Moving toward Human Rights Principles for Intercountry Adoption

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Moving Toward Human Rights Principles for Intercountry Adoption

Marie A. Failinger†

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I. Introduction

Over the past few decades, much has changed in the adoption community of birthparents, adoptive families, adoptive children, and those who facilitate adoption. After a slow start, international adoptions gained steam at the end of the 20th century and into the 21st century. Intercountry adoption has since become an international political battleground. On the political front, international adoption has become one of many weapons in the

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2 See infra notes 3-11 and accompanying text.
arsenal of nation-state competition, as most recently witnessed in Russia’s December 2012, decision to halt adoptions of Russian children by American parents. While many Russians have chafed at the fact that 60,000 Russian children were adopted by Americans in the past 20 years, this issue became prominent international news in 2010, when a Tennessee adoptive mother placed her allegedly violent seven-year-old adopted Russian son on an airplane to return to Moscow by himself. Despite a subsequent adoption suspension and later 2011 accord on adoptions between Russia and the United States, news stories of abused and neglected Russian children in American parents’ care, including the death of a Russian adoptee accidentally left by his adoptive father to die in a hot car, moved the Russian parliament to act. However, other sources claim that this move is in retaliation for America’s decision to label the nation a human rights violator.

Russia is not the only country to close down or severely curtail intercountry adoptions due to political pressure from advocates opposed to airing their national failures to care for parentless children. Perhaps most famously, Romania, which opened to

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6 Id.


8 See U.N. DEP’T. OF ECON. & SOC. AFFAIRS, supra note 1, at 18 (noting countries that are attempting to limit intercountry adoptions); Elizabeth Bartholet, International Adoption: Propriety, Prospects and Pragmatics, 13 J. AM. ACAD. MATRIMONIAL L. 181, 184 (1996) (discussing political pressure in “sending countries” against “giving their
intercountry adoption after severe post-Communist media criticism of its dismal orphanages, halted adoptions in the wake of popular objections to sending Romanian children out of the country; and Guatemala restricted a steady flow of intercountry adoptions after receiving international criticism over allegedly shady intermediary practices coercive to birthparents. Several other countries have closed their doors or significantly restricted intercountry adoptions due to similar criticisms.

Adoption scholars have joined in the critique on intercountry adoptions. Some critics have challenged whether, for example, any children should be adopted across racial lines or national borders. Other scholars like David Smolin have advocated for national and international efforts to keep children with their birth families unless there is a dire reason to relinquish them, particularly when the decision to relinquish a child is primarily based on the birth family's extreme poverty. Many in the international community, including UNICEF, the European Union, and the African Child Policy Forum have at times expressed a preference for children staying within their national borders of origin, even if it means living out their childhood in foster care or an institution. Yet, few of these advocates contest the fact that the existing options for many parentless children are unhappy ones—even despite the Russian parliament's vote to end intercountry adoptions to the United States, many of Russia's countries' children to the imperialist North Americans and other foreigners.

10 Id. at 156.
11 Id. at 158.
12 See Twila L. Perry, Race and Child Placement: The Best Interests Test and the Cost of Discretion, 29 J. FAM. L. 51, 112-15 (1990-91) (describing professionals’ views that African American children should be placed with African American families); Bartholet, supra note 9, at 177-79 (noting international rights advocates’ opposition).
13 See David M. Smolin, Intercountry Adoption As Child Trafficking, 39 VAL. U. L. REV. 281, 310-11 (2004) (arguing the international laws allow aid to be provided only to birth parents who relinquish their children).
14 AFR. CHILD POL. F., INTERCOUNTRY ADOPTION: AN AFRICAN PERSPECTIVE 37 (2012); Bartholet, supra note 9, at 155-58; see also Bartholet, supra note 8, at 191 (noting that international documents relegate international adoption to “last resort” status as compared with foster care or “other suitable care” within the child’s nation of origin).
700,000 parentless children grow up in dismal Russian orphanages, and most Russians have been traditionally indifferent to their plight.\textsuperscript{15}

The Hague Convention on Adoption\textsuperscript{16} and the Convention on the Rights of the Child\textsuperscript{17} have attempted to protect rights that members of the adoption triad (which includes birthparents, adoptive parents, and adoptable children)\textsuperscript{18} should be afforded.\textsuperscript{19} These Conventions are a good first step, but their primary role has been to regulate the process of adoption to ensure procedural justice and reliable fairness in the protocols surrounding adoption.\textsuperscript{20} Broader international conventions concerning children's rights, such as the Convention on the Rights of the Child, go further in articulating substantive rights of children.\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item[18] I will use this term broadly to signify those children that may be candidates for adoption because their birth parents are unwilling or unable to care for them properly, whether that conclusion is reached by the parents themselves, their current caretakers, or the state. I acknowledge that this term encompasses children in many very different situations along the continuum from custody by birth parents to legal adoption by other parents, but use it on the theory that the concerns and values I will discuss apply as soon as a child is vulnerable to entering the "adoption stream" and continue until he or she is legally someone else's child (and sometimes, due to adoption disruptions, beyond that time).
\item[19] See Hague Convention, \textit{supra} note 16, art. 4-5 (observing that consent needs to be given); United Nations Convention on the Rights of the Child, \textit{supra} note 17, at 169 (expressing the need to counsel and get consent from all parties).
\item[20] See, e.g., Hague Convention, \textit{supra} note 16, arts. 4 (pertaining to process of obtaining informed consent), 7 (relating to information sharing), and 10-11 (relating to accreditation of agencies).
\item[21] See, e.g., United Nations Convention on the Rights of the Child, \textit{supra} note 17, at 168 (imposing a duty to protect the child's right to development in Article 6,
\end{enumerate}
\end{footnotesize}
They presumably apply to adopted as well as birth-children, but they do not fully articulate how adoption, particularly intercountry adoption, can be a means to making these rights real.22 While the pros and cons of international adoption have been discussed exhaustively and some scholars have made efforts to clarify human rights concerns, this Article will try to put more substantive flesh on the bones of the adoption conventions currently in place by linking these articulated rights to the concept of human dignity.23 The Article begins with the assumption that international protections for parentless children cannot function effectively unless the world’s nations come to a comprehensive understanding of the unique role that adoption plays in guaranteeing children’s rights, particularly the right to human dignity, amid the significant social changes that have occurred in our world, particularly over the last fifty years.24

The touchstone for fleshing out substantive human rights expectations in international conventions has been the concept of human dignity, a concept both hard to define and consistently recognized as core to the international human rights framework. A cluster of meanings that grow out of our recognition of human dignity are foundational to a just and workable adoption regime across national lines, and governments should acknowledge that the circumstances that lead to adoption do not reflect ideal social and economic conditions (the realism principle);25 that we live in an increasingly interdependent world in all aspects of our life (the global interdependence principle);26 and that family diversity is increasing and increasingly visible in contemporary life, which is a positive thing for adoption (the family diversity principle).27 Governments should recognize, too, that adoption law must

protecting a child’s right to identity in Article 8, and protecting the child’s right not to be separated from his parents, except under enumerated circumstances in Article 9).

22 See, e.g., id. at 169 (failing to demonstrate how adoption maintains the rights of the children in Article 21 on adoption).

23 See infra notes 36-343 and accompanying text.


25 See infra Sec. III.A and accompanying text.

26 See infra Sec. III.B and accompanying text.

27 See infra Sec. III.B.4 and accompanying text.
account for a key attribute of the human person, which is particularly evident in children: human vulnerability, as described by Professor Martha Fineman and the human vulnerabilities movement (the vulnerability principle).\(^{28}\)

The four core principles of the Convention on the Rights of the Child—"non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child"\(^{29}\)—can be re-anchored to the concept of human dignity to inform these concerns about the value and limitations of intercountry adoptions. The rights to life, survival, and development recognized in the Convention give rise to principles that should inform intercountry protocols beyond the right to basic sustenance implied in the rights to life and survival, namely, the right to the opportunity for growth, and the right to the opportunity to love and be loved.\(^{30}\) In keeping with the principle of realism, these rights to the opportunity for growth and the opportunity to love and be loved must necessarily be described as opportunity rights.\(^{31}\) In the real world, no nation state currently demonstrates its full commitment to ensuring the growth and development of its child-citizens.\(^{32}\) In any world we will ever know, no nation state will be capable of ensuring that every child will be loved or able to give love.\(^{33}\) These rights, instead, suggest that the state should create structures and conditions for adoptable children, as for all children, that make it possible, even likely, that

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\(^{28}\) See Martha Albertson Fineman, The Vulnerable Subject: Anchoring Equality in the Human Condition, 20 YALE J.L. & FEMINISM 1, 8-9 (2008-09) (noting that vulnerability is a "universal, inevitable, enduring aspect of the human condition").


\(^{30}\) See infra Sec. IV and accompanying text.

\(^{31}\) See id.


\(^{33}\) See Richard Carlson, Seeking the Better Interests of Children with a New International Law of Adoption, 55 N.Y.L. SCH. L. REV. 733, 740 (2010-11) (citing Professor Bartholet’s concern that despite the issues of finding proper parents, the issues elsewhere are so bad that we must stick with adoption); Dillon, supra note 32, at 182-85.
a child will grow and flourish into adulthood, and that she will be loved.  

II. The Human Rights Instruments, Human Dignity, and Adoption

The U.N. Declaration of the Rights of the Child, passed on November 20, 1959, and the Geneva Declaration on the Rights of the Child, both foundational documents for covenants and conventions pertaining to child adoption, recognize the rights of children “to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.”

The dignitary principle is similarly referenced in two of the three most widely adopted international agreements relevant to the concerns of adopted children: the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child, though it is not in the Hague Convention on Adoption. Interestingly, the preamble to the ICCPR references these human rights using the metaphor of the family, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,” which it later describes in Article 23(1) as the “natural and fundamental group unit of society.” The Convention on the Rights of the Child repeats the Declaration’s

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38 See generally Hague Convention, supra note 16 (neglecting to reference dignity).
39 United Nations International Covenant on Civil and Political Rights, supra note 37, at 52-53.
40 Id. at 55.
concern for human dignity, proposing that every "child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity."}\textsuperscript{41}

That the dignitary principle informs the rest of the rights recognized in these instruments can be intuited from the more specific provisions. ICCPR Article 23(1) recognizes that every child "is entitled to protection by society and the State,"\textsuperscript{42} and Article 24(1) provides that "[e]very child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."\textsuperscript{43} That article also provides that every child has the right to a name, to be registered as born, and to acquire a nationality.\textsuperscript{44} The non-discrimination provision is also found in Article 2 of the Convention of the Rights of the Child, which requires state parties to "take all appropriate measures to ensure that the child is protected against all forms of discrimination" based on his or her family's "status, activities, expressed opinions, or beliefs."\textsuperscript{45}

The Convention on the Rights of the Child (CRC) similarly fleshes out these protections as they relate to adoption. Concern for the adopted child's human dignity can be discerned in these protections as well. The overarching substantive standard for interpreting the child's rights is found in Article 3, which provides that "the best interests of the child shall be a primary consideration" for legal actions concerning children and that state parties should "undertake to ensure the child such protection and care as is necessary for his or her well-being," taking into account the rights and duties of those legally responsible for the child.\textsuperscript{46} A number of CRC provisions protect the child's relationship with his

\textsuperscript{41} United Nations Convention on the Rights of the Child, supra note 17, at 167.
\textsuperscript{42} United Nations International Covenant on Civil and Political Rights, supra note 37, at 55.
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} United Nations Convention on the Rights of the Child, supra note 17, at 167.
\textsuperscript{46} Id.
or her birthparents: Article 5 requires that states respect the rights and duties of parents or extended family or community “in a manner consistent with the evolving capacities of the child, [and] appropriate direction and guidance” in exercising the child’s rights.\(^{47}\) Article 8 requires respect for the child’s identity, including family relations and name.\(^{48}\) Article 9 protects the child from separation from his parents except when necessary for his or her best interests and requires states to maintain the parent-child relationship when separation is necessary.\(^{49}\) Article 19 requires state protection against childhood abuse or neglect,\(^ {50}\) and Article 20 requires the state to protect a child who is deprived of his or her family environment.\(^ {51}\)

The CRC also speaks to human rights requirements relating to adoption. Article 20 requires that children separated from their parents be ensured alternative care, listing adoption “or if necessary placement in suitable institutions for the care of children.”\(^ {52}\) Article 21 of the CRC requires that adoption systems make the best interests of the child paramount.\(^ {53}\) It requires that “competent authorities” make sure that adoption is appropriate and that the parents or relevant parties be given counseling before giving informed consent to adoption.\(^ {54}\) It recognizes intercountry adoption as permissible only if the child cannot be cared for in a “suitable manner” in his or her country of origin, and provides for parity between children adopted intercountry and those adopted domestically in the receiving nation.\(^ {55}\) Moreover, it requires assurance that intermediaries and others do not receive “improper financial gain.”\(^ {56}\)

\(^{47}\) Id. at 168.

\(^{48}\) Id.

\(^{49}\) Id.

\(^{50}\) Id. at 169.


\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) Id.

\(^{55}\) Id. (explaining that intercountry adoption may be considered an alternative for the child’s care if suitable care with a foster or adoptive family or placement in the country of origin may not be obtained, and a child of intercountry adoption will enjoy the same safeguards and standards equivalent to national adoption cases).

\(^{56}\) Id.
The Hague Convention, although it does not specifically reference the idea of "human dignity," is consistent with CRC procedural protections, reiterating the "best interests of the child" standard and noting that adoptions should proceed "with respect for [the child’s] fundamental rights." It reiterates that it is the duty of states to make sure that the child is adoptable and that adoption is in his or her best interests after reviewing all possible placements within the sending country (Article 4) to collect all appropriate informed consent agreements (Article 4c), to ensure that consent has not been obtained by compensation (Article 4c(3)), and that the parents or responsible parties, and the child where appropriate, have been counseled before their consent is obtained (Article 4(c)(1), (2), and (d)). Similarly, states are required to counsel and determine the eligibility of the adoptive parents to adopt and ensure that children will be allowed to enter the receiving country (Article 5).

Scholars of intercountry adoption, most prominently David Smolin, have similarly talked about the importance of recognizing dignitary rights of all members of the adoption triad, though Smolin trains his critique primarily on recognizing the dignity of the birth-parents and birth-family. For example, he argues, "[u]nder international human rights norms, birth parents are possessed of equal and inalienable rights based on their inherent dignity as human persons. From this perspective, extreme poverty is not simply a background condition or circumstance, but in itself represents a severe deprivation of human rights." However, the concept of human dignity as it relates to adoptions remains largely unpacked.

The concept of human dignity as articulated in the human rights instruments has been criticized as either meaningless or

57 Hague Convention, supra note 16, pmbl.
58 Id. art. 4(a)-(b).
59 Id. art. 4(c).
60 Id. art. 4(c)(3).
61 Id. art. 4(c)(1)-(2), (d).
62 Id. art. 5.
64 Id. at 417.
Its defenders would argue that the concept is not reducible to any one value, and it is not something that can be "conferrable" upon a person, because he or she already possesses it. It is "a status which is first and to be taken for granted. It refers to [humans'] highest value, or to the fact that they are a presupposition for value, as they are those to whom value makes sense." We begin with human dignity as a given in any conversation about the real or the good.

Yet, while there may be dangers in either defining or instrumentalizing human dignity that these critiques fairly point out, there are a cluster of traditionally recognized meanings that help us to see how intercountry adoption can be a means to ensuring the human dignity of a child. These include the right to be "seen" as a person worthy of dignity, the right to autonomous decision-making and to be heard on those decisions, the right to be treated as of equal worth, and the right to flourish as a free person, which includes both the right to the opportunity to grow (or, in the terms of the Convention, to develop) and the right to the opportunity to love and be loved.

While the ancient concept of dignity as inhering in a person because of his or her station has largely been discarded in favor of equality discourse, there is one salient feature of the ancient understanding that we should recognize: the concept of dignitas was a relational concept, one that understands that society is seeing and evaluating the person, and there is some relationship between how one is valued and what one is due, i.e., what individuals and society must do for the person who possesses...

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67 Id. at 1; see also Rao, supra note 65, at 187 ("[D]ignity focuses on the inherent worth of each individual. Such dignity exists merely by virtue of a person's humanity and does not depend on intelligence, morality or social status.").

68 Rao, supra note 65, at 187 (describing intrinsic dignity as "a presumption of human equality—each person is born with the same quantum of dignity").

69 See infra Sec. IV and accompanying text.
dignity.\textsuperscript{70} “Dignity as recognition” acknowledges that “[a]n individual’s personality, and therefore his dignity, is constituted and confirmed by society . . . ;” “it is a dignity of difference, of recognition for individual and group differences . . . . Unlike inherent or intrinsic dignity, such dignity depends on external affirmation to validate and confirm a person’s worth.\textsuperscript{71}

The first implication of this right to recognition or to be “seen” is the duty of others to pay one notice, to take cognizance of the rights-holder as a whole person.\textsuperscript{72} While for the ancients, the virtues or standing of the person is what merits respect,\textsuperscript{73} for modern children and their parents, both birth and adoptive, the point is that they should be recognized by institutions, societies and governments (including international law) for who they are.

The second concept, which is really the focal point of both the Convention on the Rights of the Child and the Hague Convention as they pertain to adoption, is the right to autonomy in the Kantian sense, i.e., the right of individuals to make choices as independent persons, i.e., the recognition that “they are capable of legislating the moral law unto themselves,” which is the essence of the dignity of their nature.\textsuperscript{74} In legal parlance, this meaning of dignity is legislated in what are effectively the “informed consent” provisions of both conventions.\textsuperscript{75} They require that the parents or designated caretakers of adoptable children be informed, counseled about their options, and permitted to make a non-coerced choice about adoption, with coercion defined both in terms of legal and social pressure and in terms of economic pressure, i.e., offering financial incentives to cause parental

\begin{itemize}
  \item \textsuperscript{70} Lebech, supra note 66, at 3 (describing dignitas as the “standing of the one who commanded respect, whether because of his political, military or administrative achievements”).
  \item \textsuperscript{71} Rao, supra note 65, at 248 (noting the constitutional courts’ understanding of dignity depends “on recognition by others in the political and social community[,] . . . the attitude possessed by both the state and other individuals[,] . . . [and is a status] constituted and confirmed by society”) (emphasis in original).
  \item \textsuperscript{72} Id. at 249 (referring to the idea as the “politics of recognition”).
  \item \textsuperscript{73} Id. at 224.
  \item \textsuperscript{74} Lebech, supra note 66, at 6.
  \item \textsuperscript{75} See Convention on the Rights of the Child, supra note 17, art. 21(a); Hague Convention, supra note 16, art. 4.
\end{itemize}
consent for adoption. The Hague Convention also requires the child's informed consent where appropriate.

A third, modern concept of dignity assumes that humans must be treated as of equal worth. This concept perhaps can be said to be founded on the Christian concept of dignity as inhering in a human being by virtue of his or her creation in the image of God, which would suggest that it is impossible to value one human being more highly than another. In Aquinas's view, a person could lose his dignity by "deviat[ing] from the rational order by sinning," but could also recover that dignity through finding redemption in Christ. The recognition of an inviolable right to be treated of equal worth, which subsumes Kant's view that persons must always be treated as ends, and never as means, causes difficulties in situations like adoption when treating all persons as persons of equal worth is bound to lead to conflict. On the one hand, it does demand that the international community provide for the basic sustenance needs of the child, protecting his right to "life" and "survival." On the other, it is difficult to treat every person as both inviolable and of equal worth in conditions of material and non-material scarcity—that is, basically all of real life—as evidenced by any problem in which political decision-makers are faced with the prospect of granting benefits to some to the detriment of others. It is arguable that the Conventions' focus on "the best interests of the child" is a violation of this concept of dignity, because it projects the worth of the adoptable child as paramount to the worth of any other persons affected by a proposed adoption.

76 Bartholet, supra note 9, at 173.
77 Hague Convention, supra note 16, art. 4(d) (requiring that authorities from the country of origin, depending on the child's maturity and age, ensure the child has been counseled about the effects of an adoption and has provided his or her consent if it is required).
78 See Lebech, supra note 66, at 5 (noting that dignity "was after all given twice, first in Creation and again, but now even better, in Redemption, after it was marred by sin," and that this "reinforc[es] the recognition of the personhood and human dignity of everyone").
79 Id.
80 See id. at 8.
81 See Convention on the Rights of the Child, supra note 17, art. 6.
82 See Lebech, supra note 66, at 8.
Finally, the concept of dignity presumes what the early international instruments described as "freedom"\textsuperscript{83} and the Convention on the Rights of the Child describes as "development,"\textsuperscript{84} that is, the right of the person to grow and flourish in freedom. This concept goes beyond autonomy in the sense of free moral decision-making and focuses on conditions that permit or prevent the development of human faculties and personality.\textsuperscript{85} Minimally, principles of recognition, equal respect, and freedom guard against blatant types of abuse and exploitation that intercountry adoption skeptics focus on—e.g., children should not be sold, or in the language of the Hague Convention, "trafficked," and should not adopted into abusive or neglectful environments, where they may be physically or emotionally damaged by deliberate wrongful behavior or lack of care by their parents.\textsuperscript{86}

III. Principles for Intercountry Adoption Following from Human Dignity

A. The Realism Principle

Many advocates in the intercountry adoption debate have argued for what Richard Carlson has called "clear-eyed realism" in both recognizing the nature of the problem that adoption addresses and in understanding the limits of the law in addressing it.\textsuperscript{87} Yet, realism is hard to come by, either with respect to describing "the facts on the ground" or in understanding the nature of what the law does or can do.

In cases such as the Russian adoption controversy, it is

\textsuperscript{83} See id. at 6 (arguing that the dignity of man consists in the freedom to choose his or her manner of existence).

\textsuperscript{84} Convention on the Rights of the Child, supra note 17, pmbl. (describing the rights of the child as including the "full and harmonious development of [the child's] personality").

\textsuperscript{85} See id.

\textsuperscript{86} Hague Convention, supra note 16, pmbl. (describing the necessity of ensuring that intercountry adoption is in the best interests of the child, including respect for the child's fundamental rights and preventing the abduction, sale, or trafficking in children).

\textsuperscript{87} Carlson, supra note 33, at 767 (arguing that reform must be tempered with clear-eyed realism; for example, the need to understand that adoption corruption in foreign nations will sometimes be beyond control or detection).
tempting for both pro- and anti-intercountry adoption advocates to charge that the other side is not willing to acknowledge the "facts" about adoptable children and their situation—that, for example, many Russian children languish in unsuitable orphanages or that American parents have sometimes abused their children or proven incapable of adequately coping with children who sustained significant emotional damage before they were adopted.  

One reason for this is that the political debate on intercountry adoption, attempting to explain a proposed solution, isolates one subset of facts in a very complex context, which includes many different geographical and cultural contexts in both sending and receiving nations, not to mention the innumerable individual situations in which adoptable children might find themselves. Of course, rule of law presumptions that counsel for clarity, consistency, and certainty are only possible when human dilemmas are oversimplified. Thus, each side in this debate focuses on a small subset of facts as the only relevant ones for constructing guiding legal principles, to the exclusion of other "facts" that may be equally verifiable.

In such a complex situation, labeling isolated parts of such a context as "facts" gives them an authority as dispositive to resolution of legal problems that is undeserved. Moreover, such relabeling intentionally ignores inconvenient realities that do not fit into the narrative of "facts" that the advocate is constructing, or even worse, obscures the inevitable reality that such narratives contain value assumptions about what "facts" have priority in the decision to construct a legal regime. For example, in the Russian adoption case, the standard Russian news media’s careful crafting of stories to illustrate abusive practices of a small number of American children was apparently unaccompanied by media recognition of the conditions of institutionalized Russian

88 See Wendy Koch, U.S. Seeks to Defuse Russia Adoption Flap, USA TODAY (Apr. 13, 2010), http://usatoday30.usatoday.com/news/world/2010-04-12-Russia-adoptions_N.htm (describing about a dozen publicized cases of Russian children killed or abused by their adoptive parents in the U.S., including a recent case of the U.S. mother who sent her adopted Russian son alone back to Russia); see also Amid Proposed Adoption Ban, supra note 7 (describing UNICEF’s approval of Russia’s attempt to improve the child welfare system and acknowledging UNICEF’s appeal to Russia to give priority attention to the plight of Russian children in institutions).

89 See Bartholet, supra note 9, at 188.
children. Conversely, media and adoption advocates have failed to give an accurate picture of the challenges that emotionally and physically deprived orphans present to unsuspecting adoptive families without substantial resources to cope with them. Of course, any legal regime has to be built on some narrative; but it is important to always keep in mind that even the broadest narrative will simplify a complex situation.

The first consequence of the human dignity principle is that the law should take into account and respond to the complexities facing intercountry adoption and openly acknowledge the extent to which solutions to these complexities are based on the prioritization of certain values (e.g., the best interests of the child). This may seem obvious, yet it is too often ignored in practice. Those realities include a broken international social and economic system in which material and non-material inequalities and deprivations put significant strain on the ability of families of origin to raise their children to adulthood, a brokenness which has disastrous consequences for birth families (as, for example, Professors Smolin and King acknowledge) and for children (as, for example, Professors Bartholet and Dillon acknowledge). They also include, in some and perhaps many cases, wrongful or neglectful parental behavior or inadequate parenting skills that contribute to the precarious situation of adoptable children. They include social indifference to the situation of adoptable children,

90 Levy, supra note 5 (describing the Russian broadcast of an interview between the Federal Children’s Ombudsman and the child sent back to Russia by his adoptive mother). See also Koch, supra note 88 (explaining that it is not uncommon for adopted children who spent years living in Russian orphanages to behave in ways adoptive parents find challenging because of their orphanage experiences).

91 Id. (noting that the mother who returned her adoptive son claimed Russian orphanage workers misled her about her son’s violent and severe psychopathic issues).

92 Carlson, supra note 33, at 772-75.

93 See, e.g., Smolin, supra note 63, at 415-16.

94 See, e.g., Bartholet, supra note 9, at 180 (discussing damaging, lifelong harms inflicted upon children in non-family placements); Dillon, supra note 32, at 183-85 (noting that millions of children will never be brought up in their biological families).

95 See e.g., GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENST IN THE UNITED STATES 1 (2007) (noting the large numbers of U.S. children who are in the foster care system because of parental abuse or neglect, and the transition from foster care to adoption).
as journalists in Russia have documented. They also include a host of other factors.

Respect for human dignity requires balanced realism, the willingness to see all of these forms of brokenness, precisely because it requires each person involved in an adoption situation to be recognized and to be seen for what he or she is. Professor Smolin’s work clearly grasps this first meaning of the dignitary principle, in that he demands that the adoption system not look away from the violations of the human rights of birth parents who are so impoverished that they would consider giving up cherished children to survive. Similarly, the United Nation’s position paper on separated refugee children, which attempts to describe protocols for reuniting such children with their parents, focuses its line of sight on one aspect of intercountry adoption. But, as Smolin and all others in the debate likely would acknowledge, not all parents whose children are being placed for adoption are making this choice from economic necessity, nor are adoptable children refugees. To focus our attention on one subset of the universe of adoptable children, or just on children, or just on birth parents and children, is to disrespect parties’ rights to recognition. Thus, proposals for reform of intercountry adoption laws should be nuanced and limited to those circumstances and individuals to whom they apply.

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96 See Koch, supra note 88.


98 See, e.g., UNHCR Policy on Adoption, UN HIGH COMMISSIONER FOR REFUGEES 1-2 (Aug. 22, 1995), available at http://www.unhcr.org/refworld/docid/42f9c3714.html (noting UNCHR policy that “refugee children in an emergency context are not available for adoption” and adherence to the Hague Convention to protect against “the abduction, sale of or traffic in children”); see also Bartholet, supra note 9, at 156 (noting UNICEF influence on restricting intercountry adoption).


100 See generally Convention on the Rights of the Child, supra note 17 (recognizing discrete rights of parents, children, and families).
Respect for human dignity as a right of recognition counsels that we must take members of the adoption triad and the intermediaries that serve them as they are, not as idealistic children’s rights advocates or family planners might wish them to be. For example, some seemingly want to construct adoption processes to ensure that children are never adopted intercountry.\(^{101}\) For some, that means excluding single (or older or gay or disabled) adoptive parents, for example, based on research about the relative success of children in single parent homes.\(^{102}\) Lynn Wardle, for example, counsels against placement of children in homes of single parents, when possible, based on documentation of their relative vulnerability that children in two-parent homes do not display.\(^{103}\)

However, as many adoption professionals have come to realize, there is no one “perfect” kind of home for all adopted children. For example, older children who come to their adoptive families with emotional scars may feel more secure in a single-parent situation where they are not vying with other parents or children for the attention and loyalty of their parent.\(^{104}\) Children who have struggled in the homes of their families of origin may find themselves to be better parented by gay or disabled parents who have similarly struggled with social projections of “normalcy” than with “perfect” couples who have never undergone such struggles.\(^{105}\) Parents can offer love and security even if they are not well educated, well off, or even well schooled in parenting techniques.

Although it may seem idealistic rather than realistic to say so, human dignity requires that those who spar over the best way to protect family life and children must never treat individual

\(^{101}\) See, e.g., King, supra note 97, at 463 (noting that the “European Parliament has taken the position that intercountry adoption violates the human rights of children and has sought to make outlawing intercountry adoption a condition of joining the European Union”).


\(^{103}\) Id. at 324, 373.

\(^{104}\) See King, supra note 97, at 466-67 (describing caregiving relationships that are seen by Western culture as nontraditional, and examining the benefits of these relationships).

\(^{105}\) See id.
children as means to a political or ideological end. This is a realistic principle because it focuses on the actual situation of children and their families rather than on theoretical or historical objections to intercountry adoption. For example, adoption scholars like Shani King may have some valid concerns that intercountry or interracial adoption needs to be evaluated for, and purged of, historically conditioned but still-existing imperialistic assumptions and processes as adoption changes. Yet, human dignity per Kant requires, as Elizabeth Bartholet has argued, that children should not become hostages of larger social and political battles that nations or ethnic, racial, religious, or geographical communities are waging. Moreover, they should not become casualties of the various ideological battles that intellectuals are waging, whether they are about racism or Western hegemony, often without returning to the question of what real children living in these conditions today need.

The demands of human dignity do not require intellectuals, advocates or even nation-states to cease their critique of the social or political realities of either “sending” or “receiving” countries in adoption. In fact, just the opposite is true—critique of national and local practices is not simply warranted, but mandated. The right of recognition simply asks governments to act promptly and fairly in the interests of children in response to existing “facts on the ground” without necessarily accepting as future givens the assumptions that have created these “facts on the ground.” As Bartholet and other advocates of intercountry and other non-traditional forms of adoption have noted, there is an emergency here. Children need to be helped now and it is not acceptable either to put children’s lives on hold until adoption law reform is

106 Compare King, supra note 97, at 414-15, with Bartholet, supra note 9, at 159-64.
107 King, supra note 97, at 414-15.
108 See Bartholet, supra note 9, at 159-64.
109 See id.
110 King, supra note 97, at 414-15.
111 See Rao, supra note 65, at 243-44.
112 See id.
113 Bartholet, supra note 9, at 160-61, 163-64 (describing crisis in China as a result of one child rule).
accomplished, or to create adoption procedures that make children languish in damaging families or institutions.

The principle of subsidiarity can function effectively here to protect the right of recognition if it is correctly understood. As Professor Carlson has pointed out, many of the most visible players who have put their thumb on the scale against intercountry adoption argue that the principle of subsidiarity requires exhausting all possible placements for a child within his home country before intercountry adoption can take place.114

As a principle of Catholic social thought, subsidiarity is not a rigid preference for localism or nationalism. Rather, it states that "nothing should be done by a larger and more complex organization which can be done as well by a smaller and simpler organization."115 The principle implies that the local or national solution to the problem of adoptable children must be at least as effective as the international solution at accomplishing its task, here, creating an environment where children do not only exist but thrive.116 The principle of subsidiarity further assumes that an individual is more likely to be recognized for who he is, and thus to be treated with human dignity, in a small-scale environment where actual human beings can come to know him in all his complexity.117

In a context in which the search for intracountry placements can occur in weeks or a few months, for example, where placement alternatives are available in a searchable database and inquiries can be made quickly, the principle of subsidiarity seems unobjectionable as potentially lessening the amount of material

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114 Carlson, supra note 33, at 772-75.
116 For a description of the current understanding of the principle of subsidiarity as applied to adoption, see Carlson, supra note 34, at 735-36 (discussing a "strict" view of subsidiarity that requires the sending nation to exhaust all local placement options before permitting intercountry adoption and more moderate views).
117 See Pope Benedict XVI, Caritas in Veritate, http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20090629_caritas-in-veritate_en.html (noting that "[s]ubsidiarity respects personal dignity by recognizing in the person a subject who is always capable of giving something to others. By considering reciprocity as the heart of what it is to be a human being, subsidiarity is the most effective antidote against any form of all-encompassing welfare state.").
and cultural disruption for the child. On the other hand, if a child will be placed in a situation where he is at risk not only for survival but also at risk of being "unseen," unrecognized in an unregulated and unsubsidized institution for years because placement options are not easily searchable, or because of slow-paced bureaucracy, facile employment of the subsidiarity principle can pose grave harm to real children, harm that will follow them throughout their lives.\textsuperscript{118} For example, Professor Bartholet writes movingly about the psychological damage inflicted on infants whose cries for attention are not heeded for hours because attendants are not available to respond.\textsuperscript{119}

Again, the right of recognition also requires that we take into consideration the actual situation of each individual child rather than setting rigid international timelines as the UNICEF statement on adoption of refugee children does—a two-year wait for a nine-year-old to be adopted poses very different risks than a two-year wait for an infant to be adopted.\textsuperscript{120}

While international adoption advocates and scholars have been realistic about the difficulties of adoption, this realism has sometimes been divorced from practical planning that has a realistic chance of resolving the crisis that they spotlight as a justification for intercountry adoption. For example, some adoption advocates have been realistic about the conditions which adoptable children face, but have not fully faced up to the limited role that intercountry adoption can play in improving those conditions, given the enormous numbers of children without parents and the complications of moving even one child from his country of birth to his country of adoption.\textsuperscript{121} Focusing on "their issue," they may not join forces to advocate for other measures,
including foster and extended family care, which can provide permanent care for the larger number of parentless children who will never be adopted no matter how open international adoption law becomes, a problem in virtually every country in the world.\textsuperscript{122}

On the other side, too much so-called "realism" about dramatically reported intercountry adoption abuses, including baby-selling practices, abusive adoptive parents and the like has caused intercountry adoption skeptics to successfully demand more regulation of adoptions, including the regulation of fees that drive parents and intermediaries.\textsuperscript{123} Again, suggesting that these abuses are representative and should drive the law of international adoption is not "realistic" or in line with the demands of human dignity because it uses children as a means to an end.\textsuperscript{124} For example, on the subject of the economics of adoption, most "realism" literature focusing on "baby-selling" and human trafficking reports has demanded that the economic system not incentivize birth parents, intermediaries or adoptive parents to complete an adoption\textsuperscript{125}—intermediaries are considered too eager to exploit birth or adoptive parents with economic incentives, and the mark of whether an adoption is "loving" on the side of both birth and adoptive parents is whether they are willing to sacrifice on behalf of their children.\textsuperscript{126}

Yet, economics plays a role, if not the primary role, for all members of the adoption triad. To suggest or pretend that economics should not play any role is to challenge the dignitary right of the person, whether a birth-parent, an adoptive parent or an intermediary, to make autonomous decisions, to live as a morally self-regulating person who can legitimately consider the actual consequences of a decision to his life and the lives of those around him.\textsuperscript{127} For example, even the most altruistic

\textsuperscript{122} See Bartholet, supra note 9, at 158 (suggesting alternatives such as foster care, orphanages, and UNICEF programs).

\textsuperscript{123} Id. at 188; see also Bartholet, supra note 8, at 185 (describing how adoption law functions as an enemy to children by setting up barriers to international adoption).

\textsuperscript{124} Id. at 186-87.


\textsuperscript{126} Smolin, supra note 63, at 418-21.

\textsuperscript{127} See Lebech, supra note 66, at 6.
intermediaries have to make a living, so nation-states addressing abusive and exploitative intermediary fees still need to leave regulatory room for feasible business models that will not discourage valuable intercountry adoptions.\textsuperscript{128} A proper model in a nation where government highly subsidizes the care of adoptable children and the adoption process will not work in a nation where that is not possible.\textsuperscript{129} International funding agencies should also consider how to provide appropriate economic incentives, whether through direct government subsidies, underwriting private agencies, tax breaks, or other means that will result in the creation and flourishing of intermediaries that engage in adoption "best practices," particularly in those nations without a history of viable and ethical adoption organizations.

Similarly, the dignitary principle of moral autonomy embraces more than the concept of informed consent recognized in the adoption instruments—for example, that a birthparent or adoptable child should know and be counseled about the realities of his or her choices. It also asks us to show respect for the decisions that both birth and adoptive parents make, including those made in part based upon economic considerations.\textsuperscript{130} It is a rare birth parent for whom the economic cost of raising a child is not in play, and similarly, a rare adoptive parent for whom it is not a consideration for adoption.\textsuperscript{131} To disrespect the moral choice of a desperately poor parent who makes the choice for adoption by suggesting that it must be uninformed, coerced, immoral, or otherwise less worthy of respect because it is made in part for economic reasons violates that parent’s human dignity, just as much as it would to demand that an adoptive parent accept a child that he or she wisely determined he or she was not capable of parenting.

Again, the adoption community seems to consider the way economics can influence adoption decisions only as a basis to discourage adoption, by excoriating all economic considerations of

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\item \textsuperscript{128} See, e.g., Smolin, supra note 63, at 438-39.
\item \textsuperscript{129} See id. at 452 ("The solution to this dilemma necessarily would have to vary with the particular circumstances of each significant sending nation.").
\item \textsuperscript{130} See Lebec, supra note 66, at 6.
\item \textsuperscript{131} See Bartholet, supra note 9, at 187-88 (describing circumstances of poverty and suggesting that birth parents "may have one or two children they are struggling to keep alive, and know they are incapable of supporting a third.").
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birthparents or adoptive parents as "baby-selling" or "monetizing" the child.132 Instead, the partially economic nature of adoption decisions should push nation-states and the international community to consider how economic motivations can incentivize a "good" adoption in the right way, not only how they can incentivize a "bad" adoption in the wrong way.133 In a country like Russia where children often end up in orphanages, it may be appropriate to provide incentives to birth parents to surrender their children to adoption rather than orphanages if those are the only two realistic options.134 These incentives need not be substantial cash payments that might easily morph into actual baby-selling—one might instead envision, for example, providing the economic means for the Russian mother to keep in touch with and perhaps even visit that adopted child as he grows up so she feels less like she is abandoning him to an unknown fate.135 On the adoptive parent side, for example, in the United States, economic incentives may take the form of providing realistic tax deductions or credits for parents who adopt special needs children or adopt from countries with protocols requiring extra expense.136

Similarly, most nation states are likely to make decisions on both adoption procedures and economic support based on a mix of reasons, some of them motivated by concern for displaced children and others by a desire to pass off responsibility for the care of their children or to hone some political image in the world community. Any system or set of values that ignores the complexity of these motivations is unlikely to be good at putting children in the best

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132 See, e.g., Smolin, supra note 13, at 311-14 (discussing ways in which economic incentives for birth parents to relinquish effectively amount to induce child trafficking).

133 See King, supra note 97, at 464-65.

134 See Bartholet, supra note 9, at 191-92 (describing the conditions of some orphanages, and advocating for adoption over foster care and orphanage placement).

135 See, e.g., King, supra note 97, at 464-65 (advocating for programs that would aid parents who are "temporarily unable to care for their children").

136 Currently, U.S. taxpayers can take a maximum tax credit up to $10,000 per adopted child. See 26 U.S.C. § 23(a)-(b) (2013). For most international adoptions, this is far too low to cover the costs of adoption, particularly when the adopted child has special needs. See, e.g., Susan Freivalds, International Adoption: What You Need to Know to Begin the Process, ADOPTIVE FAMILIES, http://www.adoptivefamilies.com/articles.php?aid=686 (estimating that intercountry adoptions cost from $15,000 to over $40,000).
possible environments given available resources.\textsuperscript{137} Scholars of the history of the idea of dignity note that one of its streams has been institutional dignity, the idea that communities and nations “have” dignity, and that certain practices, such as torture or prostitution, may violate the dignity of these communities and nations, even when individuals involved in those practices consent.\textsuperscript{138} The institutional dignitary principle requires that we look at the institutions and governments that regulate the adoption process with clear eyes, both accepting their resource, social, and political limitations and confronting them honestly about how well they meet international standards for the protection of children, particularly under the Convention of the Rights of the Child and the Hague Convention on Adoption.\textsuperscript{139} On both national and international levels, this means basic oversight of those who facilitate adoptions to ensure that they are meeting the minimal standards of the conventions.\textsuperscript{140} If nothing else, this is important because, as Professor Bartholet says, even the occasional sensational abuse, which sometimes, if rarely, occurs in private adoption, often results in over-regulation and moratoriums on adoption, as the Russian ban on American adoptions evidences.\textsuperscript{141}

However, as with parents and intermediaries, critique need not only be found in negative or regulatory approaches to evaluations of countries’ approaches to compliance with the international covenants. If there is such a thing as institutional dignity, all nations of the world have a commitment to support those nations who struggle to meet the standards because of their own internal limitations.\textsuperscript{142} History shows that simply shaming countries with poor child welfare and adoption practices through exposure has more often served to dry up adoption rather than improve those

\textsuperscript{137} See, e.g., King, supra note 97, at 423-24 (describing how the motivation of adoption shifted “from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples” in America in the 1960s and 1970s).

\textsuperscript{138} Rao, supra note 65, at 228-30.

\textsuperscript{139} See id. at 235-41.

\textsuperscript{140} See id.

\textsuperscript{141} Bartholet, supra note 9, at 174 (explaining that preventing baby-selling or other adoption abuses may help to reduce adoption scandals, which trigger anti-adoption reforms that significantly reduce the number of legitimate adoptions).

\textsuperscript{142} See Rao, supra note 65, at 235-41.
practices for children in their jurisdiction.\textsuperscript{143} Perhaps recognition and support of positive efforts for change can have the opposite effect.\textsuperscript{144} For example, an independently organized Intercountry Adoption Agency could seek private and governmental funding to reward "best practices" of countries that design protocols and standards that effectively and fairly move children from home to home with the least disruption and, especially for adoptable infants, as close to their birth as possible.\textsuperscript{145} Similarly, countries with particularly abysmal practices that have made great strides forward could be recognized, economically or otherwise, for their efforts. Even modest amounts of funding awarded to honor "best practices" would serve as a symbolic incentive to all nations to push themselves toward more humane child welfare and adoption systems.

Analyzing the literature, it seems doubtful that UNICEF, or any other U.N. agency currently serving the needs of children, is in a viable position to turn this situation around—to pull back on the overregulation and bureaucratization of intercountry adoption that has resulted from undue responsiveness to reactive popular media portrayals of intercountry adoption that have been further skewed by internal politics or national xenophobia. Existing private agencies and coalitions like UNICEF may now be too closely identified with one country's citizens' self-interest or with one position in the ideological battle over adoption.\textsuperscript{146} Evidence of that fact can be found in the change in UNICEF's attitude toward the value of intercountry adoption as politics have changed within the department.\textsuperscript{147}

By contrast, a truly independent agency, focused not simply on

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\item \textsuperscript{143} Bartholet, supra note 9, at 160 (describing the political forces that shamed South Korea at the 1988 Seoul Olympics and changed the internal political discussion about intercountry adoption).
\item \textsuperscript{144} See id. at 168-69 (examining recent U.S. adoption legislation that may affect adoption in the long term).
\item \textsuperscript{145} See id.
\item \textsuperscript{146} Bartholet, supra note 9, at 155-56, 166 (noting that UNICEF has recently issued statements indicating a large number of adoptions from any particular country should be a "red flag" about the country's practices, and acknowledging that sending countries' decisions on adoption are influenced, among other things, by UNICEF).
\item \textsuperscript{147} Id. at 156 (noting the major role that UNICEF has played in recent attempts to restrict international adoption).
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regulation but also on improving intercountry adoption, could not only reward “best practices” but also engage in research and development of these practices for intracountry adoptions that could result in subsequent improvements to existing conventions. It could also mediate political controversies between nation-states about intercountry adoption, consult with such nations on their implementation of Hague Convention protocols as they intersect with other children’s rights in the Convention on the Rights of the Child and other documents, and challenge all nation-states to meet the goals of the CRC and the Hague Convention to ensure every child the opportunity to grow up in a family.

B. The Global Interdependence Principle

A second recognition in international adoption rights law should be that the world is now, and increasingly, interdependent. If companies are going to be economically viable, they must conform to international and foreign legal norms, in addition to the norms within their own nations, because markets for certain goods have changed. National media in many countries explore international crises on a scale that is interchangeable with that for national and local stories, rather than relegating them to a back page. Increasingly, young people are engaged in international travel and foreign study, once a luxury reserved for wealthy children, as an expected part of their education, starting at high school age or even before. Perhaps as importantly, adolescents and young adults are beginning to view themselves as citizens of the world as much as of their respective nations.

The recognition of global interdependence entails two principles important for adoption law. The first is a principle that


149 Adriana Medina-Lopez-Portillo, Intercultural Learning Assessment: The Link Between Program Duration and the Development of Intercultural Sensitivity, 10 Frontiers: Interdisc. J. Stud. Abroad 179 (2004) (noting the “growing emphasis on internationalizing higher education and [] rapidly increasing numbers of students embarking on study abroad programs each year”).
few would contest, but most are not willing to implement: the entire world is responsible (and should be held responsible) for the welfare of adoptable children throughout the world, with due respect for the scarcity of economic resources to meet those needs, the limitations of international intervention, and the proper roles of birth families and state institutions in caring for them.

Second, perhaps more controversially, adoptable children should be able to call on the international community to denounce adoption shutdowns, like Russia’s, as violations of their right to non-discrimination based on ethnic origin and social status under treaties such as the International Covenant of Civil and Political Rights and the Convention on the Rights of the Child.

1. The Consequences of Global Interdependence for Governmental Responsibilities for Adoptable Children

In the adoption context, the recognition of global interdependence should be embodied in an international commitment to working toward the day when every child has a family or family equivalent, regardless of the child’s nationality and regardless of where that family lives. Since the advent of intercountry adoption, American adoptions have been largely ethnocentric, focused on assisting American families who wish to adopt, rather than on supporting the needs of adoptable children where they live. The State Department has also policed the immigration of children from other countries based on political assumptions about which international children might be a burden rather than a benefit to the nation. For example, the State Department has enforced the statutory restriction barring admission of persons with communicable diseases against

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150 Smolin, supra note 99, at 53.

151 Not only do HIV positive children face difficulties in entering the United States, but all children must also have a skin test for TB. Elisabeth Pernicone, AIDS and Adoption—Part 2: Adopting an HIV-Positive Child, THE AIDS BEACON, http://www.aidsbeacon.com/news/2009/10/08/aids-and-adoption-part-two-adopting-an-hiv-positive-child/. If the TB test is positive, a lung tissue culture must be taken and must come back negative before the child can enter the United States. Id. Until recently, this test could take up to eight weeks but there has been recent approval of a “rapid test” that can take three days. Id.

children with HIV or AIDS who have identified adoptive parents in the United States.\footnote{Pernicone, supra note 151 (explaining that people with tuberculosis and HIV have communicable diseases, according to the CDC, and that they are forbidden from traveling to the United States, even if already adopted).}

American federal and state government adoption laws, as well as those of other countries, should fully recognize that national borders have become more fluid, and that people interact across them with relative ease in other areas of public life, such as commercial ventures and higher education opportunities. Adoption should not be an exception to this flow across borders.\footnote{See generally Elizabeth Bartholet, supra note 9 (noting that the interests of the child may sometimes be in favor of adoption and recommending reform that facilitates rather than impedes such adoptions).}

The ratification of the Hague Convention on Intercountry Adoption by the United States and other countries is a step toward that recognition.\footnote{Wilkening, supra note 4, at 1045-46.} However, it is not a substantive practical commitment by the United States or other signatories ensuring that, to the extent possible, every child in the world is guaranteed his rights under the Convention on the Rights of the Child, particularly his rights under Articles 20 and 21 to adoption and foster care where appropriate.\footnote{Convention on the Rights of the Child, supra note 17, art. 20(1), (3) (noting that these children “shall be entitled to special protection and assistance provided by the State” and that “such care could include . . . foster placement [or] . . . adoption”).}

The global interdependence principle suggests that the U.S., among other wealthy nations, has more than a moral responsibility; indeed, it has an international legal responsibility to assist those nations that are struggling to provide families for their displaced children.

David Smolin has offered perhaps the most challenging proposal to make this aspiration a reality. Smolin, like others, notes the vast amount of resources American parents spend in adopting children, while scores of other children struggle in their families of origin or languish in orphanages or other poor conditions.\footnote{Smolin, supra note 99, at 16-17; see also Bartholet, supra note 8, at 190 (noting cost of international adoption at $15,000-$30,000 and high economic and time barriers to international adoption).} He has argued that a global commitment to adoptable children would be most easily met if some of the

\footnote{153 Pernicone, supra note 151 (explaining that people with tuberculosis and HIV have communicable diseases, according to the CDC, and that they are forbidden from traveling to the United States, even if already adopted).} \footnote{154 See generally Elizabeth Bartholet, supra note 9 (noting that the interests of the child may sometimes be in favor of adoption and recommending reform that facilitates rather than impedes such adoptions).} \footnote{155 Wilkening, supra note 4, at 1045-46.} \footnote{156 Convention on the Rights of the Child, supra note 17, art. 20(1), (3) (noting that these children “shall be entitled to special protection and assistance provided by the State” and that “such care could include . . . foster placement [or] . . . adoption”).} \footnote{157 Smolin, supra note 99, at 16-17; see also Bartholet, supra note 8, at 190 (noting cost of international adoption at $15,000-$30,000 and high economic and time barriers to international adoption).}
resources now spent to further intercountry adoptions by Americans could be channeled into supporting children’s families of origin.\textsuperscript{158} Essentially, he argues for a surcharge on adoption fees, which would go to other birth families in an adopted child’s sending nation to incentivize them not to give up their children because of poverty.\textsuperscript{159}

Smolin is surely correct in arguing that Americans have been myopic and selfish about economic disparities between the First and Third Worlds, preferring to spend most of their resources on what they perceive will benefit them and their immediate circle (adoption) rather than what might benefit more of the world’s children (i.e., charity or foreign aid). As a matter of social justice more broadly, it is hard to argue with him—there is no justice in a world in which some are born with the resources to spend tens of thousands of dollars on making or adopting a child, while others cannot feed the children they have.

However, the mechanism Smolin proposes for recognizing a global responsibility to the world’s children proves somewhat problematic, as Professor Carlson points out,\textsuperscript{160} and probably does not adequately take into account the mixed motivations of those in the adoption community. If adoptive parents were completely motivated by altruism, most would probably recognize the dilemma Smolin poses and distribute their economic resources more broadly and less selfishly to meet the needs of the world’s children.\textsuperscript{161} Even if they were primarily motivated by altruism and donated their money rather than adopting, there is no guarantee that either private gifts or government funding aimed at displaced children and their families would go to them, given the over-bureaucratization, corruption, and less-than-desirable competence in many private and public institutions dealing with children’s needs.\textsuperscript{162} Carlson also notes there are difficult questions that arise about how such money would be distributed and to which families.\textsuperscript{163}

\textsuperscript{158} Smolin, supra note 63, at 432-34.
\textsuperscript{159} Id. at 445-47.
\textsuperscript{160} Carlson, supra note 33, at 758-59.
\textsuperscript{161} Smolin, supra note 13, at 283.
\textsuperscript{162} Carlson, supra note 33, at 758.
\textsuperscript{163} Id. at 758-59.
Furthermore, it is not clear that Smolin’s proposal of a surcharge on intercountry adoptions is a fair way to solve the inequity he identifies. As Smolin, Carlson, and others note, some intermediaries already impose a “tax” on existing adoptions in the form of money or essentials that adoptive parents are expected to bring to foreign orphanages when they pick up their children. In the current system, in which such a gift is expected, an intermediary can logically argue that an adoptive parent gets some benefit from this “tax” because the orphanage might go out of existence but for the fee, thus drying up adoptive parents’ access to adoptable children.

Adding an additional “gift” or fee to make it possible for other birth-parents to keep their children may seem like “double taxation” in these cases. It also might discourage American parents from undertaking international adoption for fear that their own adoptions might be disrupted by the incentive scheme. Moreover, it is somewhat perverse to further “tax” those parents who are already offering to support an adoptive child for whom they would otherwise have had no responsibility, while other citizens in both the sending and receiving nations take little or no responsibility for these children, whether they can afford to or not. Imposing an additional tax on adoptive parents further reinforces the “market” model because it underscores the reality that these American parents are so desperate to have a child that they are more willing to pay such a tax than others who have no interest in caring for the world’s children in crisis.

One theoretical alternative to Smolin’s proposal is simply to recognize that the United States morally “owes” sending nations more foreign aid just because they are poor nations. Rather than taxing U.S. adoptive parents, the adoption community might make stronger efforts to enlist adoptive parents of third world children, who may have an emotional investment in their children’s countries of origin, into efforts to increase foreign aid to these countries. For example, Professor Bartholet argues that

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164 See Carlson, supra note 33, at 755, 771; Smolin, supra note 13, at 318.
165 Carlson, supra note 33, at 754-55.
166 See Smolin, supra note 13, at 283.
167 Carlson, supra note 33, at 759.
168 See Bartholet, supra note 8, at 183 (noting, “[t]hese are families whose members
adoptive parents of a child from Vietnam will have a stronger emotional bond with that country than the average U.S. citizen.\footnote{169} These parents may be more willing to lobby for foreign aid to feed starving children and their parents in Vietnam, to encourage private companies to develop the economy in their children’s homeland, and to encourage cooperative efforts between national governments to protect and foster the development of children still in orphanages or foster homes in Vietnam.\footnote{170} Alternatively, at least in theory, the international community could acknowledge that the children of the world are, generally speaking, ultimately net benefits (even if temporary liabilities) to their nations and, in a non-monetized way, acknowledge that (as some critics of intercountry adoption have argued) transferring a child from a poor nation to a rich one is effectively transferring a future national asset. However, rather than imposing the cost of that transfer on the adoptive parents, who will already be doing their part to feed, clothe, and raise a “national asset,” the international community could agree that receiving nations owe a must learn to appreciate one another’s differences,” and, thus, the adoptive parents develop bonds with adopted children’s birth countries “in terms of racial and cultural heritage, while at the same time experiencing their common humanity.”\footnote{169 See Bartholet, supra note 15, at 351 (noting the significance of these “international adoptive families living in the privileged countries of the world, in which both parents and children are sensitized to the conditions of poverty and deprivation characterizing the children’s birth countries”); see also Bartholet, supra note 8, at 207 (noting intercountry adoptive families’ views on the community value of such adoptions: “[w]e, like these children whom we claim so adamantly as our kids, have deeper roots than we knew, an enlarged sense of family, another place in the heart, and a rich and varied history of facing life issues we would never have encountered without them”).}.

\footnote{170} Bartholet notes that adoptive parents want to “give back” to organizations in sending countries and that they “will be more likely to support government policies that are generous and friendly, rather than stingy and hostile, toward the children’s sending countries, and that they will be more likely to vote for public officials that will support efforts to alleviate world poverty.” Bartholet, supra note 15, at 351.

It seems likely that when people form the kind of powerful loving bonds across racial and national lines that they form in international adoptive families, it will affect their feelings in a larger political context about who is ‘us’ and who is ‘other’ in ways that will be positive for the world more generally.”\footnote{167 Id; see also Bartholet, supra note 8, at 198 (noting that adopters of international children “have reason to identify, through their children, with the situations of other children not lucky enough to have found homes,” creating “a climate more sympathetic to wide-ranging forms of support for children abroad.”).}
specific adoption debt to sending nations when intercountry adoptions occur, because those receiving nations will receive the benefit of the future adult.\textsuperscript{171} Thus, nations themselves could be “taxed” for the adoptive children they receive, with the proceeds going to the sending nations, whether that financial obligation is truly a legally owed hard “tax” or simply a “moral tax,” an expectation that there should be a grant of foreign aid proportionate to the receiving country’s admission of children.

However, recognizing that the basis of Smolin’s argument is not that sending nations should be enriched by adoptions, but that birthparents should be helped to keep their children, general foreign aid is a poor method for achieving that goal. In theory, at least, the international community could utilize the proposed Intercountry Adoption Agency to devise these international “taxation” standards to transfer wealth from receiving nations to sending nations.\textsuperscript{172} This Intercountry Adoption Agency, in turn, could distribute these collected “taxes” directly to local governments, to the parents who need help providing for their children,\textsuperscript{173} or to the institutions that serve them.\textsuperscript{174} Of course, Carlson has pointed out that there are difficulties with direct incentives to poor parents, as well as management difficulties in distributing funds from “taxes” paid by adoptive parents or their governments to parents believed likely to give up a child because

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{171} See Robert O. Keohane, Reciprocity in International Relations, 40 INT’L ORG. 1, 4-6, 20-21 (1986) (discussing the creation and recognition of duties and obligations in reciprocity situations between nations, which, in this case, should exist between nations giving up their future assets, their children, and the receiving nations who recognize their own obligation to account for that transfer); but see Bartholet, supra note 8, at 207-08 (arguing that while sending nations claim that their adoptable children are “precious resources,” receiving nations such as the United States do not consider them assets).
\item \textsuperscript{172} See King, supra note 97, at 465 (describing support systems used in San Francisco and Michigan that could be models for distributing resources in more effective ways to birth families wishing to keep their children).
\item \textsuperscript{173} In nations with more sophisticated economic systems, this might come in the form of a bank account or debit card that parents could use to purchase necessities. Where such systems do not exist, the international adoption financial agency would need to locate a local charitable organization or government entity to receive and distribute appropriate economic resources for these families. See, e.g., James P. Ziliak, Craig Gunderson & David N. Figlio, Food Stamp Caseloads Over the Business Cycle, 69 S. ECON. J., 903, 903 (2003) (noting that welfare reform in 1996 in the United States required “states to replace paper coupons with Electronic Benefit Transfer cards”).
\item \textsuperscript{174} See King, supra note 97, at 464.
\end{enumerate}
\end{footnotesize}
of economic desperation.  

While this thought experiment admittedly may not be realistic for many reasons, including significant bureaucratic costs, political obstacles, and possibilities for corruption, it does have two virtues. First, an international adoption program that addresses the financial and societal contributions of these adoptions would make an important symbolic statement that furthers adoptable children's right to dignity; rather than treating adoptable children as liabilities that need to be offloaded or eliminated, it would engender a recognition that children are indeed assets of their birth countries, in both developed and developing nations. While there is some remnant of "monetization" in such a scheme, this is a much more important, and less objectionable, public statement than implying that children are assets, if at all, only to parents and, therefore, it is the parents who should pay not only for their care, but also for their "acquisition." Second, it would recognize that the foreign aid sent by rich nations to poor ones for child welfare programs is not bestowed out of charity but due as a right. Finally, it would shed light on the importance of targeting these funds in such a way as to make the rights described in the Convention on the Rights of the Child a reality rather than a luxury that nations "buy" only if

175 Carlson focuses particularly on the difficult decision about who would get money. Carlson, supra note 33, at 748-50. For example, some families would threaten to give their children up for adoption in order to gain subsidies. Id. One option—distribution of resources to families with inadequate resources to care for their children across the board—would remove the incentive to threaten to give one's child up, but would be cost prohibitive. Id. at 750. On the other hand, a targeted subsidy to prevent removal of a child in a family that has already taken steps in that direction would be more feasible and would create a lesser evil (inequality among poor families) than the evils that might occur if the family chose to let its child die, if the lives of all of a community's children were threatened by distributing inadequate food and resources to them all, or if a child was sold on the black market for child labor or prostitution. See id. at 759-60 (discussing these dilemmas of distribution in greater detail).

176 See Bartholet, supra note 8, at 165, 184, 198 (noting the views of some in sending countries that foreign adoption of their children is the "ultimate exploitation" and that "[p]olitical forces in the 'sending countries' have been condemning in increasingly loud voices the practice of giving their countries' children to the imperialist North Americans and other foreigners.").

177 See Carlson, supra note 33, at 759.

178 See Keohane, supra note 171, at 4, 20-21 (discussing the idea of obligations and duties being inherent traits of reciprocity when there is an exchange between nations).
their other basic needs, like security and infrastructure, are met.

2. The Non-Discrimination Principle

As suggested previously, one meaning of dignity is the right of individuals to be judged as of equal worth. One instantiation of that principle is in the right to non-discrimination found in many international covenants.\textsuperscript{179} The International Covenant on Civil and Political Rights (ICCPR) recognizes rights of non-discrimination in state treatment of both adults and children.\textsuperscript{180} Article 2 paragraph 2 of the ICCPR assigns the duty to signatories to ensure that individuals can exercise their rights without "discrimination of any kind as to...national or social origin...or other status."\textsuperscript{181} Article 24 recognizes the right of every child, without any discrimination, to receive from his family, society, and the State the protection required by his status as a minor.\textsuperscript{182} General Comment 17 links the right to non-discrimination and national duties to take measures necessary to achieve this right, including aspects that "may also be economic, social and cultural."\textsuperscript{183} It notes the responsibility of signatory nations to take "every possible economic and social measure" to protect children against the ravages of disease, malnutrition, violence, inhuman treatment, and exploitation, to "foster the development of their personality," and provide them with education.\textsuperscript{184}

The Convention on the Rights of the Child similarly provides:

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or

\textsuperscript{179} See, e.g., United Nations International Covenant on Civil and Political Rights, \textit{supra} note 37, art. 2(1).

\textsuperscript{180} See id. art. 24.

\textsuperscript{181} Id. art. 2(2).

\textsuperscript{182} Id. art. 24.


\textsuperscript{184} Id.
social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members.\textsuperscript{185}

This Convention similarly recognizes that the right extends to economic and social wellbeing.\textsuperscript{186}

There is no logical reason why these provisions should not, as human rights principles, apply to adoption, a situation in which the equal worth of individual members of the adoption triad is often disrespected in both procedural and substantive ways, including by essentializing or stereotyping them. This application of the non-discrimination principle has already been invoked in international adoption.\textsuperscript{187} For example, gay and lesbian adoptive parents have made arguments that excluding them categorically violates their rights under international covenants not to be discriminated against because of their “other status,” i.e., their sexual orientation.\textsuperscript{188}

In theory, at least, if a country such as Russia closes its adoption processes to individual would-be parents solely on the grounds that they hail from a particular country, those individuals should be able to argue that, under the ICCPR, they were discriminated against “because of their national, ethnic or social origin” or status. Conversely, the country may be able to defeat such a presumption through evidence that the reason for denial was not based on the adoptive parents’ ethnic or national origin.\textsuperscript{189} For example, if the country closes its adoption processes to all foreign adoptive parents, it may be able to argue that it currently has the resources to ensure a family to all children within its borders, or that it has closed adoptions in order to make progress

\textsuperscript{185} Convention on the Rights of the Child, \textit{supra} note 17, art. 2.

\textsuperscript{186} \textit{Id.} art. 3(2)-(3) (requiring State Parties to “ensure the child such protection and care as is necessary for his or her well-being” and specifying individual duties of protection of economic and social wellbeing in articles that follow).


\textsuperscript{188} \textit{Id.}

\textsuperscript{189} International Covenant on Civil and Political Rights, \textit{supra} note 37, art. 2(1).
Such a decision, supported by evidence that the country indeed has adequate placements for virtually all of its children, or is taking reasonable measures to reach that goal, should be able to defeat a discrimination claim made by adoptive parents. Similarly, if a nation closes its adoptions to only one country based on evidence that the country is not providing adequate protection to the sending nation’s adopted children, the presumption that the decision was the result of discrimination on the basis of ethnic or social origin would be rebutted.

However, there is a jurisdictional problem with these arguments. The ICCPR and Convention on the Rights of the Child primarily focus on internal discrimination, generally treating decisions by nations against nationals of other countries as sovereignty decisions rather than discrimination problems. For example, ICCPR Article 2 rights against non-discrimination apply “to all individuals within its territory and subject to its jurisdiction.”

However, in a few cases, foreign nationals temporarily residing in signatory nations may attempt to adopt children from their host nation, and these potential adoptive parents might be able to make a discrimination argument if their efforts are met with resistance. For example, a U.S. diplomat or CEO of a multinational company stationed in Romania might attempt to adopt a Romanian child and return with him to the United States. Should Romanian officials deny his adoption, his discrimination complaint filed may be met with the rejoinder that he is being denied adoption due to his status as an alien, not based on his national origin. Even if the diplomat could succeed in his

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190 See U.N. Human Rights Committee, supra note 183 (encouraging the reporting by States of the measures being taken to care for children “deprived of their family environment . . . in conditions that most closely resemble those characterizing the family environment”).

191 Id.

192 See International Covenant on Civil and Political Rights, supra note 37, art. 2(1).

193 Id.

194 The International Covenant on Civil and Political Rights specifically addresses the rights of aliens to “liberty of movement,” to “leave the country,” and to not be expelled from the foreign country without reason. Id. arts. 12, 13, 26. While other articles refer to rights using generally inclusive language and Article 26 protects “all persons” against discrimination under the law, classification as an alien with regard to such things as adoption rights and the ability to leave the country with a child adopted of
claim, this type of scenario would be relatively uncommon. Most Westerners adopting internationally do not travel to their child's home nation until their adoptions are well underway, if at all. If a country closes adoptions to those nationals, those individuals seeking to adopt would have no reason to travel to the country, be "within the territory," or "subject to [the sending country's] jurisdiction." However, when we look at who is the intended rights holder, particularly in the Convention on the Rights of the Child, but also under Article 24 of the ICCPR, in light of the recognition of global interdependence, the legal right to nondiscrimination based on national or ethnic status should be seen as inhering in the adoptable child. It may seem like an awkward use of treaty language to suggest that a country denying its citizens the right to be adopted by citizens of a particular nation for ethnocentric or nationalist reasons is engaging in ethnic or "national or social origin" discrimination. Yet, but for the fact that the child and the adoptive parents are of different national origins, the child would be able to be adopted and secure the family that is his right under the Convention on the Rights of the Child (CRC) and the Hague Convention.

We might consider two examples to explain why country closures to some foreign nationals constitute discrimination based on national or social origin. In the first example, two adoptable children in similar situations in a Russian orphanage are eligible for adoption by two similarly situated parents, but one parent is American and the other is Russian, and Russia denies adoption to the first child. The child is being discriminated against based on the national origin of the adoptive parent. In the second example, two adoptable children in similar situations in American and Russian orphanages are eligible for adoption by two similarly

that country is not specifically laid out. Id.

See, e.g., McKinney, supra note 29, at 361 (offering an account of the Vanderhoof's adoption of Julian from Guatemala).

See International Covenant on Civil and Political Rights, supra note 37, art. 2(1).

Id. art. 24(1).

Id.

Id.
situating American parents and the second is not adopted. Here, the child who is not adopted is being discriminated against on the basis of his own national origin.

To illustrate why a difference in the nationality of an adoptive parent and adoptable child might give rise to a discrimination claim akin to national origin or ethnicity claims, we might appropriate an analogy from American constitutional law. In *Loving v. Virginia*, the Supreme Court faced the argument that a Virginia law against the intermarriage of white and non-white citizens did not violate the Equal Protection Clause because it forbade whites and non-whites equally to marry across the color line. In finding that the law violated the Equal Protection Clause, the Court essentially held that denying the right to enter into a fundamental relationship because of the difference in the parties' races was racial discrimination. So too, denying a child the right to a family through adoption solely or primarily because of the different national or ethnic origin of his intended parents "without an objective and reasonable justification" should violate the ICCPR and CRC non-discrimination provisions.

On the other hand, a nation might argue that the correct basis for distinction is not the national origin or ethnicity of the parent, but his nationality, otherwise viewed as his status as an alien with respect to the country of the child's origin. However, analogous international cases on separation of families bear out the fact that, for human rights purposes, nationality can be a status giving rise to a claim for discrimination. For example, in the recent case of *Hode and Abdi v. United Kingdom*, the European Court of Human Rights (ECHR), Fourth Section, found that the United

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200 Id.
202 Id. at 7-8.
203 Id. at 12.
205 See *International Covenant on Civil and Political Rights*, *supra* note 37, art. 2(1); *Convention on the Rights of the Child*, *supra* note 17, art. 2.
207 Id.
Kingdom had violated the non-discrimination provision of Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms\(^{208}\) by refusing permission for a spouse to join her refugee husband in the United Kingdom, because she had not married him before he left the country on a visit.\(^{209}\) When moving to the second step of the analysis, whether there is "no objective and reasonable justification if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized," the European Court of Human Rights focused on an "internal" difference in British law.\(^{210}\) It found that there was not an "objective and reasonable" difference between refugee families who were not entitled to be reunited and worker and student spouses who were allowed to be reunited under British law.\(^{211}\) However, in the first step of the analysis, when the court was considering whether the complainants were treated differently on the basis of a status recognized by international law, the Court held that immigration status or nationality was a "status" on par with ethnic or national origin and could be the subject of a complaint.\(^{212}\) Moreover, the ECHR has recognized nationality as a status giving rise to discrimination claims in other cases.\(^{213}\) When a country denies an adoption of its own child whose best interests mandate adoption "because a parent is American," traditional sovereignty concerns with immigration, such as national security or economic competitiveness, do not come into play.\(^{214}\) Instead, such a ban more resembles the unthinking racist or ethnic origin discrimination that stereotypes one individual as representative of


\(^{209}\) Hode and Abdi v. United Kingdom, supra note 206.

\(^{210}\) Id. at 15-16.

\(^{211}\) Id. at 13.

\(^{212}\) Id. at 12-14.

\(^{213}\) See, e.g., Wouter Vandenhole, Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies 128 (2005) (describing court case on "other status" protection).

\(^{214}\) See, e.g., Herszenhorn & Eckholm, supra note 3 (discussing political motivation for Russian ban on adoptions by U.S. citizens).
a group, in contradistinction to his actual characteristics. Such stereotyping essentially violates the dignitary rights of both child and parent by refusing to recognize them as they actually are.

In summary, where intercountry adoption is in the best interests of the child under the CRC and the Hague Convention, it is incumbent upon international courts and authorities to recognize the right of a child not to have his adoption disrupted by his sending country’s arbitrary refusal to grant adoption rights to his adoptive parents based on their nationality alone. Some further national interest must be proven in order to block such an adoption.

3. Responding to Concerns about Loss of a Child’s Culture

One of the chief arguments against intercountry adoption is that such adopted children will be robbed of the only world that they know, including their culture, and thus robbed of their identity. The Convention on the Rights of the Child also suggests that the principle of human dignity carries an implicit promise to respect the origins of each displaced child as they have shaped his or her identity. As history has demonstrated, this global principle carries the seeds of potential harm as well as possibility. Advocates can legitimately provide horror stories of older children so ripped from their culture that they suffer profound emotional and tragic blows to their identity. At a political level, the Convention on the Rights of the Child rebukes individuals or their states and countries of origin for adopting an attitude and presumption of cultural superiority, assuming that children from other countries live in inferior cultures or are themselves inferior by virtue of their cultures, and that adopting

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215 See Perry, supra note 12, at 51-53 (discussing attitudes towards multi-racial families).

216 See, e.g., Carlson, supra note 33, at 746 (describing view that even young children can be robbed of their cultural identity).

217 Convention on the Rights of the Child, supra note 17, at 168 (requiring that state parties “respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference”).

218 See, e.g., Smolin, supra note 99, at 37-45 (describing trauma suffered by two children adopted from Southeast Asia).
and assimilating them into American homes will raise their “worth” and provide them with a better life than their culture of origin could possibly provide.\(^\text{219}\)

Even if one refuses to accept the conclusion that cultural critics draw, it is important to acknowledge the truth of the criticism. The requirement that adoptive children’s cultures be respected by their new families is not simply a moral requirement, it is also a practical necessity, at least with older children.\(^\text{220}\) The U.S. experience with boarding schools and adoption of American Indian children into white majority homes not prepared to address their cultural differences illustrates the practical consequences of raising children who have lived in other cultures with an attitude that the new culture is superior to the old.\(^\text{221}\) Many Indian children ripped from their cultures or confronted with the claim that their cultures of origin were inferior and that they should leave them behind experienced severe mental and emotional trauma that followed them into adulthood.\(^\text{222}\)

Even where such a message is not explicit, American Indian and other cross-culturally adopted children report the difficulty of dealing not only with differences from their adoptive family that stem from their own personalities, but also with cultural differences that they may not even be consciously aware of, often attributing that difference to some personal fault or weakness.\(^\text{223}\) The effect of this trauma is well documented in the higher rates of alcoholism, drug abuse, and suicide in the Indian community, all of which have had consequences both for succeeding generations of American Indians and for society as a whole.\(^\text{224}\)

\(^{219}\) See generally Convention on the Rights of the Child, supra note 17.

\(^{220}\) Id.

\(^{221}\) See, e.g., Lorie M. Graham, Reparations, Self-Determination and the Seventh Generation, 21 HARV. HUM. RTS. J. 47, 58-59 (2008) (noting that American Indian children “were raised in an environment that often frowned upon their indigenousness” and as a result they “experienced long-term emotional, social, and psychological problems”).

\(^{222}\) Id.

\(^{223}\) Id. at 59 (observing that cross-culturally adopted American Indian children “found it difficult both in childhood and adulthood to establish permanent roots . . . and sought to deny their own heritage. This denial and lack of community connection caused further distress, often leading to such things as substance abuse.”).

\(^{224}\) Id. at 58-59. Making an observation about the suicide rates among adopted
As scholars have recognized, however, the nature of the deprivation that children will suffer depends upon many things. One is the age of a child—it is difficult to argue that an infant has been robbed of a culture he has never experienced, whereas an adolescent certainly will suffer a substantial loss if she is removed to a remote and different cultural setting. Second, some children are more resilient than others. Some have had loving and stable care for years, which they have lost through tragedies such as parental AIDS deaths or war or famine, and others have never felt the security of a family and home. As we see in First World cultures as well, some children seem to be “wired” to be emotionally fragile and even less profound dislocations can cause profound damage, while other children seem to surmount even large tragedies such as the loss of parents, homes, and even national culture because of man-made and natural disasters.

That is not to say that older children cannot gain from being placed into adoptive homes different from their culture of origin, only that it is a much more sensitive business. To protect children, adoption professionals and regulators must be committed to biculturalism, to the notion that children placed for adoption are not simply leaving their culture of origin for a new one, but that

American Indians:

[S]uicide rate [was] twice that of the reservation population and four times that of the general population . . . . Since many of the economic, cultural, and social structures of American Indian communities were built around these kinship networks, the destruction of the family unit contributed to the dire socioeconomic conditions befalling many Native American nations.

Id.


226 See, e.g., Ann S. Masten, Ordinary Magic: Resilience Processes in Development, 56 AM. PSYCHOL. 227, 233 (2001) (“Studies of Romanian adoptees provide dramatic documentation of developmental catch-up in many of the children, both physically and cognitively . . . . However, the impressive recovery trajectories of many children following dramatic improvements in rearing conditions do not mean that all children recover well.”).

227 See, e.g., Spencer Eth & Robert S. Pynoos, Developmental Perspectives on Psychic Trauma in Childhood, in TRAUMA AND ITS WAKE 48-50 (Charles R. Figley ed., 1985) (discussing the many variables that can influence a child’s ability to cope with trauma at varying stages of development).

228 See, e.g., id.
they are gaining a second culture, sometimes a second language, and possibly even a second religion, that will make them stronger and more versatile citizens. This phenomenon already occurs in American families where spouses marry across racial, religious, ethnic, class, or educational lines and spouses essentially bring up their children in both of the cultures from which they come. Where adult spouses are from different cultural situations, there can be conscious recognition of cultural differences and mature negotiation and planning about those differences will be carried on as traditions taught to the family’s children. However, in the case of adoption, where parents share a common history and culture that is different from their child’s, the adoptive child is in no position to recognize his or her difference as valuable and to negotiate how he or she will become “bicultural” with the parents. If the parents are not genuinely respectful of the different culture and eager for their whole family to become bicultural, the explicit and implicit message of respect for diversity is unlikely to be heard by the adoptive child or other children in the family.

Finally, intercountry adoption is not the cultural death sentence for children that it once might arguably have been when Americans were adopting children from Korea or Japan. Recognizing the fact of modern global interdependence, pro-adoption scholars have noted that the dislocation suffered by children being adopted internationally or transracially in previous generations may not be as profound in current adoptions as in the past. For one thing, worldwide immigration has brought increasing cultural diversity to First, Second, and Third world cultures so that children who grow up, at least in urban settings,

230 See, e.g., id.
231 See, e.g., id.
232 See, e.g., David M. Brodzinsky, Adjustment to Adoption: A Psychosocial Perspective, 7 CLINICAL PSYCHOL. REV. 25, 26-27 (discussing rates of emotional and psychological disorders among adoptees).
233 See, e.g., Bartholet, supra note 8, at 202-07 (describing success of children adopted internationally).
are likely to be exposed to more than one culture. Parents who adopt across cultures are increasingly probed for evidence that they respect their child's cultural difference and will make affirmative efforts to let their child experience aspects of those cultures, even in their own nations. Increasingly, adoptive parents are taking their children to see their homelands and in some cases, their birth families.

Moreover, adopted adults have much more opportunity to engage in their cultures of origin, to travel through educational opportunities in high school and college, and even to work transnationally. Informal engagement through internet chat rooms, email "pen pals," and other ways in which people now virtually "reach their hands" across the world can similarly bring children into contact with their cultures of origin. Adopted adults are contacting families of origin through internet searches and other electronic means as well. The "paper trail" for adoption is improving throughout the world, albeit more slowly in some places than others, and the advent of open adoption has made birth records more accessible, albeit, again more slowly in some places than others. If internationally adopted children

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234 See, e.g., Nancy Foner, How Exceptional is New York? Migration and Multiculturalism in the Empire City, 30 ETHNIC & RACIAL STUD. 999, 1015 (2007) ("As the children of immigrants come of age, new cultural patterns, often referred to as cultural hybrids, are emerging as they grow up, go to school, work beside, and sometimes intermarry with the long-established native-born.").

235 See Patricia Hanigan Scroggs & Heather Heitfield, International Adopters and Their Children: Birth Culture Ties, GENDER ISSUES, Fall 2001, 3, at 9 ("The respondents as a whole had very positive attitudes toward developing and maintaining connections to, and an appreciation and respect for, the cultures of the countries from which their children were adopted.").

236 See id. at 15 (discussing motivations for taking adopted children to visit their home country).

237 See id. (discussing various ways of developing an adopted child's connection with the home culture).

238 See Smolin, supra note 99, at 9-10 (describing laws addressing open adoption, research findings, and considerations of the best interests of the child) (citing CHILD WELFARE INFORMATION GATEWAY, WORKING WITH BIRTH AND ADOPTIVE FAMILIES TO SUPPORT OPEN ADOPTION 1-6 (2003)); Wilkening, supra note 4, at 1049-50, 1054-55 (discussing Hague Convention requirement for pre-adoption records and paucity of such records in some countries).

239 See Smolin, supra note 99, at 9-10; Wilkening, supra note 4, at 1049-50, 1054-55.
experience anxiety about their birth families or their national or cultural heritage, they have many more opportunities to explore their past and engage with their birth culture than past generations of adopted children have had. \(^{240}\) People do not stop learning and changing once they become adults.

Thus, even if there is validity to the concern that transnationally adopted children may lose their culture, transnational adoption need not be a cultural "death sentence" even in situations where children grow up in relatively homogeneous Western communities.

While a child who is not immersed in his culture will not gain precisely the same experience as one who grows up inside of that culture, from a social perspective, we should be happy to welcome children into the world who are bicultural, just as we celebrate the richness that comes with children who are bilingual or have had the opportunity to travel or live in other cultures. These children can help us translate from culture to culture and often see the cultural complexity of the world through new and imaginative lenses that those who have lived in monolithic cultures can never quite experience. \(^{241}\) They can better identify the similarities that bring cultures together and the things that distinguish them in order to identify those things that divide us and cause unfortunate international misunderstandings. \(^{242}\) They and those who have had similar cross-cultural experiences—to be found, for example, in organizations of adopted Korean-Americans—can create new cultures and communities that contribute to the valuable diversity of our world. \(^{243}\) Just as we have learned from intercultural and interreligious marriage and friendship, we can learn from these families whose members bring different cultures to the mosaic. \(^{244}\)

\(^{240}\) See Smolin, supra note 99, at 9-10; Wilkening, supra note 4, at 1049-50, 1054-55.

\(^{241}\) See Scroggs & Heitfield, supra note 235, at 24 (discussing adopted children interacting with people from their home culture).

\(^{242}\) Id.

\(^{243}\) Eleana Kim, Wedding Citizenship and Culture: Korean Adoptees and the Global Family of Korea, 74 SOCIAL TEXT 57, 58 (2003) ("Transnational Korean adoptees have recently been legally incorporated into the 'global family' of South Korea as part of the cultural and economic 'globalization' policy (segyehwa) nominally inaugurated under former president Kim Young Sam and expanded under president Kim Dae Jung.").

\(^{244}\) See Foner, supra note 234, at 1015.
That is not to be idealistic about these blended families—certainly, cultural and identity differences can cause conflict as often as new insights. Nevertheless, that paradoxical intimacy of conflict and embrace engenders what makes it possible for the human community to develop and thrive.

4. The Family Diversity Principle and the Rights of Recognition and Equal Worth

Any new international rights regime for adoption must not only recognize the historical diversity of the family but also hold diversity to be a value and a resource in a dignitary understanding of intercountry adoption law. Practically speaking, as family historians have pointed out, families have taken diverse shapes not only over time, but also within particular historical periods. Once again, intercountry adoption discourse has weighted family diversity only on the side of discouraging adoption, not on the side of facilitating it. It is not only adoption skeptics who have argued that intercountry adoption practice has ignored the diverse and equally valuable family formations in non-Western countries that provide “a family” to a child without parental care, thus obviating the need to find a new nuclear family for the child. United Nations commentaries on the international conventions

245 See Brodzinsky, supra note 232, at 27.


From a theoretical point of view, we can expect several factors to jeopardise the adjustment of international adoptees. (1) Children placed in families with different racial, cultural, and religious characteristics from their own may be less easily integrated into their adoptive family and community. They may lose access to their own heritage and be exposed to some measure of racism. Consequently, they may have difficulties, especially in forming a positive self-concept and integrated identity.

Id.

248 See, e.g., King, supra note 97, at 468 (decrying failure to recognize care of children “in social networks that do not reflect a modern nuclear family,” noting “that the concept of a modern nuclear family may or may not have any relevance to these children and their families”).
themselves underscore the importance of recognizing non-nuclear family formations and alternative community arrangements for caring for children without birthparent care in identifying an in-country placement for a child.\textsuperscript{249}

However, the rush to accuse adoption advocates of Western imperialism or family myopia may be sometimes misplaced. Non-Western cultures’ extended families are undergoing what some would call erosion,\textsuperscript{250} countering the Western tendency to romanticize them.\textsuperscript{251} As a consequence of urbanization and capitalism in non-Western cultures, more families in these cultures are nuclear or single-parent families, separated by long distances and economics and overburdened by difficult work situations.\textsuperscript{252} In these circumstances, the subsidiarity principle may not as easily support local placement of the world’s children.

From the other side, the Western paradigm of the nuclear husband-wife family is eroding, even though non-Western adoption systems have traditionally embraced it as normative for appropriate intercountry adoptions and excluded, or given lower priority to, non-nuclear heterosexual families. While other willing parents, including single and disabled parents, older parents, gay and lesbian couples, and even unmarried heterosexual couples are more successfully adopting children in the United States, some sending countries have placed significant obstacles in the way of these parents attempting to adopt their children.\textsuperscript{253} As noted, gay and lesbian couples have challenged their exclusion from intercountry adoption by sending countries as a discriminatory

\textsuperscript{249} See David M. Smolin, \textit{The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals}, 35 \textit{SETON HALL L. REV.} 403, 408 (2005) ("For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care, which should be used only as a last resort and as a temporary measure . . . ").

\textsuperscript{250} See, \textit{e.g.}, T.W. Bennett, \textit{CUSTOMARY LAW IN SOUTH AFRICA} 181-84 (2004) (describing nuclearizing effects on extended South African family as a result of factors such as colonialism, urbanization, and wage labor migration).

\textsuperscript{251} \textit{Id.}

\textsuperscript{252} \textit{Id.}

\textsuperscript{253} See, \textit{e.g.}, Mertz, \textit{supra} note 187, at 284-95 (2011) (describing other nation-states limitations on single and GLBT adoptive parents, and other limitations on age, wealth, and health).
practice. If private intermediaries and national governments are not open to forms of family life that diverge from either their conventional family form or one that they idealize, they will be unable to recruit families for as many children as possible.

Following the previous discussion, the dignitary principle found in the U.N. documents suggests that nations can violate the principles of recognition and equal worth by failing to take diverse family forms on their own merits, by stereotyping them according to expectations of any one culture about "the" best way to raise a child. Inspecting the ability of a particular adoptive family to care for a particular adoptable child does not violate these principles because it investigates the strengths and weaknesses of the family as it is in reality against the abilities and needs of the child as he or she is. This happens, or should happen, in most adoptions anyway through mechanisms such as the homestudy. Imposing some categorical ban on certain families before this inspection occurs fails to recognize the equal worth each family form deserves unless and until it is proven that such a family is not capable of parenting a child. Once again, the nondiscrimination


\[255\] See Smolin, supra note 249, at 408.

\[256\] See id.


A home study is a series of meetings between the adoptive parents and a social worker that is designed to provide the parents with detailed information about the adoption and to give the social worker the opportunity to assess the parents' understanding of the difficulties involved and to determine if they have thought through the consequences of adoption.

\[Id.\]


Since January 1, 1997, no state or other entity in a state receiving federal funds and involved in adoption or foster care may (1) deny any person the opportunity to become an adoptive or a foster parent, or (2) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved.

\[Id.\]
principles of the CRC and the ICCRP suggest that the form a family takes is a "status" that should give rise to further inquiry about whether there is something about the behavior of that family formation that violates the sending or receiving state’s public policy.\textsuperscript{259} While a state party may factor in the difficulty of child-adoptive family cultural differences, including linguistic, religious or political differences, as a basis for granting or denying a placement, state parties should not be able to deny an otherwise qualified family adoption based solely on, for example, interracial, gender or similar differences between the child and the family.

C. The Recognition of Vulnerability

The "vulnerability and the human condition" movement originated by Professor Martha Fineman focuses on grounding public policy on the reality that "fundamental to our shared humanity is our shared vulnerability, which is universal and constant—inherent in the human condition."\textsuperscript{260} The vulnerability movement calls upon societal institutions to be shaped by "the recognition of, and need to respond to, this shared vulnerability."\textsuperscript{261}

Adoption is a paradigmatic situation illustrating this reality about the human condition. Citing psychologists Mary Stewart van Leeuwen and Gretchen Miller Wrobel, theologian Kristen Johnston Largen expands upon how each member of the adoption triad brings his or her vulnerabilities and sense of brokenness to the process of adoption:

"Adoption is valuable for forming families, yet it encompasses loss. Members of the adoption triad—adoptive parents, adopted children, and birth parents—are influenced by the loss inherent in adoption.” For example, there are mothers who are forced into giving up their children for adoption both because of social pressures... and because of economic pressures... Also, there is the pain involved for potential parents who are thwarted

\textsuperscript{259} See Convention on the Rights of the Child, supra note 17, at 169 (establishing acceptable parameters for international adoption).


\textsuperscript{261} Id.
in their attempts to adopt[,...] [whose experience Stevenson-Moessner likens to miscarriage]. And, finally, there are those adopted children who long for a sense of reconciliation and wholeness, a more complete sense of identity through a connection with birth parents; and sometimes this longing simply goes unfulfilled.262

The vulnerability in adoption can also be found in the regrets of birth parents that their own actions brought them to such a crisis or that they felt forced to give up their children.263 It may also be found in the grief of adoptive parents that they have not been able to bear birth-children, which Kristen Johnson Largen notes has been exacerbated by the promise of reproduction by technology, which increases the cost of failure and solidifies the concept of adoption as a "last resort," with all that may imply about the worthiness of the child to be adopted.264

As applied to adoption, the vulnerability movement would demand that the adoption community—individuals, institutions and governments—should confer on adoptive children and their parents, both birth and adoptive, those assets, including "wealth, health, education, family relationships, and marketable skills" that make it possible for the children to grow up as resilient adults.265 This principle embraces acknowledging, respecting, and taking responsibility for the vulnerability of the adoptive child and his or her parents, both birth and adoptive, and thus should be preferred over a "best interests of the child" standard.

As in other areas involving the care and raising of children, such as custody arrangements, the "best interests of the child" principle has gained virtually universal assent in the adoptive community.266 It finds a prominent place in the preamble to the Hague Convention, which reads in part that the signatory states are entering into the Convention "[c]onvinced of the necessity to take

263 *Id.*
264 *Id.* at 290.
266 See Bartholet, *supra* note 8, at 198 (noting that nation states generally agree that the "best interests" standard should be "the paramount principle" guiding out-of-home placements).
measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights.”

It is also the signature substantive standard that colors the Convention on the Rights of the Child.

However, the recognition of human vulnerability extends beyond a “best interests” standard. To be sure, the “best interests” standard properly signals that when there is a fundamentally irreconcilable conflict that portends profound harm to the child, the child’s best interests need to be paramount to those of either birth or adoptive parents. Holding that standard in mind helps to ensure that children will not be used as the means to either their birth or adoptive parents’ personal ends to the extent it is possible to prevent that in the real world. Since adults have more power and voice to further their own interests, it is important that courts and governments lift up the interests of the child as the predominant focal point for decision-making in situations of conflicting claims and needs.

Such a recognition resembles Catholic theology’s “preferential option for the poor” that lifts up the needs of the poor as a special focus of attention for both justice and charity, in recognition of the fact that the poor are often invisible and undervalued.

Yet the “best interests” standard carries false seeds about the possibility and desirability of a “perfect match.” It can be read to mean that there is a family “out there” that will provide the best possible environment for the child, and that it is incumbent on institutions and governments to identify and match the child with that family. Because no family is “perfect,” such a standard

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267 See Hague Convention, supra note 16, pmbl.
268 See Batholet, supra note 8, at 169 (discussing the standards for adoption generally and prioritizing adoption within the home country).
269 Id.
270 Id.
271 Id.
272 Russell Powell, Theology in Public Reason and Legal Discourse: A Case for the Preferential Option for the Poor, 15 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 327, 332 (2008-09) (describing the principle of the preferential option, described by Gutierrez as “a moral imperative to create conditions for marginalized voices to be heard, to defend the defenseless, and to assess lifestyles, policies, and institutions in terms of their impact on the poor and the excluded”).
273 The Hague Convention makes it incumbent on signatory states “as a matter of
may tempt governments to violate an established priority of all child welfare programs and international treaties such as the Hague Convention—protecting a family of origin—by pressuring a birth-family to deliver the child to this “best” family. Conversely, the “best interests” standard may be misread as a call to deny a prospective adoptive family in another country the opportunity to adopt because of the possibility that some “perfect” culturally matched parent may arise in the child’s home country at some point in his life. Thus, while a government is waiting for a “perfect family,” a child may be losing developmental and attachment ground by waiting in an inferior institution.

Even when adoption is the only realistic choice, the moral weight that the “best interests” standard may impose on intermediaries, adoptive and birth parents alike, to find an ideal family that does not exist may put inappropriate pressure on the adult decision-makers in that process. Birthparents may harbor guilt if they are involved in the selection of an adoptive family that does not meet their dreams for their children. Even if the adoption is not open, birth parents may blame themselves if they discover, later in life, that the family to which their children have been sent is abusive, neglectful, or otherwise problematic. On priority, [to take] appropriate measures to enable the child to remain in the care of his or her family of origin.” See Hague Convention, supra note 16, pmbl. Generally, the standard’s assumption that families of origin are most likely to have the biological and emotional ties necessary to sacrifice their selfish interests on behalf of their birth-children seems to have practical warrant. While that assumption proves to be false in numerous cases, it does have a virtue, as Professor Bartholet suggests, of balancing the overweening power of the state by protecting fundamental rights to family decision-making and family integrity. My argument here follows a similar critique of the “best interests” standard, see Carlson, supra note 34, at 774-75 (describing the “best interests” standard as excluding the interests of other members of the adoption triad, and misleading in its promise of a “best” placement for the child, which may delay placement).

275 See Carlson, supra note 34, at 774-75.
276 See id.
278 Id.
the other side, adoptive families may experience failure when their adopted child comes with unforeseen disabilities or challenges, or post-adoption family life is not as idyllic as they built it up to be.

The “best interests” standard also implies that the interests of all others involved in adoption should be neglected in the quest to find that perfect match for the child. In particular, the “best interests” standard can be used to downplay the fundamental rights of birth parents to raise their children. The vulnerabilities movement asks governmental and social institutions to recognize that some families of origin are, indeed, extremely vulnerable for any number of reasons. Single birth parents may be under significant stress in raising their children alone, especially if they carry psychological or other baggage from their own families of origin. Birth parents may also simply lack role models or adequate education about effective parenting skills. Employing the “best interests” standard ruthlessly may result in social workers pressuring natal parents to give their children up for adoption in circumstances in which merely providing the parents with appropriate social supports would make it possible for their children to thrive in their care. It may also be used to shame natal parents because their family situation is not as perfect as a “best interests” standard would seem to require.

On the other side of the adoption triad, the “best interests” standard can be used to ignore or damage adoptive parents’ right

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279 See Smolin, supra note 13, at 283 (discussing competing views of inter-country adoption).

280 See e.g., Vulnerability and the Human Condition, supra note 260. Ensuring meaningful equality of opportunity and access requires a responsive state that actively and comprehensively monitors its asset-conferring institutions – one that addresses the unequal distribution of privilege that affects citizens across identity markers. Such an approach may help us transcend the limitations and political landmines of our current discrimination-based inquiry rooted in identity categories.

Id.

281 Pannor et al., supra note 277, at 4 (noting that the most frequent reason birth parents gave for relinquishing their child was that the mother was single and felt the child would be better in a two-parent home).

282 Id. (noting the second most common reason for relinquishing a child was being “unprepared for parenthood”).

283 Id. (citing pressure from social worker as one of the common reasons birth parents relinquished the child for adoption).
to dignity, which needs also to be considered. As Professor Largen suggests, adoptive families engaged in the process are also vulnerable. Infertile adoptive parents have suffered social shaming because of their inability to conceive. In many eras, adoptive families have been viewed as less worthy or less honorable than families with birth children. The process of inspection that adoptive parents undergo, particularly since the professionalization of adoptive services, has resulted in minute probing of adoptive families to identify a “perfect match” and a “safe risk” for each child. Such inspection can be invasive and debilitating to adoptive families who may feel forced to choose between disclosing their failings (with the risk of being denied the opportunity to adopt) or masking possible weaknesses or vulnerabilities in their situation or parenting skills in order to ensure a placement. In addition to the short, and sometimes terrifying, waiting period after placement during which adoptive parents are at risk of losing their children to a birth parent who changes her mind, the American adoptive process usually involves extensive waiting periods before and after placement. In the pre-placement waiting period, adoptive parents can go through a roller-coaster of emotions as potential adoptive children are being sought and matched, with emotionally devastating parallels to an auction. In the post-placement period, parents are monitored for

284 See Largen, supra note 262, at 290.
285 See id. at 290 (considering the damage to “an individual and a couple’s sense of self” when a child cannot be conceived).
286 Id. at 289-90.
287 See Christine Adamec & William L. Pierce, THE ENCYCLOPEDIA OF ADOPTION 133-35 (2d ed. 2000) (describing the typical pre-adoption inspection, which includes a process of evaluation and instruction by an agency representative and will likely include discussions about intimate information, a home study, individual conferences, classes, and a background investigation).
288 See id. at 135 (discussing pre-adoption interviews in which potential adoptive parents are probed about failed attempts to conceive, and the fact that adoption can be denied if the case worker feels that the couple or individual provides misleading information or has not adequately come to terms with their infertility).
290 See Adamec & Pierce, supra note 287, at 135 (describing the adoption waiting
signs that they are not being successful with their adoptive children and can worry that they must be on their “best behavior” to ensure that they will be allowed to adopt their children.\textsuperscript{291} Heavy-handed caseworkers may potentially coerce or shame adoptive parents into making parenting decisions that they would not otherwise freely choose to make.

The recognition of human vulnerability requires that states and institutions pay equal attention to the vulnerabilities and needs of everyone in the adoption triad and respect and respond to those needs as the adoptive process proceeds. As with the Hague Convention, it recognizes the priority of keeping families of origin together, when that is possible without significant damage to the child, honoring both the rights of the birth parent to raise her child whenever possible and the child’s interest in being raised in her community of origin.\textsuperscript{292} Yet, it also recognizes that adoptive families, including those who are willing to make risky commitments to children with significant challenges, deserve respect for their own identities and gifts.\textsuperscript{293} Finally, the recognition of human vulnerability suggests the importance of individualized consideration of the needs for support of birth parents, children, and adoptive parents; in the making of families, one size does not fit all.\textsuperscript{294} This is true about homestudy and other investigative requirements, as well as the imposition of financial, educational, or other minimum qualifications on adopting families. Furthermore, it is a challenge to the rush toward standardization of adoption processes that the international adoption conventions are furthering.

The recognition of vulnerability calls for less judgmental intrusion on these adoptive families, asking agencies that do home studies and investigations of adoptive parents to think carefully about the “least restrictive alternatives” in data-gathering, to

\begin{itemize}
\item \textsuperscript{291} See, e.g., Steps in the Domestic Infant Adoption Process, supra note 289.
\item \textsuperscript{292} See Hague Convention, supra note 16, art. 4(b).
\item \textsuperscript{293} Adherence to Professor Martha Albertson Fineman’s call to recognize and respond to every person’s vulnerability would inevitably lead to recognition that those willing to adopt are deserving. See Vulnerability and the Human Condition, An Interdisciplinary Initiative, supra note 260.
\item \textsuperscript{294} See King, supra note 97, at 466-67.
\end{itemize}
ensure that they are asking for information that is truly relevant to the quality of placement, and to implement policies and procedures which treat adoptive parents with dignity and respect for the unique anxieties and stresses attending the process of adoption.

As no family can be fully prepared for the demands a child will place on it, and in adoption, these surprises will be of an even larger order of magnitude in many cases, the recognition of vulnerability also demands the support of agencies designed to help adoptive parents carry out their parental responsibilities in the ways that they have determined would best suit their family values and goals. Along with adoption tax breaks, federal and state subsidies for special needs adoption go part of the way toward that goal. However, as earlier suggested, many such programs define "special needs" children very narrowly to include children with severe disabilities, excluding older or minority children who also may present special challenges to families who adopt such children but have no personal experience of what it is like to be a minority or to be bounced around from home to home. Many, if not most, of these programs and tax breaks provided for adoption are standardized or, for disabled children, are confined to a dollar range rather than being calibrated to account for adopting parents' varying economic circumstances or medical and other costs required to maximize the potential of disabled children. In fact, one author has noted that the current tax break system is actually backwards, because it gives parents with substantial means (e.g., $100,000 in taxable income) more of a benefit than those adoptive

295 Adamec & Pierce, supra note 287, at 81 ("[A special needs adoption] study revealed that parents found adoption subsidy and Medicaid to be very important and said that they could not have afforded to adopt without these supports in place.").


[Many U.S. children who have disabilities are not considered special needs for the purposes of the adoption credit. Generally, special needs adoptions are the adoptions of children whom the state's child welfare agency considers difficult to place for adoption, and most foster care adoptions are special needs adoptions, but few other adoptions are special needs adoptions.]

Id.

parents with smaller incomes, who may not be able to take advantage of the tax breaks at all.\textsuperscript{298}

Finally, the recognition of human vulnerability reinforces the need for the global adoption community to have an honest conversation about how the needs of the world’s children can best be met. To focus on the vulnerabilities rather than the rights of those in the adoption triad avoids the necessary consequence that some must win and others lose because rights trump other interests.\textsuperscript{299} That requires compassionate accounting for these vulnerabilities rather than treating the Hague Convention’s legitimate concern that children be able to grow up in an environment of “happiness, love and understanding” as an impossible dream that justifies nations in not doing what they can to aid displaced children.

Moreover, honest conversation about the vulnerability of members of the adoption triad can lead to honest and supportive conversation about the resources (or lack of resources) and vulnerabilities of the communities and nations whose children of origin are at stake. In recent decades, many countries have pushed back against intercountry adoptions.\textsuperscript{300} In some cases, this governmental response has been for very good reasons.\textsuperscript{301} There have been many shady practices, such as baby selling and coercion of birth parents to relinquish children from their homes in the Third World to demanding parents in the First World.\textsuperscript{302} Moreover, the vulnerability of families in the Third World has made it tempting for parents and governments there to relinquish their responsibilities while, at the same time, First World adoptive parents have adopted the mentality that adopted children are much better off in their care.\textsuperscript{303} As a result, it has been easy for First World governments, institutions, and parents to refuse to


\textsuperscript{299} This presents at least a partial solution to the conflict that would inevitably result from the adoption of a Kantian view. See Lebech, supra note 66, at 5.

\textsuperscript{300} See Bartholet, supra note 9, at 157-58 (describing the recent change in position of the European Parliament and Romania in this respect).

\textsuperscript{301} See, e.g., Smolin, supra note 13, at 320-22.

\textsuperscript{302} Id.

\textsuperscript{303} See generally Convention on the Rights of the Child, supra note 17 (attempting to address and correct the mentality of cultural superiority).
recognize that intercountry and intercultural adoption can, in some cases, take as much from a child as it gives, depending on how adoptive families approach the problem of intercultural transfer.

On the other hand, as the Russian government’s reaction to isolated cases of harm befalling adoptive children shows, some of the pushback from Second World and Third World governments to adopting out their child citizens has not been focused on protecting birth families or their children. Some countries have slowed or ended intercountry adoption because they have felt it was a black mark on the country’s international image to admit that they could not adequately care for orphaned or abandoned children within their own nations. However, they have not necessarily responded to what they consider to be a national shame by increasing efforts to ensure adoption within their own nations. In these cases, the “best interests” standard is critical in pressuring countries to provide the social supports necessary for birth parents to keep their children, find national adoptive families, and help them make successful transitions or otherwise permit children to be adopted by families worldwide who are able to care for them properly. The Hague Convention recognizes 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.” It requires states to consider what they might do to ensure both efforts to place the child within his state of origin and to cooperate with intercountry agencies when they cannot make an in-country placement.

304 See, e.g., Bartholet, supra note 15, at 358 (“National pride appears to be a major reason sending countries often refuse to allow their children to be adopted internationally, with countries embarrassed to be shown up as unable to care for ‘their own,’ and willing to claim ownership rights even if in fact they are unable to provide such care.”).

305 See Nick Paton Walsh, Russia Dumps Its Children on the Streets, THE OBSERVER (Apr. 17, 2004), http://www.theguardian.com/world/2004/apr/18/russia.nickpatonwalsh; see also Allen, supra note 15, at 1701 (describing the failure of the Soviet state to care adequately for the children in its charge); see also Bartholet, supra note 8, at 191 (noting critics’ complaint that there is “something shameful about sending homeless children abroad.”).

306 See Hague Convention, supra note 16, pmbl.

307 Id.
IV. Children's Right to Grow and to be Loved

The CRC, CPPR, and other international instruments recognize that a necessary, if not sufficient, right to preserving human dignity is what might be termed the right to sustenance—to those material needs that make life itself possible without extreme pain or want: food, clothing, shelter, and medical care. In some cultures, including the United States, not even these rights are guaranteed, at least not at the level of constitutional or basic law.\(^{308}\) In the American conception, virtually all basic rights are negative rights or opportunity rights—the government may not interfere with a person's pursuit of sustenance except to the extent that a person violates the rights of others, but the government also has no obligation to provide sustenance to those who are presumed to have the capacity and liberty to seek sustenance for themselves.\(^{309}\) However, in the case of children, respect for human dignity must necessarily carry much heavier positive duties even in "negative rights" constitutions, like that of the United States. Children cannot meet their own basic survival needs for food, clothing, shelter, and medical care alone because modern economies preclude them from utilizing others' property or working to meet their needs.

However, the conventions also recognize rights beyond those basic physical needs. The preamble to the Convention on the Rights of the Child recognizes a moral right of children to grow up "in a family environment, in an atmosphere of happiness, love and understanding" and to be "fully prepared to live an individual life in society, and brought up in... the spirit of peace, dignity, tolerance, freedom, equality and solidarity."\(^{310}\) These moral rights are instantiated in the state parties' promises to preserve a child's identity, family when possible, civil and political rights, rights against abuse or exploitation, and what the convention terms "the right of the child to education."\(^{311}\)

\(^{308}\) See Dillon, supra note 32, at 182-85.


\(^{310}\) See Convention on the Rights of the Child, supra note 17, pmbl.

\(^{311}\) See, e.g. id., arts. 8 (protection of identity), 9 (protection against separation from
The right to grow or develop is practically instantiated by experience and by interaction with others. While the right to education enshrined in the CRC is a way of talking about institutionalizing this right, at a basic level, human beings develop as they interact with others who are different from themselves and with the physical world around them. The experience of encounters that nurture growth is paradoxical. On one hand, the child will encounter others who will provide him with support and resources—love, food, physical affection, a psychological and spiritual sense of security and harmony, and knowledge, among others. On the other hand, even the most loving individuals and the safest physical environment will present every child with challenges: whether he is figuring out how to crawl across the floor or get food into his mouth, how to manipulate a parent into providing a desired item, or how to discern what will make him angry and what will make him pleased. Challenge is as much a necessity in a child’s growth and development as is a supportive adult. Formal education, as we understand the term, is an institutional embodiment of this interplay of the child with his world, but it is only a part, in some regions of the world a small part, of what allows a person to develop.

The right to love and to be loved also has this dual aspect of support and challenge that is critical to the development of the human personality and, therefore, to human dignity. In arguing for the right of parentless children to be adopted, Paolo Barrozo has explained, in part, why these are necessary aspects of human

family), 12 and 13 (right to expression of views), 14 (right to freedom of thought, religion, and conscience), 15 (right of association and assembly), and 28 (right to education).

312 Deborah L. Vandell, Lana Nenide & Sara J. Van Winkle, Peer Relationships in Early Childhood, in BLACKWELL HANDBOOK OF EARLY CHILDHOOD DEVELOPMENT 455-66 (Kathleen McCartney & Deborah Phillips eds., 2006) (explaining the importance of human development through interactions outside one’s family and immediate community).

313 See infra notes 314-316, and accompanying text.

314 See generally Masten, supra note 226, at 228-29 (discussing the resilience of children in various environments).

dignity.\textsuperscript{316} One reason, he argues, is practical: children are relatively vulnerable to their parents' and family's "structures of power . . . that routinely allocate resources the young need to survive and develop."\textsuperscript{317} Following Robert Goodin, he notes that love transforms childhood vulnerability from an experience of want, of being helpless against the discretionary power that literally holds the child's life in his hands, to an experience of "care, protection, trust and affection."\textsuperscript{318} Barrozo further argues for a developmental aspect to love, stating that it "creates the kind of conservatory where the share of human capabilities each person is endowed with can have a fair chance of flourishing."\textsuperscript{319} In terms of the interplay of support and challenge, parents and others who love a child instinctively strive for that balance between support and challenge—parents provide both emotional and physical security for the child while pushing him or her to discover and hone his or her abilities in response to challenges of the human and material world.

Human dignity requires that human beings be provided an environment that allows them to develop through this dual experience of support and challenge, even beyond childhood. That this is true can only be demonstrated by imagining its opposite: consider what happens even to an adult in solitary confinement for a limited period of time.\textsuperscript{320} Dr. Grassian notes that most adults in solitary confinement suffer from "florid delirium, characterized by severe confusional, paranoid, and hallucinatory features, and also by intense agitation and random, impulsive, often self-directed violence. . . . [I]ndividuals will soon become incapable of maintaining an adequate state of alertness and attention to the environment."\textsuperscript{321} Even if they are not in solitary confinement, psychologists have documented similar effects in orphanages, some of which have as high as thirty to
forty percent mortality rates.\

"[B]abies who are not held and nuzzled and hugged enough will literally stop growing and—if the situation lasts long enough, even if they are receiving proper nutrition—die."\

In less dire circumstances, as Barrozo points out, love is necessary to permit the child to develop because it is “in unconditional love that the young ordinarily find the terra firma that assures them of their place in the world, and where their own sense of limitation and vulnerability is transmuted into self-confidence and an appetite for the future as an inviting frontier of open possibilities.” Providing love thereby ensures that adopted children can grow up to be self-reliant, capable individuals who are intellectually and emotionally able to function in market and similar economies, and to contribute socially and economically to the care of the wider society. Similarly, nations have an interest in making sure that the other developmental supports children receive, including formal education, prepare them for economic, social, and political citizenship.

However, there is an additional moral, dignitary reason why the opportunity to love and be loved is one that every nation state owes its young people. Except for the experience of divine love, being beloved by others is the closest we get in this life to experiencing being seen for whom we really are and to being valued as ends and not means. In the experience of being loved, we are valued for the complex of thought, emotion, experience, and human response, often described as identity or personality that is contained within and emanates from our bounded physical self. Of course, it is a serious exaggeration to suggest that any child in the world is loved unconditionally by anyone, since all human beings have limits or conditions beyond which they cannot

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323 Id.

324 Barrozo, supra note 316, at 703.

325 See id.

326 See Largen, supra note 262, at 287.

327 See Szalavitz & Perry, supra note 322.
or will not sacrifice themselves for others. However, as observed through human experience, the parent-child bond, and particularly the birth mother-child bond, is most consistent in creating the reality of a love that cherishes a child for who she really is and that offers to sacrifice to ensure that such a child can experience the love and growth that makes for a whole person. At the same time, we know from human experience both that maternal-child love does not necessarily develop and that maternal-child love, or parental-child love, does not necessarily depend on a biological connection: some birth mothers and even more birth fathers do not love their children, and some mothers and fathers who do not give birth to their children love them beyond measure. And, we know that the ability to love is not restricted to parents—spouses, lovers, distant relatives, co-workers, friends, and even small collectives can provide the love and dignitary respect due a human being in the right circumstances with the right individuals.

However, it is from this central human experience of mother-child love that the debates about whether Third World children are better off being adopted by first world parents or staying in their own cultures often develop. On one hand, First World adopters argue that they have the time, resources, and love to provide children with the security they need to develop as full persons. Moreover, they have the wherewithal to provide the child with more encounters with the outside world through education, social activities, travel, and the like. On the other hand, Third World advocates legitimately argue that even a child's very small

328 See generally Adamic & Pierce, supra note 287, at 62-64 (describing the bonding and attachment process that generally develops primarily with parents and begins with the mother at birth).

329 See id.

330 A lack of loving connection between a parent and child is difficult, if not impossible, to measure but, as a reference, the National Clearinghouse on Child Abuse and Neglect reported more than three million children as victims of abuse and neglect from their parents in 1996, 16% of such cases reflect parental abandonment. Id. at 2-3. Abuse is identified considerably less in adoptive families where only an estimated one percent of homes have been recognized as abusive. Id.

331 See Convention on the Rights of the Child, supra note 17 (attempting to address and correct the mentality of cultural superiority).

332 See id.
village—where members of the community are interacting with him all the time, where he grows up learning the rituals of his culture (stories, song, religious rites, etc.), and where he is put to the challenge of mastering the natural world based on his own creativity—provides the child with equally valuable encounters. That may be true, even if he does not have advanced formal schooling, as it will be an experience that is more consonant with his identity than the strange world he will experience through adoption.

This is a debate, fueled by the implicit mistake inherent in the “best interests of the child” that cannot be resolved at the level of national or international child welfare policy. As written, this language in the international convention can easily be ignored by states and their institutions as a set of pious and unrealistic platitudes, and perhaps rightly so. First, no nation, indeed no individual, can guarantee the outcome that the instruments hold forth that each child on earth will be brought up in “an atmosphere of happiness, love and understanding.” Not only are these unquantifiable states of experience, but even to the extent we can recognize their presence in an intuitive sense, we know that they are not consistently achievable. Even in the best families, sometimes the atmosphere is not happy, loving, or understanding. Second, and here the principle of subsidiarity becomes useful, the right to develop as a full person and, particularly, the right to love and be loved, at its core and certainly for very small children, can only be accomplished in small units such as the family.

What nation-states and the institutions that serve them can do, however, is prohibit those structures that care for children, particularly very small children, from making it virtually impossible to effectuate the right of children for the opportunity to

334 See Lebech, supra note 66, at 5 (recognizing that conflicting agendas will often make it difficult to please each party in an adoption triad).
335 See Convention on the Rights of the Child, supra note 17, pmbl.
336 See Adamec & Pierce, supra note 287, at 2-3 (demonstrating that even in a nation as affluent as the United States, abusive households are common).
337 Id. at 63 (describing the potential for situations in which adoptive parents, despite having a desire to connect with their children, will struggle to form a bond).
grow and to be loved. The chief reason orphanages have such poor results with children is that it is not possible, given human limitations, for any large collective or organization to "love," to create the intense, consistent, and self-sacrificing relationship with another that typifies the parent-child bond.\textsuperscript{338} Thus, institutions and organizations cannot be effective at creating the necessary conditions for a child to experience being beloved, nor can they respond in love to others.\textsuperscript{339} Using them to raise children, particularly very small children, should, therefore, be a violation of human rights whenever any other option that would ensure a child's right to be loved and to develop is available to a nation.

Such an acknowledgement does not resolve the debate between those who believe children without committed birth parents should be adopted into First World nuclear families if at all possible and those who believe that children should be cared for in their own cultures to achieve full personhood in the environment envisioned by the Convention on the Rights of the Child. However, it does do two things: first, it insists that such decisions cannot be made at an abstract level with per se rules that either favor or exclude certain types of parents, families, or family-like communities, or that may even exclude certain children by making them invisible as rights-holders because of who they are or where they live.\textsuperscript{340} Second, it places emphasis on the two priority questions that a nation must ask itself about its vulnerable children: Who will ensure that this child can survive, and who will love him? Answering these questions by looking intensively at birth parents, adoptive parents, and small communities of care givers around the child through the lenses of

\textsuperscript{338} Romanian orphanages serve as a prime example of the shortcomings of orphanages in raising physically and mentally healthy individuals. See Bartholet, \textit{supra} note 9, at 157-58.

\textsuperscript{339} Institutions are unlikely to have the capability to provide the personal connection described by Maia Szalavitz as an important part of healthy development that is generally formed with parents through a series of responses. Szalavitz & Perry, \textit{supra} note 322. If for no other reason, this may be the case due to inadequate resources to provide the amount of physical contact with an adult that an infant needs for healthy development. \textit{Id.}

\textsuperscript{340} See Convention on the Rights of the Child, \textit{supra} note 17, art. 2(1) (attempting to prohibit any discrimination against children, but failing to adequately prevent discrimination in the intercountry adoption system).
realism, global interdependence, family diversity, and human vulnerability will ensure that society’s goals for the child are achieved. It is the only way to ensure that the child and those around him will be treated with recognition and respect for their equal worth, afforded the protection of autonomy, and provided support for their right to flourish as required by the concept of human dignity.

The requirement that nation states recognize and respect each child as of equal worth is particularly critical for the adoption stream of “waiting children,” who may be older or suffer from a physical or mental disability. The “sorting” schemes of historical adoption systems in the United States, which triaged children to determine which would be considered worthy of adoption, have no place in our contemporary paradigm for intercountry adoption. Similarly, the emphasis of intermediaries in intercountry adoptions on triaging children for earlier adoption based on factors like disability, appearance including skin color, or age needs to be denounced within the international adoption community, and intermediaries whose placements evidence a pattern of such sorting should lose their licenses or permissions to facilitate adoptions.

V. Conclusion

The principle of human dignity thus implies both prohibitions on, and positive responsibilities for, the state. The international community has an affirmative obligation not to sit passively by waiting for adoptive families, whether intracountry or intercountry, to present themselves. Rather, the international community should conduct aggressive outreach programming to families in each nation, encouraging them to consider adoption and making them aware of the range of children awaiting adoption. This may require better efforts at subsidizing

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341 See Bartholet, supra note 9, at 191 (entreating a focus on the “needs of children, parents, and communities” in intercountry adoptions).

342 Ellen Herman, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 87 (2008).

343 Children with disabilities and medical conditions are now more likely to be adopted as many adoptive parents find that they have the ability and resources to adopt such a child. See Adamec & Pierce, supra note 287, at 80-81.

adoption than tax credits, which redound to the benefit of the wealthiest families.\textsuperscript{345} Reflection on the actual experience of families who have adopted demonstrates that adoptive families’ desires for building their families are as diverse as the children who are available to them.\textsuperscript{346} Many families have both the strength and the desire to parent children who do not fit the “ideal child” paradigm. They may recognize that these children, who might have been passed over for adoption in earlier periods, are precisely the children whom they are psychologically or spiritually called to love and parent.\textsuperscript{347} However, both financial barriers and uncertainties or myths about the adoption process (or the sheer bureaucracy of the process itself) may deter otherwise loving families from initiating the process.\textsuperscript{348} National children’s agencies need to identify and eliminate these barriers, both financial and procedural, as a matter of effectuating the rights described in the Convention on the Rights of the Child and the Hague Convention.\textsuperscript{349} Judges and lawyers who are involved in creating and implementing adoption law should reinforce the importance of recognizing the inherent dignity and worthiness of children, emphasizing that each child brings different gifts as well as different challenges to society.

\textsuperscript{345} See Hibben, supra note 298, at 136-37.

\textsuperscript{346} See Adamec & Pierce, supra note 287, at 335. Also, cultural diversity in modern adoption is evidenced by the 2001 Census, which indicates that over 15% of adoptions were international and 17% of adopted children were a different race than their parents. Katarina Wegar, Introduction, in ADOPTIVE FAMILIES IN A DIVERSE SOCIETY 1, 1-5 (Katarina Wegar ed., 2006).

\textsuperscript{347} See Adamec & Pierce, supra note 287, at 251 (describing findings that parents who adopt special needs children often “place a greater emphasis on flexibility, patience and motivation to adopt,” and are “frequently older, more educated and married longer”).

\textsuperscript{348} See, e.g., Hibben, supra note 298, at 157 (describing the intricacies of just the tax implications of adoption).

\textsuperscript{349} See, e.g., Convention on the Rights of the Child, supra note 17, arts. 20-21, and Hague Convention, supra note 16, pmbl.