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## **Finding Home in the World: A Deontological Theory of the Right to be Adopted**

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PAULO BARROZO

Finding Home in the World:  
A Deontological Theory of the Right  
to be Adopted

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## I. INTRODUCTION

The family is a political institution,<sup>1</sup> and it is so in two complementary ways. First, the family is political in the sense that it is usually on families that the development of the individual's mature capacities for political engagement first hinge. But the family is also political because political choices—whether in the form of legislative or court decisions, economic policies, adoption policies, etc.—reach deeply within and shape the family. When it comes to the institution of the family, there is no politically neutral choice, including the choice to just leave things where they stand.

It is to this political institution, the family, that law and custom everywhere first allocate the fiduciary duties of each adult generation in relation to the capacities created, expanded, and honed during the course of human evolution, and embodied in each new generation. Humanity evolved to become capable of learning, creativity, imagination, judgment, interpersonal connection, communication, goal-oriented action, and love. Certainly, each newcomer to the rankings of humanity comes endowed with these capacities differently. Tragically, the endowment is sometimes meager. Notwithstanding whatever endowments an individual may possess in his or her early years, the hope, if not the assumption, is that families will play a central role in nurturing those endowments to their fullest expression.

We may promptly concede that in far too many cases, families fail miserably in the discharge of their fiduciary duties, and yet the fact—amply confirmed by the social, developmental, and bio-medical sciences, as well as by ordinary experience—remains that no other type of institution compares to a good family when it comes to the care and nurturing of the young. The reason why this is the case tends to elude anyone taking a materialist approach to the requirements of a successful upbringing, for many other institutions, including well-funded orphanages, provide better access to food, shelter, education, health care, safety, and sundry conveniences than the typical family in many if not most parts of the world. What seems to set good families apart and explain their success in upbringing is that they parent. That is, in the context of typical families, the tasks involved in upbringing are mediated by love. As G. W. F. Hegel insightfully pointed out, “the family . . . has as its determination the spirit's feeling . . . of its own unity, which is love.”<sup>2</sup>

One important reason why love matters so much is because it counterbalances the relative vulnerability of the young vis-à-vis structures of power, such as the family, that routinely allocate resources the young need to survive and develop. In his important book on vulnerability, Robert Goodin characterized relationships of vulnerability as those in which (1) “[t]he relationship embodies an *asymmetrical* balance of power,” (2) “[t]he subordinate party *needs* the resources provided by the relationship in order to protect his vital interests,” (3) “the relationship is the *only source* of such resources,” and (4) “[t]he superordinate party in the relationship

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1. See SUSAN MOLLER OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989).

2. GEORGE WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 199 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ. Press 2003) (1820).

exercises *discretionary control* over those resources.”<sup>3</sup> Yet families do not possess a monopoly over resources for the young. The state, social organizations, and communities certainly may supplement or substitute for families, thus breaking their monopoly. Furthermore, the law creates floors below which families or any substitute caretaker cannot withhold resources from children and adolescents. And yet, seen through the prism of the four-point criterion of vulnerability, the typical existence of the young is marked by profound relative vulnerability. It is on adults close and afar—whether acting in their personal capacities as parents, kin, or neighbors, or as agents of the state or broader society—that the young depend. Unless and until love intervenes, all that is left to the young is the daily renewal of an unmediated experience of vulnerability—a crushing psychological predicament for anyone to be in. The point is not that love sugarcoats this cold reality, although it certainly does that to some extent. Rather, love alters this reality by changing, on one side, the motivations and dynamics of resource allocation and, on the other, the way that the vulnerable experience power asymmetry. When loved by a good family, objective vulnerability is subjectively experienced by the young as care, protection, trust, and affection. And this subjective experience provides the best environment for the expansion and development of the potential with which a child was initially endowed. Not a small accomplishment for love.

There is a second, connected reason why love affects the change in kind from caregiving to parenting. Love creates the kind of conservatory where the share of human capabilities each person is endowed with can have a fair chance of flourishing. This is the developmental role of love. It is in the experience of profound and unconditional love that the young ordinarily find the *terra firma* that assures them of their place in the world, and where their own sense of limitation and vulnerability is transmuted into self-confidence and an appetite for the future as an inviting frontier of open possibilities.

Another important aspect of the human potentials first entrusted to families that receives less attention is the way these potentials condition the personal meaning and enjoyment of human rights during an individual’s lifespan. Actual enjoyment of the positive and negative freedoms and entitlements to shares of public goods that constitute the traditional bill of rights have one major presupposition: that individuals possess at a minimum the human capacities to learn, create, imagine, judge, connect, communicate, act, and love. When these capacities fail to be minimally present for any individual, the meaning of human rights is changed for him or her and the individual’s enjoyment of those rights becomes deeply challenging. Sometimes the frugal possession of human capacities is not caused by persons and institutions in any significant way. In other cases, however, this frugality is the work of human action and omission. When the latter occurs, it constitutes the first and deepest aggression a person can suffer on his or her human rights.

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3. ROBERT E. GOODIN, *PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES* 195–96 (1985).

It is not difficult to connect the arguments thus far advanced. Because they intersect a buffer of love between the young and the harshness of a world of vulnerability, typical families are the best institution in which to grow and develop whatever portion of human potential individuals possess at various points of their young lives. Thus, the young not growing up in good families constitutes potentially one of the most serious breaches of their human rights because of its possible, if not probable, far-reaching effects.

For the unparented young, the only access to parenting is through adoption. The obvious corollary to this reality is that to give the unparented access to an adoptive family is a human rights-imposed duty, binding individuals, society, and public and private institutions. This is, in its most fundamental expression, the deontological conception of adoption as a fundamental right. Its most eloquent defender, Elizabeth Bartholet, envisions a world “in which we recognize children as citizens of a global community with basic human rights entitlements.”<sup>4</sup> She writes that “core human rights principles give children the right to true family care. Unparented children have a right to be placed in international adoption if that is where true families are available. They have a right to be liberated from the conditions characterizing orphanages, street life and most foster care.”<sup>5</sup>

Adoption is the institution of one person becoming a son or daughter, and another becoming a respective parent by force of a deliberate decision of a judicial or other state authority. However compelling the deontological paradigm of adoption may be, it took millennia for adoption to be seen in this light, and even now this view is only gradually shaping the institution of adoption. For most of history, adoption in particular and family law in general, developed under the influence of consequentialist considerations (adoption is to serve concrete interests of the adopter), occasionally tempered by charitable impulses (the well-being of the adoptee is to be sought), and, more recently, couched in human rights language (adoption if and when allowed ought to respect the human rights of the child).<sup>6</sup>

Because of the continued dominance of consequentialist views, the deontological paradigm that emerges in the form of a human rights approach to adoption faces two major and partially connected obstacles. First, and despite the fact that the human

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4. Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 GLOBAL POL’Y 91, 99 (2010).
  5. *Id.* at 94. See also ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999); Elizabeth Bartholet, *International Adoption: The Child’s Story*, 24 GA. ST. U. L. REV. 333 (2007); Bartholet, *supra* note 4; Elizabeth Bartholet, *International Adoption: Thoughts on The Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 151 (2007).
  6. Examples of discounting consequentialism with charitable impulses and dressing it with human rights rhetoric are abundant. One does not need to go beyond the Hague Convention on Intercountry Adoption to find it: “the child,” one reads in the preamble, “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.” Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Preamble, *concluded* May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter IAC]. Article 1 of the Convention, speaking of the objects of the convention, starts with: “[T]o establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law.” *Id.* art. 1.

rights approach has found compelling advocates, its jurisprudential basis has yet to be fully articulated. And in part because of insufficient theorization, the emerging deontological adoption is constantly at risk of being rhetorically and practically subsumed or engulfed by the resilient consequentialist-cum-charity paradigm.<sup>7</sup> This article addresses these two obstacles, laying out the foundations of a deontological theory of adoption.

Part II analyzes the consequentialist-cum-charity understanding of adoption. Part III expounds on what I call the value theory of rights. Part IV articulates the jurisprudential foundations of deontological adoption and the human right to be adopted. The reader will probably find that this article operates at a high level of theorization. This is by design, for high theory is needed in order to dispel the confusion and contradictions that plague first order analyses and opinions on the matter. And while the decision to take the theoretical path indicates my ambitions in relation to this article, it also demarcates the limited attention the article is able to give to important details. Hopefully, others will rectify, supplement, and detail the foundations laid out in this work.

## II. CONSEQUENTIALIST-CUM-CHARITY THEORY OF ADOPTION

In the early 1990s, the Hague Convention on Intercountry Adoption was received as a children's rights document. It has since proven not to be so, unsurprisingly, for it was not designed to be a children's rights document. Instead, the Convention adopts a dominium perspective—that is, of a sovereign-like absolute property ownership—in relation to unparented children. This position relies on property and contract analogies<sup>8</sup> and respective transactional and diplomatic jargon; it is not concerned with how to maximize compliance with the human right to be adopted, but rather with violations (e.g., abduction, sale, trafficking) of states' monopolistic dominium over their populations. Consequently, it focuses predominantly on safeguards and policing. This is a recipe for non-compliance with the human right of the unparented to be adopted. It betrays states' monopolistic claims over national children as natural resources and political pawns. And that monopoly, according to the terms of the Convention, can be exercised at will. How then can we explain why so many children's rights advocates, at the time of the Convention's development and to this day, defend the Convention and its categories and mechanisms as a promoter of children's rights? To understand this, we need to turn to the history and substance of the consequentialist-cum-charity theory of adoption.

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7. Maybe nothing illustrates this risk more dramatically than the way international adoption is treated by international organizations, governments, the media, and the public.

8. This is unsurprising, I should add. Indeed, one reads in the Preparatory Works for the Hague's Sixteenth Session that it should choose two out of three subjects for possible convention drafting by the following session. *See* Permanent Bureau, *Proceedings of the Sixteenth Session 1988, Miscellaneous Matters, Hague Convention on Private Int'l Law, Tome I, 253* (1991). Intercountry adoption was one of them, and the other two were business-related topics. The Convention shows the marks of protection of states' monopolistic dominium over unparented children through private law categories.

A. *Historical Excursus*

Adoption is as old as recorded history. But as even a perfunctory study of its history reveals, from the beginning the institution was seen and used primarily as a means to benefit the social, political, and economic interests of adopters. It was only within the bounds demarcated by mundane benefits for adopters that charitable motives were allowed to operate. Only gradually, and hardly before the twentieth century, did the well-being of the adoptee and sentimental motives on the part of adopters become less marginal as a matter of both personal decision making and adoption policy design. Nonetheless, these more recent changes continue to operate within a consequentialist paradigm tempered by charitable or, to update the language, humane considerations and, more recently, dressed in a right-of-the-child rhetoric.

In ancient Rome, adoption reflected the harsh culture of Roman civilization and was rarely done for charitable reasons or sentimental motivations.<sup>9</sup> It was first and foremost done for property, financial, or political reasons. In Rome, only male citizens who were head of the household could adopt. The *paterfamilias*, by either giving or receiving in adoption, used the institution as an additional mechanism to implement strategies regarding social status, family name perpetuation, and restructuring of the family, as well as a way to face inheritance and financial difficulties or opportunities.

There existed at the time two similar institutions, adrogation and adoption. Adrogation occurred when an individual who was emancipated from a previous family was taken under the *potestas* of another *paterfamilias*. If, however, the individual was directly transferred from one *paterfamilias's potestas* to another's, this constituted adoption, properly speaking. While adrogation was done publicly, adoption was done privately. Adrogation and adoption were not restricted to minors, although Justinian, in an effort to curb some of the abuses of the institution, imposed the requirement that the *paterfamilias* interested in adopting had to be at least eighteen years older than the adoptee. Women received discriminating treatment as adopters and adoptees. Women needed an emperor's license to adopt, which was usually only obtained by women who had no surviving offspring to whom to leave their estate. Furthermore, while women could be adopted, they could not be adrogated. In any event, adoption of women was the exception, in part because they were unable to continue the adopter's family name. In addition, adoption and adrogation brought all the entitlements possessed by the adoptee under the *potestas* of the adopter. In cases where the adoptee was a *paterfamilias*, his entire household would come under his adopting father's *potestas*.<sup>10</sup>

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9. For learned reflections on the cultural underpinnings of Roman law, see RUDOLF VON JHERING, *L'ESPRIT DU DROIT ROMAIN DANS LES DIVERSES PHASES DE SON DEVELOPPEMENT* 1 (O. de Meulanaere trans., Paris, A. Marescq, 1880); see also ALAN WATSON, *THE SPIRIT OF ROMAN LAW* (1995).

10. On adoption and family law in Rome, I have relied on JANE F. GARDNER, *FAMILY AND FAMILIA IN ROMAN LAW AND LIFE* (1998).

In eighteenth-century England, Blackstone was still writing of “legitimate child[ren],” explaining that those were the ones “born in lawful wedlock.”<sup>11</sup> “The duty of parents to provide for the *maintenance* of their children, is a principle of natural law,” he added.<sup>12</sup> And “[t]he *power* of parents over their children is derived from . . . their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it.”<sup>13</sup> Blackstone’s codification and memorialization of English law foretells a tension that would inform the consequentialist-cum-charity adoption paradigm for centuries to follow, namely the tension between foregrounding the interests of children while simultaneously allowing their instrumentalization on behalf of parental interests.

Another leap forward in history shows that by the early 1900s, and due in no small measure to Charles Dickens’s novels, England had changed enough to see children generally, and those in need of adoption in particular, through charitable rather than through purely instrumental lenses. This same wave of change also brought regulation of child labor and other child welfare reforms to the country. However, in the England of the World Wars, adoption was seen in part, along with contraception, as a tool for family planning available to potential adopters.

As adoption in England was being retooled by Victorian and post-Victorian culture in a new consequentialist-cum-charity paradigm, it continued to suffer from great stigma. The memory of baby farms was still too alive; places where unwanted children were sent by their parents, usually an unmarried biomother, to be adopted by the “baby farmer,” usually a woman, in exchange for monetary compensation. Conditions in baby farms were tragic and mortality rates very high. It would have been surprising if the combination, on one side, of instrumentalization for family planning and, on the other, stigmatization did not lead to secrecy surrounding adoption in England.<sup>14</sup> And so it did. Compounding the stigma of adoption were desperate biomothers who would abandon, murder, or sell their children.<sup>15</sup> Only well into the twentieth century did adoption consequentialism—despite continuing to see the unparented young as a family planning tool—extend to bioparents’ charitable impulses, primarily in relation to biomothers who were increasingly seen through the lenses of victimization.<sup>16</sup>

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11. 1 WILLIAM BLACKSTONE, COMMENTARIES 343 (Wayne Morrison ed., 2001).

12. *Id.*

13. *Id.* at 347.

14. See JENNY KEATING, A CHILD FOR KEEPS: THE HISTORY OF ADOPTION IN ENGLAND, 1918–45 (2009).

15. *Id.* at 30. A great deal of unmarried mothers were thought to be immoral, and could be detained in an institution indefinitely under the Mental Deficiency Act of 1913. *Id.* at 33.

16. For a helpful summary of the history of adoption in England (and elsewhere) as well as a scholarly articulation of the influence of instrumentalist considerations in family law approach (including its welfare aspects), see JOHN EEKELAAR, FAMILY LAW AND PERSONAL LIFE (2006). For a groundbreaking jurisprudential analysis of the difference between rights and utility in family law, see Stephen Parker, *Rights and Utility in Anglo-Australian Family Law*, 55 MOD. L. REV. 311, 319 (1992).



Early policies to address the problem of abandoned children included their forced emigration to British colonies. By the time of World War I, thousands of children had been “exported” to live in indentured servility abroad, though the war started to change that. Families left childless by war sought adoption as a mechanism for family reconstitution. The National Children Adoption Association (NCAA) and the National Adoption Society (NAS), both dating from 1917–1918, became active players in adoption, selecting and matching adoptees and adopters. Eugenics, which was making its way to mainstream culture everywhere, extended the breeder mentality to adoption.<sup>17</sup>

The National Council for the Unmarried Mother and her Child (NCUMC) was soon founded with the mandate to look after the welfare of biomothers and their children. The NCUMC promoted the view that adoption ought to be seen as a last resort, to be used as an exception.<sup>18</sup> The NCAA, NAS, and NCUMC campaigned for legal adoption, which culminated in the Adoption of Children Act of 1926. The new law placed discretionary authority in the courts concerning matters of adoption, which legalized it, while agencies retained their license and initiative to match adopters and adoptees.<sup>19</sup> The majority of adoption agencies tended to vet potential adopters, asking for references, conducting interviews, and establishing probation periods, which included home visits, before adoptions were finalized.<sup>20</sup> Some, however, did not, and the Adoption of Children (Regulation) Act of 1939, following recommendations of the Departmental Committee on Adoption Societies and Agencies, limited the role of private agents. Informing those changes was the view that the well-being of the child should be the primary utility to be served by adoption.

Across the Atlantic, apprenticeship, the flip side of indentured servility, was the form that adoption and foster care first took. Starting in the colonial times, the governments of the American colonies would often act as *parens patriae*, intervening in families on behalf of the children and compulsorily placing unparented children, as well as the very poor, in apprenticeships. Later, urbanization and greater poverty led to a growing number of children being placed in orphanages, one solution for which was the use of “orphan trains.” Beginning in 1854, orphan trains were used to bring children from the East to the West to be placed in groups working in rural areas.<sup>21</sup> English-style baby farms also existed in the United States, with the same record of neglect, abuse, and mortality rates.<sup>22</sup>

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17. See KEATING, *supra* note 14, at 39–42, 47, 50–51, 55, 157–58.

18. *Id.* at 62, 74.

19. *Id.* at 113–17.

20. *Id.* at 136.

21. See E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 5–8 (1998).

22. ELLEN HERMAN, *KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES* 32–36 (2008). Also instructive and thoughtful are the analyses of Ruth-Arlene W. Howe, *Parenthood in the United States*, in *CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND* 187, 187–

In the mid-nineteenth century, Mississippi and Texas were the first states to establish registries for adoptions, which followed the general format used to register property deeds. In 1851, Massachusetts enacted the first modern adoption law in the country, which identified the needs and well-being of children as the primary goal (utility) to be served through adoption. Soon after, twenty-five states would pass adoption legislation modeled after Massachusetts's.<sup>23</sup> At the time, most placement agencies were religiously affiliated enterprises seeking to bring ill-adjusted or abandoned children into their faiths.<sup>24</sup> Adoptions tended to be made by "matching," seeking phenotypical resemblance and avoiding "defects" in order to facilitate secrecy.<sup>25</sup> In fact, matching was central to what had been rightly called "kinship by design,"<sup>26</sup> a form of family engineering done by private parties as well as by the state. Kinship by design relied on detailed regulations and standards, as well as on the authority of psychological and scientific knowledge.<sup>27</sup>

A landmark in child welfarism was the foundation, in 1912, of the U.S. Children's Bureau, charged by Congress with a broad mandate to "investigate and report" on child welfare in the nation. Subsequently, the Child Welfare League of America (CWLA), a private agency comprising of adoption agencies from around the country, was founded in 1921. In 1938, the CWLA published adoption standards, which included safeguards for children, adopters, and the state. Failure to follow the standards would lead to suspension from the CWLA.<sup>28</sup> Alongside the evolution of welfarism came advances in social sciences and in educational, psychological, and development theories, which gave welfarism the authority of science.<sup>29</sup> The role of science in shaping adoption was one of postulating which means would most efficiently lead to the desired consequences, whether the welfare interest of children, the family planning interests of adopters, or the population management interest of the state. All, to be sure, sufficiently intertwined in charitable or humanitarian discourse.

Humanitarian impulses are not, however, merely dependent upon consequentialist forces. They have their own dynamic and internal push. There is indeed, in the operation of ordinary practical reason, a dialect of reflection, for "it is an essential principle of every use of our reason to push its cognition to consciousness of its

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306 (Sanford N. Katz, John Eekelaar & Mavis Maclean eds., 2000), and Sanford N. Katz, *Dual Systems of Adoption in the United States*, in *CROSS CURRENTS: FAMILY LAW AND POLICY IN THE US AND ENGLAND*, *supra*, at 279.

23. *CARP*, *supra* note 21, at 11–12.

24. *See id.* at 14.

25. *HERMAN*, *supra* note 22, at 122–23.

26. *See id.* at 9.

27. *See id.* at 2–3.

28. *See id.* at 58.

29. *See id.* at 98, 105, 156–57, 256.

necessity.”<sup>30</sup> This reflective folding of reason upon itself in search of assurances of the rationality and soundness of its contents is the very element of transition from an uncritical to a critical morality. In part because of the push of reflectivity inherent in humanitarianism, following the devastation left by World War II, humanitarianism gained a new momentum in Western culture. This led, in the field of child policy, to changes in adoption practices meant to increase placement of disabled and minority children. That was followed by an increase, in the decade from 1953–1962, in the number of transcultural and transracial adoptions.<sup>31</sup> Along with the question of confidentiality, transculturality and transraciality would become the center of the debate about adoption in the United States.

Throughout its history, from Rome through England to America, adoption was marked by its instrumentalization by adopters within a changing framework of charity or humanity, and against the background of regulation that closely traced the demands of instrumentalization and charity at each step. The recent mimetic appropriation of child’s rights discourse by adoption consequentialism can only poorly cover what it is not willing to change. Where do the strength, appeal, and resilience of adoption consequentialism come from? In order to better explain the power of the consequentialist underpinnings in the evolution of adoption, I turn now to the most basic and general elements of consequentialism in law and policy.

### *B. The Structure of Consequentialism in Adoption Law and Policy*

Consequentialism has always dominated adoption law and policy, as the historical précis above illustrates. Understanding its elementary argumentative structure and the view of the world it comes from and helps sustain is a fundamental step toward weakening its grip. The stakes in weakening the ascendancy of consequentialism in adoption are indeed high, for in the context of adoption, it quickly turns into instrumentalization of the young in the name of the state, politics, ethnicity, race,<sup>32</sup> religion, economic interests, or reductionist conceptions of child well-being, which in practice, if not in discourse, are satisfied when minimal material conditions of survival are provided. The picture is further complicated when tradition weighs in to freeze reform initiatives in the name of risk aversion, which borders, if not completely trespasses into, the irrational. That is why hope for clarity on the matter must start with an understanding of the basic elements of the consequentialist outlook, including its usual alliance with conservatism. What then is the elementary structure of consequentialism that has had demiurgic powers on the life of the institution of adoption?

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30. IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 37, 108 (Cambridge ed., Cambridge Univ. Press 1996) (1785) (emphasis omitted).

31. CARP, *supra* note 21, at 31–34.

32. In the United States, transracial adoption has been particularly controversial. A very cautionary argument is well-presented by RUTH G. McROY & LOUIS A. ZURCHER, JR., *TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS* (1983).

We should start by recognizing that we are all consequentialists, but only in part. Our cognitive apparatuses, as well as the cultural worlds we inhabit, cannot dispense with consequentialism, or at least with a version of it. But how much should we allow ourselves to rely on its counsel in the context of adoption? In the history of ideas, consequentialism finds support in that type of theory of knowledge that gives heuristic primacy to the senses, tailored as they are to capture and process the external material world. Hidden underneath the consequentialist interest in the material world is the belief that the maximization of preferences or well-being is the basic good in human existence, and that any hierarchy among courses of action is to be established in light of their expected consequences in the promotion of those preferences or well-being.

Whereas the various types of duties and rights-based moral outlook called deontology attempt to establish a list and hierarchy of courses of action by speculation—and therefore an apriorism of reason at least substantially uncontaminated by the material stakes and instrumental interests of the sensorial experience—consequentialism makes the inverse move. Lived experiences and the concrete material interests and stakes that come with it have the privilege of establishing both the list and the hierarchy of the ends and corresponding courses of action one ought to pursue. These ends, rather than presented as a duty discovered or constructed by reason, are determined by the demands of adaptation to circumstances or suggested by hedonist or more general welfarist considerations.

The basic mental operation implicated in consequentialism is the analysis of the relative efficiency of competing courses of action and the expected benefits of competing ends. Through strategic cost-benefit calculation and empirical observation, consequentialism hopes to detect the behavioral patterns best manifesting a tendency to produce the most efficiently desired ends, the stipulation of which is given by the nature of things or the relevant concrete circumstances. Especially note the work that the idea of “tendency” is performing for consequentialism; patterns of behavior are regarded as appropriate to the extent they tend to produce target outcomes. I will come back to this point later in this article.

For now, let us focus on the ends and consider one question that consequentialism has found difficult to answer: Under what set of criteria may any end be said to be good? In the context of his critique of the Levellers, David Hume wrote that “if we examine the particular laws, by which justice is directed, and property determined; we shall still be presented with the same conclusion. The good of mankind is the only object of all these laws and regulations.”<sup>33</sup> This, of course, still begs the question of what exactly is the good of humankind. The answers given by consequentialists to this question tend to circumnavigate at least one of a few fixed ontological points, namely, the general requirements of a well-functioning society (not necessarily a just or decent one), and the desirability of maximizing pleasure and minimizing the pain of individuals, or, lastly, some broader welfarist conception of pain and pleasure.

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33. DAVID HUME, ENQUIRIES CONCERNING THE HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS 192 (L. A. Selby-Bigge, M.A. ed., Oxford Univ. Press 2nd ed. 1963) (1777).

In the adoption field, it is clear how much these ontological, normative, and cognitive aspects of consequentialism are interdependent. It is first in the mutual support of normative and cognitive stances that the architecture of the consequentialist-cum-charity adoption paradigm is founded. For the consequentialist mindset, there are no goods-in-themselves other than the survival of society (or some discreet group within society) and the physical pleasure or the general well-being of individuals.<sup>34</sup> Consequentialism is not about human flourishing; it is about survival and hedonism, two centerpieces of modern culture and sensibility.

Thus, the consequentialist argumentative structure is bounded, on one side, by the individual experience of pain and pleasure (and its welfarist extensions) and, on the other, by the collective experience of life in society. Human life takes place, therefore, between atomistic physicalism and society, between individual survival and social reproduction. The speculative as well as practical import for adoption of this thought scheme cannot be overstated. Once stripped of the sugarcoating rhetoric of charity and rights of the child, the reality is that throughout its history, adoption served the bare survival needs of children and the perceived needs of society (such as for mechanisms of status modification, hiding reproductive problems or moral missteps, family and property planning, and management of the population as a natural resource of states, ethnicities, races, and religions).

When it comes down to choice of adoption policies, now, as in the past, cost-benefit analysis rather than deontological considerations take the front seat. UNICEF's policy on intercountry adoption provides examples of this. In a recently published policy statement titled *UNICEF's Position on Inter-country Adoption*, the organization weighs, on one hand, the view that,

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 family setting in their countries of origin, it may indeed be the best solution.<sup>35</sup>

On the other hand, the organization is concerned about perceived risks created by "the growth of an industry around adoption, where profit, rather than the best interests of children, takes centre stage. Abuses include the sale and abduction of children, coercion of parents, and bribery."<sup>36</sup> Unfortunately for millions of unparented

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34. A good-in-itself is that which survives without justification in the form of a reference to another good.

35. *UNICEF's Position on Inter-country Adoption*, UNICEF, [http://www.unicef.org/media/media\\_41118.html](http://www.unicef.org/media/media_41118.html) (last visited Feb. 10, 2011).

36. *Id.* UNICEF's *2009 Report on Regular Resources* states that the organization's regular expenditures per country are based on three criteria: the country's under-five mortality rate, its gross national income per capita, and the absolute size of its child population. UNICEF, *REPORT ON REGULAR RESOURCES 2009 14* (2010), available at [http://www.unicef.org/publications/files/UNICEF\\_RR\\_Report2009\\_091410.pdf](http://www.unicef.org/publications/files/UNICEF_RR_Report2009_091410.pdf). The Report goes on to state that regular expenditures go to "priority countries" which are determined based on the above three criteria. "These unrestricted funds are allocated to those countries

children around the world, UNICEF resolved the calculus in favor of precautionary measures, stalling or altogether stopping adoption in the form of moratoria.

The outcome of this type of cost-benefit analysis and the related application of precautionary principles is to ensure the breach of the fundamental right to be adopted for millions of unparented children and adolescents. But for many proponents of this approach, the outrage at the mass violation of this fundamental right, directed at such a vulnerable segment of the global population, passes without leaving any traces of outrage or remorse. Assuming their good motivations, which I am sincerely prepared to do, the reason why they seem untouched by the systemic human rights violations they directly perpetrate or indirectly condone is to be found in the way consequentialism tends to ill-equip, in terms of moral outlook, those who see the world through it. In international adoption law and policy, consequentialism-cum-charity is a powerful blindfold over the nature and entailments of the cosmopolitan right of the unparented to be adopted, everything else being equivalent, by the first good parent from a relatively safe place to come forward.<sup>37</sup> Only in the combined effect of consequentialism, conservatism, and adoption prejudice can one start to find an explanation for the resistance toward international adoption in quarters where one would expect to find enthusiastic and committed support for it.

Returning to the discussion of the idea of “tendency,” the cost-benefit analysis promoted by adoption consequentialism has an important twist. When carefully examined, it reveals itself to be, in truth, an ethic of conviction disguised as an ethic of results. This requires explanation because consequentialism sets itself in opposition to deontology. The explanation is nonetheless fairly simple and found in the idea of tendency. As far as I know, for the first time in the history of thought, eighteenth-century consequentialism gave moral status to the concept of tendency operating in the social universe.<sup>38</sup>

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with the highest incidence of child vulnerability.” *Id.* at 16. The Child Protection focus area of UNICEF is the one that encompasses children without parental care. According to UNICEF, it assisted 114 countries in 2009 (note that this is up from 64 in 2008) in addressing family separation issues. UNICEF, THEMATIC REPORT 2009: CHILD PROTECTION FROM VIOLENCE, EXPLOITATION AND ABUSE 9 (2010), available at [http://www.unicef.org/protection/files/2009\\_Global\\_Thematic\\_Report\\_FINAL.pdf](http://www.unicef.org/protection/files/2009_Global_Thematic_Report_FINAL.pdf). Given UNICEF’s record in stalling or stopping international adoption, one would hope the structure of financial incentives in place would be redesigned to incentivized UNICEF’s country offices to actively push for and assist in compliance efforts with the human right of the unparented to grow up in good families.

37. For contemporary attempts to specify, in the Kantian tradition, the substance and some of the institutional implications of cosmopolitanism, see, for example, PERPETUAL PEACE: ESSAYS ON KANT’S COSMOPOLITAN IDEAL (James Bohman & Matthias Lutz-Bachmann eds., 1997); Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Robert E. Goodin, *What is so Special about Our Fellow Countrymen*, 98 ETHICS 663 (1988); David Held, *Democracy: From City-States to a Cosmopolitan Order?*, 40 POL. STUD. 10 (Supp. 1992); Thomas Pogge, *Cosmopolitanism and Sovereignty*, 103 ETHICS 48 (1992).
38. A predated appearance of this concept can be found in the form of statistics in nineteenth-century natural and social sciences, as in the works of Laplace and Spencer, respectively. See, e.g., HERBERT SPENCER, SOCIAL STATICS, ABRIDGED AND REVISED: TOGETHER WITH THE MAN VERSUS THE STATE (1896); PIERRE-SIMON LAPLACE, A PHILOSOPHICAL ESSAY ON PROBABILITIES (Frederick Wilson Truscott & Frederick Lincoln Emory trans., Chapman & Hall 1902) (1886).



Consequentialism denies the possibility of certainty about any future outcome of courses of action undertaken in the present and replaces it with reliance on the tendency that courses of action have to produce certain outcomes. In doing so, consequentialism falls in line with modernity's turn to probabilism. The issue is that, when looked at more closely, reliance on tendency and its elevation to a moral principle is no more than authorization to act according to the agent's conviction with regard to that tendency. The *ex post facto* correction of the course of action selected as the best one impacts only similar convictions in the future, but does not in any way impinge on the moral quality of the course of action that an agent rationally, but ultimately wrongly, chose at the time. In fact, for moral approbation, consequentialism does not require that the result of an action advance the utilities of individuals or societies, whatever those utilities may be. All that is required for approbation is the choice of that which seems, under the given conditions, to be the course of action with the greatest tendency to produce desired outcomes.<sup>39</sup>

In any event, the uncertainty about the future inherent in the idea of tendency can do little to placate fear and angst about the future. When adoption law and policy is approached from a consequentialist mindset, this uncertainty calls for a delicate and fragile process of continuous attachment to the status quo, which of course is not changed just because the plea for stasis in adoption may take on the discursive form of charity and the best interests of potential adoptees. If one starts from consequentialism, one ends in conservatism.

Anchored in the main tenets of general consequentialism, adoption consequentialism is characterized by a conservatism that instrumentalizes the young in the name of precautionary principles and of national, ethnic, racial, religious, and family planning interests. The deployment every day of more nuanced best interests, charity, and children's rights rhetoric have no power to change that reality, although it has gone a long way towards making it acceptable, if not largely invisible.

### III. VALUE THEORY OF RIGHTS

In contrast to adoption consequentialism, adoption deontology has taken the form of a human right of the unparented to be adopted. Understanding of the substance and corollaries of a right to be adopted (not to be confused with claims of rights to adopt) requires an excursus on the general nature of fundamental rights, to which I now turn.

#### *A. The Theory Stated*

Around the world, there is an overwhelming consensus about the legal and moral authority of human rights. This does not, of course, imply any universal agreement about the substance of human rights. Instead, the question of what constitutes this substance is subject to contentious debate. This is to be expected, given the centrality

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39. The reader may find it therefore surprising that generations of intellectuals, century after century, attempted, and still attempt, to justify the idea that a coherent moral philosophy of results exists.

of these rights in the lives of rights holders,<sup>40</sup> and considering the long list of duties, incapacitations, liabilities, and disabilities<sup>41</sup> they impose on governments and other social actors.

Specification of the substance of fundamental rights cannot proceed until two basic questions are answered. The first question asks whether the right in question is more accurately understood as protective of a privileged will,<sup>42</sup> interest,<sup>43</sup> or value.<sup>44</sup> The second seeks to identify the conditions of validity of the categorical nature of fundamental rights norms. I address both in turn, always with the right to be adopted in mind.

A fundamental right protects a privileged will when it carves out in the legal system a sphere within which the individual will is sovereign.<sup>45</sup> A classic example in the American context is the *Lochner* Court's due process-based freedom of contract right. In *Lochner v. New York*, the Supreme Court defined the liberty interests in entering into a contract as a right that excludes all extraneous interferences with the will of the parties so long as they remained within the boundaries demarcated by voluntarism.<sup>46</sup> This view of fundamental rights was dominant in the nineteenth century but has fallen out of favor in the United States, especially after the end of the *Lochner* era in the late 1930s. Its explanatory power in relation to the right to be adopted is nearly null given the questions that the autonomy of the will of the young naturally raise.

The currently dominant understanding of fundamental rights explains them as privileging some individual interest over the interests of states or third parties.<sup>47</sup> In another American example, *Lawrence v. Texas*, the Supreme Court recognized the petitioner's interest in engaging in certain intimate sexual conduct as privileged vis-à-vis the state of Texas's interest in regulating the matter.<sup>48</sup> Fundamental rights can, in this fashion, be described as mechanisms for situational allocation of primacy to selected interests that are otherwise in constant competition with opposing ones. Despite the elasticity of the interest conception of rights to describe, in its own terms, the broad category of fundamental rights and its affinity to consequentialism, it does

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40. It has been correctly said that the rights of individuals has evolved "from the protection of the sensibilities of their bodies to protection of the sensibilities of their souls." EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 362 (Walter L. Moll trans., Transaction Publishers 1992) (1936).

41. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied to Legal Reasoning*, 23 *YALE L.J.* 16 (1913).

42. See FRIEDRICH CARL VON SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* (William Holloway trans., Hyperion Press 1979) (1867).

43. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

44. See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64 (1972); ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* (1996).

45. See VON SAVIGNY, *supra* note 42.

46. 198 U.S. 45 (1905).

47. See RAZ, *supra* note 43.

48. 539 U.S. 558 (2003).



not follow that this description best captures the essence of human rights. At best, the interest theory of rights can be said to explain fundamental rights only to the extent that any interest to be protected can independently be justified as good.

I submit that describing fundamental rights as protected values provides the most sensitive characterization of the rich structure and substance of fundamental rights. The value theory understands fundamental rights as protective of individuals as embodiments or agents of values. Legal systems ordinarily allocate initiative to such individuals, or their representatives, to protect the values they embody through justiciable claims. The result is a decentralized system of rights protection. Additionally, the value theory of rights explains why in the absence of an individual's ability or willingness to claim the value he or she embodies, the license or obligation to do so can pass to others.

It is helpful to compare the basic structure of a justiciable human right as formulated by the two theories of rights.

- (1) Basic structure of a fundamental right according to will and interest theories:

*(A) Human right norm N gives A the right to formulate and exercise his will in relation to B without interference from C*

*(B) Human right norm N gives A the right to pursue interest B without interference from C*

- (2) Basic structure of a fundamental right according to the value theory:

*(A) Human right norm N protects value B in A as against C*

Where the protection of value includes:

*(B) Empowering A or his representative to promote B as against C.*

In contrast to the interest theories of rights and the traction it gains on consequentialism, the value theory of rights is deontological by definition, for all the action lies in the rational construction of values strong enough to generate cognate duties. Understood as the protection of values embodied in individuals, the value theory of fundamental rights is a manifestation of high legal and moral rationalism. While in the context of adoption consequentialism turns into the instrumentalization of the potential adoptee, deontologism appears in the form of a principled articulation of the inherent dignity of every unparented young person as a self-standing person possessing the fundamental human right to be adopted.

### *B. Kantian Foundations*

The deontological approach proceeds by categorical norms, the validity of which is independent of their efficacy and efficiency. Kant articulates the nature of

categorical norms best. The philosophical argument begins by distinguishing between two types of norms, the techno-pragmatic and the categorical. Techno-pragmatic norms include those pertaining to arts and technology, as well as those of prudence and common sense. Both their content and binding force are related to empirical and contextual considerations. Categorical norms, by contrast, are the product of a free legislative will to the extent to which that will legislates from critical reason alone.<sup>49</sup> Whereas technical norms evoke a rationality of the instrumental kind, categorical norms are a product of and remain dependent on principled or idealist rationalism. As per their respective jurisdictions, technical norms are valid only in the context in which they remain efficient in producing the results they serve, while categorical norms are universally valid.<sup>50</sup>

Furthermore, in addition to the authority bestowed upon them on the basis of the rational justifiability of their propositions, categorical norms also receive authority by virtue of their legislator's moral status and the particular dignity she lends them.<sup>51</sup> The cornerstone of the argumentative framework of deontology lies in the way the idea of *autonomy* combines the natural attributes of rationality and freedom with the reality of individuals as empirical and contextual beings. The day-to-day worldly exercise of an extra-worldly freedom amounts to an affirmation of the distinct moral status of each and every person on the sole basis of species membership.<sup>52</sup>

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49. "The first imperative could also be called *technical* (belonging to art), the second pragmatic (belonging to welfare), the third moral (belonging to free conduct as such, that is, to morals)." KANT, *supra* note 30, at 69.

50. Kant clarifies:

When I think of a *hypothetical* imperative in general I do not know beforehand what it will contain; I do not know this until I am given the condition. But when I think of a *categorical* imperative I know at once what it contains. For, since the imperative contains, beyond the law, only the necessity that the maxim be in conformity with this law, while the law contains no condition to which it would be limited, nothing is left with which the maxim of action is to conform but the universality of a law as such; and this conformity alone is what the imperative properly represents as necessary. There is, therefore, only a single categorical imperative and it is this: *act only in accordance with that maxim through which you can at the same time will that it become a universal law*. Now, if all imperatives of duty can be derived from this single imperative as from their principle, then, even though we leave it undecided whether what is called duty is not as such an empty concept, we shall at least be able to show what we think by it and what the concept wants to say. Since the universality of law in accordance with which effects take place constitutes what is properly called *nature* in the most general sense (as regards its form)—that is, the existence of things insofar as it is determined in accordance with universal laws—the universal imperative of duty can also go as follows: *act as if the maxim of your action were to become by your will a universal law of nature*.

*Id.* at 73.

51. Here, "legislator" means any or every person.

52. And further, Kant adds:

And what is it, then, that justifies a morally good disposition, or virtue, in making such high claims? It is nothing less than the *share* it affords a rational being in *the giving of universal laws*, by which it makes him fit to be a member of a possible kingdom of ends, which he was already destined to be by his own nature as an end in itself and, for that

Another important aspect of the deontological theory of norms is the distinction between the criteria of validity for technical and categorical norms. The validity of categorical norms—as an expression of truth or rational justifiability—is a function of the rational cognitive and moral correctness of the principles they legislate. Thus, the criteria of validity of categorical norms are analytically distinct and empirically independent from their efficacy (rate of general compliance) and efficiency (how well it produces the desired outcomes). Because its complete existence and operation is bound to the empirical world, the criteria of validity of technical norms are coextensive with the efficiency with which the courses of action carried out under their authority reach the proposed ends. Thus, if validity in the universe of categorical norms is a function of the rational correctness of the norms and remains absolutely independent of the efficiency of the actions it orders for the achievement of this or that end, it follows that idealist-rationalism postulates the impossibility of a refutation of its normative projects by experience.<sup>53</sup> At best, experience may recommend adjustments as to means, but not ends.

A commitment to reason is therefore at the core of deontology's reliance on categorical fundamental rights norms. But consequentialism, too, claims to be rational. The difference lies in the type of rationalism each espouses. Consequentialism relies on instrumental reason, while deontology is dependent on principle-based reason.<sup>54</sup> From the time of the European Enlightenment, legal and moral rationalism

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very reason, as lawgiving in the kingdom of ends—as free with respect to all laws of nature, obeying only those which he himself gives and in accordance with which his maxims can belong to a giving of universal law (to which at the same time he subjects himself). For, nothing can have a worth other than that which the law determines for it. But the lawgiving itself, which determines all worth, must for that very reason have a dignity, that is, an unconditional, incomparable worth; and the word *respect* alone provides a becoming expression for the estimate of it that a rational being must give. *Autonomy* is therefore the ground of the dignity of human nature and of every rational nature.

KANT, *supra* note 30, at 85.

53. And further, Kant states:

The will is thought as a capacity to determine itself to acting in conformity with the *representation of certain laws*. And such a capacity can be found only in rational beings. Now, what serves the will as the objective ground of its self-determination is an end, and this, if it is given by reason alone, must hold equally for all rational beings. What, on the other hand, contains merely the ground of the possibility of an action the effect of which is an end is called a *means*. The subjective ground of desire is an *incentive*; the objective ground of volition is a  *motive*; hence, the distinction between subjective ends, which rests on incentives, and objective ends, which depend on motives, which hold for every rational being. Practical principles are *formal* if they abstract from all subjective ends, whereas they are *material* if they have put these, and consequently certain incentives, at their basis. The ends that a rational being proposes at his discretion as *effects* of his actions (material ends) are all only relative . . . .

*Id.* at 78.

54. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCURSIVE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., MIT Press 1996); see also JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION*:

saw reason as a chisel for carving out a space for human autonomy and dignity between the oppressive forces of nature, tradition, and religion.

Conservatives, increasingly speaking from a consequentialist paradigm, have always warned against the pointless and reckless nature of this exercise. Reason, they argue, despite its spectral and ancillary existence in our minds, has been repeatedly invited since at least the time of Socrates to man the helm of humankind's vessel, but proved at every turn capable of doing so only limitedly and temporarily, and always as an impostor. Reason, once demystified, would no longer deserve the prestige it is given. It would become clear, conservatives assured, that it was wasteful and dangerous to turn to reason with petitions and hopes for a life away from instinct, the oppressing weight of tradition, and the fear of vengeful deities. Outside its instrumental application, reason is little more than otiose intellectual amusement reserved for those with the required inclinations and little else of import to do.<sup>55</sup> What then to say of those who, even when confronted by fulminating skeptical arguments and the lessons of experience, still maintain faith in the independence and power of utopian reason, assigning to it not only control over finite individual existences but also over the potentially infinite fate of the species? The conservative charge against legal and moral rationalism is not a light one.

In its self-comprehension, consequentialism sees questions relating to adoption as it sees every other question, as a *problema tecnicum*, to borrow the vocabulary used by Kant.<sup>56</sup> As a *problema tecnicum*, the cognitive challenge faced by consequentialist adoption law and policy was and still is that of discovering the efficient means that would more likely than not lead to the political, economical, cultural, and other ends

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REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., Beacon Press 1984) (offering a powerful account of modernity as a process of progressive rationalization of culture (life world) against which social agents engage in communicative practice by advancing explicitly or implicitly claims to the validity of their assertions only to be redeemable on the basis of their rational potential vis-à-vis the rationalized cultural background).

55. As David Hume wrote:

In a word, human life is more governed by fortune than by reason; is to be regarded more as a dull pastime than as a serious occupation; and is more influenced by particular humour, than by general principles. Shall we engage ourselves in it with passion and anxiety? It is not worthy of so much concern. Shall we be indifferent about what happens? We lose all the pleasure of the game by our phlegm and carelessness. While we are reasoning concerning life, life is gone; and death, though *perhaps* they receive him differently, yet treats alike the fool and the philosopher. To reduce life to exact rule and method, is commonly a painful, oft a fruitless occupation: And is it not also a proof, that we overvalue the prize for which we contend? Even to reason so carefully concerning it, and to fix with accuracy its just idea, would be overvaluing it, were it not that, to some tempers, this occupation is one of the most amusing, in which life could possibly be employed.

1 DAVID HUME, *The Sceptic*, in *ESSAYS MORAL, POLITICAL, AND LITERARY* 231 (T.H. Green & T.H. Grose eds., 1875).

56. IMMANUEL KANT, *Toward Perpetual Peace*, in *PRACTICAL PHILOSOPHY*, *supra* note 30, at 311, 344. And this is in spite of the fact that, strictly speaking, the logical root of consequentialism, as shown above, is an ethic of conviction inconsistently disguised as an ethic of results. See *supra* text accompanying note 38.

sought to be promoted through adoption. More generally, and up to the present day, consequentialism's criteria for the specification of which ends to pursue remains bounded by attributes of human nature (such as aversion to pain and the necessary and sufficient material conditions of survival), interested stipulation (such as that of ethnic or religious groups), geopolitical interests (such as positive and negative incentives provided by powerful nations), and the list goes on. For principled deontology, on the other hand, the question of adoption is eminently a *problema morale*, irreducible to pre-reflective natural attributes of the species, group interests, geopolitics, and the like.<sup>57</sup>

Insofar as it faces problems of adjustment between means and ends, deontological adoption does not give up the rationally established moral end of protecting each and every unparented minor as an independent and full-fledged embodiment of inherent dignity; nor does it give up the rationally established norm of the fundamental right to be adopted. Hence, under this adoption paradigm, principle and utility counterpoise each other. For deontologists, the problem of unparented children is not one of mere survival or of how to employ the unparented in a greater political, cultural, or ethnic cause. To the contrary, the problem of unparented children is a potential human rights violation.

No doubt, adoption deontology worries as much as adoption consequentialism about the risks inherent in adoption, and in parenting more generally. Both vehemently condemn human trafficking and commodification, and neither advocates leniency toward anyone involved in such practices. There are, however, at least four differences in the way they currently approach risks of adoption and parenting. First, deontology understands that neglect and abuse occur proportionally much more in the context of biological parenting than in that of adoptive parenting. Second, deontology does not think that the solution for abuses in biological or adoptive parenting is best addressed by mass moratoria on biological or adoptive parenting. Third, because deontology is aware of the instrumentalization of adoption by state,

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57. In his essay *Toward Perpetual Peace*, Immanuel Kant wrote:

In order to make practical philosophy consistent with itself, it is necessary first to decide the question, whether in problems of practical reason one must begin from its material principle, the end (as object of choice), or from its formal principle, that is, the principle (resting only on freedom in external relations) in accordance with which it is said: So act that you can will that your maxim should become a universal law (whatever the end may be). [. . .] The latter principle must undoubtedly take precedence; for, as a principle of right, it has unconditional necessity, whereas the former necessitates only if the empirical conditions of the proposed end, namely of its being realized, are presupposed; and even if this end (e.g., perpetual peace) were also a duty, it would still have to be derived from the formal principle of maxims for acting externally. Now the first principle, that of the political moralist (the problem of the right of a state, the right of nations, and cosmopolitan right), is a mere technical problem (*problema technicum*), whereas the second, as the principle of the moral politician, for whom it is a moral problem (*problema morale*), is far removed from the other in its procedure for leading to perpetual peace, which is now wished for not only as a natural good but also as a condition arising from acknowledgement of duty.

KANT, *supra* note 56.

politics, ethnicity, race, religion, economic interests, or reductionist conceptions of child well-being, and because it is also aware of the constant reinvention of prejudices against adoption, it can see fundamental rights violations through the fog of charitable and precautionary discourses. Finally, unlike adoption consequentialism, adoption deontologism favors legal frameworks and enforcement mechanisms that address adoption abuses without causing greater violations of the human rights of the unparented young.

An explanation of how adoption deontologism was able to escape the conceptions and uses of adoption that are so deeply enshrined within culture, society, and the laws would push the argument beyond the confines of this article. I point only to the intellectual-history fact that deontological reasoning is critical. Unlike instrumental reason, which by definition must be immersed into the contexts in which it operates, idealist reason thrives in taking distance from contexts, analyzing them from afar, and only then re-immersing back into contexts as a force for reform. Principles self-generated by reason ought, in the deontological paradigm in question, to govern opinion about the merits of social arrangements and have precedence over unreflectively received cognitive contents or mere strategizing. Submerged in historical time, living from the first to the last instant *inter-esse* amidst the things of the world—and enmeshed in a perishable body with only rudimentary sensory instruments for capturing the outside world—the human condition would seem to have little to recommend itself were it not for the transcending powers of critical and imaginative reason. Sustained by these, the human experience is capable of a triple decoupling from nature, tradition, and religion.

In the Kantian mold, this is all made possible by self-absorbed mental procedures that assume two basic forms: that of the analysis, purification, systematization, and adjudication of the data collected from experience by the senses; and, second, that of the autonomous creation of normative contents irreducible to data from experience, including any inherited tradition.<sup>58</sup> As adjudicator and organizer of the data from experience, consciousness corrects distortions and clears up representational dissonances. As generator of prescriptive ideational contents, it can do these things in accordance with self-generated norms, which warrant the binding status of these ideational contents.<sup>59</sup> Upon the foundation laid by this revolt against nature, tradition, and religion, humankind claims broader control over its own evolution; a control whose principal mechanism is found in the deontological shaping of culture, institutions, and social practices. This kind of critical detachment and a commitment to assess and prescribe for the world from the vantage point of critical detachment allowed adoption deontologism to escape from below the ideological and rhetorical weight of consequentialism-cum-charity.

Belief in the partial independence of reason, and on its power to shape the world, places deontologism under great pressure to be oblivious of biographical time in favor

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58. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* (J. M. D. Meiklejohn trans., Encyclopaedia Britannica 1952) (1872); KANT, *supra* note 30, at 37–108.

59. Kant's two first critiques are the canonical sources for both forms of self-absorbed procedures of the mind.

of historical time. The pressure to focus on *longue durée* as opposed to conjunctures relates to the emphasis of deontology on moral universalism and is further compounded by two other beliefs: first, that only in the timeframe of history will events properly appear in evolutionary radars; and, second, that the viewpoint of the species is the only one from which we can intelligibly speak of regress or progress in human affairs. Kant welded all this when he wrote that,

human nature is such that it cannot be indifferent even to the most remote epoch which may eventually affect our species, so long as this epoch can be expected with certainty. And in the present case, it is especially hard to be indifferent, for it appears that we might by our own rational projects accelerate the coming of this period which will be so welcome to our descendants. For this reason, even the faintest signs of its approach will be extremely important to us.<sup>60</sup>

It is of little surprise though that deontological adoption presupposes, both in domestic and global contexts, the point of view of the species.

Despite the pressure in favor of long-term moral progress, adoption deontology struggles for the here and now of individual children and adolescents. There is no mystery in this fact, for large movements of history, as well as the implementation of universals, proceed in small concrete steps, one person at a time. Furthermore, the universals in question, to wit, the inherent dignity of each young person and their fundamental right to have a loving parent interposed between them and the crushing vulnerability characteristic of their lives as young persons, can only be redeemed at the biographical level of each unparented young.

How, however, in the intimate realm of human consciousness does utopian rationalism orchestrate the various movements of approximation and dissociation required by, on the one hand, the fact that human individuals belong to the animal kingdom and live in concrete contexts and, on the other, that notwithstanding this they still claim a specificity sufficient to give access to a life governed by universal duty? How can we reconcile the finitude of nature and context with the human spirit's longing for infinitude? Maybe in the entire deontological corpus there is not a single passage comparable to the following in which Kant acknowledges the existential dilemma implied in being destined to live in limbo between the physical and the superphysical:

Two things fill the mind with ever new and increasing admiration and reverence, the more often and more steadily one reflects on them: *the starry heavens above me and the moral law within me*. I do not need to search for them and merely conjecture them as though they were veiled in obscurity or in the transcendent region beyond my horizon; I see them before me and connect them immediately with the consciousness of my existence. The first begins from the place I occupy in the external world of sense and extends the connection in which I stand into an unbounded magnitude with worlds upon worlds and systems of systems, and moreover into the unbounded times of their periodic motion, their beginning

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60. IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Purpose*, in *POLITICAL WRITINGS* 41, 50 (H.S. Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 1970) (1784).



and their duration. The second begins from my invisible self, my personality, and presents me in a world which has true infinity but which can be discovered only by the understanding, and I cognize that my connection with that world (and thereby with all those visible worlds as well) is not merely contingent, as in the first case, but universal and necessary. The first view of a countless multitude of worlds annihilates, as it were, my importance as an *animal creature*, which after it has been for a short time provided with vital force (one knows not how) must give back to the planet (a mere speck in the universe) the matter from which it came. The second, on the contrary, infinitely raises my worth as an *intelligence* by my personality, in which the moral law reveals to me a life independent of animality and even of the whole sensible world, at least so far as this may be inferred from the purposive determination of my existence by this law, a determination not restricted to the conditions and boundaries of this life but reaching into the infinite.<sup>61</sup>

Against the instrumentalism upon which consequentialism in adoption rests its case, deontologism in adoption offers the universality of cogent normative ideation produced by critical and imaginative reason. Against *phyei* (natural order), deontologism affirms the *thesis* of an order resulting from the operation of critical reason. Against the traditionalist expansion of the jurisdiction of social norms through the perception of their utility, deontologism postulates the universalism of the norms deduced from the self-absorbed procedures of reason. For reason alone has the power to produce—against decaying bodies, sensory inundation by physical data, and blinding forms of consciousness—irresistible normative universalism. Through fundamental rights the socially constructed particularisms of statehood, political partisanship, ethnic/racial/religious belonging, economic interests, and reductionist conceptions of child well-being are put under immense justificatory demands. Demands that consequentialist-cum-charity can hardly redeem.

#### IV. DEONTOLOGICAL INTERNATIONAL ADOPTION AND THE RIGHT TO BE ADOPTED

##### A. *The Fundamental Right to Be Adopted*

“Borders have guards and the guards have guns,” wrote Joseph Carens in an important article making the moral case for open national borders.<sup>62</sup> In international adoption law, states are given a monopoly over their population and are expected to police against “abduction, the sale of, or traffic in children.”<sup>63</sup> This posture reveals both a precautionary perspective not authorized by the facts of international adoption, and the power of conservative consequentialism in the field of adoption. The child is objectified and commodified when international adoption is seen through the lens of border policing, protectionism, national pride, and cultural fetishism. In contrast, deontological adoption understands adoption as a fundamental right of the unparented.

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61. IMMANUEL KANT, *Critique of Practical Reason*, in PRACTICAL PHILOSOPHY, *supra* note 30, at 133, 269–70.

62. Carens, *supra* note 37, at 251.

63. IAC, *supra* note 6, art. 1(b).



The basic structure of the value theory of a fundamental right of the young unparented to be adopted can be thus expressed:

*The right to grow in a good family protects the human dignity and potential for flourishing of the unparented young, by:*

- (1) *Primarily allocating to the young and their advocates standing to claim this right in the course of promoting the human dignity and potential for flourishing embodied by the former.*
- (2) *Creating an obligation for state and international organizations to seriously and consistently promote and to a maximum possible guarantee the rights, privileges, powers, and immunities into which this right can be disaggregated.*
- (3) *Creating the obligation for states and international organizations to remedy, by a combination of retrospective compensatory remedies and prospective efforts, any violation of this right.*

Where:

- (4) *Lack of access of the unparented to a good family through adoption constitutes a grave violation of the human dignity and potential for flourishing that they embody.*

In this way, the substance of the right of the unparented to be adopted is redefined as the protection of the value of human dignity and the potential for flourishing as embodied in every child and adolescent.

Considerable prejudice against adoption has always existed. In the modern era, and until recently, adoption, when known outside of the privacy of the family, amounted to a public confession of reproductive incapacity, and to be adopted carried the marks of rejection and the stigma of second-class status. Even as late as the twenty-first century, adoption prejudice makes its presence clear throughout adoption law and policy. Of course, today adoption prejudice must hide behind charitable sensibilities and human rights rhetoric, but there is no doubt it continues to exist. For example, it is not only acceptable, but also a source of social prestige, for physicians and health care corporations worldwide to profit in the billions of dollars every year by providing biological reproductive services.<sup>64</sup> However, it is considered a grave

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64. According to one market forecasting analyst, the reproductive technology industry in the United States was estimated to reach \$9.8 billion in 2009. See *Human Reproductive Technologies: Products, Markets and Manufacturers, Report Highlights*, BBC RESEARCH, <http://www.bccresearch.com/report/HLC017C.html> (last visited Mar. 17, 2011). See also *The Big Business of Fertility* (American Public Media broadcast Oct. 4, 2010), available at [http://marketplace.publicradio.org/www\\_publicradio/tools/media\\_player/popup.php?name=marketplace/pm/2010/10/04/marketplace\\_cast2\\_20101004\\_64&starttime=00:07:27.500&endtime=00:09:16.0](http://marketplace.publicradio.org/www_publicradio/tools/media_player/popup.php?name=marketplace/pm/2010/10/04/marketplace_cast2_20101004_64&starttime=00:07:27.500&endtime=00:09:16.0); Claudia Dreifus, *An Economist Examines the Business of Fertility*, N.Y. TIMES, Feb. 28, 2006, at F5.

moral shortcoming if professions and business enterprises provide adoption services, and prosper doing so.

Also, historically, population was seen as the most precious natural resource for any nation state or nation-state-to-be. States draw armies and laborers from the largest population possible. Post-colonial sensibilities reconceived this natural resource approach to children by seeing them as race, religion, or cultural heritage carriers.<sup>65</sup> This has tragically led to the imprisonment of children in institutions and abusive domestic relationships. Despite the much greater risk, both in absolute numbers and proportionally, of abuse in the context of biological parenting, no one seems to be advocating a moratorium on biological reproduction as an acceptable means to address the millions of cases every year of neglect and abuse of the young by their biological parents. Yet one negative headline is enough to lead the world to call for adoption delays (under the favorite language of “safeguards”) or moratoria.

Children are self-standing, full-fledged possessors of human rights. Because they are silent and, for those in orphanages or hidden behind the walls of abusive families, also invisible, many self-appointed advocates feel free to make light of their plight. This attitude, when expressed or acted upon by states and international organizations, is illegal under human rights law as it is well-understood—and a moral disgrace. In this article, I have criticized, from the perspective of deontological adoption, the consequentialist-cum-charity position taken by UNICEF, the Hague Convention, and many childcare and advocacy organizations. A Joint United Nations Programme study found over sixteen million double orphans in Africa, Asia, and Latin America alone.<sup>66</sup> Despite that, the forty-six page report mentions adoption just twice, and then inadequately, in the form of makeshift local adoption substitutes.<sup>67</sup> In the same report, institutionalization is referred to euphemistically as “Center for Orphaned Children,” “Community School,” “Day Care Center,” “Center for Children,” and the like.

I have elsewhere affirmed that to condemn the views on international adoption of institutions such as UNICEF is not to question the good intentions or seriousness of purpose of those bodies.<sup>68</sup> The problem is deeper, ultimately resting on views propped by the structure of consequentialist thinking that muddle conceptions of human rights and the personhood of the young. Those views also betray great imaginative and institutional conservatism.

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65. See HEATHER JACOBSON, *CULTURE KEEPING: WHITE MOTHERS, INTERNATIONAL ADOPTION, AND THE NEGOTIATION OF FAMILY DIFFERENCE* (2008) (putting forth a nuanced and thoughtful study of the ways in which the assimilation may be a two-sided phenomenon in transcultural adoption).

66. JOINT UNITED NATIONS PROGRAMME ON HIV/AIDS ET AL., *CHILDREN ON THE BRINK 2004: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION 11* (2004).

67. *Id.* at 15, 20 (“There is a pressing need to ensure that familybased [sic] care is available for these children, either through support for relatives, foster care, local adoptive placement, or community organizations that are integrally linked to the community . . . . For children who slip through the extended family safety net, arrangements preferable to traditional institutional care include foster placements, local adoption, surrogate family groups integrated into communities, and smaller-scale group residential care in homelike settings.”).

68. Paulo Barrozo, *The Child as a Person*, 1 *GLOBAL POL’Y* 228 (2010).

From as early as the fifteenth century, struggles to unify and consolidate nation states turned into efforts to create large and replenishable armies and working forces. From the perspective of emerging states, the first and most precious natural resource was its population, and the highest policy priority was population management. “‘The principal object of my policy’, stated Joseph II in the 18th century, was ‘the preservation and increase of the number of subjects. It is’, he added, ‘from the greatest number of subjects that all the advantages of the state derive.’”<sup>69</sup> This view became part of the policy DNA of nation states and, after World War II, of their international organization creatures. By the second part of the twentieth century, population management ideologies were compounded by the inability or unwillingness to transcend the resilience of localism and culturalism against clear commitments to the human rights of the young as a person. No one should think it is easy to honor mandates as important as the human rights of the unparented when they are deeply torn between contradicting values and loyalties as the consequentialist-cum-charity self-appointed spokespersons for the unparented young are.

On the other hand, in many ways it has never been better to be a child than in our time, though the evolution of the legal and moral status of the young was a slow one. It took millennia for children to progress from being little more than labor and transactional resources for families and economic and military resources for states. Later, children came to be seen by post-colonial sensibilities as an identity medium. In most parts of the world, children achieved the legal status of objects of protection on the part of families, societies, and states only relatively recently. Twenty years ago, the arc of this evolution reached the point of considering the child as an independent, self-standing subject of human rights. But the earlier stages of the evolution of the legal and moral status of the child have never been completely replaced. The result is the truncated and ambivalent conception of the child as a person and subject of human rights found in the rhetorical cloaks of consequentialism-cum-charity in adoption.<sup>70</sup>

Throughout history, adoption has been instrumentalized within a constantly shifting and highly adaptable framework of charity or humanity, and against the background of regulation that traces closely the demands of instrumentalization and charity at each step. Against this, the deontological paradigm of adoption proclaims that to have the buffer of love placed between the young in her or his vulnerability and the harsh world in which we live can only be achieved through the enforcement of a fundamental right of the unparented to be adopted. It further argues that because of the centrality of growing up in good families to the present and future enjoyment of human rights, lack of access of the unparented to a good family through adoption constitutes a grave violation of the human dignity and potential for flourishing that

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69. *Id.* at 228. This is also quoted in TIM BLANNING, *THE PURSUIT OF GLORY: THE FIVE REVOLUTIONS THAT MADE MODERN EUROPE 1648–1815*, at 41 (2007).

70. Even more sophisticated philosophical reflection on adoption tends to fall to the attraction of the consequentialist paradigm dressed in rights discourse. See, for example, Mary Lyndon Shanley, *Toward New Understandings of Adoption: Individuals and Relationships in Transracial and Open Adoption*, in *CHILD, FAMILY, AND STATE* 15 (Stephen Macedo & Iris Marion Young eds., 2003).

they embody. This violation gives rise to obligations on the part of states and international organizations to guarantee the rights, privileges, powers, and immunities into which this right can be disaggregated, and for states and international organizations to remedy, by a combination of retrospective compensatory remedies and prospective efforts, any violation of these obligations.

### *B. Negative and Positive Violations*

How do states, international organizations, and other entities, such as child welfare organizations, comply with a right to be adopted? Because the act of adopting is inherently voluntary and should remain so, compliance on the part of institutions lies in doing all within their power and means to promote and facilitate adoption, and when the young has found, or has been found by, a good family willing to adopt, institutions should support their coming together as a family in the shortest possible time. This all seems straightforward enough, but those familiar with global adoption know all too well that the daily routine of adoption across borders is to have institutionalized unparented children and loving, eager parents kept apart by states, international organizations, and child welfare organizations.

The reason why these institutions are able to get away with massive and widespread human rights violations has three connected roots. First, they operate in a global cultural environment dominated by the consequentialist-cum-charity conception of adoption, a conception that, as argued above, is disabling the rights of the unparented. Second, those institutions deploy welfarist and human rights rhetoric able to numb observers already standing in the consequentialist-cum-charity paradigm. Finally, they have thus far been able to get away with their human rights violations because their action is indirect, meaning that they tend to operate negatively and positively at the structural level. The preceding sections addressed the first two roots of the violation. In this section, I focus on the negative and positive structures of the violation.

The duties created by the human right of the unparented to be adopted are not satisfied by the purity of charitable or humanitarian motivations, or with the coating of human rights rhetoric. Especially in the context of international adoption, attention must be paid to the negative and positive means of violations of the right of the unparented to be adopted. In a universe permeated by tragedies brought about by good intentions, it is especially important to understand the operation of structures of violation that act behind the backs or through the agency of the well-intended. I have argued in this article that the idea that the young possess inherent and unconditional dignity and potentials that ought to be tapped is central to deontological adoption. It is precisely the deontological element of this idea that enables criticism of courses of action, individual or collective predicaments, social structures, and the legal and policy choices that channel them.

Structural causes or conditions of violations of the right to be adopted can be negative or positive. Negative structures function by restricting or filtering out opportunities to escape human rights violations, or by maintaining insufficient, though

favorable, conditions for such violations. Positive structures, on the other hand, set in place and in motion the causes and conditions of rights violations, or otherwise forge the very forms of collective engagement in which such violations thrive.

Closely intertwined with negative structure and positive structure is the idea of vulnerability mentioned in Part I of this article.<sup>71</sup> The rejection of vulnerability has taken two expressions. The first rejects vulnerability as an intrinsic component of the human predicament and responds to this predicament with *ataraxia*—tranquility and suspension of judgment in the ancient Pyrrhonic and Epicurean traditions—mental flight, and practical evasion. In direct opposition to this conception, the second expression of the rejection of vulnerability embraces both the joys and risks of human intellectual, moral, and practical engagement, and focuses on the imagination of strategies of individual empowerment. It is in this second expression that a concern with vulnerability is best understood in the context of the human endowments that the human right of the unparented to be adopted seeks to protect and foster.

Consider first the negative structures of violations. In *The Subjection of Women*, John Stuart Mill offers the insight that institutions never come to social life at a perfectly isonomic starting point for its members. When they arrive in social life, institutions crystallize previous social arrangements and distributive patterns. Mill writes that,

Laws and systems of polity always begin by recognising the relations they find already existing between individuals. They convert what was a mere physical fact into a legal right, give it the sanction of society, and principally aim at the substitution of public and organized means of asserting and protecting these rights, instead of the irregular and lawless conflict of physical strength. Those who had already been compelled to obedience became in this manner legally bound to it.<sup>72</sup>

When the current Hague Convention-based regime of international adoption was set in place, it found millions of unparented children worldwide and powerful political and cultural interests trying to position themselves between the unparented and available good parents on the global stage. There is little doubt that, thus far at least, the spirit and implementation of the Hague system sided with the powerful political and cultural interests prolongs and makes permanent the institutionalization, makeshift placement, or homelessness of millions of unparented children. And the mechanisms used to accomplish this mass violation of fundamental rights were primarily negative structures in the form of legal frameworks, implementation choices, funds reallocation, and partial or complete adoption moratoria.

Mill also explains the subtleties of the interaction between structures and forms of consciousness in their evolutionary dynamic, an interaction that is constantly hidden behind the opacity of the mechanisms of social cohesion and behavioral patterns. Speaking of the predicament of women, Mill pointed to the way the social structure in which they are embedded negatively influences their opportunities to

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71. See *supra* note 3 and accompanying text .

72. JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 8–9 (1869).

escape suffering, rendering them, on the contrary, considerably more vulnerable to cruelty and exploitation. As he dramatically states the problem, “sex is to all women; a peremptory exclusion.”<sup>73</sup> A form of exclusion that, because of the largely stealthy and rather negative operation of its structural components, remains widely unseen. Invisible, its victims are thus condemned to “the feeling of a wasted life”<sup>74</sup> and suffering without sympathy from the rest of society. What womanhood was for women, unparenthood is for the unparented—that is, a peremptory exclusion.

Mill’s probing criticism calls for awareness about the way negative structures operate to maintain the status quo. He speaks of the “cruel experience” of those who historically tried to oppose the mechanisms of human unhappiness, and of how their insubordination was met with the force of law and the whole apparatus of social norms and entrenched prejudices. Responsible for an ideological and practical insurrection against the powers of negative structure, the rebels appeared “in the eyes of those whom they resisted . . . not only guilty of crime, but the worst of all crimes.”<sup>75</sup> Many advocates and practitioners in the field of international adoption have met the same fate.

With the practical and institutional mechanisms of negative structures of violation—foremost among which is, in the case of international adoption, the conservatism of consequentialism-cum-charity and the adoption laws and policies it helped forge—comes its ideological component by the influence of which Mill once asked, “was there ever any domination which did not appear natural to those who possessed it?”<sup>76</sup> This question for Mill spoke to the “fanaticism with which men cling to the theories that justify their passions and legitimate their personal interest”<sup>77</sup> and the fact that “power holds a smoother language, and whomsoever it oppresses, always pretends to do so for their own good.”<sup>78</sup> One could not better describe the nature and effect of the consequentialism-cum-charity ideological block over the hard realities of unparenthood.

Mill’s analysis of negative structures impacting women in the nineteenth century is almost perfectly transferable to the condition of the unparented in our time. In the case of the unparented, as well as that of the women Mill had in mind, legal and social apparatuses are reinforced by the combination of impossibility of collective action caused by the dispersion of its directly interested agents with the proximity to which these agents are kept to the micro agents—in the case of adoption, the many putative advocates and protectors of children that turn out to defend their objectification and instrumentalization—of negative structures of violations of the human right to be adopted.

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73. *Id.* at 187.

74. *Id.*

75. *Id.* at 13.

76. *Id.* at 20–21.

77. *Id.* at 21.

78. *Id.* at 92.



Positive structures of violation have the same effect by other means. The central point here is that positive structures act through the diffuse agency of macro social arrangements and legal frameworks to proactively and directly violate the right of the unparented young to be adopted. This causal force of positive structures are already figured prominently, if in a rustic and underdeveloped form, in Plato, as the initial exchanges in *The Laws* so well illustrate.<sup>79</sup> In the operation of positive structures—such as the scheme of central authorities in international adoption or UNICEF’s overt and behind-the-curtains campaign for adoption moratoria—the impersonal, often inescapable and stealthy causal complexes set in place and urged forward by these structures lead to the violation of the rights of millions to grow in a good family. As much as negative structures, positive ones also attract an ideological counterpart in the form of mechanisms of rationalization, legitimation, and veiling.

Deontological reason is then urged to break through the ideological fog and shed light on the material and ideational bases of negative and positive structures of violations of the right to be adopted. Only those prepared to pay an immense intellectual price can be oblivious to the pervasiveness of active impersonal social mechanisms of exclusion, exploitation, immiseration, and humiliation of the unparented. Unfortunately, there are too many in the field of adoption who are willing to pay this price.

## V. CONCLUSION

We all come to the world embodied—that is, as biological structures. There is of course a deep kind of vulnerability that comes with that, to which individuals and societies respond by placing the bare minimum conditions for life maintenance at the top of their priorities. That conceded, it is essential to equally understand that biological embodiment does not exhaust who and what we are; that there are human endowments that can and should be protected, nurtured, and directed to life purposes. When that happens, individuals and our species as a whole experience the kind of transcendence upon which the meaning of each person’s life depends. Because of their importance in placing love at the center of the experience of both biological and existential vulnerability, it is understandable why good families occupy a privileged position in the biographical as well as the sociological dimensions of the life of the species.

The ubiquity, therefore, of the problem of unparented young and the universality of the human right of the unparented to grow as daughter or son in a good family requires nothing less than a truly cosmopolitan response. Unparented children and prospective parents around the world should meet, regardless of country, race, or culture. Global adoption is the preeminent institutional mechanism for making this happen.

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79. PLATO, *THE LAWS* 13 (Trevor J. Saunders trans., Penguin Books 2004) (350 B.C.) (“At every stage the lawgiver should supervise his people, and confer suitable marks of honour or disgrace. Whenever they associate with each other, he should observe their pains, pleasures and desires, and watch their passions in all their intensity; he must use the laws themselves as instruments for the proper distribution of praise and blame.”).

Full adoption (or permanent guardianship with de facto adoption where domestic laws do not allow close relatives to formally adopt) by extended family is usually better than other types of adoption, provided that the general conditions for adoption are met and it builds on existing trust, loyalty, care, and love. But the existential limbo of uncertain status in which children often find themselves in extended family or community placement is no substitute for real parent-child relationships. All too often, the placement of children with extended family or with the community means little more than free domestic labor under parental-like authority. This is no substitute for the experience of growing up with loving and caring parents.

In terms of law, morality, and policy, it makes a world of difference to approach the humanitarian crisis of global unparenthood from a discerning deontological perspective rather than from the consequentialism-cum-charity characteristic of the dominant adoption paradigm, which turns the unparented into instrumentalities of blood, race, culture, heritage, or politics. The international human rights of the child reject the avoidable vulnerability, suffering, regimentation, and isolation of children without parents. Because the effects of institutionalization, abandonment, and second-class belonging generally prevent children from fully enjoying most other rights later in life, the human right to grow in a family is a pre-condition for the enjoyment of most other human rights.

Unparented children are among the most discrete and insular minorities anywhere, constantly subjected to the orphanage-to-asylum pipeline. Until they find a good family of their own, the unparented live in crushing vulnerability and dependence upon their respective states and the institutions and organizations that claim to speak for them while holding fast to objectifying and instrumentalizing preconceptions and prejudices. When loved by and in a good family, objective vulnerability is subjectively experienced by the young as care, protection, trust, and affection. This subjective experience speaks to the inherent dignity of every child as a person and provides the best environment for the expansion and development of the potentials with which a child was initially endowed.

Deontological adoption offers a conception of adoption consistent with the promotion of the dignity and flourishing potential of the unparented as a human right to be adopted. Thus far, it has had a greater impact on the rhetoric of the dominant adoption consequentialism paradigm than on concrete adoption laws and policies. The only solace is to know that to the extent idealistic reason has a place in the future of humanity, deontological adoption will prevail and the young unparented everywhere will have a good chance to overcome imposed barriers of borders, ethnicity, race, culture, and religion in order to find a home and be part of a family. To have to wait for that is a tragedy, but to know that the cosmopolitan right of the unparented to be adopted will become reality one day is no small solace.