

**CHALLENGING *MONOHUMANISM*:  
AN ARGUMENT FOR CHANGING THE WAY  
WE THINK ABOUT INTERCOUNTRY  
ADOPTION**

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We in the West have come to terms with intercountry adoption (ICA) by virtue of the historically inferior place of adoptees’ birth countries in

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the European Western experience. Many of the countries that we adopt from are places in which the United States or other Western countries had colonies. Our relationship with these countries is a relationship through which we, as a country, have developed our personality and the image of ourselves.

The Convention on the Rights of the Child<sup>1</sup> (CRC) provides a legal framework that establishes a child's right to be raised in the context of her family and her culture. We regularly violate this most fundamental right of children because we fail to come to terms with our imperialist orientation toward the world. This failure has been caused, in part, by how we have constructed our way of thinking about intercountry adoption. We now have a conception of ICA that I refer to in this Article as *MonoHumanism*.

To many, a focus on the "humanity" of the child may sound universal, while a focus on cultural or national identity may sound partial. Similarly, *MonoHumanism* may at first blush seem inclusive rather than ethnocentric or myopic. I have chosen this phrase purposefully, though, due to the strength of the inversion of the ideal of inclusiveness that accompanies this language. The phrase *MonoHumanism* was chosen because of the juxtaposition of "Mono" with the word "Humanism" to underscore the ethnocentric and myopic failure to include discourses that have their origins in the lives, cultures, and vocabulary of historically oppressed peoples, in an area that is often conceived of as a "win-win" for all parties involved and as the most humanitarian of endeavors. Even more fundamentally, the term "Mono" seems to exclude other possibilities and is commonly used that way, for example, with the terms "monotheistic" and "monolithic."

On a basic level, *MonoHumanism* reflects a collective notion identifying "us" as Americans and everyone else as "the other." *MonoHumanism* is fundamentally the notion of American culture as a superior one in comparison with all non-American peoples and cultures. What *MonoHumanism* represents, more specifically, is the notion that the United States has substituted its own view of all non-American peoples or cultures for positive knowledge of them,<sup>2</sup> facilitating the creation of the Western identity of self as the normative center. The narrative of identity that accompanies *MonoHumanism* subscribes both universality and superiority to Western knowledge and discourse, which effectively results in the exclusion and displacement of the knowledge and dis-

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1. Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/RES/44/25 (Dec. 12, 1989) [hereinafter CRC].

2. As Edward Said has observed, the dominant group sometimes substitutes its own view of the other for positive knowledge of it. EDWARD SAID, *ORIENTALISM* 1-13 (1979) [hereinafter SAID, *ORIENTALISM*].

course of historically oppressed peoples.<sup>3</sup> In the context of intercountry adoption, *MonoHumanism* means that children are not seen in the context of their family, community, and culture, but instead, narrowly as the potential children of Western adults. In other words, children are seen through a narrative of identity in the United States, which I am calling *MonoHumanism*, to the exclusion of knowledge and discourse with its origins in the lives, cultures, and vocabulary of the children themselves.

ICA is most often conceived of as both humanitarian and the only viable option for children who are adopted. But, while there are plenty of situations in which there are realistically no other options for adopted children, and many end up in loving, adoptive homes, that does not tell the entire story. We now have laws in place to recognize and protect children who might have the option of being raised by their birth parents or other caregivers in the context of their culture. And, by acknowledging the power of discourse,<sup>4</sup> we can begin to dismantle the concept of *MonoHumanism* in order to make room for a more nuanced conversation that reflects the interests of children and the countries from which they come.

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3. See *id.* at 21–22.

4. I use the terms “discourse” and “discursive formations” interchangeably. These terms refer to themes that shape our understanding of intercountry adoption (ICA). While these themes often represent, on a fundamental level, seeing Americans as “us” and seeing everyone else, including the adopted child, as “other,” the themes have more specific manifestations in our discourse about ICA. I am loosely basing my use of the terms “discourse” and “discursive formations” on Michel Foucault’s uses of those terms. See, e.g., MICHEL FOUCAULT, *THE ARCHEOLOGY OF KNOWLEDGE* (A.M. Sheridan Smith trans., Tavistock Publ’ns 1972) (1969). One particularly good example of the power of discourse is provided in Foucault’s *The Order of Things*, which he begins by quoting a passage from the Argentine writer, Jorge Luis Borges:

[A] “certain Chinese encyclopedia” . . . divides animals into the following categories: “(a) belonging to the Emperor, (b) embalmed, (c) tame, (d) sucking pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, [and] (n) that from a long way off look like flies.”

MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* xvi (Routledge Classics 2002) (1966). Why does this collection of “kinds” of animals seem so funny? It is because, as Foucault recognizes, it violates our sense of order, a sense that is only based in an absolute reality to the extent that we have created it ourselves. *Id.* Similarly, Jean-Paul Sartre has said that “*existence* comes before *essence*,” suggesting that rather than the meaning of things being predetermined, the meaning of things is created by man. Jean-Paul Sartre, *Existentialism Is a Humanism* (1946), reprinted in *EXISTENTIALISM FROM DOSTOYEVSKY TO SARTRE* 287, 289 (Walter Kaufmann ed., 1966). The work of cognitive psychologists also supports this notion. See, e.g., J.M. Balkin & Sanford Levinson, *Legal Canons: An Introduction*, in *LEGAL CANONS* 3, 21 (J.M. Balkin & Sanford Levinson eds., 2000) (“Cognitive psychologists from Eleanor Rosch onward have noted that human beings tend to focus on certain members of categories that they regard as most representative or salient.”).

I have made a conscious choice to focus on discourse in law review articles.<sup>5</sup> This is in large part because of the power of attorneys in the United States and the impact that their work can have on the lives of families. On one level, out of the three branches of government, one, the judiciary, is almost exclusively made up of attorneys. And, on the other, it is attorneys who pass laws in the legislative branch, lobby to get these laws changed, challenge the constitutionality of these laws, and represent in court families who are subject to these laws. Many international treaties such as the CRC need implementing legislation in order to be effective, as they are not self-executing. It is also lawyers, of course, who engage in legal scholarship. Thus, given the influence of lawyers in our society, I have chosen to focus my efforts on analyzing legal scholarship on adoption. But, even though I have chosen to focus my efforts on analyzing law review articles, there is no reason to think that these narratives do not also exist in the media, in reports of governmental and non-governmental organizations (NGOs), in other scholarship on adoption, or in any other “non-legal” source. The law review articles written on ICA, as a matter of course, cite coverage of adoption from all of these sources, and, thus, base their narratives on these sources.<sup>6</sup> It is also true that law professors often write op-ed columns on adoption that are reflective of their scholarly work.<sup>7</sup>

In Part I of this Article, I provide a brief history of ICA. In Part II, using a post-colonialist theoretical framework, I explore the work of legal scholars from the past twenty years on the subject of ICA.<sup>8</sup> This

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5. My review of legal scholarship includes works by practitioners, law faculty, and students.

6. See, e.g., Howard E. Bogard, *Who Are the Orphans? Defining Orphan Status and the Need for an International Convention on Intercountry Adoption*, 5 EMORY INT'L L. REV. 571 (1991) (citing, *inter alia*, *Time*, the *Los Angeles Times*, *USA Today*, U.S. congressional hearing testimony, books, the *Chicago Tribune*, *The Washington Times*, and the U.S. Department of State); Anthony D'Amato, *Cross-Country Adoption: A Call To Action*, 73 NOTRE DAME L. REV. 1239 (1998) (citing *20/20*, *The Washington Post*, and *The New York Times*); Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677 (1999) (citing *The Seattle Times* and the National Council for Adoption).

7. Elizabeth Bartholet, for example, has written articles on international adoption that have been published in the *The Washington Post* and in *Vogue*, among other publications. See, e.g., Elizabeth Bartholet, *Slamming the Door on Adoption*, WASH. POST, Nov. 4, 2007, at B7; Elizabeth Bartholet, *Family Matters*, VOGUE, Nov. 1993, at 102.

8. This Article analyzes law review articles on the subject of ICA, many of which are cited here. In all of them, ICA is a main subject of discussion. See, e.g., Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER F. WORLD AFF. 181 (2004); D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005); Bogard, *supra* note 6; Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243 (1994); D'Amato, *supra* note 6; Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Con-*

*vention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179 (2003); Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61 (2006); Mary Hora, *A Standard of Service That All Families Deserve: The Transformation of Intercountry Adoption Between the United States and the Russian Federation*, 40 BRANDEIS L.J. 1017 (2002); Howe, *supra* note 6; Kay Johnson, *Politics of International and Domestic Adoption in China*, 36 LAW & SOC'Y REV. 379 (2002); Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 GEO. WASH. INT'L L. REV. 477 (2004); Lisa M. Katz, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283 (1995); Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187, 189-90 (1994); Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597 (2005); Jena Martin, *The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U.C. DAVIS J. INT'L L. & POL'Y 173 (2007); Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005); Sarah Sargent, *Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351 (2004); Barbara Stark, *Baby Girls from China in New York: A Thrice-Told Tale*, 2003 UTAH L. REV. 1231 (2003) [hereinafter Stark, *Baby Girls*]; Barbara Stark, *Lost Boys and Forgotten Girls: Intercountry Adoption, Human Rights, and African Children*, 22 ST. LOUIS U. PUB. L. REV. 275 (2003) [hereinafter Stark, *Lost Boys*]; Stacie I. Strong, *Children's Rights in Intercountry Adoption: Towards a New Goal*, 13 B.U. INT'L L.J. 163 (1995); Cynthia Ellen Szejner, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 216-17 (2006); Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM L. & POL'Y J. 189 (1999); Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323 (2005); Barbara Yngvesson, *Placing the "Gift Child" in Transnational Adoption*, 36 LAW & SOC'Y REV. 227 (2002) [hereinafter Yngvesson, *Placing the "Gift Child"*]; Dan Berger, Note, *Improving the Safety and Efficiency of Foreign Adoptions: U.S. Domestic Adoption Programs and Adoption Programs in Other Countries Provide Lessons for INS Reform*, 5 CORNELL J.L. & PUB. POL'Y 33 (1995); Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171 (2003); Crystal J. Gates, Student Trend Paper, *China's Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369 (1999); Nicole Bartner Graff, Note, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children Be Controlled?*, 27 SYRACUSE J. INT'L L. & COM. 405 (2000); Bridget M. Hubing, Note, *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); Holly C. Kennard, Student Comment, *Curtailing the Sale and Trafficking of Children: A Discussion of the Hague Conference Convention in Respect of Intercountry Adoptions*, 14 U. PA. J. INT'L BUS. L. 623 (1994); Erika Lynn Kleiman, Note, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327 (1997); Molly S. Marx, Comment, *Whose Best Interests Does It Really Serve? A Critical Examination of Romania's Recent Self-Serving International Adoption Policies*, 21 EMORY INT'L L. REV. 373 (2007); Mary Ann Candelario McMillan, Comment, *International Adoption: A Step Towards a Uniform Process*, 5 PACE INT'L L. REV. 137 (1993); Stephanie Sue Padilla, Note, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817 (1993); Veronica S. Root, Note, *Angelina and Madonna: Why All the Fuss? An Exploration of the Rights of the Child and Intercountry Adoption Within African Nations*, 8 CHI. J. INT'L L. 323 (2007); Elisabeth J. Ryan, Note, *For the Best Interests of the Children: Why the Hague Convention on Intercountry*

analysis exposes the centrality of *MonoHumanism* to our discourse on ICA. I find that no one has engaged in a longitudinal analysis of the Western adoption discourse in legal scholarship, post-colonialist or otherwise, with the goal of better understanding our conception of ICA, and of how this conception may affect the rights of children to be raised in the context of their birth families. Furthermore, notwithstanding voluminous legal scholarship on ICA, only a few legal scholars have attempted to use post-colonialist theory as an analytical tool in this area, either explicitly or in a way that is conceptually aligned with post-colonialist theory.<sup>9</sup> In Part III, I illustrate how our discourse regarding intercountry

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*Adoption Needs to Go Farther, as Evidenced by Implementation in Romania and the United States*, 29 B.C. INT'L & COMP. L. REV. 353 (2006).

9. See, e.g., Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 135 (1998) [hereinafter Perry, *Mothers*] (using post-colonialist theory to support her argument that developing nations are often perceived as "subordinate nations" in the context of international adoption, and placing black women, other women of color, and poor women at the center of her analysis). While Twila Perry's work reflects the most direct reference to post-colonial theory, other legal scholars have attempted to expose colonial, imperialistic, or neocolonial motivations in the context of international adoption. For example, Ryah Lilth sees ICA and mail-order bride buying as indistinguishable, aside from the fact that ICA is often justified by imperialist and colonialist discourses of morality articulated by religious and humanitarian organizations. Ryah Lilth, Note, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions*, 9 BUFF. WOMEN'S L.J. 225, 229, 258–59, 262 (2001). Similarly, while not referencing post-colonial literature, David M. Smolin describes an othering process in explaining an "adoption myth" prevalent in the international adoption community, in which virtuous adoptive parents bond with grateful and loving orphans, which is contrasted with the denigration of biological parents from developing countries. David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 3, 5–6 (2007) [hereinafter Smolin, *Child Exploitation*]. Again, reflecting the post-colonialist practice of placing the subject at the center of the analysis, Smolin tries to reframe the adoption debate by using narratives from intercountry adoptees, birth parents, adoptive parents, middle agents, government agents, international agents, and legal scholars to reconstruct the "identity" of exploited "subjects" from the developing world and thereby expose the "apologists" of ICA. *Id.* at 18–45; see also David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 135–60 (2006) [hereinafter Smolin, *Child Laundering*]; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 451–74 (2005) [hereinafter Smolin, *The Two Faces*]. Claudia Fonseca makes a similar use of narratives of the poor in Brazilian *favelas* to empower the would-be subjects of "adoption myths," by describing local community-based practices of "child circulation and *adocao a' brasileira* [adoption Brazilian-style]." Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 36 LAW & SOC'Y REV. 397, 404–12 (2002) [hereinafter Fonseca, *Inequality*]. Fonseca sees the "child-saving-rhetoric" that is relied on by adoption agencies to position their work as beyond reproach, and to suggest that adoptive parents (who are often wealthy, at least by comparison) are moral, upstanding, and capable, as opposed to birth parents who (often poor) are characterized as irresponsible, uncivilized, sexually unrestrained, and immoral. *Id.* at 420–22. Fonseca notes that *favela* mothers are effectively legally disenfranchised so as to be unable to protect themselves or their children in an inequitable system in which the global South, or

adoption contributes to our violating the rights of children (and families) as they are defined in the CRC. Lastly, in Part IV, I explore how my argument fits into the current and somewhat polarized debate on ICA and how the world might look if we were to dismantle and reject the concept of *MonoHumanism*. As I discuss in Part IV, a world without *MonoHumanism* might result in reforms that are more responsive to the child's rights and the rights of families whose economic circumstances seem to propel adoption. Such reforms could, for example, include requiring individuals and the United States to contribute to programs designed to facilitate family preservation and in-country placement of children, legal reform that makes a child's right to be raised in the context of her family—as this right is reflected in the CRC—a precondition to even considering adoption, and could also include focusing more resources on the enforcement of laws that protect the right of a child to live in the context of her family.

### I. INTERCOUNTRY ADOPTION: A BRIEF HISTORY

Most people identify ICA as a post-World War II phenomenon, which is only partially correct. The movement of children into the colonies through slavery and indenture,<sup>10</sup> and the so-called “orphan trains” in the late nineteenth century and early twentieth century, were a precursor to modern-day ICA.<sup>11</sup>

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developing countries, are on one side, and the global North, or Western countries, are on the other. *Id.* at 423–27.

10. See, e.g., MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: A HISTORY OF CHILD CUSTODY 2 (1994) (explaining that children who came to America as slaves or indentured servants “were an important part of the colonies' settlement”); BARBARA BENNETT WOODHOUSE, HIDDEN IN PLAIN SIGHT: THE TRAGEDY OF CHILDREN'S RIGHTS FROM BEN FRANKLIN TO LIONEL TATE 63 (2008) (“The United States was settled, in large part, by working indentured children—many of whom were bound out for long terms of service and separated by an ocean from their parents.”).

11. In 1853, a minister named Charles Loring Brace took on the task of “saving” thousands of children in New York who were seen on the streets searching for money, food, and shelter. After deciding that the only way in which to save these children was to send them to Christian homes in the country, Brace founded the Children's Aid Society in order to arrange trips, raise money, and obtain the legal permissions needed to relocate these children. More than 100,000 children were sent, via so-called orphan trains, between 1854 and 1929. While the “orphan trains” were not “international,” they reflected an early example of a large-scale attempt to “save” children by taking them out of their environments and placing them into new environments with new families while encouraging a total break with their past. See generally MARILYN IRVIN HOLT, THE ORPHAN TRAINS: PLACING OUT IN AMERICA (1992); MIRIAM Z. LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN'S AID SOCIETY 1853–1890 (1964); I-IV ORPHAN TRAIN HERITAGE SOC'Y OF AM., ORPHAN TRAIN RIDERS: THEIR OWN STORIES (Kay B. Hall ed., 1992, 1993); EILEEN SIMPSON, ORPHANS: REAL AND IMAGINARY (1987).

Notwithstanding this history, ICA as it is commonly conceived of in the United States began in earnest after World War II.<sup>12</sup> In the aftermath of a war, intercountry adoption was viewed as a benevolent humanitarian solution.<sup>13</sup> The emergence of this phenomenon opened the door to a surge of adoptions from Korea after the Korean War in 1954.<sup>14</sup> Many of the children adopted from Korea during this time were the children of U.S. servicemen who had been stationed in Korea.<sup>15</sup> Then President of Korea Syngman Rhee began an intercountry adoption program to deal with the problem of “orphaned” children, who numbered in the thousands.<sup>16</sup>

The media went through a revolution of sorts around the time of the Korean War,<sup>17</sup> and, thus, “the media’s ability to cover the Korean War and carry the plight of the orphans into the homes and hearts of Middle America fueled rescue fantasies in a way that was not possible during World War II.”<sup>18</sup> In part, because of social upheaval and poverty as a direct consequence of the war,<sup>19</sup> widespread Korean adoption continued through the 1980s, and, by the mid-1980s, over 6,000 Korean children had been placed in the United States.<sup>20</sup> South Korea was the country

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12. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 159 (2007) [hereinafter Bartholet, *Thoughts*]. Bartholet noted,

The numbers and pattern of international adoptions have changed over the years . . . . Yet there was virtually no matching of these children with these adults until after the Second World War. That war left the predictable deaths and devastation, and made the plight of parentless children in the vanquished countries visible to the world at a time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting. Thus began the first wave of international adoptions . . . .

*Id.*; see Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interests of the Child?*, 10 TEX. WESLEYAN L. REV. 343, 343 (2004) (“International adoption in the United States began with the placement of children from Europe following World War II.”); see also Peter Selman, *The Movement of Children for Intercountry Adoption: A Demographic Perspective* (Aug. 18–24, 2001) (poster presentation at the XXIVth International Union for the Scientific Study in Population (IUSSP) General Population Conference), available at [http://www.iussp.org/Brazil2001/s20/S27\\_P05\\_Selman.pdf](http://www.iussp.org/Brazil2001/s20/S27_P05_Selman.pdf).

13. Bergquist, *supra* note 12, at 343.

14. *Id.*; Bartholet, *Thoughts*, *supra* note 12, at 159.

15. Bergquist, *supra* note 12, at 343; see also Bartholet, *Thoughts*, *supra* note 12, at 159 (explaining that “[t]he Korean War led to the opening up of South Korea for adoption in part because of war-created needs: orphaned and abandoned children, and children fathered by American soldiers who would face discrimination in Korean society”).

16. Bergquist, *supra* note 12, at 343; see also Bartholet, *Thoughts*, *supra* note 12, at 160.

17. Bergquist, *supra* note 12, at 343.

18. *Id.*

19. *Id.* at 344.

20. *Id.*

from which the most people in the United States adopted for a number of years, but it has now been surpassed by China and Guatemala.<sup>21</sup> While there are intercountry adoption programs in many countries around the world, these countries are not as significant as China and Guatemala in terms of the number of children placed in the United States. Ethiopia, for example, has received a surge of recent media attention,<sup>22</sup> due in part to recent celebrity adoptions from there, but in terms of absolute numbers it does not place among the top countries from which Americans adopt.<sup>23</sup>

Adoptions by U.S. families in the aftermath of the Korean War have been described as “compassionate”<sup>24</sup> and have often been compared to the adoption of European children following World War II.<sup>25</sup> While these eras have many parallels, they are also different in significant ways.<sup>26</sup> For one thing, most of the children adopted in the aftermath of World War II

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21. U.S. Dep’t of State, Table XIII: Significant Source Countries of Immigrant Orphans (Totals for IR-3 and IR-4 Immigrant Visas Issued to Orphans, Fiscal Years 1998–2007), <http://www.travel.state.gov/pdf/FY07AnnualReportTableXIII.pdf> (last visited Jan. 26, 2009) [hereinafter U.S. Dep’t of State, Table XIII]. According to U.S. Department of State official statistics, in 2007, there were 939 U.S. adoptions from South Korea, as compared to 5,453 from China, 2,310 from Russia, and 4,728 from Guatemala. *See id.*; *see also* Barholet, *Thoughts*, *supra* note 12, at 160. Barholet stated,

For years Korea was the source of most of the children coming into the [United States] for adoption, largely because it was one of relatively few countries that designed its international adoption system to facilitate placement of children in need of homes with adults abroad who would provide them. But then South Korea began to limit the number of children released for adoption abroad. Political forces opposed to international adoption criticized the government for “selling” its children to foreigners, and shamed it in the press during the 1988 Seoul Olympics, changing the overall political dynamic surrounding international adoption. By 2006 Korea was only the fourth largest sending country to the [United States].

*Id.* (citations omitted).

22. Jane Gross & Will Connors, *Surge in Adoptions Raises Concerns in Ethiopia*, N.Y. TIMES, June 4, 2007, at A1 [hereinafter Gross & Connors, *Surge in Adoptions*]; Contactmusic.com, Angelina Jolie—Jolie’s Latest Adoption Increases Ethiopia Interest, <http://www.contactmusic.com/new/xmlfeed.nsf/mndwebpages/jolies%20latest%20adoption%20increases%20ethiopia%20interest> (last visited Jan. 26, 2009). International interest in adopting from Ethiopia cannot solely be attributed to the fact that stars, such as Angelina Jolie, brought attention to adopting children from Ethiopia. The increase in adoptions from Ethiopia is occurring at a time when Ethiopia’s process for adopting internationally has been described as considerably more efficient than the process of some other countries, and at a time when it is more difficult to adopt from countries from which American families have historically adopted. *See, e.g.*, Jane Gross & Will Connors, *Efficient Adoptions Attract U.S. Couples to Ethiopia*, INT’L HERALD TRIB., June 4, 2007, at 2, available at <http://www.iht.com/articles/2007/06/04/europe/adopt.php> (last visited Jan. 26, 2009).

23. *See, e.g.*, U.S. Dep’t of State, Table XIII, *supra* note 21. For example, compared to 5,453 adoptions from China in 2007, there were only 1,255 children adopted from Ethiopia in the same year.

24. Bergquist, *supra* note 12, at 344.

25. *Id.*

26. *Id.*

were adopted from countries that the United States viewed as “equal,” but for the fact that these countries had just gone through a war that had left them in an economically, socially, and politically precarious position vis-à-vis the United States.<sup>27</sup> These countries were of the “First World” and were made up of white Europeans who were ethnically different, but not so different that it would be difficult to assimilate them into U.S. society.<sup>28</sup> Furthermore, the children who were adopted in the aftermath of World War II were often adopted by families who shared the same ethnic heritage as these children.<sup>29</sup>

Korea, on the other hand, was considered a “third-world”<sup>30</sup> country “with a long history of occupation and colonization by the United States, China and Japan.”<sup>31</sup> The relationship between the United States and Korea was defined by the geopolitical interests of the United States.<sup>32</sup> The United States had a military presence in Korea to protect its strategic interests, and the people of Korea had little economic, political, or military power compared to the United States.<sup>33</sup> The nature of the relationship between the two countries was part of the backdrop against which intercountry adoption from Korea took place during this time. Consequently, intercountry adoption from Korea was seen as particularly

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27. *Id.*

28. *Id.*

29. *Id.*

30. The term “Third World” originated during the Cold War in order to refer to nations not aligned with either the communist or non-communist blocs, and this term is often used to describe underdeveloped nations, particularly those in Africa, Asia, and Latin America. Throughout this Article, sending countries are sometimes described as “Third World” countries or developing countries, and receiving countries are described as developed countries, Western nations, or “First World” countries. These expressions mimic the language used in the reviewed articles. However, these expressions are also problematic due to the othering process involved. These expressions promote sending countries or poor countries as less evolved or developmentally incomplete and in need of guidance by those who are developed or hierarchically superior. The objective of this Article is not, however, to debate this othering process in referencing non-dominant countries. In any case, I may use the expression “Third World” country from time to time in an attempt to reappropriate the phrase to signify an alternative, a third way, or another point of view. In this Article, I also use the terms “sending” and “receiving” countries. This use echoes the language used in many law review articles. These expressions are themselves problematic, however, due to the fact that they imply equity between the countries involved and mask the power differential between them.

31. Bergquist, *supra* note 12, at 344.

32. *Id.* During the Cold War, the United States had various strategic alliances with Western Europe and with various Asian countries, including South Korea. During this time, South Korea was “part of a governmentalized realm of a hegemonic U.S. State and, as a consequence, enjoyed geopolitical proximity to the United States. The United States was responsible for and had a primordial obligation to the governments of these [S]tates.” GEARÓID Ó. TUATHAIL, *Between a Holocaust and a Quagmire: “Bosnia” in the U.S. Geopolitical Imagination, 1991–1994*, in *CRITICAL GEOPOLITICS* 148, 149 (1997).

33. See, e.g., MARK BORTHWICK, *PACIFIC CENTURY: THE EMERGENCE OF MODERN PACIFIC ASIA* (2007); TUATHAIL, *supra* note 32.

benevolent; many U.S. parents' decisions to adopt were apparently motivated by a religious or moral desire to "save" orphans from an impoverished third-world country.<sup>34</sup>

In addition to the geopolitical interests of the United States, the U.S. civil rights and women's movements also formed part of the backdrop to intercountry adoption in the United States.<sup>35</sup> These movements "brought about a new consciousness of brother/sisterhood, global citizenship, and social responsibility."<sup>36</sup> The idealism and activist sentiments of the time resulted in demands that the United States atone for its history of racial and gender subordination.<sup>37</sup> The desire to "save" children from third-world countries and a sentiment of social responsibility are evident in the motivations of some parents who decided to adopt internationally during the 1960s and 1970s.<sup>38</sup> Joe Kroll, the executive director of the North American Counsel of Adoptable Children and parent of a Korean adoptee, reflected this sentiment in his testimony before a congressional subcommittee:

As transracial adopters in the seventies, my wife and I (and many others) went blissfully into the process thinking we would save children and integrate society by integrating our family. No one asked our infant daughter what she thought. As white adults we had certain privileges that allowed us to pick and choose from where our children would come.<sup>39</sup>

Whereas during World War II the motivation to adopt children internationally appeared to revolve around an altruistic core, the societal concept of adoption became a slightly more complex phenomenon during the 1960s and 1970s, when the needs of parents took a more prominent place in the collective psyche and adoption became a way to meet parental needs for children. On the coattails of the women's rights

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34. Bergquist, *supra* note 12, at 344.

35. *Id.* at 345.

36. *Id.*

37. *Id.*

38. The child welfare system in the United States also has its foundations in this concept of "child saving," or "the idea that children should be rescued from the ills of poverty by taking them away from their parents." Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 *FAM. CT. REV.* 453, 453 (2002); see also LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* (1999) (telling the story of an "orphan train" in which forty children were removed from urban, poor neighborhoods by New York nuns and sent to farming communities, based on the prevalent child-welfare principle at the time that children should be saved from the ills of poverty and relocated to "proper" environments in which they could thrive).

39. Bergquist, *supra* note 12, at 345 (quoting *Hearing Before the Subcomm. on Human Resources of the H. Comm. on Ways and Means*, 104th Cong. (1998) (statement of Joe Kroll, Executive Director, North American Counsel on Adoptable Children)).

movement, couples were having children later (as women increasingly aspired to careers),<sup>40</sup> which was accompanied by a rise in infertility.<sup>41</sup> Birth control,<sup>42</sup> abortion,<sup>43</sup> and the societal acceptance of single-parent households meant that there were fewer white infants available for adoption.<sup>44</sup> Soon, more families were in “need” of children than before. As one scholar put it, “[i]nternational adoption became a matter of finding children for childless couples. Motivation for adoption ha[d] shifted from the altruistic, finding a home for a parentless child, to the supply and demand economics of finding children for childless couples.”<sup>45</sup>

But it was not only the tangible need for a child that was met here; adopting children of different nationalities, ethnicities, and races also was one way in which individuals could meet (what appeared to be) a widespread need to make a statement about social responsibility and the ability to participate in crossing racial and ethnic boundaries in a society that was trying to atone for its racial past.<sup>46</sup> An additional element of the motivation to adopt internationally may also have been an element of asserting oneness with all peoples, as many in the post-World War II generation were reacting against the inhumanity of racist and divisive ideology.<sup>47</sup>

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40. See *id.* at 345; see, e.g., MARY BETH NORTON, *A PEOPLE AND A NATION: A HISTORY OF THE UNITED STATES, BRIEF EDITION, VOLUME B: SINCE 1865*, at 403 (2d ed. 1982).

41. Bergquist, *supra* note 12, at 346.

42. *Id.*

43. *Id.*

44. Bartholet explained, “In the [United States] and elsewhere, prospective parents . . . found fewer infants available domestically to adopt because of an increase in the use of birth control and abortion, and a decrease in the stigma against single birth mothers keeping their babies to raise themselves.” Bartholet, *Thoughts*, *supra* note 12, at 164; see also Martha Garrison, *Why Terminate Parental Rights?*, 35 *STAN. L. REV.* 423, 443 (1983) (“The greater availability of abortion and contraception, as well as a new willingness of unwed mothers to keep their babies, all but dried up the supply of traditionally adoptable children.”).

45. Bergquist, *supra* note 12, at 346.

46. *Id.* at 345–46. Potential adoptive parents turned to international adoption, as opposed to adopting African-American children, because of opposition to interracial adoption in the United States, perceptions of administrative ease, and the belief that adopting internationally was less likely to fall through and was more “humanitarian.” See, e.g., *id.* at 345–46 (discussing the opposition of the National Association of Black Social Workers to interracial adoption); see also Kathleen Ja Sook Bergquist, Mary E. Campbell & Yvonne A. Unrau, *Caucasian Parents and Korean Adoptees: A Survey of Parents Perceptions*, 6 *ADOPTION Q.* 41 (2003) (exploring the motivation of adoptive parents to adopt internationally instead of domestically); Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 *U.C. DAVIS L. REV.* 1415 (2006) (attempting to debunk the myths about domestic and international adoptions and to show that racial preferences, even if unconscious, play a role in many Americans’ decisions to adopt internationally).

47. Franklin & Eleanor Roosevelt Inst., Introduction to Human Rights, <http://www.udhr.org/Introduction/> (last visited Jan. 8, 2009) (discussing the context in which the U.N. Universal Declaration of Human Rights was created, including a discussion of the consciousness created as a result of Nazi tyranny during World War II). This generation—the “baby boomers”—grew up in a

Intercountry adoption typically involves an exchange between a developing country and an industrialized country.<sup>48</sup> Whether the exchange is viewed as one between birth parents with very few resources, and families with resources, or as one between a country with an extensive (admittedly imperfect) social service infrastructure and a country with no social service infrastructure, the exchange bears a neo-colonialist hue.<sup>49</sup> For the purposes of this Article, however, what is important is the picture of the “international child” accepted by Western society. It is the picture that we have painted to suit our own needs, a picture that does not always reflect the true needs of the sending countries or uncover the children who are truly most in need of parents. With respect to those children,

[i]nternational adoption isn't the answer to improving the overall plight of children in developing countries. Even the strongest supporters admit the movement of adoptees across international borders represents only a tiny fraction of the neglected, abused and abandoned children in these countries. And supporters of international adoption are quiet about the children who are left behind.<sup>50</sup>

It is because of the children who are left behind that our collective recognition of the existence of *MonoHumanism* is so important. One way to get there is through the lens of post-colonialism. It is to this that I turn next.

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time in which the United Nations was honored and looked to with hope for lasting peace, and in which organizations such as the U.N. Children's Fund (UNICEF) and Save the Children encouraged Americans to see all children everywhere as “our” children—to feel responsibility for them. It was, in part, Nazi tyranny that had resulted in the creation of a consciousness that reflects the notion that we are all entitled to basic fundamental human rights and that we all carry a responsibility to protect those rights. *See generally* Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter Universal Declaration].

48. *See* Bergquist, *supra* note 12, at 349.

49. *Id.* Bergquist noted,

Adoption usually involves an exchange between a resource rich and resource limited community or country. Economic necessity is one of the dominant factors in relinquishment, whether it be by a birth parent or a country whose social services infrastructure cannot support the number of children in care, at least initially. The neocolonialism inherent in that exchange is striking. The acquiring of a country's or people's resources as a necessary function of colonialism is arguably the case in international adoption, with children being a national resource.

*Id.*

50. Bergquist, *supra* note 12, at 349 (internal citation omitted).

## II. INTERCOUNTRY ADOPTION IN LEGAL SCHOLARSHIP AND THE EMERGENCE OF *MONOHUMANISM*

### A. *Post-Colonialism and Intercountry Adoption*

Post-colonialism is a set of theories that critique analytical structures—such as literature, film, law, and political science—that identify previously colonized peoples through binary opposition structures that reflect a hierarchical inferiority of the previously colonized populations.<sup>51</sup> Post-colonialist theory originated as a critique of structures that identified previously colonized people in opposition to what was defined as a “superior” occidental identity. According to these analytical structures, the post-colonial is an antipodal and lesser “other,” essential for creating the Western identity of “self” as the normative center.<sup>52</sup> This narrative of identity allows the West to subscribe both universality and superiority to its body of knowledge and discourse, including its “sup-

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51. The foundational post-colonial texts include those of Frantz Fanon, Ngugi wa Thiong’o, Chinua Achebe, Haunani-Kay Trask, Trinh Minh-Ha, and Albert Memmi. Edward Said’s book, *Orientalism*, is generally accepted as the founding work of post-colonial studies. See SAID, *ORIENTALISM*, *supra* note 2. In *Orientalism*, Said criticized a tradition of views of the West based on an era of European imperialism in previous centuries in which Europe dominated the Middle and Near East, and he argued that, from its position of imperialistic dominance, the United States had defined the “Orient” in a bare binary way as “the other” in order to solidify itself as perennially superior. See *id.* at 1–28. According to Said, an acceptance of the self-referential framework of the West—a view that is entrenched and continues to dominate Western views of the East (and other countries in the developing world)—keeps the post-colonial “other” in a subordinate position in Western paradigms. See *id.* at 201–328. A consequence of this, and of particular relevance to this Article, is that the West then feels morally validated—or even obligated—to exercise a paternalistic and dominant role in “guiding” the lesser other. See generally *id.* An illustration of this paradigm is the so-called “white man’s burden,” which is a misuse of Rudyard Kipling’s title for a poem published in 1899. Rudyard Kipling, *The White Man’s Burden*, *McCLURE’S MAG.*, Feb. 1899, at 290; see also EDWARD W. SAID, *CULTURE AND IMPERIALISM* (1993). See generally CHINUA ACHEBE, *ANTHILLS OF THE SAVANNAH* (1987); CHINUA ACHEBE, *THINGS FALL APART* (1959); FRANTZ FANON, *BLACK SKIN, WHITE MASKS* (Charles Lam Markmann trans., Grove Press 1967) (1952); FRANTZ FANON, *A DYING COLONIALISM* (Haakon Chevalier trans., Grove Press 1965) (1959); FRANTZ FANON, *TOWARD THE AFRICAN REVOLUTION* (Haakon Chevalier trans., Grove Press 1967) (1964); FRANTZ FANON, *THE WRETCHED OF THE EARTH* (Constance Farrington trans., Grove Press 1963) (1961); ALBERT MEMMI, *THE COLONIZER AND THE COLONIZED* (Howard Greenfeld trans., 1965) (1957); TRINH MINH-HA, *WOMAN, NATIVE, OTHER* 47–76 (1989); NGŪGĪ WA THIONG’O, *DECOLONIZING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE* 4 (1986); HAUNANI-KAY TRASK, *FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI’I* 3, 21 (1993); Ngūgĩ wa Thiong’o, *Moving the Center: An Interview with Charles Cantalupo*, in *THE WORLD OF NGUGI WA THIONG’O* 207, 219–20 (Charles Cantalupo ed., Afr. World Press, Inc. 1995) (1993).

52. Kenneth Nunn, defining “otherness,” stated, “(1) the other is a means of defining the self; (2) the other is an abstraction; (3) the other cannot define itself; and (4) the other is to be feared and controlled.” Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 *DEPAUL L. REV.* 679, 698 (2002).

porting institutions, vocabulary, scholarship, imagery, [and] doctrines.”<sup>53</sup> The aim of post-colonial theory is to expose provincialism in Western theory and politics, in favor of heterogeneous discourses, particularly discourses that have their origins in the lives, cultures, and vocabulary of historically oppressed people.<sup>54</sup>

Post-colonialism has been an analytical tool used by both critical race scholars and feminist legal scholars to expose “othering processes” in structural and linguistic aspects of legal scholarship, in legal practice, and in jurisprudence.<sup>55</sup> International law, and specifically international human rights law, has also been analyzed, and scrutinized, through a post-colonialist lens.<sup>56</sup>

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53. SAID, *ORIENTALISM*, *supra* note 2, at 2.

54. As a general matter, post-colonial theorists are interested in discourse of resistance from so-called “subalterns.” This term, “subaltern,” is used by post-colonial theorists to describe people or groups of people considered of inferior rank. *See generally* MAPPING SUBALTERN STUDIES AND THE POSTCOLONIAL (Vinayak Chaturvedi ed., 2000); READING SUBALTERN STUDIES: CRITICAL HISTORY, CONTESTED MEANING AND THE GLOBALIZATION OF SOUTH ASIA (David Ludden ed., 2001); ROBERT YOUNG, *WHITE MYTHOLOGIES: WRITING HISTORY AND THE WEST* (1990).

55. *See generally* Richard Delgado, *Rodrigo's Corrido: Race, Postcolonial Theory, and U.S. Civil Rights*, 60 *VAND. L. REV.* 1691 (2007) (using narratives to discuss post-colonial theory and its insights into LatCrit and civil rights movements); Richard Schur, *The Dialogic Criticism of Richard Delgado: Chicano/a Literature, Equality, and the Rhetoric of Form*, 19 *LAW & INEQ.* 129 (2001) (analyzing Richard Delgado's work, also through the use of narratives, to expose and deconstruct “otherness” in legal scholarship and in reference to critical race legal theory (CRT)). *See also* Stephen M. Feldman, *The Politics of Postmodern Jurisprudence*, 95 *MICH. L. REV.* 166, 190 (1996); Reginald Leamon Robinson, *Human Agency, Negated Subjectivity, and White Structural Oppression: An Analysis of Critical Race Practice/Praxis*, 53 *AM. U. L. REV.* 1361 (2004) (critiquing CRT praxis and its failure to avoid structural determinism in its own arguments).

56. *See generally* Padideh Ala'i, *A Human Rights Critique of the WTO: Some Preliminary Observations*, 33 *GEO. WASH. INT'L L. REV.* 537 (2001) (discussing a U.N. report that suggests that colonialism principles exist in the current international financial order); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *HARV. INT'L L.J.* 1 (1999) (exposing racism and colonialism in the foundations of international law); Tayyab Mahmud, *Geography and International Law: Towards a Post-colonial Mapping*, 5 *SANTA CLARA J. INT'L L.* 525 (2007) (linking the drawing of nation-state boundaries to the rise of international law and the entrenchment of “otherness” in the conceptualization of the Third World); Karin Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, 16 *WIS. INT'L L.J.* 353 (1998) (presenting third-world discourses about international law); Makau Wa Mutua, *The Ideology of Human Rights*, 36 *VA. J. INT'L L.* 589, 597, 617 (1996); Sundhya Pahuja, *The Postcoloniality of International Law*, 46 *HARV. INT'L L.J.* 459 (2005); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 *TRANSNAT'L L. & CONTEMP. PROBS.* 1 (1999) (invoking CRT methodology and post-colonialism for analyzing the international economic legal order); Deborah M. Weissman, *The Human Rights Dilemma: Rethinking the Humanitarian Project*, 35 *COLUM. HUM. RTS. L. REV.* 259 (2004) (suggesting that, as part of the human rights project, advocates need to address the reality that human rights narratives and discourses are often used to advance agendas of domination, particularly by developed nations). *See also* Beth Lyon, *Discourse in Development: A Post-Colonial “Agenda” for the United Nations Committee on Economic, Social and Cultural Rights*, 10

Even though it may seem obvious that post-colonial theory is relevant to intercountry adoption, it has not been widely used as an analytical tool in this area.<sup>57</sup> The relative lack of post-colonial analysis in intercountry adoption discourse is a testament to the strength of the dominant narratives that I discuss in this Article. With few exceptions, the legal scholars who write in this area may discuss “colonialism,” “imperialism,” or “exploitation” fleetingly in describing debates about ICA, but the vast bulk of the work of these scholars is essentially “apolitical.” As Twila Perry suggests,

Most law review articles on the subject of international adoption are essentially apolitical. Often the focus of concern is the plight of white Americans seeking to negotiate the adoption of a child from a third world country, and the goal of the article is usually to find a way to facilitate the process . . . .

The emphasis on the need of individual children for adoptive homes in which they will be nurtured on a one-on-one basis comes at the expense of thinking harder about the political and economic circumstances that shape the lives of so many more children in this society and in the world. The pattern of the transfer of children from poor women to women who are economically better off or from women who suffer racial subordination to women who possess racial privilege raises questions that must go beyond the need for nurturing in individual relationships. For feminists, adoption, like marriage, must be analyzed as a political institution in which issues of rights, inequality and the potential for exploitation must be central.<sup>58</sup>

It is this “apolitical” approach in legal scholarship that reflects *MonoHumanism*.

B. *Through the Post-Colonial Lens: Myths and Othering Processes in Law Review Articles on the Subject of Intercountry Adoption*

As a general matter, legal scholars are inclined to propose reforms to domestic or international laws, treaties, or conventions in order to

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AM. U. J. GENDER SOC. POL’Y & L. 535 (2002) (showing compatibility with post-colonialism in the development of the Committee on Economic, Cultural, and Social Rights and observing challenges in sustaining its work vis-à-vis dominant international financial order); Teemu Ruskola, *Legal Orientalism*, 101 MICH. L. REV. 179 (2002) (arguing that Chinese law is inappropriately defined by comparison and opposition to Western legal concepts).

57. For the few examples of legal scholars who have used post-colonial theory in this area, see *supra* note 9.

58. See Perry, *Mothers*, *supra* note 9, at 163–64.

streamline ICA.<sup>59</sup> A dominant theme that runs throughout the narratives is that children up for adoption are abandoned, at risk of imminent harm, or, more fundamentally, that intercountry adoption is always the best solution for these children.<sup>60</sup> In contrast, there are very few articles that question the wisdom of ICA or discuss the lack of consideration of trans-racial and transcultural issues in child placement, or the lack of regulation criminalizing child trafficking or the coercion of birth parents for the purposes of ICA. The dominant narratives often conceptualize intercountry adoption solely as the rescue of an “orphan.”<sup>61</sup> These narratives also reflect a narrow conception of children outside of the context of their family, community, and culture and through a narrow prism as the potential child of Western adults. These narratives reflect *MonoHumanism*.

There are five dominant narratives in the legal scholarship that I have defined as follows: (1) the Humanitarian History Narrative; (2) the Rescue Narrative; (3) the Improved Life Chances Narrative; (4) the Invisible Birth Parents Narrative; and (5) the Natural “Market” for Intercountry Adoption Narrative.

### 1. Narrative One: The Humanitarian History Narrative

Legal scholars often tell an almost identical “history” regarding the beginnings of ICA, in which ICA starts as a humanitarian effort to rescue orphaned or abandoned children in the aftermath of World War II, followed by the end of the Korean War and of the Vietnam War.<sup>62</sup> These

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59. See *infra* note 112.

60. See *infra* note 112.

61. See *infra* note 112.

62. See Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEGAL STUD. 237, 239 (1998); Howe, *supra* note 6, at 682; Kales, *supra* note 8, at 479 (suggesting that, in the aftermath of World War II and the Korean and the Vietnam wars, the plight of abandoned and orphaned children was brought to the world); Katz, *supra* note 8, at 285–86; Caeli E. Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 561 (2005); Van Leeuwen, *supra* note 8, at 191; Liu, *supra* note 8, at 191–92; Szejner, *supra* note 8, at 211; Wardle, *supra* note 8, at 337–38; Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing the Rapid Growth of Illegal Practices Plaguing International Child Adoptions*, 28 SUFFOLK TRANSNAT’L L. REV. 31, 33–36 (2004); Berger, *supra* note 8, at 42–43; Catherine M. Bitzan, Note, *Our Most Precious Resource: How South Korea Is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT’L L. 121, 124–25 (2008); Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved with Good Intentions?*, 17 IND. INT’L & COMP. L. REV. 119, 125, 144 (2007); Fleisher, *supra* note 8, at 176; Brandi R. Foster, Note, *Evolution of the “Traditional Family”: A Comparative Analysis of United States’ and United Kingdom’s Domestic and International Adoption Law*, 14 IND. INT’L & COMP. L. REV. 315, 319–20 (2003);

three post-war periods are usually described simply and unequivocally as humanitarian actions involving adults from the United States and other Western nations reaching out to children from the developing world who were in need of parents.

#### Counternarratives:

##### An Alternative or More Nuanced “History” of Intercountry Adoption

The recounting of ICA through its humanitarian beginnings is an incomplete history. World War II, the Korean War, and the Vietnam War were U.S.-supported wars, which, in part, created the conditions that left children orphaned or abandoned and their countries in disarray.<sup>63</sup> An alternative explanation is that Americans resorted to ICA, not solely for humanitarian reasons, but also to atone for U.S. involvement in the wars and destruction of the native countries of these children.<sup>64</sup> This counternarrative is supported by the fact that ICA often started as military initiatives that had the purpose of extracting children from their immedi-

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Kleiman, *supra* note 8, at 333; Kate O’Keeffe, Note, *The Intercountry Adoption Act of 2000: The United States’ Ratification of the Hague Convention on the Protection of Children, and Its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT’L L. 1611, 1615–16 (2007); Gates, *supra* note 8, at 370–71; Graff, *supra* note 8, at 405; Hubing, *supra* note 8, at 661–62; Marx, *supra* note 8, at 375; McMillan, *supra* note 8, at 137; Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN. ST. INT’L L. REV. 483, 497–99 (2004); Padilla, *supra* note 8, at 823–24; Ryan, *supra* note 8, at 362; Sara R. Wallace, Note, *International Adoption: The Most Logical Solution to the Disparity Between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT’L & COMP. L. 689, 692–93 (2003); Stephanie Zeppa, Note, *“Let Me In, Immigration Man”: An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT’L & COMP. L. REV. 161, 164–65 (1998).

63. Gates, *supra* note 8, at 370–72 (noting that, in the aftermath of World War II, international adoption from many developing countries increased, due to a breakdown in extended family networks that had served as caregiving networks for foreign children); Padilla, *supra* note 8, at 824 (“The next wave of children came from war-torn Vietnam, but this time in the midst of controversy. Critics alleged that many of the children were not orphaned, but merely temporarily separated from their parents. Still, between 1963 and 1976, 3267 Vietnamese children were adopted by [U.S.] parents.”).

64. Kleiman, *supra* note 8, at 332–33. Erika Lynn Kleiman stated,

The reasons for the popularity of international adoption have changed over time. There was no widespread awareness of the possibility of international adoption until after the Korean War. At that time, in response to American involvement in Southeast Asia and as an attempt to atone for American destruction of the children’s native countries, Americans began to bring orphaned Asian children to the United States as a philanthropic gesture.

*Id.*

ate conditions, rather than the purpose of attempting to find their birth parents or initiating other placement efforts within the child's country.<sup>65</sup>

The Humanitarian History Narrative also suggests that, after the Korean War, war-orphans were universally and unequivocally rejected by Koreans due to established Confucian beliefs in strict family lineage.<sup>66</sup> However, a counternarrative that helps to provide a more nuanced and accurate picture indicates that sometimes Koreans opposed ICA due to the belief that adoption would strip children of their lineage and heritage.<sup>67</sup> These counternarratives allow for a more nuanced history of ICA than one that is simply a humanitarian effort to rescue orphaned and abandoned children. A more nuanced history might require us to potentially face some difficult questions, for example, regarding whether all "war-orphans" are truly orphaned or abandoned.

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65. See, e.g., Banks, *supra* note 62, at 33–36 (finding that "Congress enacted the Displaced Persons Act (DPA) in 1948 . . . to assuage a temporary refugee crisis rather than establish a permanent regulatory structure"); O'Keeffe, *supra* note 62, at 1616–17 (stating that, in response to public concern after hearing stories from returning military personnel after World War II, the U.S. Congress enacted the DPA, which allowed entry of orphaned adoptees outside of country visa quotas and that in 1975, the U.S. military organized "Operation Baby-lift" to carry out 70,000 Vietnamese orphans, 2,000 of which were sent to the United States, of which 655 were adopted in 1975 alone); Olsen, *supra* note 62, at 497 (noting that U.S. legislative initiatives around ICA after World War II were spearheaded by military personnel).

66. See, e.g., Liu, *supra* note 8, at 188. Margaret Liu stated that

[t]he Korean War ripped apart a nation and left thousands of children homeless. Abandoned and institutionalized, these children were unable to find homes in their native land. Children remained unwanted as the Confucian emphasis on continuing the family through an unbroken blood line discouraged Korean parents to adopt and raise children unrelated to them.

*Id.*; see also Hubing, *supra* note 8, at 661–62 ("Despite the drastic increase in adoptions in the United States after World War II, international adoptions did not receive widespread attention until after the Korean War . . . [A] large number of the children were fathered by U.S. soldiers and became outcasts of Korean society."):)

67. See, e.g., Kimball, *supra* note 62, at 579–80. Caeli E. Kimball noted,

In Asian regions, particularly Korea, bloodlines are extremely important because they establish one's character. Despite this pride, Korea has a reputation for being a major baby exporter, sending thousands of its children to be adopted overseas. Part of Korean opposition to sending Korean children overseas to be adopted by non-Korean families is the belief that adoption will strip the child of his or her lineage and heritage, on which Korean culture prides itself. Culturally, Koreans see adoption as "disgraceful [and] shameful." Korea's reputation as a baby exporter has fueled the societal belief that adoption disgraces the country.

*Id.*

## 2. Narrative Two: The Rescue Narrative

The second dominant narrative is the “rescue” narrative, in which children are conceptualized as children in dire need of being rescued from their immediate circumstances.

Today, placement of children from war or disaster zones for the purpose of ICA is governed by international treaties on refugees.<sup>68</sup> ICA of refugee children is a placement option of last resort given that war and other disasters compromise the tracing of a child’s origin and make the determination of orphanage difficult.<sup>69</sup> Consequently, ICA narratives have moved away from “war-orphan” narratives to alternative explanations of why children need to be saved from developing countries. In contemporary ICA narratives, developing countries suffer conditions that are insurmountable in the short term, such as economic collapse, political instability, civil wars, disaster, disease, overpopulation, and widespread poverty.<sup>70</sup> Children from these countries are said to live in

68. Carlson, *supra* note 8, at 249 n.20, 261 n.66 (stating that, although refugee children may still be adopted, ICA is considered the last resort under applicable U.N. refugee conventions and that, given the difficulty in determining a child’s status as a refugee, refugee children were not included in the scope of the Hague Convention); *see also* Martin, *supra* note 8, at 183. As a general matter, refugees are people who have been forced to leave their country based on a well-founded fear of persecution. *See, e.g.*, Convention Relating to the Status of Refugees art. 1, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137. Sometimes, internally displaced children will ask to become refugees in another country. *See, e.g.*, U.N. Econ. & Soc. Council [ECOSOC], *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission Resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, Principle 15, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) (“Internally displaced persons have . . . the right to seek asylum in another country.”); Wendy Perlmutter, *An Application of Refugee Law to Child Soldiers*, 6 GEO. PUB. POL’Y REV. 137, 137 (2001) (“Approximately 20 million children are members of refugee and internally displaced populations. Many of these children seek refugee status with family members . . .”).

69. Carlson, *supra* note 8, at 249 n.20.

70. *See, e.g.*, Hillis, *supra* note 62, at 239 (describing sending countries as “less-developed nations where factors including the stigma of illegitimacy, the minimal use of contraceptives, government instability, war, and poverty contribute to the population of homeless children”); Banks, *supra* note 62, at 38 (arguing that in sending countries, such as Guatemala, “perpetual poverty, political strife and overpopulation create an excess of orphans”); Fleisher, *supra* note 8, at 176 (finding that war, poverty, and social upheaval are factors in sending countries allowing ICA). Liu noted that

[m]illions of children in this world are left without families, homes, and care every year. The problem is not isolated to any specific country, but exists primarily in countries where wars or natural disasters leave impoverished families and outcast mothers no other choice but to relinquish their children out of need or shame.

*Id.* at 187; *see also* Strong, *supra* note 8, at 170 (finding that “a number of lesser developed countries have an excess of orphans, due to the stigma of illegitimacy, absence of contraception and abortion services, and governmental instability”); Wardle, *supra* note 8, at 330–31 (finding that sending countries are war-torn and poor); Ryan, *supra* note 8, at 356–57 (finding that sending countries are “marred by political strife, war, and often devastating levels of poverty”); Wallace, *supra* note 62, at 694 (stating that war, poverty, economic downturn, and

terrible circumstances and to be at severe risk of high developmental or physical damage.<sup>71</sup> These narratives generate a sense of urgency to extract children from their home countries before they grow older and become ruined psychologically or physically by their environments.

The most common narratives directly attribute surging numbers in orphaned or abandoned children to the incompetence of the governments of developing countries. Law review articles on ICA consistently repeat two stories of public policy initiatives—Nicolae Ceaușescu's policy of five children per household and prohibition on contraception in

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overpopulation characterize sending countries); Kelly M. Wittner, Comment, *Curbing Child-Trafficking in Intercountry Adoptions: Will International Treaties and Adoption Moratoriums Accomplish the Job in Cambodia?*, 12 PAC. RIM L. & POL'Y J. 595, 598, 618 (2003) (arguing that sending countries are "war-torn, poverty-stricken countries . . . [in which] civil uprisings and severe poverty produce large numbers of orphaned children").

71. Bogard, *supra* note 6, at 571–72 (describing the deplorable conditions of Romanian orphanages in which children spend "aimless hours" in dirt yards or live in dormitories that "reek[] of sewage and mold" (citation omitted)); Van Leeuwen, *supra* note 8, at 195, 199 (referring to reports revealing "ghastly conditions in the state-run orphanages," in which Chinese baby girls were starving to death and also suffering psychological damage); Berger, *supra* note 8, at 37–38, 40 (establishing a direct equivalency between war refugees and poor children by stating that "[l]ike the refugee programs, ICAs offer hope to children who have little opportunity to improve their situation, or to escape possibly life-threatening conditions"); Bitzan, *supra* note 62, at 141–42 (acknowledging the existence of institutional and foster care for Korean children, but still positing that either can cause developmental damage to children and that ICA is a better placement option); Gates, *supra* note 8, at 375 (stating that "ear and upper respiratory infections, sores, scabies, . . . low birth weight, small stature, . . . developmental delays," and gastrointestinal parasites are "common conditions of children from Third World countries"); see also Katherine Sohr, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559, 563–64 (2006) ("Unfortunately, as children get older, their chances for adoption decrease and their potential for developmental delays and emotional difficulties increases." (citation omitted)); Donovan M. Steltzner, *Intercountry Adoption: Toward a Regime that Recognizes the "Best Interests" of Adoptive Parents*, 35 CASE W. RES. J. INT'L L. 113, 128–29 (2003). Steltzner stated,

Institutional life in an orphanage can be extremely damaging to a child's physical and social well-being. Due in part to poor sanitation and pollution, and higher risk for such medical problems as asthma, "central nervous system pathologies, developmental delays, failure to thrive, anemia, rickets, fetal alcohol syndrome, malnutrition, parasites, exposure to syphilis, and tuberculosis," infectious diseases, and motor problems. Furthermore, for every five months spent in an institution, the average child will exhibit a one-month physical growth delay.

*Id.* (citations omitted); see also Strong, *supra* note 8, at 164 (describing "millions of children [who] live in physical and psychological poverty in underfunded orphanages around the world"); O'Keefe, *supra* note 62, at 1635 (stating that at least 1 million children live on the streets, begging and shining shoes, exposed to sexual abuse, drug addiction, and terrible health conditions, and, if not on the streets, in delinquency homes or institutions and orphanages that are overcrowded).

Romania, and China's one-child policy.<sup>72</sup> These narratives portray incompetent governments that create large populations of abandoned children through population control policies. Despite the idiosyncratic circumstances in which the Chinese and Romanian cases developed, a telling of these cases generally precedes or is central to explanations of why ICA is a humanitarian response to children's rights, thus negating the need to discuss any alternative domestic placement option.

In legal scholarship, decisions by sending countries to restrict or oppose ICA are typically described as transgressions to children's rights,<sup>73</sup> or overreactions of governments due to public shame, fear of imperialism, nationalistic pride, or xenophobic attitudes toward Westerners.<sup>74</sup>

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72. On China's one-child policy, see, e.g., Johnson, *supra* note 8, at 379; Kimball, *supra* note 62, at 579; Curtis Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 GA. J. INT'L & COMP. L. 319, 320–21 (2000); Van Leeuwen, *supra* note 8, at 193; Szejner, *supra* note 8, at 213; Fleisher, *supra* note 8, at 176; Foster, *supra* note 62, at 320; Gates, *supra* note 8, at 369–70; Zeppa, *supra* note 62, at 167. On Nicolae Ceaușescu's anti-contraception and mandatory five-children-per-household policies, see, e.g., Kales, *supra* note 8, at 483; Carrie A. Rankin, *Romania's New Child Protection Legislation: Change in Intercountry Adoption Law Results in a Human Rights Violation*, 34 SYRACUSE J. INT'L L. & COM. 259, 261 (2006); Steltzner, *supra* note 71, at 126–27; Berger, *supra* note 8, at 38; Marx, *supra* note 8, at 381–84. For a discussion of both China's and Ceaușescu's policies, see, e.g., Wardle, *supra* note 8, at 340; Hubing, *supra* note 8, at 658–62; O'Keefe, *supra* note 62, at 1617, 1624; Ryan, *supra* note 8, at 359–62; Wallace, *supra* note 62, at 689–90, 713–16, 717–19.

73. See generally Rankin, *supra* note 72, at 280–82; Sohr, *supra* note 71, at 560–61; Galit Avitan, Note, *Protecting Our Children or Our Pride? Regulating the Intercountry Adoption of American Children*, 40 CORNELL INT'L L.J. 489 (2007) (critiquing even the United States for creating obstacles for ICA of children in foster care); Bitzan, *supra* note 62, at 153–54 (arguing that, notwithstanding Korea's intent to rely on domestic adoption, it should do so without discontinuing ICA); Marx, *supra* note 8, at 397–403; Wittner, *supra* note 70, at 611–18.

74. Bogard, *supra* note 6, at 580–81. Howard E. Bogard noted that

[m]any Third World countries, however, view [international adoption] as “imperialistic, self-serving, and a return to a form of colonialism.” As such, the entire practice has not escaped the prejudices accompanying internal adoption and is overshadowed by perceptions of national pride and a clash between the so-called “have” and “have-not” countries.

*Id.* (citations omitted); see also Carlson, *supra* note 8, at 246; Dillon, *supra* note 8, at 187, 254 (stating that many ICA organizations, including UNICEF, have bought into arguments of nationalism or imperialism, and consequently hurt children's rights); Hora, *supra* note 8, at 1035; Katz, *supra* note 8, at 283, 291–92; Van Leeuwen, *supra* note 8, at 202; Stark, *Baby Girls*, *supra* note 8, at 1246–47 n.102; Wardle, *supra* note 8, at 350; Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 114, 119 (1999); Gates, *supra* note 8, at 375, 391 (explaining that developing countries reject ICA because they feel publicly shamed that they cannot take care of their own and that developing countries see ICA as exploitation and colonialism); Hubing, *supra* note 8, at 660; Marx, *supra* note 8, at 377; McMillan, *supra* note 8, at 140 (arguing that the “ethnocentric bias” of Latin American countries impedes ICA); Padilla, *supra* note 8, at 839 (finding that “nationalistic concerns” lead to arbitrary closing and opening of ICA).

Several authors sustain this narrative by referencing two specific quotations that demonstrate that countries view ICA as a shameful admission of their incapacity or as an act of imperialism or colonialism. The quotation typically referenced in discussions of the “shame” experienced by sending countries is from Elizabeth Bartholet: “[Intercountry adoption is a] shameful admission to the world of the government’s inability to care for its own, the loss of a vital national asset, and perhaps the ultimate example of the exploitation by rich nations of the poor nations of the world.”<sup>75</sup> Similarly, to make the point that sending countries view ICA as an act of imperialism or colonialism, law review articles typically reference Howard Alstein & Rita Simon: “[W]hat the West has generally viewed as charitable, humane—even noble—behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources.”<sup>76</sup> None of the law review articles explicitly consider a post-colonial critique; many, however, suggest that sending countries feel imposed on by wealthy Western countries through ICA.

#### Counternarratives: Intercountry Adoption as Exploitation?

An alternative narrative to the dominant rescue narrative reveals what has been described as the predatory nature of ICA.<sup>77</sup> Today, ICA surges after regime collapses and natural disasters in developing countries, precisely when institutions for child placement—formal and informal—are at their weakest.<sup>78</sup> Legal scholars rarely take the position

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75. Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND POLICY § 10.04(1) (Joan Hollinger ed., 1988).

76. Howard Alstein & Rita J. Simon, *Introduction* to INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 1, 2 (Howard Alstein & Rita J. Simon eds., 1991).

77. Bhabha, *supra* note 8, at 183–84 (contending that ICA is motivated by “predatory globalization” and explaining that the very fine line between coercion and consent of birth parents in ICA is often trespassed); Graff, *supra* note 8, at 411. Graff noted,

Guatemala is upon the adoption world stage now much in the same way Romania was in the early 1990s. The focus of the U.S. hunger for foreign babies is currently trained with full force upon Guatemala. The consequences of this are already being felt. Mothers are being exploited. Mass numbers of children are simply being sold to the highest bidder. A recognized, international crisis is upon Guatemala. The issue is how a poor and governmentally unstable country such as Guatemala can defend itself from the rapacious needs of American baby consumers. Irrespective of the number of Guatemalans intimately involved in and financially benefiting from the illicit trade in babies, Guatemala will eventually be forced to protect its children.

*Id.*

78. See, e.g., Strong, *supra* note 8, at 170 (“Recent events such as the war in Bosnia-Herzegovina, the famine in Somalia, and the AIDS epidemic in Uganda have increased the

that ICA should be the option of last resort for children in the developing world. Little attention is paid in legal scholarship, for example, to the argument that industrialized countries are exploiting developing countries and stealing their national resources, *i.e.*, their healthy children.

Similarly, scholars do not often discuss how the rescue rhetoric might play into the psychological process for adoptive parents of cleansing the foreign child of “otherness” and redefining belonging and origin through citizenship.<sup>79</sup> Legal scholars actively promote the notion that the younger children should be taken away from their country conditions as soon as possible, in order to avoid mental and physical problems that develop with age.<sup>80</sup> This, in turn, creates an urgency to extract infants and

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number of older children . . . [and] infants[] available for adoption.”); Kimball, *supra* note 62, at 561 (“In response to the disaster [of the tsunami in Southeast Asia on December 26, 2004], Americans have flooded the U.S. Department of State with phone calls and letters voicing interest in adopting Tsunami orphans.” (internal citation omitted)). Kimball wrote that

[a]s history shows, intercountry adoption is at its peak when world disasters, wars, and other economic or political changes occur because richer and more stable countries have families who want to try to rescue children from the plight of poverty and instability. These disasters and situations of turmoil make it extremely difficult for affected countries to support their children, thus forcing them to allow their children to be internationally adopted.

*Id.* at 581 (internal citation omitted); *see also* McMillan, *supra* note 8, at 142–43, 145 (finding that ICA in Romania and Russia surged with the collapse of the communist governments); Ryan, *supra* note 8, at 353–55 (reporting that after the 2004 Tsunami and the *60 Minutes* special report on Romanian orphanages, adoption agencies were deluged with phone calls). Ryan stated,

However impractical the rush of adoption interests may be after a disaster such as the 2004 tsunami, it is not a new phenomenon, and it arises most every time a political crisis or national disaster brings images of forlorn children to the forefront . . . . But while times of political and social crises tend to peak interest in (and provide extensive media coverage of) international adoptions, such adoption is a common and everyday practice among dozens of nations.

*Id.* at 354–55.

79. *See generally* Ratna Kapur, *The Citizen and the Migrant: Postcolonial Anxieties, Law, and the Politics of Exclusion/Inclusion*, 8 THEORETICAL INQUIRIES L. 537 (2007) (discussing the use of citizenship in the prevailing world order for laundering migrants into national discourses, and arguing that current understandings of citizenship are based on normative criteria that have their origins in colonialism and thus in the “dominant racial, sexual, and cultural norms”).

80. *See, e.g.*, Steltzner, *supra* note 71, at 130, 152 (noting that while “[m]ost of the physical defects . . . can often be treated by Western medicine,” many “mental and psychological traumas . . . are more difficult to diagnose, and, if severe, may be nearly impossible to cure . . . . The longer a child is in an orphanage, the more his or her cognitive abilities decrease, and the more developmental and behavior disorders become apparent.”). A strong proponent of international adoption, Wardle noted that

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 compe-

young children from the developing world. This could also be characterized as the desire for a clean slate: a baby or young child unconditioned by his or her native environment. And, after a “quick extraction,” the ICA bureaucracies allow the infant or child adoptee to gain expeditious citizenship in the United States, which completes the process of “laundering” the child for the parents who may desire an unadulterated newborn child. This is why, in part, Stephanie Sue Padilla describes ICA as “this most intimate aspect of our lives—the rebirth of a child into a family.”<sup>81</sup> From this alternative perspective, the Rescue Narrative facilitates the “laundering” of children as infants, and their “rebirth,” into an adoptive family.

As noted above, when sending governments oppose or restrict ICA, their actions are interpreted as responding to public shame, nationalistic pride, or xenophobia. These narratives, although meant by authors as apolitical or neutral summaries of opposing arguments, anthropomorphize governments by attributing emotional or irrational qualities to their decisions about how to handle child placement domestically. This description contrasts sharply with arguments that ICA is the logical, rational, or efficient solution to the “demand” for adoptable children by Western adults, or to the argument that these children are in need of being rescued.

Another prevalent narrative is that sending countries place bans on ICA that are unfounded; this narrative prevails despite the fact that sending countries (and the United States as a receiving country) impose bans or moratoria on ICA due to serious incidents of child trafficking.<sup>82</sup> Child

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tenacy tests; are generally less depressed, more optimistic; appear to have higher self-esteem, self-confidence, and feelings of security; 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.

Wardle, *supra* note 8, at 370 (citing Patrick Fagan, *Adoption: The Best Option*, in III ADOPTION FACTBOOK 2 (Connaught Marshner & William L. Pierce eds., 1999)).

81. Padilla, *supra* note 8, at 844.

82. *See id.* at 838 (noting that the U.S. Department of State “expressed concern over ‘an increasing incidence of illicit activities in the area of international adoption’ [sic]” (quoting *Romanian Adoptions, 1991: Hearing Before the Subcomm. on International Law, Immigration and Refugees of the H. Comm. on the Judiciary*, 102d Cong. 13, 258 (1991)); Blair, *supra* note 8, at 373; Banks, *supra* note 62, at 46–47 (“Some commentators perceive accounts of illegal adoption as exaggerated, but statistics showing the number of children exported, and detailed descriptions of child procurement schemes, rebut this opinion. The UNICEF Report and Sale of Children Report reveal an absence of effective monitoring over international adoptions . . . .” (internal citation omitted)). Blair stated,

The global scope of trafficking was perhaps best illuminated by Ethica, a non-profit organization promoting ethical adoption practices. In 2003, Ethica reported that, of the forty nations that had made the top twenty list of nations sending children to the

trafficking occurs when children who would otherwise not be adoptable, are bought, sold, stolen, or purposefully lost into the limbo of middlemen and institutions that facilitate ICA. Reports of child trafficking from sending countries are often qualified in law review articles as “rumors of,” “scandals of,” “tales of,” and at times are explicitly described as misrepresentations or exaggerations by the media of sending countries that hurt children who need adoption.<sup>83</sup> The terms used in law review articles

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United States for adoption within the previous fifteen years, 43% were temporarily or effectively closed to intercountry adoption. Most of these closures, Ethica suggested, were prompted by concerns on the part of sending or receiving nations, or both, related to abduction, trafficking, and corruption.

*Id.* (internal citations omitted); see also D’Amato, *supra* note 6, at 1247; Kleem, *supra* note 72, at 329–32 (noting that “[t]he third factor that may lead China to restrict its international adoptions is the negative activities associated with the practice. These include child selling and abduction, financial exploitation by professionals who work in the field, and other random acts that are reported in the media” and describing child-selling and child-buying incidents in China, Taiwan, Romania, and Canada); Liu, *supra* note 8, at 204–05 (describing the Romanian government’s imposition of a ban against international adoption in an effort to curb “illegal child trade” achieved through black market adoptions); Maskew, *supra* note 8, at 621–25 (discussing the U.S. suspension of adoptions from Cambodia due to allegations of trafficking in human beings); Carlberg, *supra* note 62, at 145–46 (discussing the hold Vietnam placed on ICA from Vietnam due to numerous incidents of child trafficking, yet describing the cessation of adoption as “unfortunate,” as children continue to need homes); Chadwick, *supra* note 74, at 121, 124–25 (finding that Russia and Romania imposed moratoria on ICA due to baby smuggling incidents); Gates, *supra* note 8, at 386–87 (finding that Chinese laws were reformed to facilitate ICA in order to “eliminate black market adoptions,” but instead, adoptive parents continued to circumvent laws by directly contacting birth parents for “buying and smuggling a child . . . out of China”); Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT’L L. 465, 486–87 (1995); O’Keeffe, *supra* note 62, at 1619–24 (providing examples of child trafficking in Peru, Romania, India, Cambodia, and Guatemala that forced these countries to reform their adoption laws); Wittner, *supra* note 70, at 600–02 (narrating instances in Cambodia, Romania, and Guatemala in which crises of baby-selling overwhelmed any effort to curb illicit practices, leading inevitably to restrictions and moratoria on ICA).

83. See, e.g., Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181, 199 (1996) [hereinafter Bartholet, *Propriety*] (acknowledging “some documented instances of kidnappings and of improper payments to birth parents” but denying that such instances are widespread and asserting that “[c]urrent law makes it extremely risky for adoption intermediaries and would-be adopters to engage in baby buying or kidnapping”); Carlson, *supra* note 8, at 246, 257 (“Some of the opposition to intercountry adoption is blindly nationalistic, oblivious to the interests of children, and armed with sensational exaggerations of the extent of illicit baby-selling operations.”); Hillis, *supra* note 62, at 240 (“[T]he allegation that intercountry adoption serves as a front for black market baby-sellers has created more obstacles for intercountry adoptive parents to surmount.”); Katz, *supra* note 8, at 292; Liu, *supra* note 8, at 204; Wardle, *supra* note 8, at 347 (arguing that concerns about baby selling are “exaggerated,” “given greatly exaggerated air time by the sensationalizing media . . . and . . . excessive attention by profit seeking media producers”); Berger, *supra* note 8, at 38–39, 52 (using the word “alleged” to describe baby selling and arguing that ICA should not be curtailed because of exaggerated media reports of baby selling); Chadwick, *supra* note 74, at 121; D’Amato, *supra* note 6, at 1245; Marx, *supra* note 8, at 395–96; McMillan, *supra* note 8, at 140–41.

to describe these claims imply that reports of child trafficking are not real or are unreliable. While it may be true that illegal practices are difficult to trace, and that bans on ICA may adversely affect some children, denying the existence of pervasive tactics of child trafficking is a narrative that is not nuanced enough to reflect reality.<sup>84</sup>

There are only a few legal scholars who articulate positive counter-narratives about sending governments. One looks at China as an unusual sending country that has deliberately guided population growth and ICA policies to suit its national interest.<sup>85</sup> Another reviews changes in Korean policies to show that restrictions on ICA seem inevitable in the future, as the country exerts a stronger economic position and has explicitly stated its desire to replace intercountry adoption with in-country caregiving.<sup>86</sup> In these alternative narratives, sending governments are portrayed as responsible governments in control of their future, doing their best to address population needs, which includes caring for their children.

Aside from these few cases, next-generation ICA narratives rely heavily on an “othering process” that describes sending countries and sending governments in negative contrast to a “history” of humanitarianism of the West, and as antipodes to Western rationality, wealth, culture, and the rule of law. The dominant Rescue Narrative betrays a hegemonic and imperialist hue fraught with distortion. This distorted view fails to take these children in the context in which they come, but instead suggests that all “third-world” children are in dire need of being rescued.

### 3. Narrative Three: Improved Life Chances Narrative

Related to the Rescue Narrative is the Improved Life Chances Narrative. Invariably, legal scholars describe the opportunities for adoptive children as improved in the United States, and in doing so, imply the superiority of upper- and middle-class parents to poor birth parents.<sup>87</sup>

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84. Blair argues that ICA advocates would do best to accept that illegal practices are occurring, since ignoring child trafficking for adoption is a main reason for the shutting down of ICA by major sending countries. Blair, *supra* note 8, at 402. Blair states,

Advocates of intercountry adoption ignore the incidence of systemic trafficking and displacement of domestic adoption occurring during the past decade at their peril. Exposure of systemic trafficking and displacement problems in countries such as Cambodia, India, Guatemala, and Romania bring intercountry adoption into disrepute, fuel the arguments of those who are simply opposed to intercountry adoption on political or philosophical grounds, and spur new moratoria by both sending and receiving nations.

*Id.*

85. Luo & Smolin, *supra* note 8, at 607–10; *see also* Stark, *Baby Girls*, *supra* note 8.

86. *See* Bitzan, *supra* note 62.

87. I discuss the portrayal of birth parents and adoptive parents specifically in the following Section, in which I discuss the Invisible Birth Parents Narrative.

Scholars routinely explain that intercountry adoption offers hope to children of improving their life chances, often of escaping a life “marred by poverty,” and provides them with increased educational and employment opportunities.<sup>88</sup> Similarly, scholars routinely contrast, either explicitly or implicitly, the lack of opportunity in developing countries with the abundant opportunity in the United States, which is reflected in modern conveniences, better educational institutions, and Western medicine.<sup>89</sup> The United States, the dominant narrative suggests, unconditionally provides better opportunities for children from developing countries.

Counternarratives:  
The Post-American World

There is surely a humanitarian aspect to many intercountry adoptions. Obviously, there are children who, if not adopted, would have a very bleak life and few opportunities in their countries. But, legal scholars tend to describe all sending countries as poor, impoverished countries that are bereft of opportunity, and all parents and caregivers from these countries as unable to care for their children. The reality is more nuanced than these scholars would suggest. Scholars rarely mention that the countries from which people adopt are not exclusively impoverished, or, in fact, that China and Russia, the two leading “sending” countries, have recently experienced consistent economic growth. In particular, China, the largest sending country, has been described as an economic powerhouse.<sup>90</sup> In fact, in 2005, the National Science Foundation published a

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88. See Szejner, *supra* note 8, at 212 (noting that “a great many [adoptive parents] are also motivated by a desire to raise children whose lives would otherwise be profoundly marred by poverty, disease, war, homelessness, or discrimination in their countries of origin based on their ethnoracial background or religion.” (quoting Joan H. Hollinger, *Intercountry Adoption: A Frontier Without Boundaries*, in *FAMILIES BY LAW: AN ADOPTION READER* 215, 215 (Naomi R. Cahn & Joan H. Hollinger eds., 2004))); see also Bitzan, *supra* note 62, at 142 (noting that “[d]ue to the lack of a known bloodline, these children are without the strong personal identity of a family group and are denied the benefits of a family name in seeking education, employment opportunities, and marriage”); Carlberg, *supra* note 62, at 144 (“During this time, the citizens of Vietnam experienced political and economic turmoil that resulted in dreadful living conditions, which in turn led to many families turning to adoption with the hope that their children would have a better life.”); see also Berger, *supra* note 8, at 40; Root, *supra* note 8, at 353.

89. See, e.g., Martin, *supra* note 8, at 181 (noting that one argument for ICA is that “intercountry adoption alleviates the world’s ills by taking children away from countries with overtaxed resources and reducing the overall number of homeless children”); Steltzner, *supra* note 71, at 129 (describing health care available to children in orphanage systems in Russia and Romania as “what would be considered malpractice in the United States”); Berger, *supra* note 8; Chadwick, *supra* note 74, at 119 (“Arguably, a Western lifestyle of material security, with access to modern conveniences, higher education, and advanced medicine could be viewed as a beneficial choice.”); see also Wardle, *supra* note 8, at 342–43.

90. FAREED ZAKARIA, *THE POST-AMERICAN WORLD* 89 (2008).

much discussed report that highlighted the large number of engineers educated in China as compared to in the United States.<sup>91</sup> Clearly, the story of impoverished sending countries that do not have the capacity to care for their children and that have sub-standard educational and economic opportunities is incomplete. In fact, little attention is paid to the fact that the poorest nations of the world fail to play a significant part in the intercountry adoption process.<sup>92</sup>

Legal scholars also pay little attention to countries that have turned to in-country placement as the preferred solution for children in need.<sup>93</sup> While Brazil, for example, was fourth among the countries from which children were adopted by U.S. parents by the end of the 1970s, by 1994, intercountry adoption had slowed to a “trickle.”<sup>94</sup> Scholars have attributed this slow-down to the poor finding creative ways in which to evade interventionist adoption policies and to continue to employ local practices and customs for child care.<sup>95</sup> The fact that children who would previously have been international adoptees are being raised in Brazil, because, in part, of the perception of many Brazilian families that their own “patterns of shared parenthood” are the optimal solution for these children, reveals a more nuanced narrative than one of increased life opportunities in which Western adults provide non-Western children with what the dominant narrative would suggest is the winning lottery ticket of “improved life chances.”

#### 4. Narrative Four: The Invisible Birth Parents Narrative

Another contemporary narrative derives from the failure to acknowledge birth parents. If birth parents are acknowledged in the literature at all, references typically contextualize them as dead, sick, incapacitated, impoverished, desperate, neglectful, addicted to drugs and alcohol, or shamed into abandoning their children.<sup>96</sup> Legal scholars often

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91. NAT'L SCI. FOUND., *RISE ABOVE THE GATHERING STORM: ENERGIZING AND EMPLOYING AMERICA FOR A BRIGHTER ECONOMIC FUTURE* 16 (2007). While there was a dispute as to which professionals were classified as “engineers” in this report, it is clear that a large percentage of engineers educated globally in 2004 were educated in China.

92. Selman, *supra* note 12, at 14; Smolin, *Child Laundering*, *supra* note 9, at 126–27 (finding that the “incidence of extreme poverty is not in and of itself predictive of child laundering problems”).

93. Claudia Fonseca, *Patterns of Shared Parenthood Among the Brazilian Poor*, in *CULTURES OF TRANSNATIONAL ADOPTION* 142 (Toby Alice Volkman ed., 2005) [hereinafter Fonseca, *Patterns*].

94. *Id.* at 142.

95. Fonseca, *Inequality*, *supra* note 9, at 420–22.

96. Laura Beth Daly introduced the following narrative to describe birth parents themselves as utterly helpless:

Imagine being 12 years old, pregnant, unmarried, and living in impoverished conditions in the isolated countryside of Guatemala. Your only desire is to be able to

characterize adoptive parents as victims, whose best interest is to streamline ICA procedures.<sup>97</sup> Similarly, one author flatly states that what is in the best interest of adoptive parents is in the best interest of the child.<sup>98</sup> Western adoptive parents are often generously described as loving, humanitarian, wealthy, and resourceful caregivers, ready to travel to the ends of the world to save a child.<sup>99</sup>

#### Counternarratives: The “Othering” of Birth Parents

Too few legal scholars take on the challenge of seeing ICA from the perspective of poor birth parents, who may have been enticed, coerced,

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provide a loving, healthy, and safe environment in which your child can grow up, but given your age and lack of resources . . . [y]ou are being forced to sell your newborn baby because you have no other viable options.

Laura Beth Daly, Note, *To Regulate or Not to Regulate: The Need for Compliance with International Norms by Guatemala and Cooperation by the United States in Order to Maintain Intercountry Adoptions*, 45 FAM. CT. REV. 620, 620 (2007); see, e.g., Katz, *supra* note 8, at 287 (finding that adults in developing countries are disinterested, incapable, or too impoverished to adopt children); Carlberg, *supra* note 62, at 121 (explaining that in Vietnam, “the incentives for trading human life have become too high for some biological parents to forego”); Chadwick, *supra* note 74, at 118 (observing that birth parents are “dead” or have abandoned their children and that if they are alive, they are “unable to care for their children because they [are] involved with drugs, alcohol, prostitution, are unemployed, imprisoned, or institutionalized in a mental asylum”); Hubing, *supra* note 8, at 657–58; Wittner, *supra* note 70, at 603–06 (finding that birth parents’ vulnerability to traffickers is due to being poor, uneducated, ignorant, and desperate); see also Bogard, *supra* note 6, at 572, 574–75 (neglect and abandonment); Van Leeuwen, *supra* note 8, at 193, 194 (socio-economic conditions); Martin, *supra* note 8, at 177 (cultural values); Steltzner, *supra* note 71, at 124 (social stigma of children with disabilities); Berger, *supra* note 8, at 52 (indigence); Wallace, *supra* note 62, at 689, 694 (shame, poverty, and war). *But see* Root, *supra* note 8, at 323–24 (explaining that the public perception of Angelina Jolie’s adoption of an African child as positive and Madonna’s adoption of a Malawian child as negative was the consequence of differences in law and exposure by the press that Madonna’s child had a father who kept occasional contact with him). Thus, the difference between the Madonna and Jolie adoptions is interesting not only because it acknowledges birth parents, but also because it is an example of an “orphan” narrative that is broken, and consequently shatters the illusion of humanitarianism.

97. Kales, *supra* note 8, at 481, 484 (explaining that, in their “desperation for a child, [adoptive parents] may fall victim to unscrupulous intermediaries,” and that Westerners “poured into Romania to rescue the impoverished Romanian children, but often fell victim to baby-selling schemes”); see also Liu, *supra* note 8, at 189–90 (observing that a large number of adoptive parents who are “willing to travel to the four corners of the world” are often denied access to children).

98. Steltzner, *supra* note 71, at 115–16.

99. See, e.g., Katz, *supra* note 8, at 292–93 (describing adoptive parents as affluent people who can pay large sums of money); Berger, *supra* note 8, at 52 (contrasting wealthy adoptive parents with indigent biological parents); Gates, *supra* note 8, at 370 (claiming that American adoptive couples are “compelled” to save children from war, famine, and other disasters); see also Liu, *supra* note 8, at 190–91; Kleiman, *supra* note 8, at 333; Wittner, *supra* note 70, at 598.

or tricked into relinquishing birth rights.<sup>100</sup> Instead, birth parents undergo an “othering process” in which they are unworthy of keeping their children, or willingly relinquish their rights for a few bucks. Narratives of deliberate relinquishment of a child create a morally ambiguous universe, which has the effect of portraying birth parents as selfish, while at the same time failing to address how a mother who loves her child could bear to part from him.<sup>101</sup>

In contrast, very few argue in favor of supporting birth families as a better option for children, over ICA.<sup>102</sup> Few recognize that there are children in poor countries who may benefit most from staying with their families, within their communities and their culture, rather than being uprooted in order to satisfy the desires and imaginations of Western adults. In this regard, a very important debate led by critical gender and race theorists on transracial adoption in the United States barely makes a dent in the analysis of ICA.<sup>103</sup> When intercountry adoption is discussed in

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100. For examples of authors who have taken on the challenge of introducing the perspective of poor birth parents into the debate, see Bhabha, *supra* note 8, at 186–87 (deconstructing the narrative of birth mothers who give away their children, observing that they are often coerced (even by their husbands) to give away their child for money); Kathleen L. Manley, Comment, *Birth Parents: The Forgotten Members of the International Adoption Triad*, 35 CAP. U. L. REV. 627, 628–29 (2006) (concluding that “birth parents may be misinformed in the process of international adoption, and it is very difficult for them to remedy fraud or deceit” and that “the black market prevails in the international adoption arena, and many birth parents feel pressured into selling their children ‘for a better life’ without fully understanding the consequences”).

101. Yngvesson describes this “othering process” thusly:

The fascination this story evokes—its representation of a selfless mother who gives her child away in order to create a family for him—is an effect of its moral ambiguity for the educated, white, middle-class audiences to whom it is directed. A mother who gives away her child is unthinkable. She gives the child away because she loves it so much, the story and its accompanying image imply; but the unspoken subtext—If she really loved the child, how could she bear to part from it?—is no less powerful a message in a moral economy in which becoming a woman is inseparable from the work of motherhood and the assumptions about nurturance this implies.

Yngvesson, *Placing the “Gift Child”*, *supra* note 8, at 228.

102. See, e.g., Root, *supra* note 8, at 339, 342 (taking the position that “support should be found for parents and extended family to enable them to care for [their] child before resorting to intercountry adoption” due, in part, to a desire to protect parental rights, keep the “healthiest and the brightest” within their countries of origin, avoid a potential loss of identity to Western society, and protect against child trafficking).

103. Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 38–41, 40–41, 55–56, 59–61, 68–69 (1994) (summarizing the domestic transracial adoption debate by exploring two different perspectives promoted by legal scholars: “liberal colorblind individualism” and “color and community consciousness”). Perry argues that “liberal colorblind individualism” sustains “subordination of Black communities, Black families, Black women, and Black children” by choosing to be blind to the realities of racism and oppression that Black families face. Legal

this context, it is to partially attribute the surge in ICA to problems faced by white Americans in adopting interracially.<sup>104</sup> As a general matter, some authors promote ICA as a means by which to avoid domestic requirements that would disqualify adoptive parents under U.S. laws and practices.<sup>105</sup>

### 5. Narrative Five: The Natural “Market” for Intercountry Adoption Narrative

War-orphan rescue rhetorics have been “substituted” for a more general narrative about rescuing children from the developing world. These new ICA narratives observe a rising supply of orphans in developing countries since the 1970s. I place the word “orphans” in quotation marks here because any child living without an ideal family environment in developing countries has come to be identified as an orphan in these narratives. Law review articles create this narrative by freely interchanging the word “orphan” with “abandoned,” “street,” “homeless,” and “needy.”<sup>106</sup> The dominant narrative in law review articles suggests that an

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perspectives favoring “colorblind individualism” render Black families powerless in deciding the placement of Black children, and reinforce a lesser value of Black children by continuously placing a premium on white babies. Perry favors “color and community consciousness” by arguing that only an exercise in consciousness of class and community dilemmas faced by Blacks can lead to adequate consideration of the duress faced by Black families and their communities in preserving group identity and culture in an environment of racism and oppression. *Id.*

104. On ICA as a response to domestic adoption laws, see generally Fleisher, *supra* note 8; see also Padilla, *supra* note 8, at 821–23.

105. See, e.g., Zeppa, *supra* note 62, at 185 (“Intercountry adoption is a viable solution for white couples open to interracial adoption but frustrated by domestic adoption practices, in other words, race-conscious adoption laws and racially conscious practices of private adoption agencies.”). See generally Hillis, *supra* note 62.

106. See, e.g., Blair, *supra* note 8, at 349, 359–60 (speaking of the orphaned children around the world, but also providing information about the case of an adoption handler who confessed to misrepresenting children as orphans); D’Amato, *supra* note 6, at 1239, 1241–42 (describing Vietnamese orphans as “unwanted children” and “street children”); Katz, *supra* note 8, at 286, 292, 294 (using the terms “orphans,” “children who grow up without homes or decent food and shelter,” and “abandoned children”); Van Leeuwen, *supra* note 8, at 191, 194 (using the terms “lost and abandoned overseas” and “orphans”); Strong, *supra* note 8, at 167, 173–74 (referring to children as orphans even as she acknowledges that the definition varies and is mostly contingent on whether a parent has given consent); Wardle, *supra* note 8, at 323–24 (expanding the definition of orphan by using the word “parentless,” where “[p]arentlessness refers to the condition of children who lack the present and long-term care and direction of their parents”); Berger, *supra* note 8, at 36 (describing children in Romania as “homeless children”); Chadwick, *supra* note 74, at 118, 120, 130 (describing abandoned children, orphans of Eastern Europe, “neglected children of communism,” and acknowledging that “orphans” in orphanages in Georgia often have parents); Gates, *supra* note 8, at 369, 370, 376; Lippold, *supra* note 82, at 469 (describing adoptable children in Romania as “poor and war-stricken orphans”); McMillan, *supra* note 8, at 137, 143, 163–64 (using the terms “children in need of homes,” “orphans,” “unwanted children,” and “homeless needy children”); Padilla, *supra* note 8, at 817 (using the term “alien orphans”); Wallace, *supra* note 62, at 689 (explain-

expanding discourse of who is adoptable has broadened the conception of who is adoptable.

The constant reference in these articles to children as “orphans” reflects what was a legal idiosyncrasy in U.S. immigration law. For many years, in fact, there has been a requirement that potential adoptees be classified as “orphans” under U.S. immigration law, even when the sending country has defined that child as an adoptable child.<sup>107</sup>

Notwithstanding the fact that some authors maintain that ethical adoption only involves genuine “orphans,”<sup>108</sup> most proponents of inter-country adoption have criticized the government’s “very restrictive” definition of “orphan” as limited and harmful to children’s best interests.<sup>109</sup> In fact, “the best interest of the child” has been taken by many scholars as a favored standard to reframe the question of who is adoptable. Similarly, the 1993 Hague Convention on Intercountry Adoption<sup>110</sup> is widely promoted by law review articles, notwithstanding the fact that the Convention favors placement out of a child’s home country even if

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ing that children in ICA are sometimes orphaned by poverty or cultural factors and using the terms “orphaned” and “abandoned” interchangeably).

107. 8 U.S.C. § 1101(b)(1)(F) (defining an orphan as a child who has suffered “the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing the proper care and has in writing irrevocably released the child for emigration and adoption”); *see also* Hubing, *supra* note 8, at 686–87. On Immigration and Naturalization Service (INS) definitions in U.S. law, *see also* Maskew, *supra* note 8, at 620–25; Carlberg, *supra* note 62, at 128, 139; Fleisher, *supra* note 8, at 177–78, 187–88; Lippold, *supra* note 82, at 482; McMillan, *supra* note 8, at 148–49; Padilla, *supra* note 8, at 830–31, 837–38; Ryan, *supra* note 8, at 372–73.

108. Dillon, *supra* note 8, at 187–88 (coining the term the “adoptability conundrum” to refer to the difficulty of identifying children who would have been without family care in the absence of a system of ICA, and recognizing the need for “an empirically oriented, rigorous, objective search to identify who is in the public or group child care systems of each country, how they got there, and what options are truly (not just in the realm of ideological speculation) available to them”); Maskew, *supra* note 8, at 619 (writing about the problem of misdefining “orphans” and insisting on the importance of assuring that a child is adoptable); Wittner, *supra* note 70, at 595 (explaining the problem of defining who is adoptable as the difference between “genuine orphans or future baby-trafficking victims”). Similarly, Manley suggests that the law does not sufficiently protect the rights of birth parents, and, by implication, the rights of some children who are not “genuine orphans.” Manley, *supra* note 100, at 633 (“[U.S.] law makes it nearly impossible for a foreign birth parent who has been subjected to illegal or fraudulent practices to assert his or her rights, as this body of law is designed to cut all ties between the birth parent and the adoptee.”).

109. *See, e.g.,* Berger, *supra* note 8, at 44, 65 (advocating the use of a “‘best interests of the child’ test” for granting U.S. visas to adopted children instead of the restrictive “orphan” test that is currently used); *see also* Padilla, *supra* note 8, at 844 (arguing for the same).

110. Hague Conference on Private International Law, Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. No. 105–51, 1870 U.N.T.S. 182 [hereinafter Hague Convention].

there are established caregiving networks in-country.<sup>111</sup> Pursuant to the favored Hague Convention, if a family does not adopt a child domestically, ICA is favored as the next option over domestic solutions for placement in orphanages, group homes, other institutions, or other caregiving networks that may not meet a Western definition of family.

The vast majority of scholars propose reforms to domestic and international law in order to streamline or facilitate ICA.<sup>112</sup> Similarly, most

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111. See, e.g., Gates, *supra* note 8, at 380–83 (arguing that the Hague Convention is an improvement over the other conventions because it establishes the “permanent family” as the reigning principle). Graff similarly argued that

[t]he Hague Convention has clearly remedied the textual flaws of the CRC. The Hague Convention does not make the mistake of according the family unit superior rights to the child. It further makes intercountry adoption a viable and more readily reached option for child care placement. By placing this stamp of legitimization upon intercountry adoption, the Hague Convention created in itself the power to regulate and control the practice. The CRC, in denying intercountry adoption as a viable second tier child placement choice, in effect disempowered itself.

Graff, *supra* note 8, at 425–26.

112. Bogard, *supra* note 6, at 612–16 (promoting a global legal definition of “orphan” that is as broad and encompassing as possible, in order to apply to all situations in which a child may lack an ideal family unit); Carlson, *supra* note 8, at 292 (concluding that the United States should implement domestic regulations in order to streamline the ICA process); Kales, *supra* note 8, at 493–94 (acknowledging that adoption agencies have been at the center of many ICA abuses, but arguing that the accreditation process required under the Intercountry Adoption Act (IAA) could put many adoption agencies out of business and suggesting that accreditation should not be demanded of these agencies); Kleem, *supra* note 72, at 347–48 (acknowledging the many abuses that surround ICA, but concluding that the best solution is for the United States to ratify the Hague Convention, and to create an incentive for as many sending countries as possible to ratify the same, primarily by reforming it to allow sending countries to opt out of certain terms); Van Leeuwen, *supra* note 8, at 217–18 (suggesting the importance of ratification and implementation of the Hague Convention, as well as reform of the Hague Convention in order to streamline ICA processes); Steltzner, *supra* note 71, at 116 (calling for the best interests of adoptive parents in ICA to be protected by looking at consumer remedies and wrongful adoption suits, and proposing several legal reforms in order to protect adoptive parents’ rights in both intercountry and domestic adoptions); Banks, *supra* note 62, at 50–56 (suggesting that the United States and Guatemala should sign a bilateral treaty to sustain ICA); Lippold, *supra* note 82, at 489, 499, 503 (proposing that the Hague Convention be modified to better protect the rights of adoptive parents); O’Keeffe, *supra* note 62, at 1611 (arguing that the United States’ ratification of the Hague Convention through the implementation of the IAA will only ensure safe ICA from sending countries that are also parties to the Hague Convention; and suggesting reforms to the IAA in order to allow adoptions from sending countries that are not members of the Hague Convention under comparable standards of safe adoption); Zeppa, *supra* note 62, at 182–85 (proposing that all countries should implement the Hague Convention, but urging the United States to set an example by establishing domestic legislation that would streamline the domestic side of ICA, including expanding its definition of “orphan” to include other children who could require ICA).

authors advocate ratifying, implementing, or improving the Hague Convention.<sup>113</sup>

Only a handful of law review articles provide alternative narratives to dominant narratives regarding ICA,<sup>114</sup> argue against ICA,<sup>115</sup> propose alternative solutions that seek to address underlying issues and causes of child displacement,<sup>116</sup> discuss transracial and transcultural issues in the practice of child placement,<sup>117</sup> argue for increased criminalization of child trafficking,<sup>118</sup> or focus on the coercion of birth parents for purposes of ICA.<sup>119</sup>

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113. See, e.g., Hague Convention, *supra* note 110; Blair, *supra* note 8; Carlson, *supra* note 8; Dillon, *supra* note 8; Kimball, *supra* note 62; Martin, *supra* note 8; Sargent, *supra* note 8; Szejner, *supra* note 8.

114. See generally Bhabha, *supra* note 8, at 195–96 (arguing that ignoring the human cost of policies and practices prompting and promoting ICA is extremely problematic and will be best countered through full commitments to gender justice and democratic change); Johnson, *supra* note 8, at 379, 382–83, 394 (reviewing the Chinese one-child policy and related politics of ICA, noting the unfortunate effect of population planning policies and ICA on traditional forms of adoption in Chinese culture, and disrupting the commonly held narrative that the Chinese are not willing to adopt domestically or adopt girls); Liu, *supra* note 8, at 212 (noting and predicting a decrease in ICA due to improved economic conditions in “countries that have traditionally ‘supplied’ the children” and that, “[i]ncreasingly, *orphans* who remain in their motherland become members of their society as they are cared for by government personnel or by native adoptive parents” (emphasis added)); Luo & Smolin, *supra* note 8, at 616–17 (exploring the possibilities of implementing a foster care system instead of ICA in China as a primary solution to the “orphan” population provoked by government policy and suggesting that, as China solves its economic problems, it will probably be in a singular position to back away from its role as a sending country); Yngvesson, *Placing the “Gift Child”*, *supra* note 8 (examining the discourse of “giving up” or “abandoning” a child versus “giving” or “placing” a child and viewing the insistence on “placement” as an attempt to escape (unsuccessfully) the problems of commodifying a child through adoption).

115. See, e.g., Kleiman, *supra* note 8, at 368 (concluding that the United States should focus its efforts on improving domestic conditions for displaced children before engaging resources to facilitate and improve ICA); Root, *supra* note 8, at 324–25, 353–54 (comparing two celebrity adoptions and one resulting scandal, and concluding that assistance to families and communities that give up their children should be emphasized over ICA); Wallace, *supra* note 62, at 722–23 (arguing that ICA is only a temporary solution that is exacerbating the long-term problems associated with child placement and ICA).

116. See, e.g., Kleiman, *supra* note 8, at 368; Root, *supra* note 8, at 324–25, 353–54; Wallace, *supra* note 62, at 722–23.

117. See, e.g., Howe, *supra* note 6, at 688–89 (describing the debate that surrounded transracial adoption in the United States and that led to the elimination of the consideration of race in child placement and observing similar practices in ICA in which the argument that a child needs a loving home trumps alternative considerations about how minority communities could care for their own children); Stark, *Baby Girls*, *supra* note 8 (illustrating that adult narratives do not address the identity formation processes of the Chinese “baby girl” adoptees who will develop their own narratives and disrupt the narratives that they have been told).

118. See, e.g., Maskew, *supra* note 8, at 638 (arguing for increased safeguards for birth parents, with a particular focus on child trafficking).

119. *Id.*

Since the United States' ratification of the Hague Convention through the Intercountry Adoption Act (IAA),<sup>120</sup> restrictive definitions of adoptable children have been avoided. Under the IAA, any adoptee from a signatory country to the Hague Convention may automatically enter the United States and obtain an expedited process of naturalization.<sup>121</sup> Thus, U.S. law has been modified to accommodate the demand for an expanded definition of "orphan." Undoubtedly, the pressure will now be for countries from the developing world to sign and ratify the Hague Convention and to expedite procedures as much as possible so that children arrive young to their new adoptive homes.

An expanded definition of "orphan" creates the myth of an overabundant supply of adoptable children. On the demand side of ICA, law review articles consistently tell the same story of scarcity of children in the United States and other Western States. Adoptable children in the United States are "scarce" due to abortion, single parenting, contraception, decreased fertility, and domestic restrictions on interracial adoption. Due to a "scarcity" of children, many U.S. adults are childless, and therefore seek adoptable children elsewhere. As a result, ICA is framed as a logical or rational solution (supply) to the childless couples (demand). Authors, therefore, observe ICA as a natural "market."

Howard E. Bogard provides the common story of this narrative:

Because of an increase in the number of war-orphaned children, the system of intercountry adoption has been growing steadily since the Second World War. The situation can be analyzed in terms of supply and demand. With an increase in the number of orphans, certain countries are confronted with a large population of children without family support. These "sending" [S]tates, such as South Korea, Peru, Romania, and Colombia, are unable to place their orphan children internally because of a depleted adult population that can qualify as adoptive parents. The sending [S]tates represent the supply side of the equation. Conversely, more industrialized nations, such as the United States, France, and the United Kingdom, have large adult populations that wish to adopt children in proportion to the number of

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120. Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901 *et seq.* (West 2008).

121. Wittner, *supra* note 70, at 620 (observing that the IAA modifies the restrictive definition of children eligible for adoption and immigration to the United States by permitting the adoption of children who would not normally qualify as "orphans" if they come from a Hague Convention country, requiring only that the adopted child's parent or parents be unable to provide proper care for the child and freely give their irrevocable consent to terminate their relationship).

orphans internally available. These “receiving” states fulfill the demand side of the equation.<sup>122</sup>

Counternarratives:  
An Overabundance of Western Adults Seeking “Orphans”

Scholars rarely question whether the definition of “orphan” has been broadened to create a supply of children to meet the demands of Western adults.<sup>123</sup> To the contrary, authors deliberately call for an expanded definition of “orphan,” arguing that a flexible definition “saves” more children.<sup>124</sup> In all fairness, a reverse market analogy reveals a large supply of Western adults seeking infant adoptees, but a questionable demand for those adults by children in developing countries. Applied honestly, market theory would question the current narratives. Lynn D. Wardle—a decided proponent of ICA to “save” children—reveals a staggering number of Americans, in the millions each year, seeking to adopt:

[I]t has long been estimated that every year, between one million and two million Americans are able, willing, and want to adopt an unrelated child or children . . . . However, less than one-third of those who . . . [make] an effort to adopt . . . ever . . . [succeed] in adopting one or more children. Since only fifty to sixty thousand adoptions of unrelated children (including orphans from other countries) occur in America in any given year, that means that only about one percent of the ever-married women who say

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122. Bogard, *supra* note 6, at 581; *see also* D’Amato, *supra* note 6, at 1242; Kennard, *supra* note 8, at 625–26 (noting that increased demand in the West has led “childless couples [to turn] to intercountry adoptions, and impoverished, war-torn countries anxious for hard currency have produced a ripe market”); Marx, *supra* note 8, at 411; Ryan, *supra* note 8, at 357. I am no fan of the notion of a market in children, but it is noteworthy that the market theory is used in order to justify a transaction in which one side gets something that we claim to be of inestimable value, while the other side is not compensated at all. *See generally* VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 169–207 (1985).

123. Sara Dillon presents a rare counter-example by querying whether the ICA “market” is not of our own making:

It is troubling that a good deal of writing on the subject of international adoption implies that children are available for adoption precisely because someone is willing to “pay for” them. This implies that large numbers of children would not be institutionalized, and would be with their families of origin, were it not for unscrupulous parties preying on birth families in order to feed a “market.” In this regard, the market discourse often used to describe adoption is both misleading and destructive.

Dillon, *supra* note 8, at 234.

124. *See, e.g.*, Bogard, *supra* note 6, at 612–16 (providing an expanded and uniform definition of orphan that avoids the constraints of consent or abandonment).

that they want to adopt are able to adopt in any given year. Moreover, “the annual total of intercountry adoptions in the United States saves less than 0.004% (four-thousandths of one percent) of the number of children that die [worldwide each year] . . . .”<sup>125</sup>

While one may question the soundness of Wardle’s analysis,<sup>126</sup> even when statistics are applied more carefully, the reverse market analogy does not prove that children in developing countries demand or need Western parents.<sup>127</sup> Since Western discourse establishes that “the best interest of the child” means a Western “family environment,” ICA is often seen as being in the “the best interest of the child,” no matter the costs to sending countries, children, communities, or birth parents.<sup>128</sup>

A “blind” justification for ICA that fails to appreciate the humanity of these children fuels the creation of larger legal, gray, and black markets for children. Furthermore, law review authors universally condemn child trafficking, but discuss ICA as a logical market solution without acknowledging that they may be helping to legitimize ICA as a market.

By framing ICA in market lexicon, the domestic and intercountry adoption bureaucracies cease to be primarily a means of protecting children, and instead become the means by which to “launder” a child from one country to the next, irrespective of whether the child was paid for or bought on a gray or black market.<sup>129</sup> After all, once defined as a market, human considerations are necessarily replaced by the laws of supply and demand. One scholar recognizes that ICA is such a blatant market that the best that can be done is to regulate it through price caps and tax incentives.<sup>130</sup>

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125. Wardle, *supra* note 8, at 345–46 (citations omitted).

126. Wardle’s imprecise analysis suggests a statistical correlation between ICA and child mortality rates. A more careful analysis would undoubtedly reveal that there are indeed many causes of child death each year and that the number of women who adopt internationally has little or nothing to do with the number of children who die worldwide each year.

127. Interview with Barbara Bennett Woodhouse, David H. Levin Chair in Family Law, University of Florida Law School (July 7, 2000) (“My objection to the market analogy (aside from its devaluation of human worth) has always been that it is backwards. We should be considering the children as the demand and the would be adoptive parents as the supply.”).

128. Barbara Bennett Woodhouse, *Protecting Children’s Rights of Identity Across Frontiers of Culture, Political Community, and Time*, in *FAMILIES ACROSS FRONTIERS* 259, 272 (Nigel Lowe & Gillian Douglas eds., 1996) [hereinafter Woodhouse, *Protecting Children’s Rights*] (suggesting that taking a child-centered perspective that considers a child’s best interest necessarily involves considering children in the context of their families and communities of origin).

129. See generally Smolin, *Child Laundering*, *supra* note 9; Smolin, *Child Exploitation*, *supra* note 9.

130. See Goodwin, *supra* note 8, 76–77.

The market narrative in law review articles depicts American adoptive parents as being “pushed” into ICA due to the scarcity of adoptable children in the same way that the United States is “pushed” to rely on oil in lieu of alternative fuel technologies. This narrative shifts responsibility from adoptive parents and places it squarely on the shoulders of the inanimate market. The market rhetoric is not without its own negative externalities since it lifts the veil of humanitarian concern to reveal Western adults who, it could be argued, are “pushing” for “orphans” because they feel entitled to a child, as opposed to there being a true demand for parents for these children.<sup>131</sup> Nevertheless, the ICA infrastructure that “launders” these children allows Westerners to believe that the “legalization” and “naturalization” of a baby proves that no wrong has been done, and that the child comes with no strings attached.

While the framing of ICA in the language of supply and demand may come naturally to U.S. legal scholars writing about ICA, legal scholars must not forget that valid legal instruments such as the CRC favor placement options in which children grow up in their own culture and overcome the circumstances that have left them orphaned, abandoned, institutionalized, or impoverished.<sup>132</sup> Questioning Western discourses in the framing of ICA opens the discussion to alternatives that may better meet the “best interest of children” from the vantage point of the child, as well as ease conditions of poverty in their communities.<sup>133</sup>

Not to be dismissed, the counter-narratives also reveal an underlying yearning by U.S. citizens for family and community. Perhaps U.S. legal scholars should turn a critical gaze back on U.S. culture and question whether ICA has become an unstated U.S. population policy to solve problems endemic to a culture that places the individual above the

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131. See, e.g., Padilla, *supra* note 8, at 839–40. Padilla stated,

What it means to be a good parent in Bangladesh differs from what it means to be a good parent in the United States. Against this backdrop, it is easy for adoptive parents to rationalize that their adoptive child will “be better off” living with them because from their cultural viewpoint, their family better fits their definition of “the best interests of the child.” The rationalization is further supported by the adoptive parents’ ability to offer the child better economic conditions than what the child would have been afforded in the country of origin . . . . The cultural relativism inherent in the “best interests of the child” standard creates the danger of ethnocentric colonialism.

*Id.* (citing Lee Aitken, *The High Price of a Baby’s Love*, MONEY, Jan. 1992, at 98, 102).

132. See generally CRC, *supra* note 1; Declaration of the Rights of the Child, G.A. Res. 1386, U.N. GAOR, 14th Sess., Supp. No. 16, U.N. Doc. A/4354 (Nov. 20, 1959) [hereinafter 1959 Declaration on the Rights of the Child].

133. Smolin, *The Two Faces*, *supra* note 9, at 485–86 (recognizing the irony of a discourse that fails to recognize the full humanity of children and “[t]he arbitrariness of selecting an individual child for such rescue, while doing little or nothing for those left behind, does not seem to bother most”).

family. In the end, what may be missing in the law review treatment of ICA is a healthy dose of self-estrangement.<sup>134</sup>

### III. U.N. CONVENTION ON THE RIGHTS OF THE CHILD

Although a very complex legal framework governs intercountry adoption, including the domestic laws of sending and receiving countries and international law,<sup>135</sup> I do not provide a comprehensive survey here. My intent is to demonstrate the right of children to live in the context of their families—the strongest statement of which is in the CRC—and to show that this right should be considered as a pre-condition to any consideration of ICA.<sup>136</sup>

The CRC is the most widely ratified international human rights treaty.<sup>137</sup> It is the result of the evolution of a long-existing recognition that children have rights as individuals, and, importantly, that these rights include the right to be raised in the context of their families and their culture.<sup>138</sup> An early recognition of the rights of the child occurred in

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134. See generally David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 Wisc. L. REV. 1062 (1974) (attributing the “crisis” of scholars working in the field of law and development to a loss of faith in the basic assumptions underlying their work). These scholars—including the authors—vouched for a “model of liberal legalism,” which, in the end, they recognize as “ethnocentric and naïve, not only failing to represent legal reality in the developing world, but in the United States as well.” *Id.*

135. See, e.g., Hague Convention, *supra* note 110; CRC, *supra* note 1. For literature providing a more in-depth analysis of the legal framework, see, e.g., Martin, *supra* note 8, at 190–213, 216 (comparing the Indian Child Welfare Act (ICWA) to the 1993 Hague Convention); Szejner, *supra* note 8, at 216–17 (explaining that the Hague Convention is seen by some authors as not respecting a child’s right to live in the context of their family); Marx, *supra* note 8, at 396–406 (emphasizing different placement hierarchies of the CRC and the Hague Convention and explaining that the CRC emphasizes in-country placement and that the Hague Convention emphasizes ICA).

136. See Bartholet, *Propriety*, *supra* note 83 (presenting an overview of the complex legal framework governing international adoption).

137. THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATION OF U.S. RATIFICATION 3 (Jonathan Todres, Mark E. Wojcik & Chris R. Revaz eds., 2006) [hereinafter CRC: AN ANALYSIS].

138. The ICWA provides an example of a statute that recognizes the right of a child to grow up in the context of her family and culture. 25 U.S.C. §§ 1901 *et seq.* The ICWA was passed in 1978 following a long history of Native American children who had been separated and alienated from their families and culture. The reasons for the ICWA are stated in the statute itself, which provides that “an alarmingly high number of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster adoptive homes and institutions.” 25 U.S.C. § 1901(4); see also HEALTH AND THE AMERICAN INDIAN 39–40 (Priscilla A. Day & Hilary N. Weaver eds., 1999). The policy of separating Native American children from their families began around the time of the Civil War. The ICWA recognizes the paramount importance of cultural and familial continuity in

1924, “when the Assembly of the League of Nations passed a resolution endorsing the Declaration of the Rights of the Child promulgated the previous year by the Council of the non-governmental ‘Save the Children International Union.’”<sup>139</sup> This document, which came to be known as the Declaration of Geneva, was the primary document reflecting the importance of the rights of children for more than a quarter of a century.<sup>140</sup>

In 1959, the U.N. General Assembly promulgated the 1959 Declaration of the Rights of the Child, which is still valid today and was the impetus for the adoption of the CRC.<sup>141</sup> The 1959 Declaration

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both producing well-adjusted adults and maintaining the integrity of communities. *See* 25 U.S.C. § 1901 *et seq.*; *see also* HEALTH AND THE AMERICAN INDIAN, *supra*, at 39–40.

139. League of Nations O.J. Spec. Supp. No. 21, at 43 (1924) [hereinafter Declaration of Geneva]; THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE “TRAVAUX PRÉPARATOIRES” 19 (Sharon Detrick ed., 1992) [hereinafter CRC: A GUIDE].

140. CRC: A GUIDE, *supra* note 139, at 19. The 1924 Declaration of Geneva provides in full:

By the present Declaration of the Rights of the Child, commonly known as the Declaration of Geneva, men and women of all nations, recognising that mankind owes to the child the best that it has to give, declare and accept it as their duty that, beyond and above all considerations of race, nationality or creed:

I. The child must be given the means requisite for its normal development, both materially and spiritually;

II. The child that is hungry must be fed; the child that is sick must be helped; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succoured;

III. The child must be the first to receive relief in times of distress;

IV. The child must be put in a position to earn a livelihood and must be protected against every form of exploitation;

V. The child must be brought up in the consciousness that its talents must be devoted to the service of its fellow men.

Declaration of Geneva, *supra* note 139.

141. 1959 Declaration on the Rights of the Child, *supra* note 132; *see also* CRC: A GUIDE, *supra* note 139, at 19. There was also a movement in 1948 to revise the Declaration of Geneva and to issue a new Declaration on the Rights of the Child. *See* YEARBOOK OF THE UNITED NATIONS 1947–48, at 611, U.N. Sales No. 1949.11.13 (1949); 1 OFFICE OF THE U.N. HIGH COMM’ER FOR HUM. RTS., LEGISLATIVE HISTORY OF THE CONVENTION ON THE RIGHTS OF THE CHILD 180 (2007), available at <http://www.ohchr.org/Documents/Publications/LegislativeHistoryc1en.pdf>. Language from this 1948 process appears in secondary sources and has been mistakenly characterized as a 1948 Declaration on the Rights of the Child, which was never passed by the General Assembly. *See, e.g.*, CRC: A GUIDE, *supra* note 139, at 19 (reprinting a “1948 Declaration on the Rights of the Child,” despite the fact that such a declaration was never passed); United Nations, *About the United Nations/History*, <http://www.un.org/aboutun/history.htm> (last visited Jan. 8, 2009) (reprinting a version of the Declaration of Geneva that includes language not in the original but that appears in secondary sources referencing the 1948 process). While these declarations are important in the

unambiguously recognized the preeminent right of children to be raised in the context of their families. Principle 6 of the 1959 Declaration provides that “[t]he child, for the full and harmonious development of his personality, needs love and understanding. He shall, whenever possible, grow up in the care and under the responsibility of his parents . . . . Payment of State and other assistance towards the maintenance of children in large families is desirable.”<sup>142</sup>

The evolution of a child’s right to be raised in the context of her family has been codified in the most widely ratified human rights treaty, the CRC.<sup>143</sup> All States that are members of the United Nations, with the exception of two—the United States and Somalia—have ratified it.<sup>144</sup> The impact of the treaty has been vast, as it has effected “positive changes in law, policy, and attitudes toward children’s welfare in numerous countries.”<sup>145</sup> The CRC provides a comprehensive scheme for the protection of children. The forty-two separate articles of the Convention, along with the preamble, reflect a widely shared international recognition that children have rights and that these rights are in need of protection.

As did its predecessors, the CRC protects a child’s right to grow up in the context of her family and her culture.<sup>146</sup> In part, this right is based on the fundamental truth that growing up in the context of one’s family and culture can be crucial to the “basic dignity, survival and development”<sup>147</sup> of each one of us. For this reason, as Barbara Bennett Woodhouse suggests, the purpose of recognizing children’s human rights should not be to divide children from their parents, but to unite them.<sup>148</sup>

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international recognition of the need to protect the interests of children, neither the 1924 nor the 1959 declaration was binding. Declarations are nonbinding, and are designed to be non-controversial instruments whose purpose it is to build international coalitions and foster international cooperation. See MOHAMMED BEDJAOU, *INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 265–82 (1991).

142. 1959 Declaration of the Rights of the Child, *supra* note 132.

143. CRC: AN ANALYSIS, *supra* note 137, at 3.

144. See CRC, *supra* note 1; Child Rights Information Network, *Convention on the Rights of the Child*, <http://www.crin.org/resources/treaties/CRC.asp?catName=International+Treatie> (last visited Jan. 8, 2009). The United States has signed, but not ratified, the treaty, and the Somali government does not have an internal government in place in order to ratify the treaty, even though it has also signed it. CRC: AN ANALYSIS, *supra* note 137, at 9.

145. CRC: AN ANALYSIS, *supra* note 137, at 3.

146. Barbara Bennett Woodhouse, *The Family-Supportive Nature of the U.N. Convention on the Rights of the Child*, in CRC: AN ANALYSIS, *supra* note 137, at 39 [hereinafter Woodhouse, *The Family-Supportive Nature*].

147. CRC: A GUIDE, *supra* note 139, at ix.

148. Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 39. Berta Hernández-Truyol concludes that international law clearly and unambiguously recognizes that the family is a group entitled to protection by society and the State, but that notwithstanding

The paramount place of the family unit in the context of children's rights is emphasized throughout the CRC, including prominently in the preamble, which provides that "the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,"<sup>149</sup> and further that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."<sup>150</sup>

This recognition of a child's right to be raised in the context of her family and her culture is emphasized throughout the CRC. For example, Article 3(2) provides that "States Parties 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 his or her parents, legal guardians, or other individuals legally responsible for him or her*, and, to this end, shall take all appropriate legislative and administrative measures."<sup>151</sup> Article 5 of the CRC is similarly protective of a child's home environment:

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its "exalted position in the international realm," the family is not sufficiently considered when the international community develops the norms, policies, and law that govern international relationships. Berta Esperanza Hernández-Truyol, *Asking the Family Question*, 38 FAM. L.Q. 481, 481 (2004). Thus, Hernández-Truyol proposes what she characterizes as a "fundamental shift in the approach to international policy and law making," an approach that would include the "asking of the family question," which she characterizes as ensuring that a central inquiry in any process of international norm or policymaking be to ask what effect the norm or policy will have on children and families. *Id.* at 482. For additional evidence of international law's recognition of the exalted place of the family across a wide range of human rights instruments, including those that protect civil and political rights, and social, economic, and cultural rights, see Organization of American States, American Convention on Human Rights art. 17(1), Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 23, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration, *supra* note 47, art. 16(3); *see also* International Covenant on Economic, Social and Cultural Rights art. 10(1), Dec. 16, 1966, 993 U.N.T.S. 3 (stating, in part, that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society"). For a summary of the emergence of the exalted position of the family in international law, see generally Hernández-Truyol, *supra*.

149. CRC, *supra* note 1, pmb. During the drafting process of the CRC, and specifically of the preamble, the words "as the basic unit of society" were replaced with the words "as the fundamental group of society," emphasizing the paramount importance of the family in the context of the rights of the child. *See* ECOSOC, Comm'n on Hum. Rts., *Report of the Working Group on a Draft Convention on the Rights of the Child*, 8-15, U.N. Doc. E/CN.4/1989/48 (Mar. 2, 1989).

150. CRC, *supra* note 1, pmb.

151. *Id.* art. 3(2) (emphasis added).

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.<sup>152</sup>

Similarly, Article 7 protects a child's "right to know and be cared for by his or her parents,"<sup>153</sup> Article 9 "ensure[s] that a child shall not be separated from his or her parents against their will"<sup>154</sup> except when such separation is in the best interests of the child and is consistent with due process,<sup>155</sup> and Article 10 provides that "a child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances, personal relations and direct contacts with both parents."<sup>156</sup> Additionally, Article 16 of the CRC protects a child's right to privacy, and provides that "[n]o child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or

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152. *Id.* art. 5.

153. *Id.* art. 3(2) (emphasis added). While some rights, such as those expressed in Article 5, are textually expressed in terms of the rights of parents, this right is clearly expressed in terms of the child's right.

154. *Id.* art. 9(1). The Committee on the Rights of the Child, the authoritative interpretive body for the CRC, analyzes reports submitted by States Parties regarding their compliance with the terms of the Convention. In a 1995 response to the Committee's concerns with Belgium's compliance with this article, the Committee noted that

children belonging to the disadvantaged groups of the population appear more likely to be placed in care. In this regard, the Committee recalls the importance of the family in the upbringing of a child and emphasizes its view that the separation of the child from his or her family must take the child's best interests as a primary consideration.

Comm. on the Rts. of the Child, *Consideration of the Reports Submitted by States Parties Under Article 44 of the Convention: Concluding Observations of the Committee on the Rights of the Child: Belgium*, ¶ 10, U.N. Doc. CRC/C/15/Add.38 (June 20, 1995). This principle is also reflected in Article 23(1) of the ICCPR, which provides that "[t]he family is the natural and fundamental group of society and is entitled to protection by society and the State," and in Articles 17(1) and 17(2) of the same instrument, which provide that "[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, not to unlawful attacks on his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks." ICCPR, *supra* note 148, arts. 17(1), 17(2), 23(1).

155. CRC, *supra* note 1, art. 9; see also Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 42.

156. CRC, *supra* note 1, art. 10(2).

correspondence, nor to unlawful attacks on his or her honor and reputation.”<sup>157</sup>

In order to protect a child’s right to be raised in the context of her family, State Parties to the CRC must “render appropriate assistance to parents and legal guardians in the performance of their child rearing responsibilities,”<sup>158</sup> and must “take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.”<sup>159</sup> In fact, the Committee on the Rights of the Child, the authoritative interpretive body for the CRC, has recognized the importance of the synergy of these two articles in the context of assisting parents who may be unable to undertake their child-rearing responsibilities, even if they are not at fault:

Comprehensive measures should be provided for responsible parenthood and for support to needy families, in order to assist them in their child-rearing responsibilities, in the light of articles 18 and 27, thus limiting family disruption, reducing the numbers of institutionalized children and limiting institutionalization to a measure of last resort.<sup>160</sup>

The import of a child being raised in the context of her family is also recognized in Article 8, which protects “the right of the child to preserve his or her identity, including nationality, name and family relations.”<sup>161</sup>

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157. *Id.* art. 16. Article 10 of the African Charter on the Rights and Welfare of the Child similarly provides:

No child shall be subject to arbitrary or unlawful interference with his privacy, family home or Correspondence, or to the attacks upon his honour or reputation, provided that parents or legal Guardians shall have the right to exercise reasonable supervision over the conduct of their Children. The child has the right to the protection of the law against such interference or Attacks.

Org. of Afr. Unity [OAU], African Charter on the Rights of the Child art. 10, O.A.U. Doc. CAB/LEG/24.9/49 (1990) (entered into force Nov. 29, 1999).

158. CRC, *supra* note 1, art. 18(2); *see also* Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 45.

159. CRC, *supra* note 1, art. 27(3); *see also* Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 47.

160. Comm. on the Rts. of the Child, *Consideration of Reports of the States Parties Under Article 44 of the Convention: Concluding Remarks of the Committee on the Rights of the Child: Italy*, U.N. Doc. CRC/C/15/Add.41 (Nov. 27, 1995).

161. CRC, *supra* note 1, art. 8(1); *see also* Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 43. While the CRC is the “holy grail” of children’s rights, the notion that the most natural and healthy place for children to be is with their parents is a principle that is “firmly entrenched in U.S. constitutional law.” Woodhouse, *The Family-Supportive Nature*, *supra* note 146, at 37; *see also* Troxel v. Granville, 530 U.S. 57 (2000); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Soc’y of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

While it is true that the right to be raised in the context of one's family exists at any age, the issue of culture arises differently for children who already have language<sup>162</sup> or memories,<sup>163</sup> than it does for infants who are too young to have acquired such an identity. But this does not mean that the right to be raised in one's culture does not exist for the latter. Furthermore, recognizing that no essential cultural identity is attributable to each race, nationality, or ethnicity, does not deny the existence or the significance of a multiplicity of cultural identities.<sup>164</sup> In short, it is clear that a child's identity involves more than knowing his parents.<sup>165</sup> Siblings, grandparents, other relatives, and other caregivers can be as or more important to a child's development—specifically to the transmission of their cultural identity—as are her parents. Children have a

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162. Juan Perea illustrates the nexus between language and culture, stating:

It is a gross oversimplification to consider language as merely a utilitarian means of communication. Language is the carrier and vessel of culture, which in turn shapes language and perception. Language constitutes a primary symbol of cultural identification. For Mexican Americans and other Latinos, the Spanish language is a primary symbol of their culture. The same is true, of course, for English speakers. Otherwise, European Americans would not be so tied to English as the exclusive language of proper American identity.

Juan Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1427 (2004).

163. There are a few scholars who have recognized the loss of culture that may come with ICA for older children. For example, Stark observes that the consequences of ICA for the "lost girls of Sudan," would be that, if adopted, these girls "would lose their foster families, their culture, language, religion, traditions and friends," and thus it can be argued that the most effective way to help these girls is to improve life for them without taking them out of their country and their culture. Stark, *Lost Boys*, *supra* note 8, at 292; *see also* Root, *supra* note 8, at 353 ("The international community has a duty to honor the principles outlined in the CRC, [the Hague Convention], and the African Charter. These principles include the right of African children to maintain their cultural identity and heritage."). Similarly, while Woodhouse has argued that race and culture should be part of domestic adoption law, her conclusions are just as applicable to the context of ICA. She states that

[her] premise is that race and culture of origin, no matter how hard to define with satisfying logic, *do* matter to children and therefore *should* matter in adoption law. They may well be contingent and socially constructed, but children's awareness of race and group identity indicate that they are "real" for the purposes that matter here—the fostering and protection of children's identity.

Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 114 (1995).

164. Interestingly, the title of the CRC refers to the "child" rather than "children." *See* CRC, *supra* note 1. This might be interpreted to imply a universal commonality of identity for children, and it does, but in a way that is not in conflict with the recognition of a child's individualism and humanity. The CRC recognizes that all children are in need of protection because they are children, while, at the same time, recognizing that this protection necessarily involves the respect for, and the protection of, the differences between children—*i.e.*, a recognition of their full humanity.

165. *See, e.g., id.* art. 7.

remarkable capacity to embrace relationships with many people, speak multiple languages, and enjoy a complex world at a very young age. It is the complex interaction between a child's birth country, place, region, town, race, ethnicity, nationality, and language that she has the right to experience, if possible, regardless of the extent to which she has already "acquired" such an identity in a way that removal from her environment would be objectively harmful to her.

The movement in the United States to keep adoptions open<sup>166</sup> suggests that even if children are not old enough to have memories of the places from where they came, origin is still part of their identity.<sup>167</sup> This identity has been described as "a root or ground of belonging that is inside the child,"<sup>168</sup> but also as part of a child's identity that connects her to others with similar "skin color, hair texture, [and] facial features."<sup>169</sup> Scholars have suggested that this aspect of a child's culture is such a

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166. See E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 196–222* (1998); Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in "Open" Adoptions*, 31 *LAW & SOC'Y REV.* 31 (1997); Sam Howe Verhovek, *Debate on Adoptees' Rights Stirs Oregon*, *N.Y. TIMES*, Apr. 5, 2000, at A1.

167. PETER L. BENSON ET AL., *GROWING UP ADOPTED: A PORTRAIT OF ADOLESCENTS AND THEIR FAMILIES* 26 (1994) (finding that sixty-five percent of adopted adolescents would like to meet their birth parents); DAVID M. BRODZINSKY ET AL., *BEING ADOPTED: THE LIFE-LONG SEARCH FOR SELF* (1992) (exploring the importance of birth relations to identity formation of adoptees); Woodhouse, *Protecting Children's Rights*, *supra* note 128, at 274 (acknowledging the importance of recognizing and protecting a child's access to their identity of origin, which Woodhouse describes as her family and the groups into which she was born); Barbara Yngvesson, *Going "Home": Adoption, Loss of Bearings, and the Mythology of Roots*, in *CULTURES OF TRANSNATIONAL ADOPTION*, *supra* note 93, at 25, 26–28 [hereinafter Yngvesson, *Going "Home"*].

168. BETTY JEAN LIFTON, *JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS* (1994); Fernando Colón, *Family Ties and Child Placement*, 17 *FAM. PROCESS* 289, 302 (1978) (describing the importance of birth connections as "a deeply felt psychological and emotional need, a need for roots, for existential continuity, and for a sense of completeness"); Woodhouse, *Protecting Children's Rights*, *supra* note 128, at 274; Yngvesson, *Going "Home"*, *supra* note 167, at 26; see also SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* 1 (2000) (quoting a transracial adoptee as saying that "to have a family tree . . . I had an idea of roots, that you had to be able to trace it *biologically* . . ."). Although not all adoptees may feel a need to connect with their birth history—their family, cultural, racial, or geographic origins—the vast majority of adoptees have such an interest. BENSON ET AL., *supra* note 167, at 26; see also Yngvesson, *Placing the "Gift Child"*, *supra* note 8, at 239 (arguing that it is the adoptive child's preexisting ties to a family, a history, and a culture, not just their potential for the future, that distinguishes prospective adoptees from mere commodities).

169. Yngvesson, *Going "Home"*, *supra* note 167, at 26; see also LIFTON, *supra* note 168; Woodhouse, *Protecting Children's Rights*, *supra* note 128, at 274; Yngvesson, *Placing the "Gift Child"*, *supra* note 8, at 237 (arguing that, in adoption, "the child moves, but 'Chineseness,' 'American Indianness,' 'Koreanness,' or 'Colombianness' remains the same (or rather, these qualities are enhanced and constituted anew as immutable in this movement)").

significant part of her identity that alienation from it can be psychologically harmful.<sup>170</sup>

In sum, it is the rights of a child to be raised in the context of her family and culture, and which are compromised due to our too narrow conception of the rights and interests of children, which reflect an artificially narrow conception of intercountry adoption. This conception fails to appreciate the full humanity of these children due to a failure to listen to their stories; a conception that I have defined as *MonoHumanism*. Instead, a child's right to live in the context of her family and her culture should be considered as a pre-condition to any consideration of ICA.

#### IV. A WORLD WITHOUT *MONOHUMANISM*

##### A. *The Current Adoption Debate*

The intention of this Article is to broaden a debate and discussion that is often binary and under-inclusive in that it fails to include all of the voices that should be heard on the interests of children. Bartholet summarizes the binary nature of the current debate in the following way:

Human rights issues are at the core of the current debate over international adoption. Many of us who support international adoption see it as serving the most fundamental human rights of the most helpless of humans—the rights of children to the kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life. Many who oppose international adoption, however, argue that it violates the human rights of children placed and of any birth parents that may exist, and serves only the interests of those who should be seen as having no rights—the adults who want to become parents.<sup>171</sup>

The two sides of this debate are often in direct conflict: the advocates of intercountry adoption in strong support, and the human rights activists in

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170. Woodhouse, *Protecting Children's Rights*, *supra* note 128, at 274; H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 140 (1964); see David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in THE PSYCHOLOGY OF ADOPTION 3, 7 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); BRODZINSKY ET AL., *supra* note 167, at 58–59, 63–64, 99–101; ALFRED KADUSHIN, CHILD WELFARE SERVICES 494 (3d ed. 1980); JOHN TRISELIOTIS ET AL., ADOPTION: THEORY, POLICY AND PRACTICE 14 (1997) (arguing that an adoptee is more likely to be psychologically healthy if he/she acknowledges “his/her biological roots and heritage, including [his/her] race and ethnicity”); Marianne Berry, *Stress and Coping Among Older Child Adoptive Families*, 1 SOC. WORK & SOC. SCI. REV. 71, 74 (1989).

171. Bartholet, *Thoughts*, *supra* note 12, at 151–52.

a posture that “is generally critical of international adoption, calling either for its abolition, or for restrictions that curtail its incidence . . . .”<sup>172</sup>

The critics of intercountry adoption argue that children adopted internationally will have difficulties adjusting to their new languages and cultures,<sup>173</sup> or that the child will develop identity problems due to being raised by parents of a different race, ethnicity, or nationality.<sup>174</sup> Critics have also argued that intercountry adoption “retards the growth”<sup>175</sup> of infrastructure, such as child welfare systems, within countries that could care for children in-country and have raised ethical and moral objections to intercountry adoption, based on the notion that it is the healthy children who are adopted, while the older and disabled children are left behind to live the remainder of their lives in institutions.<sup>176</sup> These objections have a post-colonial hue; that industrialized countries exploit developing countries and steal their national resources, *i.e.*, their healthy children.<sup>177</sup>

There are also those who raise objections to such adoption when adoptive parents engage in the process of “othering,” which, the argument goes, results in stigmatizing a child’s “former” culture and the “imply[d] abandonment of her biological family and the death of her old self”<sup>178</sup> due to a “legal rebirth—complete with a new name and identity—into a new family . . . [that] symbolically grants the child the good parents and good life she previously lacked . . . .”<sup>179</sup> These objections are based on fundamental principles of child development and attachment theory that were pioneered by the British psychiatrist and psychoanalyst John Bowlby. Bowlby recognized that a child is not always a clean slate

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172. *Id.* at 152.

173. Perry, *Mothers*, *supra* note 9, at 131.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 132. Rita J. Simon and Howard Alstein, who have written extensively on international adoption, have observed that “what the West has generally viewed as charitable, humane—even noble—behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism, in which whites exploit and steal natural resources. In the 1970s and 1980s, children were the natural resource being exploited . . . .” Howard Alstein & Rita J. Simon, *Introduction* to *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 2* (HOWARD ALSTEIN & RITA J. SIMON ed., 1991); *see also* Jane Rowe, *Perspectives on Adoption*, in *ADOPTION: INTERNATIONAL PERSPECTIVES 3, 6* (Euthymia D. Hibbs ed., 1991) (illustrating the sentiment of some developing countries regarding international adoption in stating that “[f]irst you want our labor and raw materials; now you want our children”).

178. Marsha Garrison, *Parents’ Rights vs. Children’s Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 394 (1996–97). While Garrison’s arguments are used in the context of domestic adoption, they are based on fundamental principles of child development and attachment theory that are as applicable in the international context as in the domestic context.

179. *Id.* at 387.

“from which the past can be rubbed by a duster or sponge,”<sup>180</sup> and by that extension a fundamental part of a child’s identity is part of where that child is from, and the connection that a child feels to people with whom she shares common “skin color, hair texture, [and] facial features.”<sup>181</sup> These objections are essentially based on the idea that an “othering” process, while well intentioned, is nonetheless a rejection of a fundamental part of that child that suggests to the child that she is not fully part of a family, a community, or a nation.

On the other hand, the position that many advocates of intercountry adoption take is simple. While they freely acknowledge that intercountry adoption is not a panacea, they also argue that, given the large number of children who need someone to take care of them, intercountry adoption not only provides a good solution for children whose parents are not in a position to take care of them, but by taking care of children who would otherwise have no options, “it pushes us on a path to creating a more just world.”<sup>182</sup> These are, the argument goes, children who otherwise would be homeless and living on the streets or “doomed to grow up in orphanages . . . .”<sup>183</sup>

The debate has become one that is particularly polarized, and major children’s and human rights groups have weighed in on the issues. Both the U.N. Children’s Fund (UNICEF) and the U.N. Committee on the Rights of the Child have taken positions that have been characterized by some as opposing intercountry adoption.<sup>184</sup> UNICEF’s official policy on intercountry adoption, according to some proponents of intercountry adoption, “makes clear its generally negative attitude to international adoption . . . [and] only grudgingly approves of such adoption, and places it low on the hierarchy of alternatives for children in need of care . . . .”<sup>185</sup> In fact, UNICEF does not condemn ICA but does clearly place it lower on the hierarchy than the right to be raised by one’s own family. In part, UNICEF’s policy provides:

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. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent

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180. JOHN BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 113 (1952); *see also* JOHN BOWLBY, *A SECURE BASE: CLINICAL APPLICATIONS OF ATTACHMENT THEORY* (1988).

181. Yngvesson, *Going “Home”*, *supra* note 167, at 26.

182. Bartholet, *Thoughts*, *supra* note 12, at 158.

183. *Id.* at 180.

184. *Id.* at 154.

185. *Id.* at 154–56.

family setting in their countries of origin, it may indeed be the best solution.<sup>186</sup>

Similarly, 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.<sup>187</sup> Many nations that had been “sending nations,” or countries that supplied children, drastically cut back or even stopped the practice of intercountry adoption.<sup>188</sup> At the same time, advocates of intercountry adoption have suggested that, “given the realities of today’s world, and the existence of so many children who will not be raised by their birth parents, international adoption does provide a very good solution for virtually all of those homeless children lucky enough to get placed.”<sup>189</sup>

My intention is not to land on either side of this binary, contentious debate. Instead, my goal is to remind all of those interested in the welfare of children that binary debates are under-inclusive of all of the interests that should come to bear on any given situation. My goal is to remind those interested in protecting the rights of both birth and adoptive families that the most difficult problems that we face can never be solved with simple solutions, but rather merit solutions as nuanced as the problems themselves. This reality is why Alessandro Conticini, the head of child protection at UNICEF Ethiopia, is one of a number of people who work in the field of intercountry adoption who are advocates of intercountry adoption, but believe that it must be “part of a larger strategy” that focuses on keeping children within their countries of origin and within the context of their families and communities.<sup>190</sup> The fact that there are no easy solutions is underscored by the anguish of a potential adoptive couple adopting from Ethiopia:

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186. UNICEF, *Inter-country Adoption*, [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html) (last visited Jan. 26, 2009).

187. See *European Parliamentarians Break the Nicholson Monopoly of International Adoptions*, BUCHAREST DAILY NEWS, Mar. 8, 2006, available at <http://www.charlestannock.com/pressarticle.asp?ID=1190> (noting that the European Parliament’s prior rapporteur on Romania had taken the position that Romania should ban international adoption and that the European Commission had subsequently pressured Romania into passing a law banning international adoption).

188. Bartholet, *Thoughts*, *supra* note 12, at 158; see also Ethica, *The Statistics Tell the Story*, <http://www.ethicanet.org/item.php?recordid=statistics> (last visited Jan. 8, 2009). Ethica is an organization that advocates for more effective regulations governing international adoption. Ethica’s website notes that over the last fifteen years, forty different countries were among the top twenty countries of origin for U.S. families that have adopted from abroad, and, of these, thirteen are closed or effectively closed, the latter meaning that the adoption of children has fallen to twenty-six or fewer annually. *Id.*

189. Bartholet, *Thoughts*, *supra* note 12, at 158.

190. See Gross & Connors, *Surge in Adoptions*, *supra* note 22.

Some parents anguished, as did Karla Suomala of Decorah, Iowa, when she arrived in Addis Abada to adopt 5-year-old Dawit and his 21-month-old-sister Meheret.

“It’s hard to know what the right thing is to do,” Ms. Suomala said. “Should we just give all the money we’re spending on this to the children’s mother?” Ms. Suomala and her husband, David Vasquez, had already spent time with her.

“It was obvious the birth mother loved her children,” Mr. Vasquez said. “She said to us, ‘Thank you for sharing my burden.’”<sup>191</sup>

A more nuanced conversation about adoption should include strategies such as requiring foreign agencies to provide social services in-country if they want to facilitate international adoptions, as is the case in Ethiopia. Another strategy would be a large-scale effort by Western governments to right the “social and economic injustice”<sup>192</sup> that creates situations in which birth parents are forced to consider adoption as an alternative for their children. The consequence of such reforms likely would not be the end of ICA, but an increase in the numbers of children provided with opportunities to grow up in the context of their families and their culture. While an exhaustive discussion of potential reforms is beyond the scope of this Article, what is clear is that we need to have a more nuanced discussion than we are currently having regarding the interests of children; a discussion that reflects the humanity of the children and the families in developing countries in addition to our own humanity. This discussion must identify and dismantle the concept of *MonoHumanism*.

## B. Potential Reforms

### 1. Mandatory Contributions to Sending Countries

Currently, some States require that the adoptive parents donate money to the orphanage from which they adopt.<sup>193</sup> Instead of, or in addition to, donations to orphanages, individuals could be required to contribute to programs designed to facilitate family preservation and in-country placement of children. In this way, adoptive parents would not only contribute to the movement of children out of their birth country, but would help strengthen the environment in which children are living

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191. *Id.*

192. Bartholet, *Thoughts*, *supra* note 12, at 158.

193. See Bureau of Consular Aff., U.S. Dep’t of State, *Country Specific Information About Adoption*, <http://adoption.state.gov/countryinformation.html#> (last visited Jan. 26, 2009).

inside of that country. These programs could take many forms, and could be modeled on family preservation programs currently in place within any given country, or could be modeled on family preservation programs currently in place in the United States,<sup>194</sup> with the goal of helping a family temporarily unable to care for their children. For example, in San Francisco, parents are provided assistance in meeting their basic needs (food, clothing, etc.), taught parenting skills, taught how to manage their money, provided crisis counseling when necessary, assisted in locating safe, affordable housing, provided affordable transportation or taught how to use public transportation, and linked up with relevant community resources.<sup>195</sup> Similarly, in one of the most extensive family preservation programs in the United States, families in the Michigan child welfare system are provided with home management skills, parenting classes, relocation assistance, domestic violence education, and financial assistance aimed at making families independent.<sup>196</sup> These are examples of programs that could facilitate family preservation and in-country placement of children.

In addition to individual donations, the U.S. government could be required to pay a fee for the right to adopt children from a country, with the proceeds from the fee to be used to support family preservation and in-country adoption.<sup>197</sup>

Requiring mandatory donations to countries would be one way to begin to address the concern of some of the critics of intercountry adoption who have argued that intercountry adoption retards the growth of infrastructure within countries that could care for children in-country, such as child welfare systems,<sup>198</sup> and to those critics who have raised ethical and moral objections to intercountry adoption, based on the notion that poverty should not be a basis on which the right to rear children is determined.

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194. By family preservations systems, I mean systems that are designed to increase the capacity of families to care for their children and therefore minimize the family's involvement with formal child welfare services.

195. Family Support Services of the Bay Area, *Family Preservation Program*, <http://www.fssba-oak.org/programs/familypres.htm#servicesoffered> (last visited Jan. 8, 2009).

196. Lutheran Child & Fam. Serv. of Mich., *Families First*, [http://www.lcfsmi.org/services/familypreservation/families\\_first.asp](http://www.lcfsmi.org/services/familypreservation/families_first.asp) (last visited Jan. 8, 2009).

197. There has been a long-standing debate in the United States in which some have argued that the child protective system should focus on family preservation policies, while others have argued that the goal of the preserving families inherently conflicts with the goal of protecting children. *See, e.g.*, RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 149 (1997) (characterizing this debate as family preservation versus children's rights).

198. *Id.*

2. Make the Child's Right to Be Raised in the Context of Her Family and Her Culture Under the CRC a Threshold Determination to Intercountry Adoption

There are many countries in which children are cared for in “non-traditional” or “informal” caregiving relationships as measured by Western norms. These caregiving relationships include various relatives, godparents, employers and neighbors, state-run boarding schools, or some combination thereof.<sup>199</sup> In some of these countries, intercountry adoptions are not permitted.<sup>200</sup> Based on ethnographic fieldwork with the urban poor of Porto Alegre, Brazil, Claudia Fonseca illustrates “how extremely poor women resort to a wide range of strategies—from charitable patrons and state-run boarding schools to mutual help networks involving a form of shared parenthood,”<sup>201</sup> in an effort to “contribute to the rethinking of national as well as intercountry adoption from the bottom up.”<sup>202</sup> Some of these caregiving relationships include individuals who we, in the West, would generally not consider family. Our adoption norms, therefore, could be changed to reflect these caregiving relationships, so that children would (typically) not be adopted if care in one of these relationships was possible, even if the child would be considered an “orphan” by Western standards. What this would mean, in concrete terms, would be that a child's right to be raised in the context of her family and her culture under the CRC would be considered as a pre-condition to any consideration of ICA. Currently, adoption law does not take this approach. With the adoption of the Hague Convention, international law has moved away from the approach of the CRC. The preamble to the 1993 Hague Convention reads, in part:

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a *family environment*, in an atmosphere of happiness, love and understanding,

Recalling that each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin,

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199. Perry, *supra* note 9, at 131.

200. For a list of countries in which ICA is not permitted, see Bureau of Consular Aff., *supra* note 193.

201. Fonseca, *Patterns*, *supra* note 93, at 143.

202. *Id.*

Recognizing 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 . . .<sup>203</sup>

This language is a significant change from previous international documents that discussed intercountry adoption. For example, Article 17 of the 1986 U.N. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally (1986 Declaration), states, “[i]f a child cannot be placed in a foster or an adoptive family or cannot in *any suitable manner be cared for in the country of origin*, intercountry adoption may be considered as an alternative means of providing the child with a family.”<sup>204</sup> Note the difference between the 1993 Hague Convention, which speaks of finding “a suitable family,” and the 1986 Declaration, which speaks of caring for a child “in any suitable manner.”<sup>205</sup> The Hague Convention “clearly favors suitable *family* care for children even if it is necessary to allow a child to leave its country of origin,”<sup>206</sup> over “non-family” caregiving relationships.

The shift away from non-family member caregiving, or, more accurately, non-Western, family-style caregiving is also evident in the language of the CRC, which preceded the Hague Convention. Article 20 of the CRC provides:

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafala of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a

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203. Hague Convention, *supra* note 110, pmb1. (emphasis added).

204. Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally, G.A. Res. 41/85, art. 17, U.N. Doc. A/RES/41/85 (Dec. 3, 1986) [hereinafter 1986 Declaration on Social and Legal Principles] (emphasis added).

205. Hague Convention, *supra* note 110; *see also* William L. Pierce, *Accreditation of Those Who Arrange Adoptions Under the Hague Convention on Intercountry Adoption as a Means of Protecting, Through Private International Law, the Rights of Children*, 12 J. CONTEMP. HEALTH L. & POL'Y 535, 538–39 (1996) (discussing the conflict between the 1993 Hague Convention, the 1986 Declaration, and the CRC).

206. Pierce, *supra* note 205, at 539.

child's upbringing and to the child's ethnic, religious, cultural and linguistic background.<sup>207</sup>

Because "intercountry adoption" is never mentioned in Article 20, some have argued that, pursuant to this article, "inter-country adoptions would be unlikely unless the receiving country was able to assure that the child's upbringing would reflect the context of the child's country of origin with its specific 'ethnic, religious, cultural and linguistic background.'"<sup>208</sup> Similarly, Article 21 of the CRC seems to reflect the (abandoned) preference in the 1986 Declaration for in-country placement, when it provides that "intercountry adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot *in any suitable manner* be cared for in the child's country of origin."<sup>209</sup>

Unfortunately, because all adoptees are classified as "orphans" pursuant to statistics compiled by the U.S. Department of State, it is impossible to know how many children who are adopted have one birth parent, two birth parents, or can otherwise be cared for in their country of origin. What we do know, however, is that there are many children being cared for in social networks that do not reflect a modern nuclear family, including various relatives, godparents, employers and neighbors, state-run boarding schools, or some combination thereof, and that the concept of a modern nuclear family may or may not have any relevance to these children and their families.<sup>210</sup>

Thus, notwithstanding the Hague Convention's apparent movement away from in-country care in non-Western family-style situations, we

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207. CRC, *supra* note 1, art. 20.

208. Pierce, *supra* note 205, at 539.

209. CRC, *supra* note 1, art. 21(b) (emphasis added).

210. Fonseca, *Patterns*, *supra* note 93, at 143, 149. Fonseca explains,

For the outside observer, the nonchalance with which people treat child circulation is striking. I have seen, for example, two young women in the process of getting to know each other complete their life of identifying questions ("On which street do you live?" "Are you not the daughter of so-and-so?" "How many children do you have?") with the final inquiry of "And are you raising all your children?" A good number of youngsters claim to have decided, they themselves, where they wanted to live. Indeed, it is not unusual to hear even a six- or seven-year-old explaining: "Auntie asked me to visit, I liked it, so I just told my mom I was going to stay on." People will include in their own life histories a list of various households in which they lived as a child—with a predictable variety of commentaries. Some foster parents are remembered as wicked slave drivers and some as fairy godmothers, but most are described in quite matter-of-fact terms . . . . [M]any, many, people will speak of two, three, and four "mothers" with no particular embarrassment or confusion. Against such a background, one wonders if it makes sense to single out the nuclear family as an analytical isolate.

*Id.* at 149–50.

should reform and interpret laws governing intercountry adoption, as Fonseca suggests, “from the bottom up,” to make sure that we are not removing children from what they would describe as family.

### 3. More Honest Enforcement of Laws

The enforcement of international law can be particularly difficult; unless a treaty is self-executing, many States must legislate treaty provisions into law and then enforce that law. Thus, it is not uncommon for States to fail to implement or enforce their treaty obligations. In addition, some States, including the United States, routinely exempt themselves from honoring certain treaty provisions. Both of these practices would (and do) tend to undermine the effective implementation of international treaties.

It may be worth focusing more resources on the enforcement of laws that protect the right of a child to live in the context of her family. Many have argued that current laws are ineffective. For example, with respect to the Hague Convention, scholars have argued that “[d]espite the convention’s good intentions, serious questions must be raised regarding its effectiveness,”<sup>211</sup> in part, because of the compromises that needed to be made that weakened the “integrity of the instrument”<sup>212</sup> and the absence of an international body to oversee compliance by the signatories to the Convention. While the Hague Convention provides for central authorities to be established in each State, because each State has sole authority to accredit its own Central Authority, one scholar has argued that, “in effect, each country is still policing its own international adoptions,”<sup>213</sup> which is, it could be argued, right back where we started. The solution, then, may be the “existence of an international cooperative effort which has enforcement power.”<sup>214</sup>

Whether the problem is with the Hague Convention itself or with another part of the very complex legal framework governing intercountry adoption, stricter enforcement—or the creation of enforcement

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211. Chadwick, *supra* note 74, at 138; *see, e.g.*, Katz, *supra* note 8, at 306–07 (arguing that the Convention fails to protect the interests of children because it does not harmonize domestic laws under uniform principles); Berger, *supra* note 8, at 45 (“[T]he Convention has several major weaknesses that make it inadequate as an overall model for reform. One weakness is that implementation is left largely to the participating countries, with only general guidance on how to structure the program and prevent abuse.”); Ryan, *supra* note 8, at 382–83 (finding that the Hague Convention falls short in that it is least likely to be effectively implemented in countries in which it is most needed, because political and economic strife in said countries weaken their governments, and because certain key provisions of the Convention are ambiguous).

212. Chadwick, *supra* note 74, at 138.

213. *Id.* (emphasis omitted).

214. *Id.* at 143.

provisions—could be a step in the direction of protecting the rights of all children.

### CONCLUSION

Whether you take resources to the child, or bring the child to a place where there are resources, is an old struggle that continues in the United States today. There is the example of “orphan trains” on the one hand and settlement houses on the other. Or, community-based foster care as opposed to expedited adoption. We are undoubtedly still wrestling with this question as a society. A related question is whether it is ever acceptable to take a child out of her home because of poverty. This Article does not dispute that these are challenging questions, but instead tries to re-frame the discussion by arguing that the right of a child to be raised in the context of her family and her culture is essential to pulling us back from the simplistic and ethnocentric notion that it is always in the best interest of a child to be raised in a more affluent and formally educated family in a country (or town) with “better” schools, hospitals, and other so-called Western conveniences.

As I have discussed throughout this paper, the CRC provides a legal framework that should protect a child’s right to be raised in the context of her family and her culture. Unfortunately, our failure to come to terms with our imperialist orientation toward the world has resulted in our violating these most fundamental of rights of children. This failure has been caused, in part, by how we have constructed the ways of thinking about intercountry adoption that we have adopted as truth. We currently have a distorted and artificially narrow conception of intercountry adoption, a conception that I have referred to in this Article as *MonoHumanism*.

My goal in writing this Article is to begin a discussion that will ensure that we protect children who might have an option of being raised by their birth parents or other caregivers in the context of their culture. My suggestion here is that by acknowledging the power of discourse, or, more specifically, the discursive formations in society that make all knowledge possible, we can begin to develop coherence between our laws and our actions. My suggestion here is that this will take us one step closer to dismantling the concept of *MonoHumanism*.