



Professor Lynn D Wardle

Inter-country Adoption

The Forest and the Trees: Issues in Domestic and International Adoption

by Professor Lynn D. Wardle¹

Every day around the world, 40,000 children die needlessly. Let me try to make this situation graphic by an analogy. If a DC-10 crashed . . . with 200 children on board, and all of those 200 youngsters were killed, the whole world would be traumatized. But fifteen million children die each year. That would mean that there's not one DC-10, but, as I do the arithmetic, that would be 200 DC-10s crashing every day. If there's one thing that you should carry away from this conference, it is the fact that today and tomorrow 40,000 children will die needlessly. How can we as a civilized society just say that this is not of importance to us?

-Father Robert Drinan²

I. Introduction

The problem of children without parents today is a huge global dilemma, and the plight of parentless children is extreme. Adoption is a perfect solution to the dilemma of parentless children. The purpose of adoption is to provide responsible and loving parents for parentless children in order to replicate and imitate a normal birth family. International adoption can provide wonderful parents for parentless children from even the poorest nations, and for over fifty years international adoption has provided homes for hundreds of thousands of orphans. Numerous instruments of international law attest to the unmatched importance of imitative family parenting for children, and establish the right of children to be raised by parents in such an environment as a matter of fundamental human rights. Yet today international adoption provides parents for only a small fraction of parentless children world-wide, and uses only a minuscule portion of the millions of parents who are willing, ready and able to adopt parentless children. A large share of responsibility for this wasted opportunity, and for maintaining archaic rules that perpetuate the suffering and deprivation of parentless for millions of children lies with the legal community, including family law scholars. For too long lawyers, lawmakers and legal commentators have supported or tolerated seriously flawed adoption, immigration, and tax laws that create serious, unreasonable obstacles to adoption, including international adoption.

Recent developments in domestic and international adoption, including promulgation and adoption of the landmark Hague Intercountry Adoption Convention, have sparked significant discussion about adoption policies in many countries. Among the adoption controversies that have arisen are: whether private (independent) adoptions should be allowed; the confidentiality of information about the parties to adoption; retroactivity of new open-records policies; potential for financial exploitation; potential for loss of cultural assets or identity; and adoption by same-sex couples. These are all very important and difficult issues, and the resolution of these controversies must be guided by the fundamental purpose of adoption. Otherwise, legal policy makers risk losing sight of the forest because of the trees.

II. The Global Tragedy of Parentless Children

The dilemma of parentless children is a problem of global dimension. Children are parentless if their parents are dead, missing, unable, or unwilling to provide them with the necessities of life and the basic needs of child development³ – food, clothing, shelter, medical care, supervision, education, and love. In all societies, in all nations, and in all cultures, there are parentless children. While parentlessness is a particularly severe problem in poor countries, the problem of parentlessness exists in all countries, even the most affluent.⁴ For example, “[a]n

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²Father Robert Drinan, *Weeping for Our Children: The Promise of the Convention on the rights of the Child*, 5 Geo. J. on Fighting Poverty 321, 321 (1998).

³What is sufficient must be defined contextually and by international standards of minimum human rights.

⁴Although the problem of children without families is not unique to any particular country or region of the world, this epidemic exists primarily in poorer countries, where wars or national disasters caused a devastating economic toll on families.” Bridget M. Hubing, *International Child Adoptions: Who Should Decide What Is In the Best Interests of the Family*, 15 Notre Dame J. L., Ethics & Pub. Pol’y 655 (2001), at I.A.. In the United States, it is estimated that one million children are homeless, living in shelters, on the streets, in

estimated 1.35 million children in the [United States of America] are homeless; children made up 23% of the homeless population [in the U.S.] in 1996, a 10% increase since 1987;⁵ an additional half-million American children live in state-supervised institutional or foster-care arrangements; and nearly 40,000 parentless children in state custody are available for adoption.⁶

The size of the problem of parentless children globally is utterly staggering. While the exact number of parentless children today is not known, "UNICEF estimates about 100 million street children exist in the world today. About forty million are in Latin America, twenty-five to thirty million in Asia, and ten million in Africa."⁷ It is said that in Bogota, Colombia, 200,000 abandoned street children roam the streets.⁸ "The number of street children is predicted to grow by tens of millions as poverty in the Third World becomes increasingly urban-based . . ."⁹ The plight of parentless children is extreme. Many parentless children cannot survive - they die, and often not tidily, not aseptically, not with dignity, but horribly of starvation, with bloated bellies, listless, bony bodies, and huge pain-drenched eyes, with cries of hunger and fear. Their suffering and death stuns us and shames us. The U.N. estimates that approximately 50,000 human beings die every day as a result of poor shelter, water, or sanitation;¹⁰ parentless children are especially vulnerable to these ravages. Disease, starvation, and natural causes are not the only mortal threats to parentless children. It is reported that in Colombia, "over 2,190 street children were murdered in 1994, an average of six children per day."¹¹

Death is not the only danger facing parentless children. Somehow, millions of parentless children survive - but when deprived of security, of education, and of protection many parentless children join the illiterate masses who live only from day to day. Unable to develop skills, many

makeshift refuges (most with parents). Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational promise of the McKinney Act for Homeless Children and Youth*, 31 Creighton L. Rev. 1209 (1998), citing U.S. Dep't of Educ., A Report to Congress: A Compilation and Analysis of Reports Submitted by States in Accordance with Section 722(D)(3) of the Education for Homeless Children and Youth Program 5-7 (July 1995) (estimates that 750,000 school-aged children and 250,000 preschool-aged children are homeless in America).

⁵Child Welfare League of America, National Factsheet 2000, <<http://www.cwla.org/advocacy/nationalfactsheet00.htm>> (16 Aug 2001). See also Marcia Johnson, *Juvenile Justice*, 17 Whittier L. Rev. 713 (1996), citing Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C.Davis L.Rev. 637, 640 (1991) (citing estimates of 1.5 million teenage runaways living on the streets). See generally Christina Victoria Tusan, Note, *Homeless Families from 1980-1996: Casualties of Declining Support for the War on Poverty*, 70 S. Cal. L. Rev. 1141 (1997).

⁶This number includes supervised kinship care arrangements. Child Welfare League of America, National Factsheet 2000, <<http://www.cwla.org/advocacy/nationalfactsheet00.htm>> (16 Aug 2001). See also Staff of H.R. Committee on Ways and Means, 105th Cong., 1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 783 (Comm. Print 1998) (this data covers 1995), cited in Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 Buff. L. Rev. 835, 839 (2000).

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

⁸Anthony D'Amato, *Cross-Country Adoptions: A Call to Action*, 73 Notre Dame L. Rev. 1239, 1241 (1998).

⁹Susan O'Rourke Von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 Suffolk Transnat'l L. Rev. 589, 616-17 (1995). See also Seitles, *supra*, at 159.

¹⁰Ellen Stearns, *Urban Growth: A Global Challenge*, 8 J. Affordable Housing & Community Dev. L. 140, Winter, 1999, at 140 n.2, citing Habitat Conference Foreshadows Major Urban Changes <<http://www.un.org/conferences/habitat/unchs/press/major.html>> (last modified Sept. 21, 1998).

¹¹Marc D. Seitles, *Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 In Pub. Interest 159, 162 (1997-98).

are unable to provide more than subsistence for themselves and their families, much less to contribute to the strength and improvement of their nation and society. Parentless children are easy targets for exploiters, and often they are victims of child labor,¹² and child sexual exploitation (both prostitution and pornography).¹³ They are the fodder of illicit enterprise, used, abused and discarded. "To be a poor child who lives with little or no family guidance or support is to live daily with the threat of murder, disease, malnutrition, physical and sexual abuse, prostitution, drug abuse, and exploitation."¹⁴ One study of street children in Guatemala reported that 93% of the street children surveyed had sexually transmitted diseases, and 90% of the children were drug users.¹⁵ Many parentless children around the world are exploited in child labor.¹⁶

In many countries, parentless children are victimized not only by the cruelties of nature and of the socio-economic jungle, but also they are also victims of the government. In fact, the most memorable example of the plight of parentless children in our lifetime is the case of the horrible state-run institutions for unwanted children in Romania that came to light about 1990. One report summarized:

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

Many of these children die; others stay in the foster factory until they are old enough to venture out on their own (perhaps as "street children"), and some are adopted.¹⁷

"The babies [found in the Romanian orphanages] d[id] not cry, however, because they ha[d] learned that noone will respond to them."¹⁸ "The psychological phrase for this condition is 'reactive attachment disorder' – a child with this disorder has an impenetrable resistance to bonding. [T]hese children have learned interaction styles that are appropriate in the institution

¹²Breen Creighton, *Combating Child Labour: The Role of International Labour Standards*, 18 Comp. Lab. L.J. 362 (1997).

¹³See generally Royce Bernstein Murray, Note, *Sex for Food in a Refugee Economy: Human Rights Implications and Accountability*, 14 Geo. Immigr. L.J. 985 (2000).

¹⁴Marc D. Seitles, *Effect of the Convention on the Rights of the Child Upon Street Children in Latin America: A Study of Brazil, Columbia and Guatemala*, 16 In Pub. Interest 159, 162 (1997-1998).

¹⁵Seitles, *supra*, at 163. In the United States, it is said that 75% of street children are drug abusers. Marcia Johnson, *Juvenile Justice*, 17 Whittier L. Rev. 713 (1996), citing Mitchell Rosenthal, *In Opposition to Drug Legalization*, 24 U.C.DAVIS L.REV. 637, 640 (1991).

¹⁶"[The International Labour Organization estimates that there are between one and two hundred million children involved in child labor" Rebecca Rios-John, *The Impact of the United Nations Convention on the Rights of the Child on UNICEF's Mission*, 6 Transnat'l L. & Contemp. Prob. 287 (1996).

¹⁷D'Amato, *supra*, at 1240-41.

¹⁸Howard E. Bogard, Comment, *Who are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 Emory Int'l L.Rev. 571, 571 (1991).

but maladaptive outside it.”¹⁹ The orphans found in the Romanian orphanages were “nearly all affected with reactive attachment disorder”²⁰

Ironically, the response of outraged persons around the world to the shocking condition of orphans in Romania was so great that it generated a chaos of well-intentioned persons (mostly from America and Western Europe) attempting to personally provide protective removal of children without any effective adoption laws or legal system to provide order.

The global crisis of children growing up with parents has many causes. Historically, one major cause of the tragedy of parentlessness has been untimely parental death - the parents have died from disease, war and crime. One of the most tragic evils of war is that so many children are left orphans or fatherless semi-orphans, and many others are separated from their families and do not know how or where to find them.²¹ It is estimated that “[i] the last decade, armed conflict killed two million children, disabled four to five million children and left twelve million children homeless.”²² For example, it is estimated that most of the 500,000 refugees who fled Kosovo were children, and that one-fourth of all children in Uganda are orphans.²³ “[T]here are more than 34 million refugees and internally displaced people worldwide; approximately 80% of them are women and children.”²⁴ Ironically, not only does war leave many children orphans, it often turns orphaned children into soldiers. “[A]t least three hundred thousand children, some as young as eight years old, currently serve in armed conflicts around the world.”²⁵ Children separated from their parents by war also are effectively orphans. According to a UNICEF report, *The State of the World's Children 1996*, during the decade prior to the report, a million displaced children were “unable to locate their parents.”²⁶

Parentless is also caused by poverty - the parents are so poor they are unable to provide or care for their child or children who are abandoned to the streets. For example, it is reported that in Brazil there are seven million (7,000,000) “meinos da rua” (children of the street) who constitute a serious problem for law and order.²⁷ It is said that over 4,000 children sleep on the streets every night in Rio de Janeiro, and similar numbers can be found in other large cities throughout Latin America.²⁸

Sometimes other external circumstances that afflict the parents prevent or impede parenting. Parental illness, addiction, disability, or incarceration may leave children without any

¹⁹D’Amato, *supra*, at 1240.

²⁰D’Amato, *supra*, at 1240-41.

²¹Petar Sarcevic, *.

²²Amy Beth Abbott, Note, *Child Soldiers - The Use of Children As Instruments of War*, 23 Suffolk Transnat’l L. Rev. 499, 500 (2000). In 1995, UNICEF issued a report that portrayed an even more distressing picture. “Children have been the most tragic casualties during the past decade, with more than 1.5 million killed, more than 4 million wounded or disabled, and some 12 million left homeless. Ten million children are believed to suffer war-related psychological trauma.” UNICEF, *Children Are Our Future: World Summit for Social Development 3* (Copenhagen Denmark, 1995), cited in Crystal J. Gates, 1999 Immigration Project, *Working Toward a Global Discourse on Children’s Rights: The Problem of Unaccompanied Children and the International Response to their Plight*, 7 Ind. J. Global Legal Stud. 299, 317 n. 132 (1999).

²³Hubing, *supra*, at A.1.

²⁴Murray, *supra*, at 985, citing Women’s Comm’n for Refugee Women & Children, Women’s Commission Fact Sheet (1999).

²⁵Abbott, *supra*, at 500.

²⁶Marsha L. Hackenberg, Comment, *Can the Optional Protocol for the Convention on the Rights of the Child Protect the Ugandan Child Soldier?* 10 Ind. Int’l & Comp. L. Rev. 417 (2000).

²⁷Margaret Liu, *International Adoptions: An Overview*, 8 Temp. Int’l & Compar. L. J. 187, 187 (hereinafter “Liu”). It is alleged that annually 1,000 of these street children are killed by “death squads of off-duty police officers who have been hired by shopkeepers to clean up the streets.” *Id.*

²⁸Seitles, *supra*, at 162.

real parent. One report noted that by the end of 1997, “10.4 million African children under 15 lost their mothers or both parents to AIDS.²⁹ “Studies in Tanzania report that nearly 30% of street children cited being an “orphan” or “abandoned” because of AIDS as one of their reasons for being on the street.”³⁰

Parental irresponsibility is also one of the historic cause of parentlessness. For example, the problem of irresponsible men refusing to accept parental responsibility for children who resulted from a nonmarital sexual liaisons is a problem that has existed for thousands of years old, as is the practice of frightened unwed mothers abandoning their children born out of wedlock to strangers,³¹ or to the church, or to some other charitable institution. Sometimes parentless is the result of a combination of these factors, or others.

Thus, there are many precipitating causes of parentlessness, and the sources, forms, and magnitude of the problem of parentless children vary among societies. Nevertheless, the dilemma of parentless children is ubiquitous, existing in all countries and all cultures. The problem of parentless children is a major global problem today.

III. Adoption, Including International Adoption, Provides A “Perfect Solution” to the Global Dilemma Parentlessness

Adoption is a proven, “perfect solution” to the problem of parentless. International adoption offers relief and hope for many parentless children in countries where conditions limit the number of domestic adoptions.

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

Adoption is so well-known today that an extended explanation of it may seem needless. However, since this paper calls for a renaissance of respect for the fundamental principles of adoption, it is appropriate to review the rudiments of adoption.

In brief, adoption is a procedure whereby a parent-child relationship is created between a child and non-parent adult(s) and whereby the parties are treated in law as if they were actually parent(s) and child. As the California Supreme Court put it: “The main purpose of adoption statutes is the promotion of the welfare of children ... by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child [[,] ... which is attainable through actual adoption”³² Historically, some form of adoption has been known since at least Biblical times.³³ In Roman law, adoption was used primarily for the purpose of providing heirs for the adult adopters, or to provide for a particular political succession, and the adopted “child” was often an adult. Most European countries, whose laws were influenced by Roman law, continued to allow adoption primarily or exclusively to satisfy

²⁹Murray *supra* at 1018, citing Jeffrey Bartholet, The Plague Years, *Newseek Mag.*, Jan. 17, 2000 at 34.

³⁰*Id.* at 1018, citing Mark Belsey, World Health Organization, World Congress Against Sexual Exploitation of Children: Health and Psychosocial Dimensions (visited Dec. 2, 1999) <<http://www.childhub.ch/webpub/csechome/2152.htm>>.

³¹Lynn D. Wardle, *Crying Stones: A Comparison of Abortion in Japan and the United States*, 14 N.Y.L. Sch. J. Int'l & Compar. L. 183, 183 (1994).

³²*Santos v. Santos*, 185 Cal. 127, 130 (1921). See generally Elizabeth S. Cole, *Adoption: History, Policy, and Program*, in *A Handbook of Child Welfare: Context, Knowledge, and Practice* 640 (Joan Laird & Ann Hartman eds., 1985) (adoption “provide[s] children with nurturant environments in the care of legally recognized parents whose custody, control, responsibilities, and rights are assured.”).

³³“Adoption as a practice is certainly as old as the human race. . . . Hammurabi's Babylonian code, the oldest set of written laws, spelled out guidelines for the adoption practice.” Brett S. Silverman, *The Winds of Change in Adoption Laws: Should Adoptees Have Access to Adoption Records?*, 39 *Fam. & Conciliation Courts Rev.* 85, 85 (2000). Reference to a form of adoption in the Bible is in Exodus describing how Pharaoh's daughter took Moses and raised him “and he became her son,” but Moses knew and never forgot that he was an Hebrew. Exodus 2:1-12. Greek mythology tells that Hercules was the adopted son of Hera, and that Oedipus was taken in and raised by King Polybus and Queen Merope of Corinth after he was abandoned by his father who had been warned by the Oracle at Delphi that he would be killed by his son.

adult concerns about inheritance, continuity, and succession. In other countries, such as England where the common law prevailed, adoption historically was not known.³⁴

A profound re-orientation of adoption occurred in the middle of the nineteenth century beginning with the enactment of child-welfare-focused adoption laws in Massachusetts in 1851.³⁵ The primary, dominant, motivating purpose of adoption American-style was to provide parents for parentless children. Secondly, but simultaneously, adoption also fulfilled the reciprocal aspirations of childless parents for children.³⁶ Thus, the heart of this child-centered model of adoption was the creation of family relationships that imitated and were intended to replicate the relationship that exists between parents and child(ren) in a birth (natural) family.

By the early part of the twentieth century, child-welfare-oriented, imitative adoption had become the dominant paradigm for adoption, replacing the old adult-centered, property- or status-transmission focus. By mid-century, this model of adoption was recognized, if not adopted, in most countries around the world. After World War II, when many service men or women and other citizens from affluent nations living abroad, saw the plight of parentless children, the use of adoption to provide homes for orphans took on an international dimension.³⁷ Because the countries where the crisis of parentless children was greatest and most obvious were poor (including then-war torn, defeated) countries, and the countries where parents were most able to provide parenting for needy children were in affluent countries, the flow of parentless children from third-world to post-industrial countries via adoption began.³⁸ The number of intercountry adoptions rose from zero in 1940 to approximately 20,000 at the end of the twentieth century.³⁹

B. The Great and Unique Value of the Adoption is the Form and Substance of Imitative Parenting.

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

Adoption has been described as “the ‘perfect solution’ to the dilemma of parentless children and childless want-to-be parents”⁴⁰ It is “perfect” for the child because it affords the parentless child a parent-led family environment which generally provides the child with the optimal, individualized, love-driven parenting. The imitative parenting model of adoption provides best for children because it is grounded in powerful realities of human nature. It understands that what motivates successful parenting is found in the nature of the unifying relationship between mother-and-father and child, not in any legalism or government incentive of coercion. No other model for the relationship, from friendship to partnership, from commercial to fiduciary, comes close to working as well to motivate the level of commitment to

³⁴Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 20.1, at 861 (2d ed. 1988); Hubing, *supra*, at 691; C. Deborah Philipps, *Adoption*, II Contemporary Family Law, Ch. §10:01 (1988). See generally Joan Heifetz Hollinger et al., *Adoption Law & Practice* 1-1 (2000).

³⁵See *infra* note ____.

³⁶ Lisa K. Gold, Comment, *Who’s Afraid of Big Government? The Federalization of Intercountry Adoption: It’s Not As Scary As It Sounds*, 34 *Tulsa L.J.* 109, 110 (1998) (“Modern adoption and particularly international adoption, now serves a more reciprocal function of meeting the needs of children who would otherwise be without homes and families, as well as the adults who would otherwise be without children.”).

³⁷Hubing, *supra*, at 660; Margaret Liu, Note, *International Adoptions: An Overview*, 8 *Temp. Int’l & Comp. L.J.* 187, 191 (1994).

³⁸Bartholet, *supra*, at 181; Hubing, *supra*, at 660-663.

³⁹Hubing, *supra*, at 660; Hillis, *supra*, at 239, n. 17; Bartholet, *supra*, at 183. Undoubtedly there were some incidental intercountry adoptions before the end of World War II, but those were not reported and there was no system or structure for transnational adoption.

⁴⁰Hillis, *supra*, at 239, citing Joan Heifetz Hollinger, *The Uniform Adoption Act: A Reporter’s Ruminations*, 30 *Fam. L.Q.* 345, 345 (1996).

children that is needed for adults to make the sacrifices necessary to provide for the tangible and intangible needs of children.

Ferdinand Schoeman got to the core of why adoption works so much better than other alternatives when he observed that relations between parents and children are more aptly described in spiritual/poetic terms that suggest integration and love than in legalistic or political terms that define boundaries.⁴¹ Parenthood is best understood in terms that suggest union and identification rather than separation. As parents, we share ourselves with our children. Most parents, even lawyers, willingly sacrifice for their children, yearn for their welfare, aspire and work continuously for their success, encourage, love, nurture, comfort, teach, protect, and promote them without giving any thought to whether it is their legal “duty” to do so, or to the legal “rights” of their children. Parents devote themselves and their resources to their children out of love, not because their children have “rights.” The love their children so much they identify with them and would do anything for them.

What happens when parents’ relationships with their children are reduced to legal “rights?” Divorce provides a clear example. Particularly revealing is the relationship between noncustodial parents and their children. While the law vigorously insists that the legal duty of the divorced, absent parent to support his children is as great as that of the residential, married father, and in America (with its high divorce rates) many laws and agencies are very active in attempting to collect child support from absent fathers. Despite the strict laws about the duty of divorced parents to support their children, and despite ongoing, vigorous efforts to enforce those laws, when divorced or never-married parents (usually fathers, but the same is true of mothers) are cut off and cut out of the lives of their children, for whatever reason or regardless of whose fault, they frequently tend to drift away (or are driven away) after divorce, and within a short time, they no longer actively seek the welfare of their children and often even neglect to make consistent child support payments. “Deadbeat dads” result from institutionalizing alternatives to marriage-based parenting, when legal duty and legal institutions are substituted for family love.

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

A wealth of social science research supports imitative adoption. Numerous studies report that children adopted at birth are at least as likely to live with two parents in a middle-class family, to do as well or better in both school and in social competency tests, are generally less depressed, more optimistic, appear to have higher self-esteem, self-confidence, and feelings of security, and are more willing to give voluntary service, are less involved in alcohol or drug use, theft, weapons or police trouble, enjoy similar or better health, achieve higher educational attainments, and have fewer mental health problems as children living with their birth parents.⁴² Studies have even shown that adoption has been extraordinarily successful in enabling even children who have suffered extremely severe forms of deprivation and abuse in their early lives, that could be expected to cause difficulties in development, to recover and flourish. For example, one major study of children caught up in the Vietnamese War who arrived in Norway for

⁴¹Ferdinand Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 *Ethics* 6, 8-9 (1980).

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

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

Id. at 8-9.

⁴²Patrick F. Fagan, *Adoption: The Best Option*, in *Adoption Factbook III*, at 2, 3 (National Council for Adoption, 1999).

adoption at ages ranging from two to five, reported that when those children arrived, “[m]any could not walk. They were passive, apathetic, retarded and malnourished.’ [Fifteen-plus years later], those children were found to be in remarkably good shape: they were basically well-adjusted and strongly attached to their families.”⁴³ Thus, imitative adoption is proven to provide maximum life-development benefits for parentless children.

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

Adoption is not the only possible response to the dilemma of parentless children. At least four other solutions historically have been practiced and must be considered. The first option is for the child to be taken in by members of his or her extended family. This is the preferred solution because it assumes an existing family connection to build upon, and if supported by some legal reinforcement (such as some form of adoption or legal guardianship) may provide the optimal affective and legal protection for the parentless child. Thus, in all international instruments,⁴⁴ as well as in many national adoption laws, placement of the parentless child with relatives is the first and preferred step to provide for the child. But this solution is almost always unavailable for the parentless children of the world today. That is, since there are natural family ties between the child and the relatives, if those relatives exist, are known, and have resources sufficient to provide for the minimal needs of the parentless child, the child usually will be taken in as a natural matter of course, before and without intervention by governmental or private child-protection agencies; if extended family are available, the child will not become (or long stay) parentless. Thus, by definition, children who are parentless are generally without the first, preferred option of being raised in the parent-led home of family relatives.

Second, institutionalization of parentless children has been another alternative that has a long history. Institutionalization “is far more common than foster care in the poor nations of the world.”⁴⁵ A Report of the Hague Conference on the condition of parentless children noted that institutions like orphanages are “often poorly staffed, managed and supervised, [yet] are a major, perhaps the major, ‘source’ of children being adopted abroad.”⁴⁶ Institutional care has a dismal long-term record in improving the condition of parentless children. Experience in a variety of cultures – from Dicken’s England to the Romania of the 1990s – has shown that more than short-term institutionalization of parentless children frequently and quickly degenerates into institutionalized child abuse. For example, a recent report described the plight of children found in Romanian orphanages:

For the tens of thousands of Romanian children living in orphanages, . . . [the conditions in which they live are deplorable, while their chance of “escape” is limited by bureaucratic red tape and nationalistic beliefs. The 379 orphanages are often over one hundred years old and lack hot water, proper sewage facilities, and heat. The children “spend aimless hours in the dirt yard of their fenced institution, or roaming the peeling corridors of a dormitory that reeks of sewage and mold.”⁴⁷

In some Romanian orphanages, as many as half of the children died during the winter of 1989-1990.⁴⁸ Yet, “[e]ach year, hundreds of thousands of children languish in foster or institutional

⁴³Bartholet, *supra*, at 204, citing Barbara Tizard, *Intercountry Adoption: A Review of the Evidence*, 32 *J. Child Psychol. and Psychiatry* 743, 748 (1991). *See also* Ian J. Harvey, *Adoption of Vietnamese Children: An Australian Study*, 18 *Austl. J. Soc. Issues* 55, 59-61, 65-68 (1983) (study of Vietnamese adoptees in Australia, finding great success among those who arrived suffering from malnutrition, deprivation and other traumatic early experiences), cited in Bartholet, *supra*..

⁴⁴*See infra* notes ___ to ___ and accompanying text.

⁴⁵Bartholet, *supra*, at 196, n. 39.

⁴⁶J.H.A. van Loon, *Report on Intercountry Adoption*, *The Hague Conference on Private International Law*, Prel. Doc. No. 1 (Apr. 1990), cited in Bartholet, *supra*, at 196, n. 39.

⁴⁷Howard E. Bogard, *Comment, Who are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 *Emory Int’l L.Rev.* 571, 571 (1991), citing Williams, *The Unwanted Children: Casualties Left by a Tyrant*, *L.A. Times*, Dec. 10, 1990, at A1, col. 5; Harder & Schneider, *From Bucharest, With Love*, *TIME*, Sept. 24, 1990, at 34; and McGrath, *Happy Couple Adopts Two Romanian Infants*, *Toronto Star*, Nov. 8, 1990, at E14, col. 2.

⁴⁸Bogard, *supra* at 571, citing Williams, *supra*, at A1.

care worldwide, while at the same time, thousands of adults, married and unmarried alike, are denied children because of ‘shortages.’⁴⁹ Orphanages may result from ill-considered government policies. That is in part the cause of the Romanian tragedy. China’s one-child policy is said to be responsible for approximately 100,000 Chinese orphans living in overcrowded state orphanages,⁵⁰ and it is reported that ninety-eight percent of those orphans are girls.⁵¹ Thus, as a permanent or long-term general solution to the problem of parentlessness, institutional child-care generally is not very promising.

A third alternative is foster care. Foster care varies tremendously; in its best (but rare) form, it is almost equivalent to adoption, involving a long-term placement of a child with a family, with parents to care for the child, who treat the child as their own, and who receive some form of government subsidy for the service. More often, however, foster care is a euphemism for cottage-industry-level institutionalization, with children being farmed out to live with a band of parentless children in a small-scale orphanage run by a small staff of under-resourced adults. In some cases, they are little better than “foster factories.”⁵² Foster care does little to improve the childhood or adult life-prospects of parentless children. For example, foster care in the United States is a heavily-subsidized, heavily-regulated, state-run, long-established approach to providing for the needs of parentless children (most deprived of parents as a result of alleged abuse or neglect). But foster care is perpetually in need of reform, and operates as a perpetual-but-impermanent limbo for many parentless children. In 1998, 520,000 children lived in state-regulated out-of-home, family foster care programs in the U.S.A.. Forty percent of these children are never returned to their birth families. The average time that children remain in foster care is now 33 months and those children averaged 3.2 different foster placements during that time.⁵³ In 1998, approximately 37,000 children in foster care were legally available for adoption in the United States,⁵⁴ but every year about 20,000 foster children exit the foster care system by reaching the age of majority, without having been adopted.⁵⁵ In 1996, 27% of homeless adults “reported having lived in foster care, a group home, or other institutional setting for part of their childhood.”⁵⁶ Thus, even the best foster care is often a ticket to poverty and deprivation. As Harvard Law Professor Elizabeth Bartholet has observed: “Foster care is available only to a limited degree and sometimes results in little more than indentured servitude. . . . A permanent adoptive family is vastly preferable from the child’s perspective to even the best foster or institutional care.”⁵⁷

A fourth response to the global problem of parentless children is to try to change the overall social, economic or political problems that cause the parentlessness – premature death,

⁴⁹Stacie I. Strong, *Children’s Rights in Intercountry Adoptions: Towards A New Goal*, 13 B.U. Int’l L.J. 163, 163 (1995).

⁵⁰Hubing, *supra*, at ___, n. 52.

⁵¹Hubing, *supra*, at ___, n. 53, quoting Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 Duke J. Gender L. & Pol’y 5, 12 (1995).

⁵²D’Amato, *supra*, at 1240-41.

⁵³Child Welfare League of America, National Factsheet 2000, <<http://www.cwla.org/advocacy/nationalfactsheet00.htm>> (16 Aug 2001). See also Staff of H.R. Committee on Ways and Means, 105th Cong., 1998 Green Book: Background Material and Data on Programs Within the Jurisdiction of the Committee on Ways and Means 783 (Comm. Print 1998) (this data covers 1995), cited in Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 Buff. L. Rev. 835, 839 (2000).

⁵⁴Child Welfare League of America, National Factsheet 2000, <<http://www.cwla.org/advocacy/nationalfactsheet00.htm>> (16 Aug 2001).

⁵⁵Mangold, *supra*, at 839.

⁵⁶Child Welfare League of America, National Factsheet 2000, <<http://www.cwla.org/advocacy/nationalfactsheet00.htm>> (16 Aug 2001).

⁵⁷Bartholet, *supra*, at 202, 206.

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

Thus, the alternatives to adoption are not comparable in terms of potential and actual benefits delivered to parentless children. The alternatives to adoption are generally inadequate, inferior, and often exacerbate some of the plight of parentless children. In some cases, they may be the best available option because adoption is not available, or may be useful as a temporary step toward adoption. But they do not provide a decent or satisfactory remedy for the parentless child or for the social problems of parentlessness.

Fortunately, adoption is not a demanding or an exclusive remedy.⁵⁸ If linked to and directed toward ultimate placement for adoption, even temporary institutionalization and foster care can complement and be complemented by adoption. Other programs such as international aid to promote the well-being of parentless children in poor countries are not sacrificed, impaired or disadvantaged at all by simultaneously facilitating, encouraging and promoting intercountry adoptions. In fact, because cross-border adoptions are largely driven by private initiative, and often are fully self-supporting (the adopting parents can pay in fees and charges all of the public costs of the government agencies involved in regulating the adoptions), they need not (and generally do not) drain any resources from other programs to meet the needs of unadopted parentless children. And because intercountry adoptions call attention to the plight of parentless children in third-world countries, they a very positive public relations bonus for other government programs that address more broadly the needs of parentless children such as the needs for temporary care, food, housing, medical, and educational programs.

IV. *The Success and Failure of International Adoption*

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

A. *The Scope of International Adoptions Today*

The exact number of international adoptions is not known. We know that the incidences of intercountry adoption varies from year to year, influenced primarily by shifting local politics and legal policies that open, expand, close or contract the prospects of Intercountry adoption in particular countries. By the mid-1990's it was estimated that approximately 20,000 international adoptions happened worldwide every year.⁵⁹ Since then the widespread adoption of the Hague Intercountry Adoption Convention has helped to facilitate international adoptions, so it is likely that the number of trans-national adoptions has continued to rise.

Families in America are the most likely to adopt parentless children from other nations, and the number of international adoptions in the United States is rising. American parents traditionally have adopted over one-half,⁶⁰ and recently perhaps three-much fourths of all of the

⁵⁸Bartholet, *supra*, at 197.

⁵⁹Hubing, *supra*, at 660. See also Jennifer M. Lippold, *Transnational Adoption From an American Perspective: The Need for Universal Uniformity*, 27 Case W. Res. J. Int'l L. 465, 469 (1995), citing New Rules Could Govern International Adoptions, Chi. Trib., May 28, 1993, at N22; Elizabeth Bartholet, *International Adoptions: Propriety, Prospects and Pragmatics*, 13 J. Am. Acad. Matrim. Law. 181, 184 (1996), citing J.H.A. van Loon, Report on Intercountry Adoption, The Hague Conference on Private International Law, Prel. Doc. No. 1 (Apr. 1990) at 62, n. 96 (estimating 15,000 to 20,000 international adoptions annually worldwide).

⁶⁰Peter H. Pfund, *The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement*, 30 U.C. Davis L. Rev. 647, 648-49 (1997) "more [foreign] children probably still come to the United States in adoption annually than to all other countries combined.").