677.
parent-led family environment is a fundamental human right, and that states that create barriers
to domestic and international adoption are in violation the standards of existing customary
international law, if not the terms and requirements of obligatory international conventions.

Hans van Loon, now First Secretary of the Hague Conference, has observed:
“Intercountry adoption of children, the movement of children across international borders for the
purpose of adoption, [has become] a worldwide phenomenon .... It manifests our shrinking
world, in which human lives, activities and interests become more and more interwoven, and
over ever larger distances.”146 It also manifests growing recognition that individual families
provides benefits for parentless children than cannot be matched or adequately provided by
government, and that the solution to global crises lies in the kind of mixed government-
facilitation-and-support-of-personal-action that adoption represents.

Of course, adoption is not a magic remedy for all of the social ills of all parentless
children around the world. Inter-country adoption at this time can remedy the problems of
parentlessness for only a small portion of the needy children of the world, for those children the
benefits are incalculable; it offers those 20,000 children families, family life, and life, and
through those children it offers even greater benefits to parentless children in the next
generation. In the worlds of Elizabeth Bartholet: “International adoption should be seen as an
opportunity to solve some of these problems for some children. It should be structured to
maximize this positive potential by facilitating the placement of children in need of nurturing

146 J.H.A. van Loon, International Co-operation and Protection of Children with Regard
to Intercountry Adoption, 244 Recueil des Cours (Hague) 191, 203 (1993).
homes with people in a position to provide those homes.”

Yet, still “[p]rocedures in sending countries and receiving countries often impede, rather than facilitate, adoptions and do not ‘serve the basic principles’ of the CRC. . . . Some countries’ laws and policies ‘operate to the detriment of the very children intercountry placements are intended to serve.”’

There is much work that remains to be done to remove parochial and irrational barriers to providing parents for parentless children.

III. Conflicting Root Paradigms Affecting Parentlessness in the United States

A. The Conflict Between Autonomy and Responsible Parenting

The growing phenomenon of social-choice partial parentless was noted earlier. That trend reflects a conflict between what cultural anthropologists call “root paradigms” of our society. “Root paradigms” are social standards and expectations that a society uses to prepare its members to cope with crises of personal, familial and social identity, they embody the core identity and validity beliefs of the society. All societies provide their members with root paradigms that “reflect the assumptions underlying the very nature of existence. . . . They guide

147Bartholet, supra, at 197.


149Supra note __. For further elaboration of these ideas, see Lynn D. Wardle, Parenthood and the Limits of Self-Determination in Contemporary Family Law, 24 St. L. Univ. Pub. L. Rev. ___ (in press).

behavior of both individuals and groups in the crises of life and often require self-sacrifice on the part of individuals in the interest of group welfare.” Root paradigms “are, at the socio-cultural level analogous to DNA . . . at the genetic level.”

Social-choice parentless manifest the outcome at the individual level of a conflict between two root paradigms at the social level. One of these competing root paradigms is “autonomy.” It involves commitment to protect, foster and empower personal autonomy and individual independence. “Modern Western society has tended to view human dependency as tantamount to subordination, or even as a sign of inferiority.” The value of autonomy has strongly influenced American family law. It is the root paradigm that underlies the most notable developments in family law in the past thirty years (such as emergence of constitutional doctrine of privacy, adoption of unilateral, no-fault divorce, legitimation of previously-prohibited relations, etc.).

The conflicting root paradigm that is just as old and just as deeply-imbedded in American law entails great concern for and high commitment of parents and of society to the welfare of children. This root paradigm can be called “responsible parenthood” Indeed, our Constitution was created in large part “to secure the Blessings of Liberty” not just to the Founding generation

151 Id at 45.

152 Id at 45.


but to their “Posterity.” Posterity was a word that was used very prominently in many state constitutions and Declarations of Rights in the founding era. Ubiquitous pursuit of the “best interests of the child” standard in legal disputes involving children is another clear manifestation of this root paradigm. State intervention in families to protect, even remove, children underscores this commitment to “responsible” parenting, not just to supporting the biological or legal relationship between parent and child.

The “responsible parenting” paradigm sometimes conflicts with the autonomy paradigm. This conflict is especially profound when the sexual practices of adults (among the most protected expressions of individual autonomy) conflict with responsible parenting requirements. Some sexual practices that adults may enjoy or choose to experiment with raise serious risk of potential harm for children. Some sexual relations that adults without children may otherwise engage in with little apparent or tolerable short-term detriment for society may expose children to grave developmental risks if engaged in by their parents.

B. Same-sex Couple Adoptions and the Conflicting Paradigms

Increasingly, gay and lesbian couples are seeking to adopt children, including by means of international adoptions. This may create potential conflict between a society’s commitment

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155 U.S. Const., Preamble.


157 Lisa Hillis, Note, Intercountry Adoption Under the Hague Convention: Still An Attractive Option for Homosexuals Seeking to Adopt, 6 Ind. J. Global Legal Stud. 237 (1998) (asserts that the Hague Intercountry Adoption Convention “must be implemented in such a way as to fully accept the eligibility and suitability of homosexual persons as potential adoptive parents.” Id., at 237.) See also Hubing, supra, at 668; Heather J. Langemak, Comment, The “Best Interest of the Child”: Is a Categorical Ban on Homosexual Adoption An Appropriate Means to This End?, 83 Marq. L. Rev. 825, 847 (2000). The legal literature supporting same-
to adult autonomy or responsible parenting.

Supporters of adoption by gay and lesbian couples assert that homosexual couples can be (and, indeed, some already are) loving, competent, excellent parents. The point to the fact that a significant number of lesbian and gay couples are already raising thousands of children (procreated in earlier heterosexual liaisons, by artificial reproductive technologies, etc.). They assert that homosexual couples can and would if allowed (and to a limited extend, in at least some countries, already do) step forward to provide more adoptive homes for parentless children, domestically and internationally, and that would help to alleviate the global crisis of parentless children. They maintain that children raised by same-sex couples are at no greater risk of harm or danger than children raised by heterosexual couples – that there is “no difference” between children raised by same-sex couples and heterosexual couples.

While comparatively little opposition to adoptions by same-sex couples has been published in law reviews (it seems to be taboo in academic legal circles), some serious questions have been raised. We do not know the full effects of homosexual parenting on children. The evidence is just beginning to be assembled, and it is far from reliable or complete. Most of the studies done so far suffer from significant methodological flaws. It may take another 20-25 years before substantial, reliable data about the effects of homosexual parenting on children is available, just as it took a quarter-century (time for a generation of children to reach maturity and to begin to speak out) before social scientists begin to accumulate significant data showing that children suffer significant harm and some are permanently disadvantaged by their parents’ divorce. However, even with our limited knowledge the argument that it makes “no difference”
to be raised by same-sex couple seems to be meritless.

Two quite extensive surveys have recently been published that substantiate the defects and flaws in the social science studies that make “no difference” claims. In the April issue of the American Sociological Review, two researchers sympathetic to what they call “lesbigay” parenting (parenting by lesbians or gay men), Judith Stacey and Timothy J. Biblarz, criticized the social science literature finding “no difference” between heterosexual and lesbigay parents. They first noted the theoretical difficulties that such a claim presents in light of existing theories of child and sexual development. The authors noted: “[I]t is difficult to conceive of a credible theory of sexual development that would not expect the adult children of lesbigay parents to display a somewhat higher incidence of homoerotic desire, behavior, and identity than children of heterosexual parents.” 158 Moreover, reviewing of 21 studies plus one meta-analysis that found “no difference” they found that the studies purporting to show “no difference” were seriously flawed as a matter of scientific methodology including improper study designs, bad data collection, biased samples, lack of or improper controls, inappropriate methodology, flawed application of methodology, and defective interpretation of results.159 They reported that the research revealed significant differences between children raised by lesbigay parents and heterosexual parents relating to sexual orientation, gender-appropriate activities, and homoerotic behaviors of the children.160

Another pair of social scientists, Robert Lerner, Ph.D., and Althea Nagai, Ph.D.,


159Stacey & Tiblarz, *supra*, at 163-167.

160Id. at 164-169.
reviewed 49 published articles concerning the impact that homosexual parents have on the rearing of their children, most of which claim that there is no difference in child outcomes based on the sexual orientation of the parents. Lerner and Nagai analyzed carefully the methodology of the 49 studies and found that the methods were seriously flawed in all but one study. The flaws included: improper hypothesis (no hypothesis or a determination to prove a negative or null hypothesis); no extraneous variable controls; improper matching; non-probability (biased volunteer samples); improper comparisons; small sample size; inadequate statistical analysis; and inadequate statistical testing (two variables). Among the problems noted by the reviewers was the problem of “false negatives” due in some part to poor test design and inadequate sample size. Lerner & Nagai concluded: “[T]hese studies display an unreflective, rote-like application of statistical methods. . . . [T]hese small studies claiming non-significant results must be treated as entirely inconclusive.” The authors suggested that the 49 studies were merely ideological fodder in scientific costume, and that the studies were unreliable for use in legal cases and in setting public policy.

Inasmuch as these studies came from researches with very different ideological perspectives, the similarity of their conclusions that the existing studies that purport to show that there is “no difference” are unreliable cannot be lightly dismissed.

Many other studies reach the same conclusion about the flawed social science. For example, Richard E. Redding of the University of Virginia states:

\[\text{\underline{\text{\textsuperscript{161}}}Robert Lerner & Althea K. Nagai, No Basis: What the Studies \textit{Don’t} Tell Us About Same-Sex Parenting (Marriage Law Project, January 2001) (hereinafter “No Basis”).}\]

\[\text{\textsuperscript{162}No Basis, \textit{supra} note __, at 95-96.}\]

\[\text{\textsuperscript{163}No Basis, \textit{supra} note __, at 108.}\]
“Much of the extant research finding no negative effects of gay parenting on children has serious limitations (e.g., small sample sizes, non-representative and self-selected samples, reliance on self-reports subject to social desirability biases and lack of longitudinal data) that are often downplayed by advocates, who often also fail to consider fully the potential importance of having both male and female nurturance and role models for children. . . . The liberal bias is also evident in the interpretation of results . . . with researchers sometimes ‘disregard[ing] their own results’ . . . suggesting negative effects of gay parenting on children’s development.”

Other concerns exist about using children (and adoption) for adult political (gay/lesbian) agendas, or for the purpose of conferring on the adopting couple a desired legitimacy and status. Straying from the child-centered, best interest focus can be devastating and contradicts the very purpose of adoption. Likewise, there are concerns that if gay and lesbian couples are permitted to adopt, it may cause nations or communities where homosexual relations are considered immoral or dangerous to children to stop adoption of their parentless children. Similarly, it may result in fewer responsible individuals (parents who are unable to parent, guardians, supervisors of orphanages, etc.) being willing to allow the adoption of children under their care or authority. Finally, since there is some indication that children adopted by same-sex couples experience more same-sex sexual orientation and engage in more homo-erotic behaviors, and since homosexual behavior by children and adolescents is associated with a host of other risk factors for healthy development of children and youth (including substance abuse, early sexual activity, multiple partners, and suicidal ideation), apart from moral concerns, there may be public health

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concerns that suggest caution.

C. Changing the Core Paradigm of “Responsible Parenting”

Adoption by gay and lesbian couples not only raise issues about conflicting paradigms, same-sex couple adoption challenges the imitative adoption model of adoption in a very direct and fundamental way. It proposes to change the core paradigm of responsible parenting.

Adoption by same-sex couples threatens the modern institution of imitative adoption in much the same way that same-sex marriage threatens the historic institution of male-female marriage. It challenges one of the defining, foundational principles of the institution of imitative parenting.

The nature of the challenge can be illustrated by contrasting it with single adoption. Single-parent adoption is reconcilable with the imitative parenting model of adoption because sooner of later most families experience the death of one parent, leaving the other parent to carry on relating to and providing family leadership for their children (whether minor or adult). With falling death rates and rising life expectancies world-wide, this happens more frequently after most or all of the children have grown up, but a significant number of children still experience some period of childhood in the care of a widowed mother or father. More commonly in affluent countries is the loss of one parent to the “death” of divorce, whereby residentially and in terms of practical parental influence, the child often is practically if not actually dragged or thrown out of life and parental of the noncustodial parent. Thus, while allowance of single-parent adoption does not provide the ideal two-parent home environment, it provides the advantages of single parenting that is the life experienced (at least during some of childhood) by nearly half of all children in America, and which is not necessarily inconsistent with the anticipation of or aspiration of the imitative adoption (two-parent) ideal, because the single parent may still (re)marry and providing the missing other-gender parent.
On the other hand, placing children with two homosexual men or two homosexual women puts the child into an altogether different setting, a family based upon a very different model and different fundamental principles of relationship. The lesbian or gay parenting relationship is built upon the controversial claim of functional equivalence, like institutional care, rather than imitation and replication of the traditional (birth) nuclear family. The homosexual couple offer the child a family model that does not imitate the nuclear birth family. Adoption, of course, is built upon the imitative birth family model. Thus, to permit same-sex couples to adopt children is inconsistent with the fundamental paradigm of imitative adoption responsible parenting. If it is allowed, it could transform the imitative, child-centered model of adoption from an imitative-nuclear-family parenting form to a functional-equivalence parenting substitute. The quest to imitate as closely as possible a birth nuclear family will become a quest to provide “functional equivalent” care for parentless children. Would that lowering of expectations be healthy for the adoption system and for parentless children? That is a serious question that must be addressed.

Today, several nations have legalized parenting by different forms of family, including same-sex (gay and lesbian) couples. In a small but growing number of countries (presently primarily in the Scandinavian countries and a few American states) laws have explicitly endorsed or authorized adoption of at least some children by some same-sex couples. Tolerance for a wide variety of divergent national policies is not inconsistent with consistency in maintaining a preference for a proven model of providing for the needs of parentless children.

D. Perpetuating the Paradigm of “Responsible Parenting”

It seems prudent to resolve policy issues about adoption in light of the core purposes of adoption. It may be pretentious to assume that we know the “right” answer to all (perhaps any)
of the forgoing questions, but it is not unrealistic to believe that we know the “right” approach to finding the right answers. The right approach is to keep in sight the fundamental principles and purposes of adoption. As Professor Sanford N. Katz puts it: “[i] any discussion of adoption . . . we must not lose sight of its primary goal: to provide a permanent, secure, and loving home for a child whose birth parents are unable or unwilling to meet the child's needs. . . .”

As noted above, a quantum leap forward in adoption law occurred when it became child-centered. For the past 150 years, that child-welfare focus has led to the development and promotion of a model of adoption in which the law works to establish and foster a parent-child relationships that is as close as possible to the relationship of birth parents and child. That model has proven to be remarkably successful in providing the optimal setting for raising parentless children, and has brought enormous joy and satisfaction to childless (or child-limited) parents who have sacrificed like birth parents for the sake of the adopted children. Thus, the purposes and successes of child-centered adoption must guide the resolution of the pending and future issues that arise concerning adoption laws and policies.

The imitative parenting model of adoption provides best for children because it is grounded in powerful realities of human nature. It understands that what motivates successful parenting is found in the nature of the unifying relationship between mother-and-father and child, not in any legalism or government incentive of coercion. No other model for the relationship, from friendship to partnership, from commercial to fiduciary, comes close to working as well to motivate the level of commitment to children that is needed for adults to make the sacrifices necessary to provide for the tangible and intangible needs of children. The parenting partnership of mother and father is the most effective, powerful, successful, model for

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165 Sanford N. Katz, *Rewriting the Adoption Story*, 5 Fam. Advoc. 9, 10 (Summer 1982).
accomplishing social, familial, and individual goals of providing well for children.

Ferdinand Schoeman got to the core of why adoption works so much better than other alternatives when he observed that relations between parents and children are more aptly described in spiritual/poetic terms that suggest integration and love than in legalistic or political terms that define boundaries. Parenthood is best understood in terms that suggest union and identification rather than separation. As parents, we share ourselves with our children. Most parents, even lawyers, willingly sacrifice for their children, yearn for their welfare, aspire and work continuously for their success, encourage, love, nurture, comfort, teach, protect, and promote them without giving any thought to whether it is their legal “duty” to do so, or to the legal “rights” of their children. Parents devote themselves and their resources to their children out of love, not because their children have “rights.” The love their children so much they identify with them and would do anything for them.

What happens when parents’ relationships with their children are reduced to legal “rights?” Divorce provides a clear example. Particularly revealing is the relationship between noncustodial parents and their children. While the law vigorously insists that the legal duty of the divorced, absent parent to support his children is as great as that of the residential, married

\[166\] Ferdinand Schoeman, Rights of Children, Rights of Parents, and the Moral Basis of the Family, 91 Ethics 6, 8-9 (1980).

We typically pay attention to the rights of individuals in order to stress their moral independence . . . . [The language of rights typically helps us to sharpen our appreciation of the moral boundaries which separate people. . . .

We share our selves with those with whom we are intimate and are aware that they do the same with us. . . . The danger of talk about rights of children is that it may encourage people to think that the proper relationship between themselves and their children is the abstract one that the language of rights is forged to suit. So, rather than encouraging abusive parents to feel more intimate with their children, it may cause parents . . . to question their consciousness of a profound sense of identification with, and commitment toward, their families.

Id. at 8-9.
father, and in America (with its high divorce rates) many laws and agencies are very active in attempting to collect child support from absent fathers. Despite the strict laws about the duty of divorced parents to support their children, and despite ongoing, vigorous efforts to enforce those laws, when divorced or never-married parents (usually fathers, but the same is true of mothers) are cut off and cut out of the lives of their children, for whatever reason or regardless of whose fault, they frequently tend to drift away (or are driven away) after divorce, and within a short time, they no longer actively seek the welfare of their children and often even neglect to make consistent child support payments. “Deadbeat dads” result from institutionalizing alternatives to marriage-based parenting, when legal duty and legal institutions are substituted for family love.

Thus, optimal effective parenting is most often motivating by extra-legal considerations of love, affection, morality, and religion that reinforce connectedness that goes to the point of deep parental identification with and commitment to the welfare of the child. Those kinds of connections are best and most commonly found in natural family relationships, specifically in birth parent-child relationships. By replicating as fully as possible that relationship, imitative adoption calls upon powers motivating good parenting that are much greater than the state can otherwise create or coerce.

A wealth of social science research supports imitative adoption. Numerous studies report that children adopted at birth are at least as likely to live with two parents in a middle-class family, to do as well or better in both school and in social competency tests, are generally less depressed, more optimistic, appear to have higher self-esteem, self-confidence, and feelings of security, and are more willing to give voluntary service, are less involved in alcohol or drug use, theft, weapons or police trouble, enjoy similar or better health, achieve higher educational
attainments, and have fewer mental health problems as children living with their birth parents.\textsuperscript{167} It is clear that dual gender parenting is somehow protective for children.\textsuperscript{168} As one distinguished psychologist explained it:

Children navigate the developmental stages more easily, are more solid in their gender identity, perform better in academic tasks at school, have fewer emotional disorders and become better functioning adults when they are reared by dual-gender parents. This conclusion is supported further by a plethora of research spanning decades that clearly demonstrates gender-league differences in child-rearing that are protective for children, that is men and women contribute differently to the healthy development of children.\textsuperscript{169}

Children learn about male-female relationships through the modeling of their parents.\textsuperscript{170} Fathers and mothers have different styles of relating to children including in their facial expressions, tactile contact, work, play, development of resistance to stress, approaches to discipline, manifestation of love, nurture and negotiation.\textsuperscript{171} The effect upon these benefits of dual-gender parenting upon children deprived of a parent of both genders and subjected to childrearing by same-sex parents is not known, but the potential for loss of some of these advantages must be seriously considered.

\textsuperscript{167}Patrick F. Fagan, Adoption: The Best Option, in Adoption Factbook III, at 2, 3 (National Council for Adoption, 1999).


\textsuperscript{169}Id. at * 2.

\textsuperscript{170}Id. at * 3.

\textsuperscript{171}Id. at * 2–* 5.
Research shows that both fathers and mothers are extremely important for child development.\textsuperscript{172} Experts in many disciplines have reached “surprising unanimity” in their recognition that “[m]en nurture, interact with, and rear competently but differently from women: not worse, not better . . . differently.”\textsuperscript{173} When fathers nurture and care for their children, they do so not quite as “substitute mothers” but differently, as fathers.\textsuperscript{174} For example, some studies show that fathers play with their infant children more than mothers,\textsuperscript{175} play more physical and tactile games than mothers,\textsuperscript{176} and use fewer toys when playing with their children.\textsuperscript{177} Mothers tend to talk and play more gently with infant children.\textsuperscript{178} Compared to mothers, fathers reportedly appear to “have more positive perceptions of the more irritable sons and less irritable daughters,”\textsuperscript{179} and perceive their baby daughters to be more cuddly than mothers do.\textsuperscript{180} Mothers smile and verbalize more to the infant than fathers do,\textsuperscript{181} and generally rate their infant sons as cuddlier than fathers do.\textsuperscript{182} Moreover, “[m]en encouraged their children's curiosity in the solution of intellectual and physical challenges, supported the child's persistence in solving problems, and did not become overly solicitous with regard to their child’s failures.”\textsuperscript{183} One study found that six-month-old infants whose fathers were actively involved with them “had

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\textsuperscript{See id.@}
higher scores on the Bailey Test of Mental and Motor Development.”\textsuperscript{184} Infants whose fathers spend more time with them are more socially responsive and better able to withstand stressful situations than infants relatively deprived of substantial interaction with their fathers.\textsuperscript{185} Years ago, Erik Erikson noted that father love and mother love are different kinds of love; fathers “love more dangerously” because their love is more “expectant, more instrumental” than that of mothers.\textsuperscript{186}

Finally, as William Pierce former President of the National Council for Adoption noted, the estimates of the number of couples desiring to adopt in the United States are not without significance for policy: If “adoption demand [were] only 200,000 or so per year” rather than 2 million, it may have significance for the debate over adoption by same-sex couples.\textsuperscript{187}

\textbf{IV. Conclusion: Amerliorating Parentlessness by Promoting and Preserving Adoption}

This paper has reviewed the global problem of involuntary parentlessness, and the potential of international adoption to provide a partial remedy for that tragic situation. It has focused on the growing “partial parentlessness” in the United States resulting from adult lifestyle choices, including adult sexual and procreative preferences. It agrees that

\begin{quote}
[i]n spite of restrictions and laws in many regions, however, intercountry adoption remains a positive mechanism through which the international community can achieve its goal of promoting the best interests of its children. Intercountry adoption offers significant legal, economic, social and psychological benefits for
\end{quote}

\textsuperscript{184} Pierce, \textit{supra}, at 76.
children who might otherwise be homeless or living in orphanages.188

This paper also briefly describes the scope of the parentlessness problem in the United States in general, and specifically regarding the deliberate partial-parentless of one-gender couple parenting. It examined the shifting root paradigm that concerns parenting, and examine the implications of the trends and changes, especially concerning same-sex couple adoption.

The social importance of parenthood requires the internal recognition or external imposition of some limitations upon the absolute autonomy of adults who wish to be parents. Responsible public policy must define and enforce limits on adult lifestyle preferences when they jeopardize the best interests of children. It is in the best interests of children and society for children to be raised by a mother and father who are committed to each other as well as to the child. The marital commitment of the parents to each other strengthens their commitment to the child, and also enhances their separate and combined capacity to provide well for the child, and if necessary, to sacrifice for the child. It is not just the simplistic “addition” that two adults can provide more resources and care for a child than one, but it is the “multiplication” by which the security of the marital commitment of spouses to each other and to society enhances the abilities and incentive of both to parent well, and the “exponentially” increased efficiency of the natural complementarity of man and woman in performing the myriad of parenting functions.

Children are entitled to be raised by a mother and a father whenever possible. It has been said that “sacrifice is the ready index to the moral quality of a relationship. If one is willing to sacrifice only a little, morality is small; if much, morality is great...”189 Since “[t]he process of


189Myers, supra note___, at 55.
human reproduction gives rise to relationships of a special kind having their origin in a unique domain of social life,” it is in the best interests of children to preserve the form of adoption, imitative adoption, that best imitates the bonding relationship that results from procreation.

-End of Presentation Draft-

\[190\] Myers, supra at 47.