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Baby Girls from China in New York: A Thrice-Told Tale

Barbara Stark

Maurice A. Deane School of Law at Hofstra University

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Baby Girls from China in New York: A Thrice-Told Tale*

*Barbara Stark***

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**Distinguished Visiting Professor, New England Law School; College of Law Faculty Scholar and Professor, University of Tennessee; B.A., Cornell; J.D., N.Y.U.; LL.M., Columbia. Early versions of this Article were presented at the University of Colorado, Columbia University, University of Connecticut, Hofstra University, and the Subversive Legacies Conference at the University of Texas. I am grateful to the organizers and participants, especially José Alvarez, Emily Calhoun, Ariela Dubler, Karen Engle, John DeWitt Gregory, Lakshman Guruswamy, Mark Janis, Deseriee Kennedy, Sarah Krakoff, Mark Lowenstein, Linda McClain, Hiroshi Motomura, Carol Ramsey, Peter Spiro, Mimi Weston, Zipporah Wiseman, and Sienho Yee. Thanks to the University of Tennessee College of Law and the William W. Davis Faculty Development Fund for their generous support, to Delton Chen, Erin Schad, Tara Senior, and Hannah Kim for extraordinary research assistance, and to Neal Fischer for his skillful preparation of the manuscript.

*Tell them nothing.*¹

Every year, almost one million baby girls are “missing” in China.² These are the babies predicted to be girls who never appear in national registries. In 2000, more than 5000 baby girls born in China were adopted by U.S. parents and emigrated to the United States.³ This Article examines the forces that drive adoptions of children from the world’s most populous country⁴ to its richest⁵ from the perspectives of the participants.⁶ It analyzes the Chinese, United States, and

¹Lisa Lu Howard. Lisa Lu, now five, was a baby girl from China who now lives in New York. The quoted statement was hissed to a playmate as they rejoined their mothers. Interview with Janice Howard, Mother of Lisa Lu, in New York, N.Y. (Apr. 7, 2002).

²See Colo. Parent Info. & Res. Ctr., *China Sees a High Gender Ratio of Newborns*, at <http://www.cpirc.org.cn/enews20020514.htm> (last visited Oct. 3, 2003) (noting growing disparity between predicted sex proportions of 103–107 newborn boys for every 100 newborn girls, and actual sex proportions since 1982; sex proportions reached 116.9% in 2000). See also Susan Greenhalgh, *Fresh Winds in Beijing: Chinese Feminists Speak Out on the One-Child Policy and Women’s Lives*, 26 SIGNS: J. WOMEN CULTURE & SOC’Y 847, 872 n.26 (2001) (noting that in 1989–1990, 979,943 infant girls were missing).

³The actual number was 5053. U.S. Dep’t of State, *Immigrant Visas Issued to Orphans Coming to U.S.*, at http://travel.state.gov/orphan_numbers.html (last visited Oct. 3, 2003). For a chart showing the dramatic growth of such adoptions since 1985 (twenty children), see Families with Children from China, *Statistical Information on Adoptions from China*, at <http://fwcc.org/statistics.html> (last visited Oct. 3, 2003).

⁴More than one-fifth (20.8%) of the world’s population, which exceeded six billion in October 1999, lives in China. <http://www2.newpaltz.edu/~knappr/EACP/population.html> (last visited Oct. 2, 2000) (on file with UTAH LAW REVIEW).

⁵The United States has the highest GDP in the world at \$10.082 trillion. China is second at \$6 trillion. Geo Hive, *Income: GDP 2002*, at http://www.geohive.com/global/c_gdpl.php. In 1999, the United States (at \$31,880) was outranked only by Luxembourg (\$32,021) in per capita GDP. Geographic.org, *GDP per Capita*, at http://www.photius.com/wfb1999/rankings/gdpl_per_Capita_0.html (last visited Oct. 20, 2003).

⁶From a more detached perspective (such as that of a government, for example), the short answer to the question “what drives these adoptions?” is “markets.” Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987). Posner states that [a]doption agencies charge fees, often stiff ones, to adoptive parents, and part of the agencies’ fee income goes to pay the medical expenses and other maintenance expenses of the natural mother; thus, the adoptive parents pay the natural mother, albeit indirectly and at a regulated price, to give up her child. In ‘independent’ adoptions, which are arranged through a lawyer or obstetrician, the element of sale is even more transparent .

Id. (citation omitted). As Professor Dowd has pointed out, “[m]oney pervades adoption, and it does so in all the wrong ways.” Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 928 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS* (1993)). Some view, or accuse others of viewing, babies as exports. See Robert S. Gordon, *The New Chinese Export: Orphaned Children—An Overview of Adopting Children from China*, 10 TRANSNAT’L LAW 121 (1997); Ryiah Lilith, Comment, *Buying a Wife But Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoption*, 9 BUFF. WOMEN’S L. J. 225, 226 (2000–2001) (noting that cost of adopting child from China has risen from \$12,000 to \$17,000 per child in 1992 to \$20,000 to \$27,000 per child in 1999). Others view them as the most vulnerable refugees. See INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 13 (Howard Alstein &

international laws—and the violation of these laws—that make this migration possible.

The story is told from three perspectives: the birth mother's, the adoptive parents', and the adoptee's.⁷ The tale is thrice-told⁸ for several reasons. First, these stories are separated by space and time, and told not only in different voices, but in different languages. Separate tellings highlight the very different contexts that shape these stories and give them meaning.⁹ Second, it is thrice-told to show why any single telling is necessarily partial, incomplete, from a legal standpoint. Multiple laws apply here in a wide range of complicated contexts, often with unanticipated consequences. Multiple tellings destabilize and problematize our understanding of the law. Third, and finally, multiple tellings show how each story is deliberately constructed by state and non-state actors to serve multiple, often conflicting, personal and political purposes.¹⁰ Multiple tellings also expose the ways in which legal rhetoric shapes stories and the shape-shifting qualities of

Rita J. Simons eds., 1991) ("One might assume that intercountry adoptees experience both grief and abandonment at being simultaneously relinquished by their birth parents and removed from their cultural and ethnic roots."); *but see* RICHARD TESSLER ET AL., *WEST MEETS EAST: AMERICANS ADOPT CHINESE CHILDREN* 8 (1999) ("[P]roponents view international and transracial adoptions as a humanitarian enterprise that results in providing homes and families to children who would otherwise languish in orphanages.") (citation omitted). In any case, it is well-documented (and endlessly contentious) that people in industrialized countries with low birth rates adopt children from less developed countries (LDCs) with high birth rates.

⁷I draw on primary sources from the People's Republic of China ("PRC"), *see infra* note 60; U.S. government studies and reports, *see infra* notes 36 and 54; personal narratives of birth parents, *see infra* notes 62 and 72; adoptive parents, *see infra* notes 8 and 35; adoptees, *see infra* note 19; and a burgeoning literature of secondary sources, including studies by social scientists, *see supra* notes 2 and 6 and *infra* note 22; and legal scholars, *see supra* note 6 and *infra* note 17; and my own experience as an adoptee and as an adoptive mother, *see infra* Part III.A.2. The references to mass media and the Internet throughout this Article reflect postmodernism's embrace of popular culture. *See* Elizabeth Wilson, *These New Components of the Spectacle: Fashion and Postmodernism*, in *POSTMODERNISM AND SOCIETY* 209 (Roy Boyne & Ali Rattansi eds., 1990). *See also infra* note 17 (describing larger project of postmodern family law of which this Article is part). *Cf.* James Herbie DiFonzo, *Customized Marriage*, 75 *IND. L.J.* 875, 882–83 (2000) (attributing "large proportion of references in [his] Article to popular journals and to sources on the Internet" to "Karl Llewellyn's dictum that 'divorce is the major area of interaction between the social institution and the legal'").

⁸This may have other meanings in the context of intercountry adoption. *See* ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 119 (1993) ("Each of my adopted children has been thrice-born and has three birth certificates to prove it—the first issued at the time of his actual birth, the second after the Peruvian adoption, and the third after the U.S. adoption.").

⁹Three tellings, of course, are similarly partial and incomplete. Any framing necessarily excludes other stories. Here, these untold stories include those of the biological fathers, *see infra* Part I.B; those who earned their livings from the process, *see infra* notes 364–66; and the claims of the groups, whether ethnic, national or political, from which the children come, *see* Part II.A.1.(b)(iii) (noting claims by families of Holocaust victims and "disappeared" and *unadopted* babies (in China and the United States)).

¹⁰*See, e.g.,* Greenhalgh, *supra* note 2, at 852 ("China presents the world's most conspicuous and consequential case of a top-down, demographic-targeting approach to population control.").

the rhetoric itself.¹¹ This includes the ways in which the needs of the present shape our understanding of the past.¹²

If the stories of biological families are like Russian matryoshka dolls, with the stories of each generation nested in those that follow them,¹³ the stories of adoptive families are more like Chinese puzzle boxes,¹⁴ with the story of the preceding generation hidden behind a false panel, only revealed to those who hold the key. The baby girls from China disrupt both metaphors. They neither “pass” as the newest matryoshka doll in their usually white American families, nor do these families hide their daughters’ stories.¹⁵ As the baby girls from China peek at us over their parents’ shoulders at the mall, glide by us in their strollers in the park, or meet their new cousins at our family Thanksgivings,¹⁶ even as we are charmed

¹¹The shape-shifting quality of adoption rhetoric is similar to that of the abortion debates and not, of course, unrelated. See Martha Nichols, *Extended Families*, 18 WOMEN’S REV. OF BOOKS 4, 4 (2001) (“Yet adoption remains a complicated issue . . . , one in which highly personal decisions don’t fall into neat political categories. In many ways, adoption politics form the shadow side of the abortion debate, often reinforcing rather than transforming conservative ideas about poverty, ‘choice’ and what being a mother is all about.”).

¹²See Michael Ariens, *A Thrice-Told Tale, Or Felix the Cat*, 107 HARV. L. REV. 620, 620 (1994) (arguing that Felix Frankfurter revised his account of events of 1937—the “fabled ‘switch in time that saved nine’”—in response to political exigencies of 1950s).

¹³They aren’t always, of course. See, e.g., Elizabeth Bernstein, *Genealogy Gone Haywire*, WALL ST. J., June 15, 2001, at W1 (describing surprises in store for those embarking on genealogical searches). For purposes of this Article, the dolls provide a metaphor for the *appearance* of continuity and replication. A single doll is also used as a metonym for the whole set, and the assumptions of biological and cultural determinism that continue to shape adoption jurisprudence.

¹⁴Actually, they aren’t. “Chinese puzzle boxes” are a misnomer, commonly used to refer to *Japanese* puzzle boxes. See Cleverwood, *Chinese Puzzle Boxes*, at <http://www.cleverwood.com/faq.htm> (last visited Sept. 19, 2003) (“What everyone thinks of as Chinese Puzzle Boxes are really Japanese Puzzle Boxes . . . [which] used to be sold in gift shops in ‘Chinatown’ . . . the truth is that they are made in Hakone, Japan and have been made there for more than 100 years.”). In this Article, Chinese puzzle boxes are used as a metaphor for concealment, riddles, and erasure. Although there are obvious tensions between the two metaphors (if the dolls suggest continuity, for example, the boxes suggest discontinuity), they are not opposites. Like the distinct cultures that produced them, their relationship is more complex. The boxes and the dolls both invite play, and both may conceal treasures, but even as they suggest what may be a universal human delight in both play and hidden treasures, they also suggest the very different, nuanced cultural meanings that infuse both. They are deliberately clumsy metaphors, chosen to playfully resist the elegant abstract dichotomies of modernism, from Karl Marx’s dialectic to Sigmund Freud’s love and death.

¹⁵See, e.g., *infra* note 314 (describing journeys of adoptive parents who return to China with their baby girls).

¹⁶ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 56 (2000). Pertman states:

Adoption is inculcating our society with more and more children who don’t look like their parents, and by doing so, it is playing a small but important role in alleviating bias on a personal level. There are innumerable white grandparents, uncles, aunts, and cousins, for example, who have surprised themselves with the unconditional love they feel for their new black or Asian or Hispanic relatives . . .

Id.

and engaged, they force us to rethink our basic understandings of “family” and the larger legal and social webs of which families are a part in a globalized world.¹⁷

The Stories

Part I tells the origin story—where do these babies come from? It explains how the Chinese government sought to address the population crisis and to promote women’s equality through the one-child policy and why this policy, paradoxically, has driven so many rural parents to abandon baby girls. Part II tells the adoptive parents’ stories. This includes their own stories; that is, why they adopt from China, as well as the stories they tell their daughters about the adoption and the country their daughters came from. Part III explains why only the adoptee herself can tell her story and considers what she needs in order to do so. Adoption can be understood, in part, as a “new story,” a deliberate break with a dubious past. But that past may contain fragments that the adoptee can use, as Pindar commanded, to “Become who you are!”¹⁸ The crucial move here is the

¹⁷This may be understood as part of a larger project of postmodern family law, in which commentators call for an expansive reconstruction of family law and family forms. Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479 (2001); Barbara Stark, *Review Essay: Pomo Parenting*, 80 OR. L. REV. 1035 (2001). “[T]he radical task of postmodernism is to deconstruct apparent truths, to dismantle dominant ideas and cultural forms and to engage in the guerrilla tactics of undermining closed and hegemonic systems of thought.” Janet Wolff, *Postmodern Theory and Feminist Art Practice*, in POSTMODERNISM AND SOCIETY, *supra* note 7, at 187, 190. See also NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 103–16 (1997) (defending single parents as positive role models); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE 52–82 (1996) (reconceptualizing traditional ideas of “family values”); Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 297–306 (1988) (criticizing current child custody law because it is based on possessive and self-centered notions of parenthood); Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 245–70 (1997) (reviewing NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997) and BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1997)) (advocating vision of family law that considers complexities of modern families). For an explanation of Edward Shorter’s use of the term “postmodern family” in 1975, see STACEY, *supra*, at 7. See generally LAWYERS IN A POSTMODERN WORLD 11 (Maureen Cain & Christine B. Harrington eds., 1994) (describing how “post-modern insights about legal discourse can be connected with an institutional analysis”).

If the story of the traditional family is like matryoshka dolls, each family replicating that of the generation that precedes it and establishing the mold for those that will follow, the story of the postmodern family is more like Chinese puzzle boxes. That which distinguishes the blended families, single parent families, gay and lesbian families, and the other “non-traditional” families in which most of us live, is generally not visible, like the false panel, except to those who know about it. Again, the baby girls from China disrupt both metaphors. Their arrival transfers many of their parents from the “traditional” (childless couples or singles) to the “non-traditional” column. At the same time, these new families are remarkably stable and adoptive parents often go to extraordinary lengths to provide their daughters with the experience of a “traditional” extended family.

¹⁸ALEXANDER NEHAMAS, THE ART OF LIVING: SOCRATIC REFLECTIONS FROM PLATO TO FOUCAULT 128 (1998). Cf. THE ODES OF PINDAR 179 (Sir John Sandys trans., 1957) (“Be true to thyself, now that thou hast learnt what manner of man thou art.”); THE ODES OF PINDAR 84 (Alexander Falconer Murison trans., 1933) (“To thine own self be true, Now thou has learnt thy

adoptivee's assertion of agency; the story she tells herself about her adoption becomes part of her own process of self-invention.¹⁹

The Laws

There are at least three kinds of law that intersect in the situations presently under discussion. First, adoption in China and the United States is governed by each country's domestic family law (actually, since adoption law is basically state law in the United States, the law of the fifty states governs adoption in that country). Second, international human rights law increasingly applies to family relations once considered "private." Third, private international law, which provides the rules for resolving conflicts between national laws.²⁰ While China and the United States generally enforce their respective family laws, both selectively apply human rights law²¹ and private international law.

character aright . . ."); THE EXTANT ODES OF PINDAR 61 (Ernest Myers trans., 1912) ("Be what thou art.").

¹⁹PETER BROOKS, READINGS FOR THE PLOT 3 *passim* (1984); Peter Brooks, *Storytelling Without Fear? Confessions in Law and Literature*, in LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW 114, 121 (Peter Brooks & Paul Gerwitz eds., 1996) ("In a secularized world, the insistence has come to be placed on truth to oneself."). Claiming their own stories is part of relatively recent adoptee activism. See, e.g., Bastard Nation, at <http://www.bastards.org/> (last visited Feb. 29, 2004) (advocating, as radical adoptee-rights group, for adoptees' right to access records relating to their identity). For a moving and straightforward account, see Susan R. Harris, *Race, Search, and My Baby-Self: Reflections of a Transracial Adoptee*, 9 YALE J.L. & FEMINISM 5 (1997).

²⁰For an early exploration of some of the tensions between national family laws and international law, see Richard E. Crouch, *International Declaration/Convention Efforts and the Current Status of Children's Rights in the United States*, in THE FAMILY IN INTERNATIONAL LAW: SOME EMERGING PROBLEMS 19 (Richard B. Lillich ed., 1981).

²¹There may be nothing unlawful about this disregard for international human rights law. If a state is not a party to a human-rights treaty, it is not legally bound by its provisions. The United States, for example, has not ratified the Women's Convention, *infra* note 24, or the Children's Convention, *infra* note 103. A state may, however, be bound by customary international law ("CIL"). Statute of the International Court of Justice, June 26, 1945, art. 38(1)(b), 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 (instructing International Court of Justice to apply "international custom, as evidence of a general practice accepted as law" when deciding disputes); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). CIL has two elements: (1) state practice; and (2) *opinio juris*, or the state's belief that such practice is legally mandated. The norm against torture, for example, is binding on states whether or not they have ratified the Torture Convention. Some scholars are skeptical as to its capacity to bind. See Curtis A. Bradley & Jack L. Goldsmith III, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 816-17 (1997); Curtis A. Bradley & Jack L. Goldsmith III, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260, 2261 (1998); Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319 (1997). But see Harold Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998) (providing scathing rebuttal of Bradley/Goldsmith position).

Even where a state is a party to a particular treaty, it may provide no mechanisms within its own law for enforcement of the treaty provisions. The United States, for example, has ratified the

Part I analyzes the ways in which human rights law influences, as well as undermines, Chinese law and the policies that shape that law.²² Part II explains how the Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption²³ ("Hague Convention") and human rights law interact with national laws to mediate the relationships, if any, between adoptive families and families of origin. Part III returns to the human rights issues of Parts I and II and explains how they may be adequately resolved in fact, even if absent in law.

If international human rights laws are like nested dolls—general norms holding progressively more specific norms until a country opts out²⁴—international family law is like a Chinese puzzle box, a basic form that holds sundry domestic laws, requiring only that they be addressed in a specific sequence.²⁵ The baby girls from China again disrupt both metaphors.²⁶ It is not

International Covenant on Civil and Political Rights, *done* Sept. 16, 1996, 999 U.N.T.S. 172 [hereinafter Civil Covenant] declaring it to be non-self-executing and thus of no legal effect absent implementing legislation, which has never been introduced. U.S. Reservations, Understandings, and Declarations to the ICCPR, Declaration No.1, 138 CONG. REC. S4784 (1992) [hereinafter U.S. RUDs], *reprinted in* HUMAN RIGHTS 784–87 (Louis Henkin et al. eds., 1999).

²²In China, state "policy" often has the force of law. That is, policy is enacted at the level of the national government, and implementation is left to lower-level regional officials. *See* DANIEL C.K. CHOW, *THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA* 122–28, 154 (2003). *See also* Pittman B. Potter, *The Chinese Legal System: Continuing Commitment to the Primacy of State Power*, in *THE PEOPLE'S REPUBLIC OF CHINA AFTER 50 YEARS* 111, 113 (Richard Louis Edmonds ed., 1999) [hereinafter *THE PRC AFTER 50 YEARS*] ("Through the first 30 years of the PRC, the [National People's Congress] was little more than a 'rubber stamp' charged with giving legislative form to [Chinese Communist Party] policy directives."). Unlike subsidiary in the European Union, or federalism in the United States, the implementing measures are rarely codified, or even recorded.

²³Convention on Protection of Children and Cooperation in Respect to Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 182, *available at* <http://www.hcch.net/e/conventions/text33e.html>. For a detailed analysis, see Richard R. Carlson, *The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption*, 30 *TULSA L.J.* 243 (1994). *See also* G. Parra-Aranguren, *Explanatory Report on the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, at <http://www.hcch.net/e/conventions/exp133e.html> (last visited Oct. 10, 2003) (providing in-depth analysis of convention's history and proceedings and Civil Covenant's text). The *Explanatory Report* is particularly important because there is no supranational institution to provide an authoritative interpretation. For a succinct statement of the Convention's advantages, see U.S. Dep't of State, *Hague Convention on Intercountry Adoption*, at <http://travel.state.gov/hagueinfo2002.html> (last visited Sept. 25, 2003).

²⁴*Compare* the Civil Covenant, *supra* note 21, art. 23, requiring states to ensure the equal rights of women in general, and the Convention on the Elimination of All Forms of Discrimination Against Women *adopted* Dec. 18, 1979, 1249 U.N.T.S. 13, 16 [hereinafter Women's Convention], which defines discrimination against women in detail, *see infra* notes 139–45 and accompanying text, and even more specifically requires states "to modify the social and cultural patterns of conduct of men and women, with a view [to eliminate] all . . . practices which are based on . . . stereotyped roles . . ." *Id.* art. 5(a), 1249 U.N.T.S. at 17.

²⁵*See, e.g., Hague Convention on Intercountry Adoption, supra* note 23, at Chapt. III (requiring States to designate a Central Authority, responsible for ensuring that adoptions proceed in accordance with Chapt. IV). These duties may be delegated to other public authorities or "duly accredited bodies," such as private adoption agencies. Under Article 22(2), a State may declare that these functions will be performed by other "qualified" persons, such as lawyers or social workers,

human rights law that brings them to the United States, nor the de facto enjoyment of more human rights than the left-behind baby girls can dream of,²⁷ but rather the violation of their birth parents' human rights that precipitates the girls' journeys.²⁸ Nor does international family law facilitate these adoptions. Rather, it is the absence of that law here that makes them possible.²⁹

I. THE FIRST TELLING: WHERE DO BABIES COME FROM?³⁰

This Part shows how state narratives shape the personal narratives of the birth parents. It explains why the latter are incomprehensible without an understanding of the former. Finally, it analyzes the ways in which both the state and the birth parents' stories draw on international human rights law, even as both violate it.

A. State Narratives

1. The Population Crisis

Historically, large families were the ideal in China, especially for the vast majority of the population that lived in rural areas.³¹ As in most agrarian, preindustrial societies, children were valued as laborers as well as family

but a sending State may specify that only public authorities perform these functions in adoptions involving its children.

²⁶For a PowerPoint presentation of an early version of this Article, I had prepared a series of increasingly complicated grids, showing axes for economics, history, human rights, and suggesting how a third dimension might provide an even richer analysis. This was a set-up: my real point was that the baby girls from China confound the grid. I imagined an advancing cartoon army of the baby girls, cooing as they crawled through the grids and destroying them in the process. But showing this graphically was a daunting technical challenge. I soon gave up and went to get my mail. It included a reprint of Pierre Schlag's brilliant article. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1049 (2002). He elegantly razes the grid. *Id.* at 1055–70.

²⁷See *infra* Part II.B.2 (noting bleak condition of many Chinese adoptees).

²⁸See *infra* Part I.C.2 (describing relative lack of recognition of reproductive rights in international arena).

²⁹See *infra* Part II.B.1 (noting that since China is not party to Hague Convention, its adoption procedures are not encumbered by Convention's requirements).

³⁰As Freud explained, this is the riddle of the Sphinx. See THE FREUD READER 22 (Peter Gay ed., 1989) (referring to "the problems of sexual life (the riddle of the Sphinx—that is, the question of where babies come from)").

³¹As Chow explains, "Confucian ideology emphasized social relationships that created duties not rights. The paramount virtues of a person . . . were the duties of filial piety in the family and the general duty of obedience to authority in society." CHOW, *supra* note 22, at 46. See Neil Gotanda, *Chen the Chosen: Reflections on Unloving*, 81 IOWA L. REV. 1585, 1592 (1996) (noting "strong orientalist impulse, in a discussion about American race, of interpreting Asian Americans through ancient Asian themes"). See generally Colloquium, *The Scholarship of Reconstruction and the Politics of Backlash*, 81 IOWA L. REV. 1467 (1996) (critiquing Jim Chen, *Unloving*, 80 IOWA L. REV. 145 (1994)). Cf. Jim Chen, *Untenured but Unrepentant*, 81 IOWA L. REV. 1609, 1609–12 (1996) (responding to critics in colloquium).

members.³² In part because girls joined their husbands' families upon marriage, boys were more important to their parents.³³ Sons were their parents' social security and old-age insurance.³⁴ The birth of a boy was regarded as a "big happiness"; the birth of a girl was viewed as a "small happiness."³⁵

By 1980, however, China's Communist leadership viewed the rapidly increasing population as a major national crisis,³⁶ putting all other national policies, including those regarding modernization and economic stability, at risk.³⁷ Fertility rates of over five live births per woman would make it impossible to maintain, let alone improve, an already dismal standard of living. The country faced imminent disaster, including widespread famine.³⁸

Although the statistics compiled by the government were challenged by demographers outside of China at the time,³⁹ and later by Chinese demographers,⁴⁰ the state mobilized its vast bureaucracy to cope with the perceived emergency.⁴¹ In what contemporary Chinese scholars describe as the

³²As Mao Zedong observed, "[O]f all things in the world, people are the most precious." Rachel A. Bouman, *China's Attempt to Promote Domestic Adoptions: How Does China's One-Child Policy Affect Recent Revisions in China's Adoption Law and Measure Up to the Hague Convention?*, 13 *TRANSNAT'L LAW* 91, 95 (2000).

³³Celia W. Dugger, *Modern Asia's Anomaly: The Girls Who Don't Get Born*, N.Y. TIMES, May 6, 2001, at 4.

³⁴The 1980 law imposed a duty to support family members, including that of children for their parents. "These extended support obligations were designed to supplement China's poor public welfare system." CHOW, *supra* note 22, at 359. See Gerrie Zhang, Note, *U.S. Asylum Policy and Population Control in the People's Republic of China*, 18 *HOUS. J. INT'L L.* 557, 564 n.41 (1996).

³⁵Barbara Jones, *A Small Happiness*, GOOD HOUSEKEEPING, Dec. 1995, at 116, available at <http://www.fwcc.org/smallhappiness.html> (last visited Mar. 10, 2004).

³⁶STAFF OF JOINT ECON. COMM., 97TH CONG., CHINA UNDER THE FOUR MODERNIZATIONS, PART I: SELECTED PAPERS 172 (Comm. Print 1982).

³⁷See generally JUDITH BANISTER, CHINA'S CHANGING POPULATION 184 (1987) (quoting Qian Xinzhong, China's former deputy minister of public health, as stating failure to curb population growth rates would "inevitably slow down the modernizations"); Edwin A. Winckler, *Reinforcing State Birth Planning*, in *TRANSITION FROM COMMUNISM IN CHINA: INSTITUTIONAL AND COMPARATIVE ANALYSIS* 181, 196 (Edwin A. Winckler ed., 1999) (describing China's state birth planning).

³⁸"In the Chinese way of thinking, personal problems are by definition trivial ones. 'People simply would not think to question the government's assessment of the size and seriousness of the population problem.'" Greenhalgh, *supra* note 2, at 866 (quoting Chinese feminist Liu Bohang). See also STEPHEN C. ANGLE, HUMAN RIGHTS AND CHINESE THOUGHT: A CROSS-CULTURAL INQUIRY 239-49 (2002) (describing Chinese emphasis on economic rights).

³⁹JOINT ECON. COMM., *supra* note 36, at 202 (noting that "[f]alsification of economic data had been exposed and denounced The [family planning] data reported by Sichuan Province particularly strained foreign credulity.").

⁴⁰*Id.* at 203 (noting that "statistical authorities in China are also becoming concerned about the problem of falsification of birth data").

⁴¹In 1978, the chairman of the Chinese Communist Party set a definite numerical limit on population growth. Mark Savage, *The Law of Abortion in the Union of Soviet Socialist Republics and the People's Republic of China: Women's Rights in Two Socialist Countries*, 40 *STAN. L. REV.* 1027, 1081 (1988). See also *id.* at 1082 n.283 (reporting C.C.P. Chairman Hua Guofeng urging Fifth National People's Congress to "strive to lower the annual rate of growth of China's population to less than 1 percent within three years").

state's "crisis-salvation narrative,"⁴² the government crafted a comprehensive population-control policy. Local party cadres were ordered to "'grasp' birth control work 'firmly,' to make it part of the 'fierce struggle between the two classes,' [and] to reassert 'the dictatorship of the proletariat' in family planning work"⁴³

2. *Women's Equality*

Under communism, Chinese women are equal to men.⁴⁴ This represents a radical departure from the traditional view, in which women were considered men's inferiors and subordinates.⁴⁵ The official state narrative of women's equality both supported the narrative of population control and was supported by it.⁴⁶ Women would no longer be expected to spend their most productive years birthing and caring for children. Rather, after one or two children, women would take their places beside their husbands in the fields, factories, universities, and laboratories of the new China.⁴⁷

⁴²Greenhalgh, *supra* note 2, at 863.

⁴³JOINT ECON. COMM., *supra* note 36, at 201–02. Abortion was illegal in China from 1949 until 1953, legal under limited circumstances from 1953 until 1965, a form of fertility control between 1965 and 1998, and a form of fertility control, sometimes compulsory, from 1978 to 1988. Savage, *supra* note 41, at 1069, 1081.

⁴⁴Article 53 of the new constitution adopted in March 1978 provided in pertinent part: "Women enjoy equal rights with men in all spheres of political, economic, cultural, social, and family life. . . . Men and women shall marry of their own free will. The State protects marriage, the family, and the mother and child. The State advocates and encourages family planning." Savage, *supra* note 41, at 1081 n.282. See Greenhalgh, *supra* note 2, at 851 (describing "two foundational narratives of nation—the narrative of national crisis and salvation and the narrative of women's liberation"). See generally RICHARD H. SOLOMON, MAO'S REVOLUTION AND THE CHINESE POLITICAL CULTURE 341 (1971) (describing intended effects of women's "liberation").

⁴⁵See CHOW, *supra* note 22, at 358. Chow states:

While [t]he first marriage law of the PRC, promulgated in 1950, sought to promote socialist ideology and modern family structure by eliminating the many inequities of the traditional Chinese family structure that recognized few rights in women, the 1980 Law had the much more pragmatic aim of developing marriage as a social institution creating the stability necessary for modernization and economic development.

Id.

⁴⁶"[I]n China, as in many third world countries, the feminist movement for women's liberation first arose in conjunction with the nationalist movement against colonialism and imperialism, only to be subordinated once political power was reconsolidated." Greenhalgh, *supra* note 2, at 850.

⁴⁷See Savage, *supra* note 41, at 1083 ("Family planning also helps liberate women from onerous household chores to enable them to take a direct part in socialist construction.") (quoting Tso, *Family Planning in Jutung [Rudong] County* (pts. 1–3), PEKING REV., Apr. 7, 1978, at 18, 19–20).

Although it failed to fulfill its promises to women, Maoism at least championed the goal of gender equality. In the post-Mao era, the advance of global capitalism coupled with the retreat of the state from direct intervention in many areas of life have been accompanied by a backlash against (state) feminism.

Greenhalgh, *supra* note 2, at 875.

3. *The One-Child Policy*

Draconian population measures were viewed as necessary to counter traditional preferences for large families.⁴⁸ The infamous “one-child policy” was adopted in the early 1980s, limiting each family to one or at most two children.⁴⁹ This was a matter of state planning, rather than individual family planning.⁵⁰ The policy was enforced through a broad range of methods,⁵¹ including: incentives;⁵² onerous fines on excess children; forced sterilizations;⁵³ abortions;⁵⁴ the refusal to register “unauthorized” children; and oppressive campaigns in which committees would monitor women’s menstrual cycles and visit women who became pregnant, sometimes harassing them for hours until they agreed to abortions.⁵⁵

⁴⁸See CHOW, *supra* note 22, at 359. Chow states that:

[T]he 1980 Marriage Law introduced birth control as a state policy and an explicit duty on the part of both spouses. Family planning would also later be included as a fundamental state policy in the 1982 Constitution . . . [C]reating an explicit obligation . . . legitimates the intervention of the state in preventing couples from having children in violation of the state’s general one child per couple policy . . .

Id.

⁴⁹In 1980, the Marriage Law was amended to require husbands and wives to practice family planning. The one-child policy was introduced two weeks later in an open letter to all members of the Party and the Communist Youth League. Savage, *supra* note 41, at 1084–85. See also Ellen Keng, Note, *Population Control Through the One-Child Policy in China: Its Effects on Women*, 18 WOMEN’S RTS. L. REP. 205, 206–07 (1997) (describing introduction of one-child policy). For an account of earlier, less effective efforts, see Xizhe Peng, *Population Policy and Program in China: Challenge and Prospective*, 35 TEX. INT’L L.J. 51, 52–53 (2000) (describing earlier population policy which had less dramatic success). Cf. Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China’s One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT’L L. REV. 283, 283 (1998) (describing “how China’s one-child policy and its laws regarding children conflict with the only uniform international adoption law presently in existence”).

⁵⁰See Greenhalgh, *supra* note 2, at 870. But see Zhang, *supra* note 34, at 563 (“There is no national law regarding incentives or penalties; the implementation of the family planning policy is the responsibility of provincial and local officials, and enforcement has varied widely from region to region and from year to year.”).

⁵¹For a controversial diatribe against the Chinese one-child policy, see STEVEN W. MOSHER, *BROKEN EARTH: THE RURAL CHINESE* 224–61 (1983). The author was expelled from Stanford’s doctoral program for “unethical conduct related to the project.” Zhang, *supra* note 34, at 571 n.91.

⁵²Incentives include “monthly stipends and preferential medical and educational benefits.” Zhang, *supra* note 34, at 562. These may also include “larger living quarters for the family, and small cash subsidies.” *Id.* at 563.

⁵³This included operations performed in “rushed, high pressure campaigns.” Greenhalgh, *supra* note 2, at 870 (citation omitted).

⁵⁴See U.S. DEP’T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993*, at 609 (Comm. Print 1994) (describing instances of forced abortion and sterilization in remote rural areas).

⁵⁵The extent of opposition to the one-child policy, and thus the need for coercive measures to impose it, is unknown. As Marianne Blair and Merle Weiner point out, there is “[c]onflicting information about the extent coercion’s used to further China’s population policies.” MARIANNE BLAIR & MERLE WEINER, *FAMILY LAW IN THE WORLD COMMUNITY* 983 (2003). But see Charles E. Schulman, Note, *The Grant of Asylum to Chinese Citizens Who Oppose China’s One-Child Policy: A Policy of Persecution or Population Control?*, 16 B.C. THIRD WORLD L.J. 313, 317 (1996)

In terms of population, the one-child policy was an unprecedented success. Fertility rates fell dramatically. The child-bearing rate dropped from 5.81 in 1970 to 2.31 in 1990⁵⁶—barely above the rate at which the population does not grow (2.1), but merely replaces itself.⁵⁷

While the one-child policy has never been formally rescinded,⁵⁸ recent reports indicate that it is being phased out.⁵⁹ The State Family Planning Commission has reiterated its commitment to family planning work, however, more specifically, to “cut []the natural growth rate to less than ten per thousand by 2000” and “keep []the total population . . . under 1.3 billion by 2000”⁶⁰ But the recent clarification of policy insists that “[f]amily planning personnel . . . perform their duties in accordance with the law and . . . in a just and civilized way . . . [so] that the legitimate rights and interests of the people are protected.”⁶¹ The focus is to be on education and publicity, to change public attitudes, especially in rural areas, and to involve rural women in the process.

B. Birth-Parent Narratives

In a Chinese study conducted so as to guarantee anonymity,⁶² birth parents said that the overwhelming majority of abandoned children were second daughters. The primary reason for abandonment was the desire for a son.⁶³ By abandoning their daughters, they could try again. Because of fines and other penalties, along with the same bias against girls which led to their abandonment,

(describing methods of punishment for not following population policies and incentives to follow these policies). Scholars have documented a resurgence of interest in domesticity among young women in China, which has been linked to a backlash against state feminism. Professor Greenhalgh found one Chinese feminist who supported the state’s policy. In her view, western critics “failed to appreciate the seriousness of China’s population and developmental problems.” Greenhalgh, *supra* note 2, at 861.

⁵⁶Sharon K. Hom, *Female Infanticide in China: The Human Rights Specter and Thoughts Towards (An)Other Vision*, 23 COLUM. HUM. RTS. L. REV. 249, 266 n.59 (1991–92).

⁵⁷Jill M. Bracken, Comment, *Respecting Human Rights in Population Policy: An International Customary Right to Reproductive Choice*, 6 IND. INT’L & COMP. L. REV. 197, 199 (1995).

⁵⁸See Greenhalgh, *supra* note 2, at 851–52 (“China’s leaders remain deeply committed to a policy that largely achieved its demographic goals almost a decade ago . . .”).

⁵⁹About Adoption, *China Eases the One-Child Policy*, at <http://www.adoption.about.com/library/blchinanew.htm> (last visited Sept. 19, 2003).

⁶⁰State Family Planning Comm., *The National Family Planning Program of China 1995–2000*, at www.unescap.org/pop/database/law_china/ch_record015.htm (last visited Sept. 27, 2003).

⁶¹*Id.*

⁶²Kay Johnson et al., *Infant Abandonment and Adoption in China*, 24 POPULATION & DEV. REV. 469, 570 (1998). See also Lisa Marlene Edelsward, *How Chinese Girls Come to be Abandoned*, at <http://mcom.cit.ie/iccg/lisatory.html> (last visited Oct. 9, 2003) (describing anonymous Chinese study).

⁶³Johnson et al., *supra* note 62, at 475. See also Greenhalgh, *supra* note 2, at 871 (“Gender bias coupled with ignorance of reproductive biology have resulted in the scapegoating of women, who are blamed for their failure to produce a son . . .”).

attempts by Chinese birth parents to reclaim abandoned infants are virtually unknown.

Many birth parents said that they left their infants close to their homes.⁶⁴ Some watched to make sure the child was found.⁶⁵ Approximately 25% of the abandoning parents were discovered and subjected to sanctions, including the forced sterilization of the mother.⁶⁶ Abandonment is illegal in China,⁶⁷ but it has become epidemic since the inception of the one-child policy.⁶⁸

Roughly 88% of the abandonments occur in the countryside.⁶⁹ In about half of the cases, the decision to abandon the child was made by the father, in approximately 40%, by both parents.⁷⁰ The remaining 10% of the abandonment decisions were divided equally between the father's parents and the mother.⁷¹ Mothers wept during in-depth interviews in which they described abandoning daughters ten years earlier.⁷² One woman remained ambivalent about having another child, although she was authorized to do so and under insistent pressure from her husband and his parents.⁷³ If she did become pregnant, she swore she would "never again abandon one of her babies."⁷⁴

C. The Laws

1. Chinese Policy on Foreign Adoptions⁷⁵

There are no exact statistics on the number of babies abandoned. As noted above, birth rates predict almost a million more infant girls than appear in Chinese population statistics.⁷⁶ An estimated 15%, approximately 191,089, are missing because of "excess female mortality"; that is, sex-selective abortion, infanticide,

⁶⁴Edelsward, *supra* note 62.

⁶⁵*Id.*

⁶⁶*Id.*

⁶⁷Abandonment was criminalized in the 1950 and 1980 Marriage Laws and in the 1992 Law Protecting the Rights and Interests of Women and Children. Johnson et al., *supra* note 62, at 479. Most birth parents are not punished, however. *Id.*

⁶⁸Johnson et al., *supra* note 62, at 472-73.

⁶⁹*Id.* at 474; Edelsward, *supra* note 62.

⁷⁰Johnson et al., *supra* note 62, at 474.

⁷¹Edelsward, *supra* note 62.

⁷²*Id.* See also Anchee Min, *Preface* to KARIN EVANS, *THE LOST DAUGHTERS OF CHINA: ABANDONED GIRLS, THEIR JOURNEY TO AMERICA, AND THE SEARCH FOR A MISSING PAST*, at xi (2000). Min, quoting a foster mother from Anhui province, states:

There are nutty-looking women who sneak around my house from time to time trying to locate the daughters they abandoned. They don't say anything. No questions. They just wander around like ghosts. I tell them that it's no good to linger on in the pain. Let the past be gone. These children are going to live.

Id.

⁷³Edelsward, *supra* note 62.

⁷⁴*Id.*

⁷⁵See discussion *supra* note 22 (describing relationship between law and policy in China).

⁷⁶See *supra* note 2 and accompanying text.

or neglect.⁷⁷ The missing female infants are a matter of growing concern, although there is no official state account of them.⁷⁸ Nor have Chinese feminists addressed this issue.⁷⁹ According to one Chinese feminist, “to solve the infant girl problem . . . would entail nothing less than changing the entire economic and social structure, including the family and inheritance system.”⁸⁰

A very small proportion—less than 1% of this missing population—is adopted by foreign parents, 90% of whom are from the United States.⁸¹ In 1991, only sixty-one infants from China received orphan visas and were admitted to this country.⁸² This number more than tripled to 206 in 1992.⁸³ In 1993, despite a

⁷⁷See, e.g., Dugger, *supra* note 33 (noting that although China prohibits sex-selective abortion, in 2000 Census, 117 boys were born for every 100 girls, in sharp contrast to global ratio of 105 boys to 100 girls. See also Colo. Parent Info. & Res. Ctr., *supra* note 2 (discussing disparities in gender of Chinese newborns). As Professor Hom notes, there is nothing new about female infanticide in China. Hom, *supra* note 56, at 254–58 (tracing female infanticide to 2000 B.C. and noting its probable resurgence in 1990s).

⁷⁸See Greenhalgh, *supra* note 2, at 867. “Because of a strong son preference rooted in China’s ancient ‘feudal culture,’ the state planning of births has led occasionally to the abandonment and even infanticide of girl babies, but those have been localized problems caused by overzealous grassroots officials.” *Id.*

⁷⁹Most of the feminists interviewed by Greenhalgh accepted “the official narrative that depicts the [plight of infant girls] as minor and attributes it to traditional culture, with no consideration of the role of state policy.” *Id.* at 872. For an explanation of the ways in which “feminism” and “feminist” have been politically problematic terms in China, see *id.* at 849 n.5. Although one of her interviewees denies that she is a feminist, Greenhalgh nevertheless includes her because her “long history of writing on problems faced by women and girls marks her as a feminist in the sense of one actively committed to improving the position of females in Chinese society.” *Id.*

It is a popular concern, in contrast, that because of the dearth of females, millions of Chinese men may be unable to find brides. *Id.* at 872. “Scholars are already investigating the sociological impact of the looming ‘bride shortage’ in China. One augurs that ‘forced marriages, girls stolen for wives, bigamy, visiting prostitutes, rape, adultery . . . homosexuality . . . and weird sexual habits appear to be unavoidable.’” Lilith, *supra* note 6, at 260 (citation omitted). See also Mary H. Hansel, Note, *China’s One-Child Policy’s Effects on Women and the Paradox of Persecution and Trafficking*, 11 S. CAL. REV. L. & WOMEN’S STUD. 369, 377 (2002) (“China is now working up to the aftermath of these practices. This aftermath includes a dire shortage of women. . . . To deal with the women shortage, men are buying and trading for wives from women traffickers.”); Ann Scott Tyson, *Chinese ‘People Mongers’ Prey on Women and Children*, CHRISTIAN SCI. MONITOR, Mar. 29, 1990, at 1 (describing resurgence of modern “slave trade” since relaxation of Maoist rules in 1979).

⁸⁰See, e.g., Greenhalgh, *supra* note 2, at 873. Greenhalgh states:

Liu’s reflections made it clear that the absence of a shared feminist narrative about the missing girls reflected more than just the hegemony of the official narrative and the commission’s politics of secrecy around embarrassing data; it also reflected the entrenched nature of the problem and the real difficulties of ameliorating it in a cultural and institutional environment that is growing ever more masculine as global capital penetrates deeper into the Chinese economy.

Id.

⁸¹See *infra* Part II.A.1 (detailing why parents adopt internationally, especially parents from United States).

⁸²See Table 4.1, *Statistics on Number of Adoptions by Year: Counts of Immigration and Naturalization Service Immigrant Visas as Reported by the Department of State*, in TESSLER ET AL.,

moratorium on adoption while the Ministries of Justice and Civil Affairs jostled for authority, 330 orphans were admitted.⁸⁴ In 1994, foreign adoptions surged to 786, as China permitted second adoptions and adoptions by families with other children.⁸⁵ By 1995, China was the main source of infant orphans coming to the United States.⁸⁶

In the same year, however, Human Rights Watch published *Death by Default*,⁸⁷ a report on the appalling conditions in Chinese orphanages, including "dying rooms" where unwanted babies were allowed to starve to death.⁸⁸ *Death by Default* found that the majority of abandoned children died within a year of their admittance to a state-run orphanage.⁸⁹ Orphanages were quickly closed to foreign visitors.⁹⁰ In 1996, the Ministry of Civil Affairs assumed responsibility for adoptions.⁹¹ By 2000, an unprecedented 5000 visas were issued.⁹²

supra note 6, at 89. The United States opened its doors to foreign orphans after World War II. Stephanie Zeppa, Note, "Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act, 22 HASTINGS INT'L & COMP. L. REV. 161, 164 (1998) (noting that in The Displaced Person's Act of 1948, Congress included provision to admit 3000 displaced orphans, in addition to more than 200,000 refugees from Germany, Austria, and Italy).

⁸³TESSLER ET AL., *supra* note 6, at 89.

⁸⁴*Id.* at 90.

⁸⁵*Id.* at 90–91.

⁸⁶*Id.* at 91.

⁸⁷ROBIN MUNRO & JEFF RIGSBY, HUMAN RIGHTS WATCH, *DEATH BY DEFAULT: A POLICY OF FATAL NEGLECT IN CHINA'S STATE ORPHANAGES* 2 (1996), available at <http://www.hrw.org/summaries/s.china961.html> (last visited Feb. 29, 2004) (noting "that overall annual mortality at many of China's orphanages is far higher than that documented in any other country"). Cf. Research Channel, *Chinese Orphanages: A Johns Hopkins Undergraduate Gets an Inside Look*, at <http://www.researchchannel.org/program/displayseries.asp?collid=265> (online video of cheerful, if modest, orphanage where student volunteered for research project).

⁸⁸Cf. Alexandra Zugravescu & Ana Iacovescu, *The Adoption of Children in Romania*, in INTERCOUNTRY ADOPTION: LAWS AND PERSPECTIVES OF "SENDING COUNTRIES" 39, 42–43 (Eliezer D. Jaffe ed., 1995) [hereinafter INTERCOUNTRY ADOPTION: "SENDING COUNTRIES"] ("Certain magazines and television companies continually exert pressure on Romanian authorities by graphically depicting awful images of institutionalized, handicapped children. The fact is that these pictures were taken in the old regime's orphanages and, since then, the new authorities have taken praiseworthy measures for the improvement of conditions.").

⁸⁹MUNRO & RIGSBY, *supra* note 87, at 2. For a vivid and depressing account of conditions in the orphanage in Fuzhou, see CHRISTOPHER BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS 189 (1993).

⁹⁰But see Human Rights Watch, *Chinese Orphanages: A Follow-up*, at <http://www.hrw.org/summaries/s.china963.2.html> (last updated Mar. 1996) (noting that, as result of *Death by Default*, "it appears that some orphanages have received instructions to provide better clothing and medical care"). As Lilith notes, "after CBS aired an 'Eye to Eye' episode about the conditions of Chinese orphanages, one article refuted the program's depiction in the 'hope that the CBS program does not deter anyone from considering adoption.'" Lilith, *supra* note 6, at 245 (citation omitted).

⁹¹MUNRO & RIGSBY, *supra* note 87, at 1.

⁹²See *supra* note 3 (citing U.S. Department of State statistics).

While the dynamics that led to these policy developments remain hidden in the black box of Chinese politics,⁹³ other sending states have undergone similar policy shifts. National pride is usually the major factor. States insist that they can take care of their own children,⁹⁴ and if they cannot, they do not want the rest of the world to know. Exposure can be a source of tremendous embarrassment, leading to the abrupt termination of intercountry adoption.⁹⁵ This happened in China after *Death by Default*,⁹⁶ in Korea after the Seoul games,⁹⁷ and in Romania after the highly publicized baby-selling scandals following the Ceausescu regime.⁹⁸

The response of sending states to criticism is complicated by the legacies of colonialism that haunt many of them. Western powers occupied much of the globe

⁹³Michael Yahuda, *China's Foreign Relations: The Long March, Future Uncertain*, in THE PRC AFTER 50 YEARS, *supra* note 22, at 88, 92. Yahuda states:

China is stilled ruled by a communist party which has shown itself to be absolutely determined to hold on to power and to have been ruthlessly successful in eliminating political opposition. Its decision-making processes at the highest levels are still clouded in secrecy, where rumor takes the place of transparency.

Id.

⁹⁴As the Indian government recently stated: "The Indian government, in its stress on national pride, believes that a society should and can take care of its own children and does not need to place them for adoption by parents from more affluent nations." Kala Lilani, *Adoption of Children from India*, in INTERCOUNTRY ADOPTION: "SENDING COUNTRIES," *supra* note 88, at 29, 29-30 (citing "rumors about Indian children adopted in foreign countries who have been physically and sexually exploited or used as human guinea pigs for medical experiments").

⁹⁵The fear of such embarrassment may effectively preclude the initiation of intercountry adoption, however desirable. *See, e.g.*, INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE, *supra* note 6, at 1, 3 (noting that "though the Nigerian civil war of the 1960s resulted in thousands of children being made orphans, Nigeria spurned all foreign adoption offers. African countries have not generally sanctioned the adoption of their children by foreigners."). There may be real risks involved in such intercountry adoptions, however, which have been ignored by the West. *See, e.g.*, S.W. Graziella Caiani-Praturlon, *Inter-Country Adoption in European Legislation*, in ADOPTION: INTERNATIONAL PERSPECTIVES, 205, 208 (Euthymia D. Hibbs ed., 1991). Caiani-Praturlon notes that, as of 1991

only Norwegian legislation . . . places a condition on inter-country adoption: there must be the assurance that the 'adoption is not harmful for the minor because of the interruption in his links with his country of origin.' This is the only example of a law that stresses an often undervalued aspect of adoption, that affects a minor who may be traumatized by a total change in environment.

Id.

⁹⁶*See supra* note 87 and accompanying text.

⁹⁷*See, e.g.*, Sam Jameson, *Keeping Them Home: Orphan—A Shade Fades in S. Korea*, L.A. TIMES, Sept. 1, 1989, at 1 (describing North Korea's propaganda about South's "orphan exports"). For a detailed account, see PERTMAN, *supra* note 16, at 226-27.

⁹⁸From August 1, 1990, through July 17, 1991, following the rescission of the law requiring a presidential decision to authorize intercountry adoption, there were no restrictions on such adoptions. "During this period, 10,000 children were sent abroad . . ." Zugravescu & Iacovescu, *supra* note 88, at 42. For a brief period, there were no criminal sanctions in Romania for improper financial gain from adoptions: "This led to trafficking in children and excessive profits from adoptions conducted in Romania and abroad." *Id.*

not that long ago.⁹⁹ They established repressive systems of “law”¹⁰⁰ and helped themselves to their colonies’ precious natural resources.¹⁰¹ Adoption of children from former colonies is seen by some as the most recent iteration of theft, this time of their most precious resource: their children.¹⁰² Related but distinct is the idea, reflected in the Convention on the Rights of the Child (“Children’s Convention”),¹⁰³ that institutional placement in the state of origin is better than intercountry adoption for a child.¹⁰⁴

⁹⁹See, e.g., Edward W. Said, *Yeats and Decolonization*, in NATIONALISM, COLONIALISM AND LITERATURE 69, 71 (Terry Engleton et al. eds., 1990) (“By the beginning of World War I Europe and America held 85 percent of the earth’s surface in some sort of colonial subjugation. This, I hasten to add, did not happen in a fit of absentminded whimsy or as a result of a distracted shopping spree.”).

¹⁰⁰Cf. ADAM HOCHSCHILD, KING LEOPOLD’S GHOST: A STORY OF GREED, TERROR, AND HEROISM IN COLONIAL AFRICA 2 (1998) (describing realization in 1897 of shipping line employee that: “There [was] no trade going on [there]. Little or nothing [was] being exchanged for the rubber and ivory [H]e realize[d] with horror that there [could] only be only one possible explanation for [the] source [of Africa’s exports]: slave labor.”).

¹⁰¹See, e.g., Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT’L. L. & CONTEMP. PROB. 1, 4 (1999) (noting how transformation of colonized states’ economies into “satellites” of colonizing states’ economies led to large scale transfer of resources). Anthony Anghie, *Time Present and Time Past: Globalization, International Financial Institutions, and the Third World*, 32 N.Y.U. INT’L L. & POL. 243 (2000). But see NIALL FERGUSON, EMPIRE: THE RISE AND DEMISE OF THE BRITISH WORLD ORDER AND THE LESSONS FOR GLOBAL POWER (2003) (challenging conventional wisdom that all empires are bad, noting that British Empire spread wealth and technology and encouraged free movement of capital and labor).

¹⁰²As Professor Barbara Tizard puts it, “It is argued that the practice is a new form of colonialism, with wealthy Westerners robbing poor countries of their children, and thus their resources However poor the country, they find the implication that they cannot care for their own children to be undignified and unacceptable.” Barbara Tizard, *Intercountry Adoptions: A Review of the Evidence*, 32 J. CHILD PSYCHOL. & PSYCHIATRY 743, 746 (1991). See also INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE, *supra* note 6, at 2 (noting that developing countries have come to define adoption by westerners of Third World children “as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources”); Parra-Aranguren, *supra* note 23, at paragraph 46 (noting that Bolivia and Columbia stressed that Hague Convention “should not give the impression that states of origin were not able to take care of their children . . .”); Michelle Van Leeuwen, *Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 PAC. RIM. L. & POL’Y J. 189, 202 (1999) (noting that “a more general concern on the part of developing nations . . . has been that international adoptions are just another form of colonialism, and are harmful to a nation’s morale”).

¹⁰³Convention on the Rights of the Child, *opened for signature*, Nov. 20, 1989, 1557 U.N.T.S. 43 (*entered into force* Sept. 2, 1990) [hereinafter Children’s Convention].

¹⁰⁴*Id.* art. 21(b), 1557 U.N.T.S. at 51. See also Jan Linowitz & Neal Boothby, *Cross-Cultural Placements*, in EVERETT M. WRESSLER ET AL., UNACCOMPANIED CHILDREN: CARE AND PROTECTION IN WARS, NATURAL DISASTERS, AND REFUGEE MOVEMENTS 181, 186 (1988) (concluding that “[c]learly it’s best when parentless children can be placed in families within native communities and homelands”). Cf. Part II.B.2.(c) (discussing American adoptive parents’ attempts to include Chinese culture in their adoptive daughters’ lives). But see Parra-Aranguren, *supra* note 23, at paragraph 46 (explaining preference for intercountry adoption in Hague Convention).

2. *International Human Rights Law*

While *women's* rights were an important part of China's official story, "reproductive rights" were not.¹⁰⁵ Indeed, consideration of the latter was preempted by the population crisis.¹⁰⁶ In general, reproductive rights are not as well established in international human rights law as equality rights.¹⁰⁷ The Civil Covenant¹⁰⁸ addresses civil and political rights, such as freedom of expression and freedom of religion, familiar to citizens of the United States from our own Constitution.¹⁰⁹ While Article 3 of the Civil Covenant requires states to "ensure the equal right of men and women to the enjoyment of all civil and political rights,"¹¹⁰ there is no explicit reference to reproductive rights.¹¹¹ Article 17 recognizes a right to "privacy,"¹¹² but unlike the right to privacy that the U.S. Supreme Court has found in the U.S. Constitution,¹¹³ the international version has not been interpreted to include the right to *reproductive* privacy.¹¹⁴

Article 23 of the Civil Covenant assures the "right of men and women of marriageable age to marry and to found a family"¹¹⁵ and requires the state to "take

¹⁰⁵See, e.g., Greenhalgh, *supra* note 2, at 870 ("[E]very one of my interlocutors lauded the one-child policy for multiplying women's options, but none noted that the same or similar freedoms could have been won with a less drastic policy.").

¹⁰⁶*Id.* at 860 ("With the official line stating that birth planning was an unmitigated good for women, arguing in print that the program also had deleterious effects was politically risky.").

¹⁰⁷The right to reproductive choice was first explicitly declared in the 1968 Proclamation of Tehran. Bracken, *supra* note 57, at 211; see United Nations Conference on Human Rights, Tehran, Apr. 22 to May 13, 1968, Proclamation of Tehran, art. 16, reprinted in U.N. CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, Vol. I at 54, U.N. Doc. ST/HR/1/Rev.5, U.N. Sales No. E.94.xiv.1 (1994). See also Reed Boland, *Population Policies, Human Rights, and Legal Change*, 44 AM. U. L. REV. 1257, 1258 (1995) (describing relegation of reproductive rights to "second-class status . . . as social and economic rights or [as] women's rights"); Berta Hernandez, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOK. J. INT'L L. 309, 310-11 (1991) (arguing that there is right to reproductive choice under customary international law).

¹⁰⁸Civil Covenant, *supra* note 21.

¹⁰⁹U.S. CONST. amend. I.

¹¹⁰Civil Covenant, *supra* note 21, art. 3, 999 U.N.T.S. at 174.

¹¹¹*Id.*; see also Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 263 (noting growing recognition of abortion regulation as issue of sexual equality).

¹¹²Civil Covenant, *supra* note 21, art. 17, 999 U.N.T.S. at 177.

¹¹³See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding right of privacy protects use of contraceptives by married couples); *Eisenstadt v. Baird*, 405 U.S. 438, 453-54 (1971) (extending privacy right to encompass use of contraceptives by individuals). Cf. Bracken, *supra* note 57, at 213 (tracing development of international reproductive rights from "couples" (in 1968) to "all couples and individuals" (in 1974)).

¹¹⁴As of 1988, only seven out of 170 countries restricted access to contraceptives. Bracken, *supra* note 57, at 216.

¹¹⁵Civil Covenant, *supra* note 21, art. 23.2, 999 U.N.T.S. at 179. See Nichols, *supra* note 11, at 4 (reviewing two recent books that describe how "open, transracial and single parent adoptions

appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage, and at its dissolution.”¹¹⁶ As the Human Rights Committee has observed: “The right to found a family implies, in principle, the possibility to procreate and live together. When States parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory.”¹¹⁷

China’s one-child policy violates even this minimal standard, since it is both “compulsory” and “discriminatory,” the burden of contraception borne almost exclusively by Chinese women.¹¹⁸

In times of “public emergency,” which is certainly how China characterized the population crisis in the early 1980s,¹¹⁹ states may derogate from certain rights, including reproductive rights, under the Civil Covenant.¹²⁰ While forced abortions or sterilizations are prohibited even under this standard, fines for unauthorized children might be acceptable, if they are not onerous. Even if the population crisis is no longer considered a “public emergency,” international human rights law permits states to limit some rights if necessary to ensure “the general welfare.”¹²¹ Permissible limits might include incentives for families with only one child, such as the preferred housing or bonuses currently offered in some regions.

The International Covenant on Economic, Social, and Cultural Rights (the “Economic Covenant”)¹²² assures basic economic and social rights, including the right to health and the right to an adequate standard of living.¹²³ Unlike the Civil

have extended the definition of family . . .”).

¹¹⁶Civil Covenant, *supra* note 21, art. 23.3, 999 U.N.T.S. at 179.

¹¹⁷U.N. Human Rights Committee, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Human Rights Instruments, at 106, U.N. DOC HR1/GEN/1/REV. 4 (2000) (General Comment No. 19, art. 23, ¶ 5).

¹¹⁸*See* Boland, *supra* note 107, at 1260 (describing China’s one-child policy as “the most aggressive antinatalist population policy in the world”).

¹¹⁹*See supra* Part I.A.1 (explaining government fear of possible famine and decreased standard of living due to China’s 1980 population crisis).

¹²⁰Civil Covenant, *supra* note 21, art. 4, 999 U.N.T.S. at 174–78 (precluding derogation with respect to certain core rights, including right to life, right to be free of torture, slavery, imprisonment for debt, retroactive criminalization, or denial of personhood, and right to freedom of thought and religion, but not mentioning reproductive rights). *But see* Boland, *supra* note 107, at 1263 (arguing that denial of reproductive rights may amount to denial of core rights). The absence of reproductive rights in Article 4 is not surprising, given the absence of any mention of these rights in the Civil Covenant. This reflects the relatively recent concern with women’s rights in the development of international human rights law. *See, e.g.*, HUMAN RIGHTS, *supra* note 21, at 383. For a description of the ways in which domestic politics enabled “the entry of feminist voices into the public space of population policy debate,” *see* Greenhalgh, *supra* note 2, at 857.

¹²¹HUMAN RIGHTS, *supra* note 21, at 324–25.

¹²²International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 4 (entered into force Jan. 3, 1976) [hereinafter Economic Covenant].

¹²³*Id.* art. 11–12, 993 U.N.T.S. at 7–8. *See also* Asbjørn Eide & Allan Rosas, *Economic, Social and Cultural Rights: A Universal Challenge*, in ECONOMIC, SOCIAL AND CULTURAL RIGHTS 15, 17 (Asbjørn Eide et al. eds., 1995) (viewing economic, social, and cultural rights as raising “question[s] of income distribution” and “protection of vulnerable groups, such as the poor”);

Covenant, it has no counterpart in U.S. jurisprudence.¹²⁴ Articles 2 and 3 of the Economic Covenant require states to “ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights.”¹²⁵

Article 10 of the Economic Covenant requires states to ensure “family rights”¹²⁶ and Article 12 requires them to ensure the “right to health.”¹²⁷ It has been argued that reproductive rights are crucial to any meaningful understanding of either. Without reproductive rights, parents cannot determine the most fundamental issues of family membership, such as the spacing or number of children. The Economic Covenant has been relied upon to argue *against* state limits on abortion.¹²⁸ The World Health Organization (“WHO”), for example, has noted that the absence of safe contraception and abortion presents grave risks to the health of mothers, whether through unsafe abortions (20 million annually), severe maternal morbidity (20 million cases annually), or perinatal deaths (7.2 million annually).¹²⁹ While it is clear that state-sponsored or state-sanctioned

Danilo Türk, *The United Nations and the Realization of Economic, Social and Cultural Rights*, in DIE DURCHSETZUNG, WIRTSCHAFTLICHER UND SOZIALER GRUNDRECHTE: EINE RECHTS VERGLEICHEN DE BESTAND SAUFNAHME [THE IMPLEMENTATION OF ECONOMIC AND SOCIAL RIGHTS: NATIONAL, INTERNATIONAL AND COMPARATIVE ASPECTS] 95, 106–07 (Franz Matscher ed., 1991) (employing term “economic” as part of set of “economic, social, and cultural rights” that guarantee minimum welfare system).

¹²⁴But cf. Charles L. Black Jr., *Further Reflection on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1104–05 (1986) (arguing that economic rights can be grounded in Constitution); Paul Brest, *Further Beyond the Republican Revival: Toward Radical Republicanism*, 97 YALE L.J. 1623, 1627–28 (1988) (noting “intellectual power” of constitutionality-based arguments for economic rights); Frank I. Michaelman, The Supreme Court, 1968 term, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 *passim* (1969) (exploring Fourteenth Amendment as vehicle to protect against poverty). For a thoughtful analysis of the Supreme Court’s resistance to protecting against poverty, see Jonathan R. Macey, *Some Causes and Consequences of the Bifurcated Treatment of Economic Rights and “Other” Rights Under the United States Constitution*, in ECONOMIC RIGHTS 141, 151–70 (Ellen Frankel Paul et al. eds., 1992).

¹²⁵Economic Covenant, *supra* note 122, art. 3, 993 U.N.T.S. at 5. Article 2 provides that “[t]he States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . or other status.” *Id.* art. 2, 993 U.N.T.S. at 5. However, Article 2 only appears to apply to rights “recognized” in the Covenant. MATTHEW C. CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT 26 (1995).

¹²⁶Economic Covenant, *supra* note 122, art. 10, 993 U.N.T.S. at 7.

¹²⁷*Id.* art. 12, 993 U.N.T.S. at 8.

¹²⁸See generally Introduction, in ABORTION AND PROTECTION OF THE HUMAN FETUS: LEGAL PROBLEMS IN A CROSS-CULTURAL PERSPECTIVE ix, ix–xv (Stanislaw J. Frankowski & George F. Cole eds., 1987) (describing complex process through which various models of abortion are adopted). There is no right under customary international law to abortion. Bracken, *supra* note 57, at 217–18. Rather, there are conflicting trends; namely, liberalized abortion in Canada, China, Burundi, Algeria, and Ghana, but stricter laws on abortion in Ireland, Chile, Ecuador, and Guatemala. *Id.* at 226–27. In 1979, China became the only country that permitted abortion under all circumstances. Savage, *supra* note 41, at 1083.

¹²⁹Sev S. Fluss, *The World Health Organization and Women*, in WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 397, 411 (Kelly D. Askin & Doreen M. Koenig eds., 2000).

coerced abortions or sterilizations violate the Civil and Economic Covenants,¹³⁰ it is not clear what kinds of incentives and disincentives, short of brute force, amount to coercion.¹³¹

Articles 4 and 5 of the Economic Covenant address the non-derogation of economic, social, and cultural rights. Article 4 provides that “the State may subject such rights only to such limitation [sic] as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.”¹³² As Philip Alston notes, this imposes a rigorous standard: “[L]imitations must, in the first place be ‘determined by law’ in accordance with the appropriate national procedures and must not be arbitrary or unreasonable or retroactive. The limitations must also ‘be compatible with the nature’ of these rights.”¹³³

Article 5 extends the prohibition against derogation in three important ways. First, it extends the prohibition to non-state third parties.¹³⁴ Thus, while a violation under the Civil Covenant requires a showing of state practice, the claim that the abuses of the one-child policy are attributable to “overzealous local officials”¹³⁵ is expressly anticipated here. Second, it extends the prohibition to activities indirectly aimed at derogation.¹³⁶ A monetary inducement for a late-term abortion posing significant risk to the mother’s health would arguably violate this standard.¹³⁷ Third, it prohibits derogation of any other rights on the “pretext” that

¹³⁰These do not present health risks; rather, the infirmity the individual seeks to avoid in each case is a *certainty*, guaranteed by the state. Indeed, an argument could be made that coerced abortions or sterilizations are a form of torture. Cf. Boland, *supra* note 107, at 1261 nn.17–18 (citing local Chinese laws from 1987 and 1990 calling for “actual physical force . . . and . . . order[s] to have an abortion or undergo sterilization”).

¹³¹Boland argues that “coercion” includes “forced abortion, sterilization, or contraceptive use; the denial of safe abortion; and more subtle activities, such as the imposition of psychological pressure and incentives that compromise voluntary choice.” Reed Boland et al., *Honoring Human Rights in Population Policies: From Declaration to Action*, in POPULATION POLICIES RECONSIDERED: HEALTH, EMPOWERMENT, AND RIGHTS 89, 100 (Gita Sen et al. eds., 1994). See also Bracken, *supra* note 57, at 235 (arguing that “financial incentives and disincentives remove free choice from individuals and couples and violate their international right to reproductive choice”).

¹³²Economic Covenant, *supra* note 122, 993 U.N.T.S. at 5.

¹³³Philip Alston, *The International Covenant on Economic, Social and Cultural Rights*, in U.N. CENTRE FOR HUMAN RIGHTS MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 39, 48 U.N. Doc. HR/PUB/91/1, U.N. Sales No. E. 91. XIV. 1 (1991).

¹³⁴See Economic Covenant, *supra* note 122, art. 5, 993 U.N.T.S. at 6 (extending protection to “group or person”). As Craven notes, “[i]t must be assumed that where the State is not in a position to ensure the rights itself, it must regulate private interactions to ensure that individuals are not arbitrarily deprived of the enjoyment of their rights by other individuals.” CRAVEN, *supra* note 125, at 112.

¹³⁵See *supra* Part I.A.3 (describing methods used by local Chinese officials to ensure compliance with China’s one-child policy).

¹³⁶See Economic Covenant, *supra* note 122, art. 5, 993 U.N.T.S. at 6.

¹³⁷Whether such abortions would violate the rights of the fetus is beyond the scope of this Article, because such rights are not recognized in international (or Chinese) law. See, e.g., Philip Alston, *The Unborn Child and Abortion Under the Draft Convention on the Rights of the Child*, 12

the Covenant requires such derogation.¹³⁸ This bars precisely the institutionalized violation of rights that critics attribute to the one-child policy.

The Women's Convention,¹³⁹ which China ratified in November 1980,¹⁴⁰ provides the most expansive protection. Article 1 begins by defining the phrase "discrimination against women" to mean "*any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women . . . of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*"¹⁴¹ Article 2 of the Women's Convention further requires the state "[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."¹⁴² This effectively holds the state responsible for *all* discrimination on the basis of gender, whether through state policy or private prejudice.¹⁴³ Thus, the Women's Convention imposes an affirmative obligation on the state to take whatever steps are necessary to counteract discrimination against women, especially with respect to family planning,¹⁴⁴ and women's rights within marriage.¹⁴⁵

HUM. RTS. Q. 156, 173 (1990) (arguing that protection of fetus as person is "inconsistent with the legislative approach which has evolved in many countries" and that such protection would "not only prohibit induced abortion but also many commonly used contraceptive measures such as the postcoital pill and the intrauterine device (IUD)").

¹³⁸Economic Covenant, *supra* note 122, art. 5, 993 U.N.T.S. at 6. China incurs no *legal* consequences because of these violations (as opposed to possible political embarrassment) because China has not ratified either covenant and regards neither as legally binding. The United States has ratified the Civil Covenant, but that Covenant does not require states which are parties to it to censure states which are not. *See supra* note 21 and accompanying text.

¹³⁹Women's Convention, *supra* note 24.

¹⁴⁰*Id.* 1249 U.N.T.S. at 14.

¹⁴¹*Id.* art. 1, 1249 U.N.T.S. at 16 (emphasis added).

¹⁴²*Id.* art. 2(f), 1249 U.N.T.S. at 16.

¹⁴³*See* Rebecca J. Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 228, 236–38 (Rebecca J. Cook ed., 1994). *Cf.* Susan Moller Okin, *Is Multiculturalism Bad For Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 7, 22 (Joshua Cohen et al. eds., 1999) [hereinafter *BAD FOR WOMEN?*] (noting that "[t]he subordination of women is often informal and private At least as important to the development of self-respect and self-esteem is *our place within our culture*. And at least as pertinent to our capacity to question our social roles is *whether our culture instills in us and forces on us particular social roles*.").

¹⁴⁴Women's Convention, *supra* note 24, art. 12.1, 1249 U.N.T.S. at 40.

¹⁴⁵*Id.* art. 16.1(e), 1249 U.N.T.S. at 41 (emphasizing that women have "[t]he same rights [as men] to decide freely and responsibly on the number and spacing of their children . . ."). More states have taken reservations to Article 16 than to any other article in the Convention. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 702 (1990); Katha Pollitt, *Whose Culture?*, in *BAD FOR WOMEN?*, *supra* note 143, at 29. Pollitt states:

That cultural-rights movements have centered on gender is a telling fact about them. . . . [I]t's . . . partly due to the fact that gender and family are retrograde areas of most majority cultures, . . . : these are accommodations majority cultures have often been

While the Women's Convention provides a clear statement of reproductive rights, and measures to be taken to assure them, enforcement is a separate issue.¹⁴⁶

Although some countries, such as the Netherlands, adopt international human rights treaties as domestic law upon ratification,¹⁴⁷ many—including China and the United States—do not. Although China has ratified the Women's Convention, accordingly, it is not enforceable as domestic law in China.¹⁴⁸ This means that Chinese women cannot claim their rights under the Convention in Chinese courts.¹⁴⁹ Nor is there any international tribunal before which they may do so. An Optional Protocol to the Women's Convention¹⁵⁰ enables individual women to file complaints before the United Nations Committee on Elimination of Discrimination Against Women ("CEDAW"), the committee responsible for implementation of the Convention.¹⁵¹ However, this is not an option for Chinese women because China is not a party to the Protocol.¹⁵²

Since the death of Mao Zedong in 1976, China has slowly but inexorably been opening its doors. The same forces that led China to develop relations with western adoption agencies have led to a new era in trade, foreign investment, and educational exchanges.¹⁵³ China has become an active participant in U.N. Conferences,¹⁵⁴ sending a large delegation to the U.N. World Conference on

willing to make. How far would an Algerian immigrant get, I wonder, if he refused to pay the interest on his Visa bill on the grounds that Islam forbids interest on borrowed money?

Id.

¹⁴⁶It usually is in human rights law. *See, e.g., supra* note 21 (describing same difficulties in enforcing international human rights law).

¹⁴⁷Thomas Buerghenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 215 (1997).

¹⁴⁸For a rigorous analysis of China's ratification and implementation of the Women's Convention, see Hom, *supra* note 56, at 298–307 (describing difficulties of actual implementation of Women's Convention in China despite formal compliance with Convention's terms).

¹⁴⁹*But see* EVANS, *supra* note 72, at 106 (describing efforts of Chinese woman to sue for penalties imposed in response to her unauthorized pregnancy).

¹⁵⁰Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, U.N.GAOR, 54th Sess. Annex, Agenda Item 109, U.N.Doc. A/Res/54/4 (1999).

¹⁵¹*Id.* at 3. It is unclear whether the legal capacity to file complaints would actually result in any complaints. According to Greenhalgh, similar complaints have only recently been raised in China. Greenhalgh, *supra* note 2, at 862. Greenhalgh notes that critics of China's population policy have been emerging from widely differing social spaces . . . these critical voices arose only in the mid to late 1990s, long after the problems they focus on developed. Their articulation at this time reflects the impact of the Cairo and Beijing conferences as well as the growing role of foreign NGOs in China's social development.

Id. *But see supra* note 148 and accompanying text (noting difficulties in implementing Women's Convention).

¹⁵²For a useful overview of the Protocol, see Heidi Gilchrist, Note, *The Optional Protocol to the Women's Convention: An Argument for Ratification*, 39 COLUM. J. TRANSNAT'L L. 763 (2001).

¹⁵³*See generally* THE PRC AFTER 50 YEARS, *supra* note 22 (containing collection of essays detailing change in Chinese society from 1949–1999).

¹⁵⁴*See* Yahuda, *supra* note 93, at 91 (noting that "in the 1990s China began to participate more

Population in Cairo in 1994 ("Cairo Conference"),¹⁵⁵ which recast "population" in terms of "women's human rights."¹⁵⁶ China also hosted the World Conference on Women in Beijing in 1995,¹⁵⁷ which reaffirmed the importance of reproductive rights. As a result, women in China are increasingly aware of human rights in general and reproductive rights in particular.

D. Disruption

The baby girls from China who come to New York disrupt the First Telling. They disrupt the state story of a new, "modern" China by showing that traditional bias against girls remains all too real. They disrupt the birth parent narrative of traditional culture by escaping it. Finally, they disrupt the notion of human rights as "nesting." Rather, they expose the inherent tensions in human rights law, especially when human rights norms conflict with traditional cultural values.

The one-child policy both violates human rights and promotes them.¹⁵⁸ While some of the measures used to enforce the one-child policy violate reproductive rights, the one-child policy furthers economic rights by reducing an unsustainable growth rate.¹⁵⁹ It furthers women's equality in particular by countering traditional social and cultural pressures to bear sons. As many commentators have observed,

actively in multilateral diplomatic settings . . .").

¹⁵⁵*Report of the International Conference on Population and Development*, U.N. Conference on Population and Development, U.N. Doc. A/CONF. 171/13 (1994) (containing insightful analysis of women's human-rights concerns brought out in Cairo Conference).

¹⁵⁶NADINE TAUB, INTERNATIONAL CONFERENCE ON POPULATION AND DEVELOPMENT (American Society of International Law, Issue Papers on World Conferences No. 1, 1994). *See also* Greenhalgh, *supra* note 2, at 855 (noting that "[t]he Cairo process gave supporters of change a vocabulary of reform that dovetailed neatly with concerns that were developing domestically [in China]. In the wake of the conference, contacts and collaborations with foreign organizations advancing reproductive health agendas multiplied as never before . . ." (citation omitted)).

¹⁵⁷U.N. FOURTH WORLD CONFERENCE ON WOMEN, THE BEIJING DECLARATION AND PLATFORM FOR ACTION, U.N. Doc. DPI/1766/WOM (1996). For a perceptive overview, see REBECCA J. COOK, THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN (American Society of International Law, Issue Papers on World Conferences No. 5, 1995). *See also* Greenhalgh, *supra* note 2, at 856–57 (describing "multiplying links to transnational agencies and feminist and reproductive health networks" forged at Fourth World Conference on Women held in Beijing in 1995).

¹⁵⁸This is an international iteration of what Margaret Radin has described as the "double-bind." Margaret Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1699–1704 (1990). *Cf.* Julie Mertus & Pamela Goldberg, *A Perspective on Women and International Human Rights After the Vienna Declaration: The Inside/Outside Construct*, 26 N.Y.U. J. INT'L L. & POL. 201, 204 (1994) (describing dilemmas of "women experiencing complex, interwoven oppressions . . .").

¹⁵⁹The benefits of reducing growth rates were recognized at the Mexico City conference on population and the environment in 1984. *Report of the International Conference on Population*, U.N. Department of Technical Cooperation for Development, at 2–3, U.N. Doc. E/CONF.76/19, U.N. Sales No. E.84.XIII.8 (1984). The plan of action adopted at the 1984 Mexico City conference explicitly urged governments "to take appropriate steps to help women avoid abortion, which in no case should be promoted as a method of family planning." *Id.* Recommendation 1B(e) at 21.

moreover, women's equality is key to any real enjoyment of reproductive rights.¹⁶⁰ Access to information and education regarding contraception is a crucial first step; but if a woman does not enjoy equal rights within the family, the reproductive rights of the couple are apt to be exercised by the husband.

In addition, earlier, more moderate efforts to curb population growth were less successful.¹⁶¹ Indeed, the one million baby girls missing annually suggest that too much may not be enough: even if the government has gone too far (in human-rights terms) in implementing the one-child policy, it has not gone far enough to counter traditional norms.¹⁶² The mothers of the baby girls, moreover, have *not* been subjected to the forced sterilizations or abortions (at least with respect to these births) that would clearly constitute human-rights violations.¹⁶³ Finally, the *government* is not abandoning these baby girls. Rather, it has explicitly criminalized such abandonment,¹⁶⁴ and a recent publication by the State Family Planning Commission mandates "[c]onstant efforts . . . [to] put an end to infanticide and abandonment of girl babies."¹⁶⁵ Despite these measures, rural families continue to abandon girls, hoping to have a boy instead.

II. THE SECOND TELLING: COMING TO AMERICA¹⁶⁶

This Part tells the adoption story from the perspective of the adoptive parents. First, it explains why they adopt from China, as well as the stories they

¹⁶⁰Cf. Okin, *supra* note 143, at 14. Okin notes that:

Many of the world's traditions and cultures, including those practiced . . . [in] Asia [] are quite distinctly patriarchal. They too have elaborate patterns of socialization, rituals, matrimonial customs, and other cultural practices . . . aimed at bringing women's sexuality and reproductive capabilities under men's control. Many such practices make it virtually impossible for women to choose to live independently of men, to be celibate or lesbian, or to decide not to have children.

Id.

¹⁶¹See Peng, *supra* note 49, at 52–53 (describing history of China's effort to curb population growth).

¹⁶²Cf. Bonnie Honig, "My Culture Made Me Do It", in *BAD FOR WOMEN?*, *supra* note 143, at 35, 40 (stating that "supporting a culture's own efforts 'to alter itself so as to reinforce the equality,' . . . of women[] is . . . promising").

¹⁶³Some of the mothers who abandoned their daughters may have done so in fear of punitive sterilization, however. See, e.g., Johnson et al., *supra* note 62, at 479–80 (noting seventeen instances where punishment for abandonment of baby girls involved sterilization of birth mothers).

¹⁶⁴*Id.* at 479; see also *supra* note 67 and accompanying text (noting anti-abandonment laws in China).

¹⁶⁵State Family Planning Comm., *supra* note 60.

¹⁶⁶The Baby Girls are not the first (and probably not the last) to come to America, where they are an ethnic and racial minority, to create a new family. In *Coming to America* (Paramount Pictures 1988), for example, Eddie Murphy portrays an African prince who comes to New York to find a bride. The African kingdom from which he comes (where his father, played by James Earl Jones, is a benign and beloved absolute monarch) resembles a state in the *real* Africa about as much as the stories of China told the Baby Girls resemble China today. The purpose of the idealized portrayals of both is the same: to inspire respect for the ethnic group of origin.

tell their daughters. Second, it analyzes the laws and the absence of laws that shape those stories.

A. Adoptive Parents' Narratives

The adoptive parents must negotiate two boundaries. First, in order to become parents, they must find an available baby. This Section focuses first on the adoptive parents' relationship with their daughter's family and culture of origin. This is the boundary between the First and Second Telling. Second, in order to prepare their daughter for independence—to enable her to tell her own story—they must provide her with a sense of her own ethnic identity. This Section next examines the relationship the adoptive parents seek to establish, or to make possible, between their daughter and her family and culture of origin. This is the boundary between the Second and Third Telling.

1. Their Stories: Why China?

*(a) Healthy Babies with No Strings*¹⁶⁷

Americans adopt 80–90% of the Chinese orphans placed with foreign families.¹⁶⁸ There is little empirical data regarding parent motivation, but one study, along with anecdotal accounts, suggests a range of reasons.¹⁶⁹ Surveyed parents indicate that “being secure from subsequent claims by birth parents” was a significant factor.¹⁷⁰ The highly publicized “Baby Richard” and “Baby Jessica”¹⁷¹

¹⁶⁷Lilith argues that “the decision to adopt internationally is often reported as based in part on convenience, a highly valued modern commodity.” Lilith, *supra* note 6, at 240.

¹⁶⁸Van Leeuwen, *supra* note 102, at 190. See also PERTMAN, *supra* note 16, at 51. Pertman states:

It's no accident that Americans adopt more children internationally than do the inhabitants of the rest of the planet combined. After all, nearly every one of us came to this extraordinary country from somewhere else . . . [t]hroughout its history, this nation has opened its doors to people who, for more reasons than anyone can count, have needed new homes. It has taken us in, given us new lives. Adopted us.

Id.

¹⁶⁹TESSLER ET AL., *supra* note 6, at 81 tbl. 3.6 (summarizing response to survey questions regarding reasons parents adopt from China). “Believing a Chinese child would be more intelligent than a child of another ethnicity” was generally viewed as “not at all important” and “believing a Chinese child would be easier to raise” received even fewer votes. *Id.*

¹⁷⁰*Id.* “[F]eeling secure that birth parents could not change their mind” received a score of 3.21 out of a possible 5; “not wanting to deal with birth parents” received a slightly lower score of 2.77. *Id.* See also PERTMAN, *supra* note 16, at 54 (noting that one reason Americans adopt abroad is their belief that “it will allow them to avoid dealing with . . . the birth parents”).

¹⁷¹*DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649 (Mich. 1993). The court ordered Baby Jessica's return to her biological parents after she had lived with her adoptive parents for two and a half years. *Id.* at 668. During this time they filed appeals and tried to initiate proceedings in another state. *Id.* at 652–54.

cases, in which adoptive parents were required to return babies to their biological parents by U.S. courts, made international adoptions even more appealing.¹⁷²

Other prospective parents are willing to deal with birth parents,¹⁷³ but cannot afford private adoptions, which can cost up to \$35,000.¹⁷⁴ A Chinese adoption costs approximately \$20,000.¹⁷⁵ This includes the \$3,000 "donation" to the orphanage required by the Chinese government.¹⁷⁶

The adoptive parents might not be the kind of parents American birth mothers would choose. Or the adoptive parents do not want to wait years for a healthy white infant.¹⁷⁷ Chinese adoptions, in contrast, generally take about eight months.¹⁷⁸ Single¹⁷⁹ and older parents may have few alternatives in the United States.¹⁸⁰ The complicated politics of race-matching in American adoptions is also likely to be a factor.

¹⁷²Zeppa, *supra* note 82, at 165–66. Darlene Gavron Stevens & Patricia Tennison, *Adoptive Parents Fear 'Baby Jessica' Legacy*, CHI. TRIB., July 24, 1993, at 1 (noting parents' anxiety in wake of case).

¹⁷³See PERTMAN, *supra* note 16, at 58 (describing parents of adopted baby girl from China whose "main regret is that, because [she] was abandoned, she'll never be able to meet members of her birth family or even obtain information about them").

¹⁷⁴Nichols, *supra* note 11, at 4. See also Posner, *supra* note 6, at 59 (noting that adoption agencies often charge "stiff" fees); *but see id.* at 71 (suggesting that "equilibrium baby price in a free market . . . might not exceed \$5,000").

¹⁷⁵Van Leeuwen, *supra* note 102, at 199; Lilith, *supra* note 6, at 225–26 (noting that cost of adopting a child from China has risen from \$12,000 to \$17,000 per child in 1992 to \$20,000 to \$27,000 per child in 1999).

¹⁷⁶As Evans notes, "In Guangdong province, the richest province in China, that \$3,000 can be equal to a couple years' worth of wages for a factory worker." EVANS, *supra* note 72, at 23.

¹⁷⁷E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 202 (1998) ("By 1975, adoption agencies across the nation began to stop taking requests for healthy, white infants. Social workers often informed prospective adoptive parents that they would likely wait three to five years for such a child.").

¹⁷⁸Van Leeuwen, *supra* note 102, at 199. See also EVANS, *supra* note 72, at 14 (noting estimate of one year).

¹⁷⁹A single parent hoping to adopt from China cannot be homosexual, however, because China no longer accepts applications from homosexuals, who often find it difficult to adopt domestically. See Lisa Hillis, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEGAL STUD. 237, 246 (1998) (arguing that "among all potential adoptive parents, homosexuals face the greatest opposition"). See, e.g., Ariana R. Jaffe, *Foster-Parenting and Adoption*, 3 GEO. J. GENDER & L. 393, 404–05 (2002) (noting that Florida, Mississippi, and Utah prohibit gay and lesbian adoption, while Massachusetts, New York, Vermont, and the District of Columbia have permitted adoptions by same-sex couples or gay and lesbian individuals).

¹⁸⁰See, e.g., Kim Clark & Nancy Shute, *The Adoption Maze*, U.S. NEWS & WORLD REP., Mar. 12, 2001, at 58, 58 ("The supply of babies is severely limited and the market is unregulated. But savvy couples manage to succeed despite high costs, bureaucratic roadblocks and outright scams."). See also BARTHOLET, *supra* note 8, at 119 (noting that "virtually every country presents its own set of difficulties. Some have programs with long waiting lists of prospective adopters; some have restrictive parent eligibility criteria that excludes singles and those over forty from consideration; some take from six to twelve months to process an adoption, requiring the child to wait in a foster home or an institution until the adoption is finalized. Countries that make foreign adoption relatively

(b) *Their Daughters' Ethnic Community*

(i) The Black/White Paradigm

Interracial adoption is permitted in every state in the United States. Indeed, any effort to prohibit it would be subject to constitutional challenge as a violation of the Fourteenth Amendment's Equal Protection guarantees.¹⁸¹ At the same time, domestic transracial adoptions involving the adoption of black children by white parents has been problematic.¹⁸² Many agencies have been reluctant to place black children with white parents.¹⁸³ The Association of Black Social Workers has

easy one day often close down the next."); see Zugravescu & Iacovescu, *INTERCOUNTRY ADOPTION: "SENDING COUNTRIES," supra* note 88, at 39 (unmarried persons cannot adopt in Romania); Tzanka Tzankova, *Adoption According to Bulgarian Family Law, in INTERCOUNTRY ADOPTION: "SENDING COUNTRIES," supra* note 88, at 53, 56 (noting possibility of one person or married couple adopting, but prohibition on adoption by unmarried couple).

¹⁸¹See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984). In *Palmore*, the U.S. Supreme Court overturned a state court custody decision removing a child from her white mother and black stepfather on the ground that she would "suffer from the social stigmatization that is sure to come." *Id.* at 431. While noting that "[i]t would ignore reality to suggest that racial and ethnic prejudices do not exist," the Court held that, "[t]he Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.* at 433. For cases refusing to modify custody because of interracial marriage before *Palmore*, see Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 931 n.35. At least one lower court since *Palmore* has recognized that it may be necessary to protect a particular child shunned and tormented by local children following his mother's marriage to a man of a different race. See *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987). For a critique of *Palmore* for failing to consider "the possibility that a Black stepfather might offer a positive value to the child," see Neil Gotanda, *A Critique of "Our Constitution is Color-blind"*, 44 STAN. L. REV. 1, 57-58 (1991). Cf. Hillis, *supra* note 179, at 247 (conceding that "there may be some legitimacy to the argument that children of homosexuals face a degree of stigmatization from their peers").

¹⁸²See generally IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) (analyzing ways in which race is legally constructed). Cf. Kai Jackson & Catherine E. McKinley, *Sisters: A Reunion Story, in THE ADOPTION READER: BIRTH MOTHERS, ADOPTIVE MOTHERS, AND ADOPTED DAUGHTERS* 190, 191 (Susan Wadia-Ells ed., 1995) [hereinafter *THE ADOPTION READER*] (describing adoptee's discovery that her biological father was white).

¹⁸³In 1985, for example, I called the agency from which I had been adopted (hoping for some kind of alumni preference) and was informed that they were only accepting applications from "black families." See also BAGLEY, *supra* note 89, at 72 ("Trans-racial adoption was not halted [in the U.S.] because data indicated that it was a failure, that adoptees and/or adoptive families suffered any damaging social or psychological effects Transracial adoption died because child welfare agencies no longer saw it as politically expedient" (citing R. SIMON & H. ALSTEIN, *TRANSRACIAL ADOPTIVES AND FAMILIES: A STUDY OF IDENTITY AND COMMITMENT* 143 (1987))); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1183-84 (1991) (noting most adoption agencies are governed by race-matching policies). But see Dowd, *supra* note 6, at 924 ("Feminists who insist that race and class must always be taken into account along with gender might argue that the failure to do so is a serious drawback in Bartholet's overall analytical approach.").

strongly opposed such placements for thirty years, on the grounds that they are not in the best interest¹⁸⁴ of black children.¹⁸⁵ As Twila Perry observes: "The researchers on transracial adoption are still virtually unanimous in their conclusion that it remains preferable for Black children to be placed with Black adoptive parents, if possible."¹⁸⁶

A major concern is that white parents will not be as able as black parents to teach their adopted black children how to cope with a racist society. James S. Bowen argues, for example, that white parents are unlikely to provide black children with "Black survival skills."¹⁸⁷ A related concern is that black children raised by white parents will be cut off from the black community. As black adoptee Susan Harris says, "I loved my parents, and I know that they loved me. I would not have traded them in for anyone, although I would have traded the all-white environment for an integrated one. And I know plenty of African-American transracial adoptees who feel the same."¹⁸⁸

¹⁸⁴See generally Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984) (critiquing "best interest" standard in interracial adoption).

¹⁸⁵NAT'L ASS'N. OF BLACK SOCIAL WORKERS, POSITION PAPER (Fourth Annual Conference of the N.A.B.S.W., Nashville, Apr. 4-9, 1972), reprinted in RITA JAMES SIMON & HOWARD ALSTEIN, *TRANSRACIAL ADOPTION* 30-52 (1997); TESSLER ET AL., *supra* note 6, at 8 ("U.S. domestic transracial adoptions have been objected to since 1972 by the National Association of Black Social Workers on the grounds that to deny black children their heritage and their identification as African-Americans . . . is to commit a form of genocide.").

¹⁸⁶Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 126 n.85 (1998); see also Dowd, *supra* note 6, at 924 (noting feminists' argument that "race should be taken into account in placing racial minorities, based on evidence that same-race placement benefits children even if cross-race placements do not hurt them, and that such placement is vital to the group interests of racial minorities"); Harris, *supra* note 19, at 5-7 (describing painful isolation of adoptee who is racially or culturally different from overwhelmingly white community and added dimension for African-American transracial adoptees whose physical appearance marks them as members of group which has been "historically exploited and oppressed").

¹⁸⁷These include several learned abilities:

[T]o ignore (racial) insults; to decipher the appropriateness of fighting back or submission; to emphasize Black strength, beauty and worth as a countermeasure to the denigration of Blackness in America; . . . to evaluate both objectively and subjectively the level of nepotistic advantage or same-group favoritism which precludes opportunities and advancement in education, employment or business.

James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 510 (1988). But see Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER L. & POL'Y 99, 102 (1995) (arguing that "[coping skills] kinds of arguments could also be applied to oppose integrated education and interracial marriage. If we think that black children can only develop appropriate coping skills and racial identities under the tutelage of black adults, then we should send them to schools with all-black faculties."). Cf. Forde-Mazrui, *supra* note 181, at 953 (arguing that "the experience of white parents may benefit Black children by teaching [them] to be less race conscious").

¹⁸⁸Harris, *supra* note 19, at 9. But see JOAN HEIFETZ HOLLINGER, ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994, AS AMENDED BY THE

In 1994, however, Congress found that the interests of hundreds of thousands of children in the child protective system waiting for permanent placement were ill-served by race matching policies. As adoption law expert Joan Hollinger noted: "Of particular concern are the African American and other minority children who are dramatically over-represented at all stages of this system, wait far longer than Caucasian children for adoption, and are at far greater risk of never experiencing a permanent home."¹⁸⁹

To address the needs of these children, Congress enacted the Howard M. Metzenbaum Multiethnic Placement Act of 1994 ("MPA").¹⁹⁰ As amended by the Interethnic Adoption Provisions of 1996,¹⁹¹ the MPA prohibits any entity that receives federal financial assistance from "delaying or denying a child's foster care or adoptive placement on the basis of the child's or the prospective parent's race, color, or national origin."¹⁹²

While the MPA diminishes the importance of race in adoption as a legal factor, it nevertheless remains a social factor. As Professor Barbara Bennett Woodhouse argues: "[R]ace and culture of origin, no matter how hard to define with satisfying logic, *do* matter to children and therefore *should* matter in

INTERETHNIC ADOPTION PROVISIONS OF 1996 at 6 (1998) (noting that "[t]he few studies that track children into their twenties indicate that transracial adoptees are doing well, maintain solid relationships with their adoptive families, and may have higher educational attainments than same-race adoptees"); Forde-Mazrui, *supra* note 181, at 948 ("White parents can provide books and music about Black culture, encourage friendships with other Black children, and encourage participation in Black cultural activities . . ."). Cf. Me-K. Ando, *Living in Half-Tones*, in THE ADOPTION READER, *supra* note 182, at 179–80 (describing confusion of Korean adoptee raised by Japanese woman and her German-Swedish husband: "I feel lucky to have been adopted by at least one parent of Asian descent. I can't imagine having two white parents."). See generally Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y 131 (1995) (exploring issues of interracial adoption).

¹⁸⁹HOLLINGER, *supra* note 188, at iii. As Professor Howe notes, however, "African-Americans adopt at a higher rate than European Americans or Hispanic families." Howe, *supra* note 188, at 158. While Professor Howe cites a survey indicating that "'three million' black household heads were interested in formally adopting a black child; [a] number [that] far exceeds the total number of Black children legally free for adoption," she cites other factors that discourage black prospective parents from adopting, including agency practices, and high fees which effectively preclude lower-income Black families from applying. *Id.* at 158–59 (citing Judith K. McKenzie, *Adoption of Children with Social Needs*, THE FUTURE OF CHILDREN, Spring 1993, at 62). While it has been argued that the availability of baby girls from China reduces the number of possible homes for these children, this is beyond the scope, or the frame, of this Article.

¹⁹⁰Pub. L. No. 103–382, 108 Stat. 3518, 4056–57 (1994) (codified at 42 U.S.C. § 5115(a) (1994)). For a description of the controversies spawned by the MPA, see Barbara Bennett Woodhouse, "Are You My Mother?" *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 120–22 (1995); HOLLINGER, *supra* note 188, at 7 (noting that "courts have allowed race to be one among a number of factors that may appropriately be considered in making placement decisions, especially if sensitivity to the development of the child's racial identity and self-esteem is determined to be important for the well-being of a specific child").

¹⁹¹Pub. L. No. 104–188, 110 Stat. 1903–1904.

¹⁹²HOLLINGER, *supra* note 188, at 2.

adoption law.”¹⁹³ Many prospective adoptive parents, sensitive to the concerns of the child’s community, reach a similar conclusion. They seek other alternatives, accordingly, such as adopting from China.

(ii) “Model Minorities”

The extent to which the reasons for opposing black/white adoptions apply to Chinese/white adoptions is an open question.¹⁹⁴ Like blacks, the Chinese have been discriminated against in the United States, dating back to the Chinese Exclusion Act of May 6, 1882¹⁹⁵ and before. They have been stereotyped,¹⁹⁶ vilified,¹⁹⁷ and the victims of hate crime.¹⁹⁸ The perception, however, is that there

¹⁹³Woodhouse, *supra* note 190, at 114.

¹⁹⁴For a description of “culture-race” as the “basis for the developing concept of cultural diversity,” see Gotanda, *supra* note 181, at 4–5. *Cf. id.* at 58 n.235 (describing author’s representation of Japanese-American mother seeking custody against white American soldier to illustrate point that “race is often an issue in child custody hearings”). As Bartholet notes,

The politics are similar to those involved in the debate about transracial adoption in this country. Children are said to belong with their ‘roots’ and in their communities of origin. Political forces in the ‘sending’ countries have been condemning in increasingly loud voices the practice of giving children to the imperialist North Americans and other foreigners.

BARTHOLET, *supra* note 8, at 143.

¹⁹⁵An Act to Execute Treaty Stipulations Relating to Chinese, ch. 126, 22 STAT. 58 (1882) (barring entry of Chinese laborers). This Act was challenged in the *Chinese Exclusion Case*, 130 U.S. 581 (1889), in which the Supreme Court upheld Congress’ broad power over immigration. *Id.* at 603–06. See John Braeman, *Deportation and Expulsion*, in *ASIAN AMERICANS AND THE SUPREME COURT: A DOCUMENTARY HISTORY* 77, 80–84 (Hyung-Chan Kim ed., 1992). For a sharp critique of the case, see Louis Henkin, *The Constitution and United States Sovereignty: A Century of Chinese Exclusion and its Progeny*, 100 HARV. L. REV. 853 (1987). The Exclusion Act was not repealed until 1943. Elizabeth Hull, *Naturalization and Denaturalization*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra*, at 403, 411.

¹⁹⁶See Eric Kao, *19th Century Images and Stereotypes of Chinese/Chinese-Americans: Media Portrayal and Historical Basis*, at <http://www.itp.berkeley.edu/~ekao/paper.html> (last visited Apr. 14, 2002) (on file with author) (describing increasingly sinister depiction of Chinese in nineteenth century media, with links to illustration of “John Chinaman” in contemporary magazines). As the author summarizes: “Chinese are alien and exotic . . . [They] all look alike . . . and come to the United States to take American jobs. Chinese are underhanded, mysterious, sinister, and cunning, with slanted eyes, long queues, long, tapered fingernails, and given to smiling enigmatically.” *Id.* at 5.

¹⁹⁷“The manners, habits, mode of living, and everything connected with the Chinese prevent the possibility of their ever assimilating with our people. They are a different race, and, even if they could assimilate, assimilation would not be desirable.” Braeman, *supra* note 195, at 81 (quoting private correspondence of Justice Stephen J. Field, author of Court’s opinion in *Chinese Exclusion Case*).

¹⁹⁸See *Becoming American: The Chinese* (PBS television broadcast, Mar. 25, 2003) (describing how Chinese workers were demonized in 1870s and noting incident in which five workers were set on fire while they slept). For a rigorous and moving description of the exclusion and marginalization of Asian Americans, see Robert S. Chang, *Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 81 CAL. L. REV. 1243, 1286–1314 (1993).

is much less discrimination against Asian Americans, including Chinese Americans, than against African Americans.¹⁹⁹ As Professor Neil Gotanda notes, “the mainstream denial of racism toward Asian Americans is a pervasive and deeply held belief.”²⁰⁰

Indeed, the adoption of Asian babies by white parents has generally been regarded as very successful.²⁰¹ Approximately 35,000 Korean babies were adopted by American parents between 1953 and 1975.²⁰² As a population, Korean adoptees thrived in America. They were happy with their adoptive families and “impressively” well-adjusted.²⁰³ They grew up and were assimilated into the mainstream culture.²⁰⁴ The studies focusing on these children, however, equate success in pre-multicultural America with “assimilation.”²⁰⁵ Researchers did not seek to measure the children’s pride in their ethnicity, nor their connection with a larger Korean community.²⁰⁶ There is less consensus on what “success” would mean now.²⁰⁷

In addition, the stereotype of a “model minority,”²⁰⁸ in which Asians are viewed as “hardworking, studious, unassuming, [and] thrifty,”²⁰⁹ may itself

¹⁹⁹ See Gotanda, *supra* note 181, at 32–34 (analyzing impact of slavery on racial categories). But see Harold Honju Koh, *Foreword*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 195, at ix, ix (noting that history of Asian Americans and Supreme Court, unlike that of African Americans and Court, “is a tale of almost unbroken sadness, not of victors and justice, but of victims and injustice”); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (striking San Francisco ordinance requiring laundries to be constructed of brick and stone, unless permission was given for wooden structure, an ordinance which was applied only against Chinese).

²⁰⁰ Neil Gotanda, *Asian American Rights and the “Miss Saigon Syndrome”*, in *ASIAN AMERICANS AND THE SUPREME COURT*, *supra* note 195, at 1087, 1087–88.

²⁰¹ BAGLEY, *supra* note 89, at 77. But cf. Lea Wait, *Expectations . . . and Realities*, in *THE ADOPTION READER*, *supra* note 182, at 150, 150–56 (describing tumultuous years American author spent raising her four adopted Asian daughters).

²⁰² Dong Soo Kim, *How They Fared in American Homes: A Follow-up Study of Adopted Children in the United States*, *CHILDREN TODAY*, March–April 1977, at 2 (noting that from 1953 to 1975 “more than 35,000 Korean children were placed for adoption in the United States”). The number of Korean children available for adoption plummeted after Korea’s 1988 Olympic games, during which Korea was publicly criticized for exporting children. TESSLER ET AL., *supra* note 6, at 10. “The adoption of Korean children by foreigners has been banned since 1996.” Van Leeuwen, *supra* note 102, at 191 n.7.

²⁰³ Kim, *supra* note 202, at 4, 6.

²⁰⁴ TESSLER ET AL., *supra* note 6, at 20.

²⁰⁵ For a careful survey of empirical studies, see BAGLEY, *supra* note 89, at 82–86.

²⁰⁶ See TESSLER ET AL., *supra* note 6, at 11–13 (attributing lack of such biculturalism among parents adopting Korean children to: (1) fact that parents were not required to travel to Korea to get their children; (2) fact that children were available because of military conflict, in which United States fought North Korea; and (3) emphasis on assimilation, rather than multiculturalism, in 1950s, 1960s, and 70s).

²⁰⁷ As Tessler notes, “In the 1990s, Americans are more likely than ever before to recognize the value of multiculturalism.” TESSLER ET AL., *supra* note 6, at 13. For one of the few exhaustive studies, see *Adopted Girls from Hong Kong in Britain: A Twenty Year Follow-up of Adjustment and Social Identity*, in BAGLEY, *supra* note 89, at 159.

²⁰⁸ Neil Gotanda, *Multiculturalism and Racial Stratification*, in *MAPPING MULTICULTURALISM* 238, 244 (Avery F. Gordon & Christopher Newfield eds., 1996) (describing transformation of Asian

present problems and white parents may well be oblivious to some of them.²¹⁰ For example, the Baby Girls from China may be subject to unrealistic expectations. While parents responding to the survey cited above explicitly denied that they expected children adopted from China to be “smarter” or easier to raise than domestic babies,²¹¹ the question itself suggests the pervasiveness of the stereotype.

Many adoptive parents are actively involved in overcoming such stereotypes.²¹² Uniting with their children to combat the racist stereotypes of mainstream culture is very different from confronting questions about their ability to do so,²¹³ or even charges of racism or imperialism²¹⁴ from their children’s

stereotype into “model minority” based on “aggressive work ethic”).

²⁰⁹Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 *ASIAN L.J.* 71, 72 (1997). Professor Saito further notes that “the negative images [one associated with the Yellow Peril] almost invariably involve the same traits [as the elements of the model minority]: ‘[h]ardworking and industrious become unfairly competitive; family oriented becomes clannish; mysterious becomes dangerously inscrutable.’” *Id.* See also Koh, *supra* note 199, at x (describing “Model Minority stereotype—an image of obedience and passivity—as confining and demeaning as other labels applied to other ethnic groups”).

²¹⁰See Harris, *supra* note 19, at 7 (describing “a little African American boy who is constantly picked on and called nigger by his peers at school. . . . [and who] has a teacher who ignores him [H]is parents who are white have no idea of what is happening.”). As Professor Bowen notes in the context of black/white adoptions: “To suggest that the skills of survival, coping and defense can be taught by those who have never learned them is at best mystifying.” Bowen, *supra* note 187, at 510.

²¹¹See TESSLER ET AL., *supra* note 6, at 81.

²¹²In its mission statement, for example, the Greater New York Chapter of Families with Children from China (“FCC”) expressly commits to “celebrate our cultural and racial differences, to help one another fully integrate into our families the diverse roots, cultures, and contexts from which we and our children come.” Families With Children From China of Greater N.Y., *Families With Children From China Mission Statement*, at <http://www.fccny.org> (last visited Oct. 9, 2003). As law professor and adoptive mother Elizabeth Bartholet argues, for instance, families that do not mimic the biological family can liberate their members from cultural stereotypes. BARTHOLET, *supra* note 8, at 185–86.

²¹³See *supra* notes 179–82 and accompanying text (explaining opposition to transracial placements).

²¹⁴The impact of intercountry adoption on the country of origin is controversial. Linowitz & Boothby, *supra* note 104, at 182. Linowitz and Boothby note that:

critics of transcultural adoption believe that the practice offers, at best, a short-term solution to the problems of homeless children; it ultimately provides neither long-term solutions to the struggles of developing nations nor permanent security to individual children. To the people of Third World countries, it reinforces the message that they are unable to care for their own children. For children adopted in Western countries, it creates a situation in which they are likely to suffer confusion about their origins, personal histories, and places in their adoptive families.

Id.

As noted above, see *supra* note 9, the children—and the country—left behind are beyond the scope of this Article, except to the extent that they become part of its subjects’ stories. See Perry, *supra* note 186, at 162 n.236 (citing Bagley for proposition that “once a couple has acquired an internationally-adopted child they are more likely to support welfare services in the country from which their child came”). See also Families with Children from China, *Charitable Initiatives Benefiting Orphanages in China*, at <http://www.fwcc.org/charitable.html> (last visited Oct. 8, 2003).

community. Adoptive parents of the baby girls from China do not face the kind of outcry that surfaced in Seoul,²¹⁵ or the international publicity that followed reports of baby sales in Romania.²¹⁶ Nor is there any vocal, organized opposition to the adoption of the Baby Girls by Chinese Americans, comparable to the opposition that has confronted whites seeking to adopt black babies in the United States.²¹⁷

(iii) The Community's Claim

The absence of current claims does not preclude the possibility of future claims, however. Such claims have been made where, like here, the children have been taken from their community of origin because of egregious human rights violations. But such claims have historically been made by a specific community, such as those who opposed the military regime in Argentina or by Jews after World War II. The Baby Girls' birth parents, in contrast, are not members of a particular social or ethnic group likely to mobilize for the return of their children.

During Argentina's "dirty war" in the 1970s and early 1980s, thousands of dissidents were illegally detained and subsequently murdered by the military police ("disappeared").²¹⁸ Hundreds of children of the "disappeared," including infants born while their mothers were in police custody, had been adopted, some by the same military police who killed their parents.²¹⁹ While most of these children were never found, some of them were tracked down and returned to their families of origin under the "best interests of the child" custody standard²²⁰ in the 1980s.²²¹

The results were mixed.²²² While some of the children adjusted readily to their new families, others were ambivalent. While some adoption professionals pressed for reunification, others were concerned that the children's interests were

(describing, and providing links to, charities benefiting children in Chinese orphanages sponsored by Families with Children from China in New York, New England, and Canada, in addition to a national effort by FCC "serving 82 orphanages so far").

²¹⁵See *supra* note 97 (citing explanations of North Korea's propaganda about the South's "orphan exports").

²¹⁶See *supra* note 99 (explaining period in Romania from 1990–1991 during which lack of restriction on intercountry adoption led to trafficking in children for excessive profit).

²¹⁷See, e.g., *supra* note 185 (citing U.S. sources opposed to transracial adoption).

²¹⁸See Laura Oren, *Righting Child Custody Wrongs: The Children of the "Disappeared" in Argentina*, 14 HARV. HUM. RTS. J. 123, 127–28 (2001) (describing abduction and presumed murder of thousands of dissidents).

²¹⁹Estimates are that as many as 450 children "were given or sold to childless military or police families." *Id.* at 124.

²²⁰*Id.* at 125.

²²¹Of 200 documented kidnapped children, forty-two were found. *Id.* at 164. Nineteen of these were reunited with their biological families, twelve stayed with their adoptive families (while resuming their original names and developing ties with their families of origin), six cases were pending, and five of the children were dead. *Id.*

²²²*Id.* at 162.

being subordinated to those of the group.²²³ In 1987, Argentina established a National Genetic Bank to enable families to establish the true identities of children of the disappeared.²²⁴ In 1996, Argentina passed an adoption act which assures adoptees access to their original birth records.²²⁵

In Poland, similarly, many Jewish children were informally adopted by non-Jews during World War II after their parents fled or were taken away by the Nazis.²²⁶ Some of these children reclaimed their Jewish heritage.²²⁷ A few were actually reunited with their parents.²²⁸ While Polish law did not allow adult adoptees access to identifying information until 1995, in 1986 Poland joined with Argentina to propose that the Children's Convention requires states to assist any child "fraudulently deprived of . . . his identity."²²⁹

2. The Stories They Tell Their Daughters

(a) *Harry Potter and Sigmund Freud*

There is a vast cross-cultural storehouse of adoption stories. Common themes may be found in the stories of Krishna,²³⁰ Moses,²³¹ and Harry Potter.²³²

²²³*Id.* at 164.

²²⁴The Ford Foundation, for example, withdrew its funding. *Id.* at 149–50.

²²⁵Law No. 24779, Mar. 26, 1997, 28.616 B.O. 1.

²²⁶See, e.g., Ass'n of Hidden Children of the Holocaust in Poland, *Children of the Holocaust Association in Poland*, at <http://www.jewish.org.pl/english/foundati/HIDDEN.html> (last visited Oct. 9, 2003) (containing home page of organization of children saved by Poles, with membership of 750 in 1999). See also HENRYK GRYNBERG, *CHILDREN OF ZION* (Jacqueline Mitchell trans., Northwestern Univ. Press 1997) (1994) (interviews with Polish war orphans); Nahum Bogner, *The Convent Children: The Rescue of Jewish Children in Polish Convents During the Holocaust*, in YAD VASHEM STUDIES XXVII, 235 (Naftali Greenwood trans., Yad Vashem Martyr's and Heroes Remembrance Auth. 1999) (describing children who survived Holocaust in Polish convents).

²²⁷See Ass'n of Hidden Children of the Holocaust in Poland, *supra* note 226 (describing these children).

²²⁸Bogner, *supra* note 226, at 284.

²²⁹D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT'L L. 587, 648 (2001) [hereinafter Blair, *Identities and Heritage*] (providing historical background on these states' support of Article 8).

²³⁰PARAMAHANSA YOGANANDA, *THE BHAGAVAD GITA* xxix (2d ed. 1999) (describing Krishna's miraculous escape from prison where his royal parents were being held, and his placement with his kindly foster parents).

²³¹2 *Exodus* 2:10 (describing Moses' abandonment by his mother to save him from Pharaoh's edict requiring all sons of Hebrews to be "cast into the Nile").

²³²J. K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 49–56 (1997) (describing murder of his parents and Harry's miraculous survival and subsequent placement with his "Muggle" (non-magic) aunt and uncle). There is ample authority for the use of such stories in this context. See, e.g., BRUNO BETTELHEIM, *THE USES OF ENCHANTMENT: THE MEANING AND IMPORTANCE OF FAIRY TALES* 5 (1976) (explaining how children use such stories to make sense of the world); MARINA WARNER, *FROM THE BEAST TO THE BLONDE: ON FAIRY TALES AND THEIR TELLERS* 318 (Farrar, Straus, and Giroux 1995) (1994) (discussing how women have used "enchantments and

First, there is the nightmare from the past from which the adopted child is rescued. Second, there is the child's discovery of his true, noble origins. Finally, the child realizes that he is the natural heir to some fabulous destiny. The nightmare from the past is redeemed by a fantasy of—or at least a hope for—the future. This often includes the child's return to his people, if not his family, of origin.²³³

These stories are so popular, according to Freud, because they tap into a widespread, if not universal, fantasy—the “family romance.”²³⁴ As child psychologist Bruno Bettelheim explains, “These are fantasies or daydreams which . . . center on the idea that one's parents are not really one's parents, but that one is the child of some exalted personage, and that, due to unfortunate circumstances, one has been reduced to living with these people”²³⁵ Indeed, the psychologists who shaped U.S. adoption policy in the first half of the twentieth century argued that adoption should be kept a secret from the child, at least for a while, since to tell her that her fantasy was in fact *true* could be disastrous.²³⁶

It is now widely accepted that children should be told they were adopted as soon as possible and be given information about their medical and social history as they are able to absorb it.²³⁷ As reflected in the laws discussed below,²³⁸ however, the desirability of contact with the biological parents is still an open question.

Some of the reasoning, as well as the rhetoric, is grounded in similar debates regarding custody of children following divorce; that is, just as the step-parents and ex-spouses in blended families are expected to cooperate for the sake of the child,²³⁹ the biological and adoptive parents are encouraged to put the child's

disenchantments” of Beauty-and-the-Beast genre of fairy tales “to help, to teach, to warn” of “women's struggle, against arranged marriage, and toward a definition of the place of sexuality in love”).

²³³See, e.g., Blair, *Identities and Heritage*, *supra* note 229, at 670 (noting that even adult adoptees often desire reunion); Oren, *supra* note 218, at 132–37 (describing new found hope of many “disappeared” children after returning to their families).

²³⁴BETTELHEIM, *supra* note 232, at 68.

²³⁵*Id.*

²³⁶CARP, *supra* note 177, at 127–30. The concern was that such children would fail to resolve the Oedipal dilemma. Namely, they would be unable to come to terms with their place in the family and to mature and form families of their own. The psychologists split, however, as to precisely when the child should be told of her adoption. If the child was told before puberty, she might have some difficulty outgrowing the family romance. If the child was told later, however, the discovery that her resolution of the family romance was based on a lie could be equally disastrous.

²³⁷See *id.* at 131 (citing Viola W. Bernard, M.D., *Adoption*, in 1 THE ENCYCLOPEDIA OF MENTAL HEALTH 70 (Albert Deutsch & Helen Fishman eds., 1963) (recommending “gear[ing] the truth to fit the . . . child's emotional level and stage of comprehension”).

²³⁸See *infra* Part II.B.3 (discussing trends and countertrends in American adoption law). The trends and countertrends are similarly divergent on the international level. Norway, for example, has recently declared the right of everyone to know his biological family. Remarks of Peter Lodjdrup, President, International Society of Family Law, June 26, 2003, Eugene, Oregon.

²³⁹Professor Marsha Garrison has made the excellent point that “[t]he foster care system's lack of concern for natural parents reflects centuries of a dual family law—one for the rich and one for the poor.” Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 432 (1983).

needs before their own. Distinctions between the two contexts, however, may justify different treatments. The biological parent's deliberate renunciation of parenthood, particularly when open adoption is an option, distinguishes that parent from a divorced parent. In addition, there may be circumstances where ongoing contact within the divorced family is *not* actually in the best interest of the child, but a concession to an ideal of parental rights that is similarly inappropriate in the adoption context.

(b) *Genetic Heritage*

Psychologist Erik Erikson's theories of child development, particularly his important work on the process by which children and adolescents develop their identities,²⁴⁰ pervades the contemporary literature on adoptee development.²⁴¹ Erikson, drawing on Freud, describes the process through which the child simultaneously acquires mastery over (and integration with) his physical and social environment. At the heart of this process, for Erikson, is the individual's sense of his place within the larger community. This requires a sense by the adolescent that the "identity of something in the [adolescent]'s core [is] an essential aspect of a group's inner coherence The term identity expresses such a mutual relation in that it connotes both a persistent sameness within oneself . . . and a persistent sharing of some kind of essential character with others."²⁴² As Erikson further observed, "the young individual must learn to be most himself where he means most to others—those others, to be sure, who have come to mean most to him."²⁴³ As an example, Erikson used Freud's identification with his Jewishness, not as a set of religious beliefs, but as a stance—outsider, critic, intellectual—representing the larger society of which Jews were (and in 1939, were not) a part.²⁴⁴

Although Erikson used the term "genetic heritage" to refer to the core features the child shared with his family and the family's community, these features are not necessarily biological. He quotes George Bernard Shaw, for example, "I have risen by sheer gravitation, too industrious by acquired habit to stop working (*I work as my father drank*)."²⁴⁵ Shaw archly identifies his industriousness as part of a "genetic heritage," which took his father in a very different direction. What matters for Erikson is the son's connection to the father

See generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt.1), 16 STAN. L. REV. 257, 257–58 (1964) (noting how California family law differs according to economic status).

²⁴⁰ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (2d ed. 1963); ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE: SELECTED PAPERS* (1959); ERIK H. ERIKSON, *IDENTITY: YOUTH AND CRISIS* (1968).

²⁴¹See, e.g., *THE PSYCHOLOGY OF ADOPTION* (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (reporting research on broad range of adoption issues).

²⁴²ERIKSON, *IDENTITY AND THE LIFE CYCLE*, *supra* note 240, at 102.

²⁴³*Id.*

²⁴⁴*Id.* at 101–02.

²⁴⁵*Id.* at 105.

through his identification with him. As in Shaw's case, this may result from "acquired habit," or emulation, as well as from genes.

The question of "genetic heritage" may be particularly sharp in the context of interracial adoption.²⁴⁶ Minority adoptees can identify (and have identified) with their adoptive parents and the communities of which their parents may be a part. Indeed, as Kim Forde-Mazrui argues, white parents have made it easier for some transracial adoptees to assimilate—to feel themselves a part of the majority culture.²⁴⁷ This has advantages. Black transracial adoptees are likely to perform better on standardized tests, for example.²⁴⁸

But there are also costs. Identifying with adoptive white parents, and the larger families and communities of which these parents are a part, may not help the adoptee cope with racism,²⁴⁹ or keep her from internalizing racism. If the parents are a part of a larger mixed-race family or community, however, and make a conscious effort to link their daughter to their communities of origin,²⁵⁰ she may grow up to identify closely with people of different ethnic backgrounds.²⁵¹ Growing up in a multicultural household, and learning how to negotiate differences, may prepare adoptees for living in a multicultural world.²⁵²

²⁴⁶See Harris, *supra* note 19 (relating difficulties recited by transracial adoptees); Ando, *supra* note 188 (discussing one adoptee's difficult journey back to Korea).

²⁴⁷Forde-Mazrui, *supra* note 181, at 953–54.

²⁴⁸See *id.* at 951 (questioning whether Asian transracial adoptees will perform *less* well on such tests) (citing Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 80 (1988)).

²⁴⁹Cf. Ando *supra* note 188, at 180 (describing Korean adoptee's experience growing up with white parents); Harris, *supra* note 19, at 10 (discussing need of white parents of black adoptees to "guide the children through and around the realities of racism").

²⁵⁰Rodrigo's "first plan for whites: the race traitor idea" may be extremely useful here:

For example, if a white person is in a group of whites and one of them tells a racist joke or story, the white can look up in surprise and say: 'Oh, you must have told that story in front of me because you assumed I am white. I am not. I'm black . . . And let me tell you why I found that story offensive.'

Richard Delgado, *Rodrigo's Eleventh Chronicle: Empathy and False Empathy*, 84 CAL. L. REV. 61, 95–96 (1996).

²⁵¹See *infra* note 395 and accompanying text (explaining link between feeling different and connected and human rights law).

²⁵²See, e.g., NATHAN GLAZER, *WE ARE ALL MULTICULTURALISTS NOW* 1–21 (1997) (discussing explosion of multiculturalism in American society and its influence on education). Compare Katha Pollitt, *Whose Culture?*, in *BAD FOR WOMEN?*, *supra* note 143, at 27, 27 ("In its demand for equality for women, feminism sets itself in opposition to virtually every culture on earth. You could say that multiculturalism demands respect for all cultural traditions, while feminism interrogates and challenges all cultural traditions.") with Wil Kymlicka, *Liberal Complacencies*, in *BAD FOR WOMEN?*, *supra* note 143, at 31, 32 (noting that feminism and multiculturalism make "the same point about the inadequacy of the traditional liberal conception of individual rights").

Whether identification with a particular nationality is an effective mechanism is an open proposition. As Erikson observed in his essay, *Race and the Wider Identity*,

while *African identity* is a strong contender for the American Negro identity . . . [because] [i]t offers a highly actual setting for the solidarity of black skin color, and

As Erikson noted in his later years, American youth faced increasing difficulties establishing their identities as the nested structure of identity formation—the family, the extended family, the community—fell apart.²⁵³ For Erikson, this was as much a social and political problem as a psychological one.²⁵⁴ Those who never took such structures for granted, but watched and learned as their parents carefully crafted them, may well be better equipped to deal with the disjunctions of postmodernity than those raised with the expectations of more traditional structures.²⁵⁵

Finally, but crucially, it should be noted that Erikson's analysis, and the analyses of those who built on his work, was predicated on a male model.²⁵⁶ There is no comparable meted narrative to describe female identity formation, but there is a growing body of literature describing the ways in which the process differs for girls and boys, beginning with Carol Gilligan's classic, *In a Different Voice*.²⁵⁷ Gilligan challenges psychologist Lawrence Kohlberg's theory of moral development as based on a characteristically male hierarchical system of rules ("Jake's ladder") rather than a characteristically female system of relationships ("Amy's web").²⁵⁸ This has inspired wide-ranging commentary by legal scholars, from symposia,²⁵⁹ to Catharine Mackinnon's apt rejoinder, "Take your foot off our necks, then we will hear in what tongue women speak."²⁶⁰ The crucial point being that girls in general may be less bound by Erikson's paradigm because, like the paradigm of legitimacy,²⁶¹ it was developed with boys in mind.

probably also provides the American Negro with an equivalent of what all other Americans could boast about or, if they chose to, disavow: a homeland, if ever so remote There seems to be a question, however, whether to Africans a Negro American is more black or more American, and whether the Negro American, in actual contacts with Africans, wants to be more American or more black.

ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 240, at 317.

²⁵³*Id.* at 133–340.

²⁵⁴*Id.*

²⁵⁵See generally Stark, *Marriage Proposals*, *supra* note 17, at 1509 (describing fragmentation and flux of postmodern family law).

²⁵⁶ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 240, at 265 (describing "extraordinary symposium" which "failed to develop fully—although Bruno Bettelheim made a determined start—the problem of the identity of female youth").

²⁵⁷CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

²⁵⁸*Id.* at 25–32.

²⁵⁹See, e.g., Isabel Marcus et al, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 50–87 (1985) (discussing potential difficulties in legal system if formulated by Gilligan's "Amy" instead of "Jake").

²⁶⁰Cited in MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 78 (1994).

²⁶¹See *infra* Part III.B.1 (noting that historically, children were property of father, thus bastard was child of no one).

(c) *Baby Girls and "Chinese Culture"*

Unlike the white parents who adopted Korean orphans in the 1950s and 1960s, many parents of the adopted baby girls from China recognize the difference between their ethnic backgrounds and that of their daughters as an issue to be addressed, rather than transcended.²⁶² They realize their daughters may be faced with racial prejudice. As adoption expert and adoptive father Richard Tessler suggests, they hope that "knowledge and pride in one's birth culture will serve as a defense against intolerance and racism, as a source of self-esteem, and as a replacement for individual biography."²⁶³ These adoptive parents make Chinese culture, or the American version of it,²⁶⁴ part of their daughters' lives, from family excursions,²⁶⁵ play dates, toys and books, to the stories the daughters are told about their adoption, who they are, and who they can be. The New York Chapter of Families with Children from China ("FCC") draws on the local Chinese community for Mandarin-language schools,²⁶⁶ traditional Chinese dance classes, and local markets offering imported foods, clothing, and toys. New York's Chinatown also enables the girls to have ongoing contact with an ethnic Chinese community.

The farther the Girls are from Chinatown, the more attenuated will be the connection and the more virtual the cultural experience. "The Mall," a popular site maintained by FCC,²⁶⁷ offers more than 100 links to sources of Chinese dolls, books, music, clothes, kites, and other toys.²⁶⁸ Since some of these are actually based in China, it is also another conduit for American dollars—almost a billion annually.²⁶⁹

²⁶²TESSLER ET AL, *supra* note 6, at 10–13; *cf.* CARP, *supra* note 177, at 95–96 (describing adoption classic, *The Chosen Baby*, read to children in 1940s through 1960s, which portrayed adoption as careful process of selecting "just the right baby." Everyone in the book is white.).

²⁶³TESSLER ET AL., *supra* note 6, at 12.

²⁶⁴Which in some cases is an outright bastardization of Chinese culture. *See infra* notes 272–77 and accompanying text (describing *The Red Thread Magazine* and Disney's *Mulan*).

²⁶⁵*See* Families With Children From China of Greater N.Y., *FCCNY Events*, at <http://www.fccny.org/newcalendar.asp> (last visited Oct. 9, 2003) (listing events for families).

²⁶⁶"The Red Apple School [an all-Chinese, Mandarin-speaking preschool in Chinatown] taught Lulu to be proud of being Chinese . . . I don't think I could have taught her that. . . . [P]ride in one's race is taught, I think, by seeing those of your race do things to be proud of." EMILY PRAGER, *WUHU DIARY: ON TAKING MY ADOPTED DAUGHTER BACK TO HER HOMETOWN IN CHINA* 7 (2001).

²⁶⁷Families With Children From China of Greater N.Y., *The Mall*, at <http://fwcc.org/resources.html> (last visited Oct. 8, 2003). For those outside New York, the Mall offers a link to <http://www.BetterChinese.com> ("Presenting one new story a day, this [bilingual, advertising-free] web service is specially designed to facilitate children age 2–12 in learning Mandarin and Chinese culture with fun and ease."). *Id.*

²⁶⁸*Id.*

²⁶⁹Lilith, *supra* note 6, at 260.

Many of these links, including some of the most popular, are maintained by sellers in the United States.²⁷⁰ Americans feel free to selectively appropriate those aspects of culture that they find congenial or colorful.²⁷¹ Mulan, the heroine of a 600 A.D. Chinese epic poem²⁷² has become an animated Disney character,²⁷³ appealing and accessible, with a Web site offering videos, dolls, costumes, and an interactive coloring book.²⁷⁴ Many Americans also feel free to modify Chinese culture to suit their own purposes. According to Chinese folklore, for example, every child is born with an invisible, thin red thread tying the child to her or his future mate.²⁷⁵ In the American version, the red thread ties the American parents to the baby girl in China who will be their daughter.²⁷⁶ *The Red Thread* has become the name of a popular magazine for adoptive families.²⁷⁷

American appropriation of Chinese culture, whether for love or money, invites the same kind of criticism that globalization in general inspires.²⁷⁸ It reduces cultural differences to a bland, commercialized lowest common

²⁷⁰See, e.g., Adoptive Families Magazine, available at <http://www.adoptivefamilies.com> (last visited Oct. 8, 2003) (published in New York); Tapestry Books, *Adoption Book Catalog*, available at <http://www.tapestrybooks.com> (last visited Oct. 8, 2003) (headquartered in New Jersey).

²⁷¹For a sharp description of the risks of getting it wrong, see Delgado, *supra* note 250, at 72 (explaining that “someone who is in the grip of false empathy has a shallow identification with the other. . . . He or she walks on the surface, uses the wrong metaphors and comparisons.”). The baby girls’ experience of culture is obviously not going to be the same as the experience of someone raised within the Chinese American community.

²⁷²*The Ballad of Mulan*, attributed to an anonymous poet in the Northern Dynasties (420–589 A.D.), was collected in the Song (960–1279 A.D.) anthology. Mulan took her father’s place in the draft of the Khan, to fight nomadic invaders and protect the indigenous Chinese Han people. See Ariel’s Home Page, *The Ballad of Mulan*, at <http://is6.pacific.net.hk/~shung/favorites/mulan.html> (last updated Nov. 28, 1996). For a more literate appropriation, see MAXINE HONG KINGSTON, *THE WOMAN WARRIOR: MEMOIRS OF A GIRLHOOD AMONG GHOSTS* 20 (5th prtg. 1977).

²⁷³MULAN (Walt Disney Pictures 1989).

²⁷⁴See Janet Maslin, *A Warrior, She Takes on Huns and Stereotypes*, N.Y. TIMES, June 19, 1998, at E13 (“Disney takes a sledgehammer to the subject of gender-stereotyping in ‘Mulan’ . . . the most inert and formulaic of recent Disney animated films.”).

²⁷⁵See, e.g., KINGSTON, *supra* note 272, at 194 (daughter being taught this by Chinese author).

²⁷⁶This story is ubiquitous in the literature on Chinese adoptions. See, e.g., EVANS, *supra* note 72, at 147 (describing American adaptation). Parents’ appropriation of this story, that the adoption was “meant to be,” can be understood as an iteration of the process through which we make sense of our lives, and imbue them with meaning and purpose, by the stories we tell. See *infra* Part III.A (adoptee’s construction of her own story).

We submitted our application to adopt in January 1986. Ten months later, on Monday, October 6, I called the agency and asked (rather presumptuously, it seems in hindsight) where our daughter was. The agency called back the next day and said she had been born on that Sunday. Whether my call had any influence on theirs, or whether it was simply a coincidence, we’ve told our daughter this story to intimate that she was “meant to be” our daughter.

²⁷⁷See THE RED THREAD MAGAZINE, Mar.–May 2002, available at <http://redthreadmag.com> (last visited Oct. 8, 2003) (“[c]onnecting the adoptive families of Chinese children . . .”).

²⁷⁸As Professor Richard Falk observes, “Western [has been] further deconstructed to be seen as American.” RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* 49 (1992).

denominator.²⁷⁹ In the process of doing so, it ignores the deep beliefs—the underlying world view—and glosses over the complexities that give a culture its vitality and meaning.²⁸⁰

Compared to the People's Republic of China ("PRC"), however, American erasure of Chinese culture seems positively benign.²⁸¹ Since 1949, the PRC has energetically cleansed society of the "bourgeois, decadent, and corrupt" culture²⁸² that predated Communism. While the purges of the Cultural Revolution are now an embarrassment, much damage has already been done. Indeed, it could be argued that the Baby Girls in New York have far greater access to Chinese culture than their counterparts in China.²⁸³

Conspicuously absent from the American appropriation is the misogyny of traditional Chinese culture.²⁸⁴ American parents participate in dragon parades with

²⁷⁹ See Jane Jenson & Boaventura de Sousa Santos, *Introduction: Case Studies and Common Threads in Globalization*, in GLOBALIZING INSTITUTIONS: CASE STUDIES IN REGULATION AND INNOVATION 9, 12 (Jane Jenson & Boaventura de Sousa Santos eds., 2000). The authors state:

Most frequently, the story of globalization is that of the winners, as told by the winners. The victory of their vision of the future is recounted as an inevitability. In the last two decades globalizations follow—to hear the victors tell it—not only from heavy tendencies of economic structures but also from the lucky escape from misguided political visions which sought to achieve social justice and equality via state action and mobilization of the economically and socially disadvantaged after 1945.

Id.; see also ANDREAS HUYSEN, AFTER THE GREAT DIVIDE: MODERNISM, MASS CULTURE, POSTMODERNISM 21 (1986) ("Especially with the help of the new technological media of reproduction and dissemination monopoly capitalism has succeeded in swallowing up all forms of older popular cultures, in homogenizing all and any local or regional discourses, and in stifling by cooption any emerging resistances to the rule of the commodity."); SASKIA SASSEN, LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION 19 (1996) ("The most widely recognized instance of Americanization is seen, of course, in the profound influence U.S. popular culture exerts on global culture.").

²⁸⁰ See Jenson & de Sousa Santos, *supra* note 279, at 13 (describing "vernacularization of historical religious sites for tourists"); see also Boaventura de Sousa Santos, *Oppositional Postmodernism and Globalizations*, 23 L. SOC. INQUIRY 121, 135 (1998) (arguing that globalization results in one local culture dominating globe, forcing others to remain local).

²⁸¹ Michael Sullivan, *Art in China Since 1949*, in THE PRC AFTER 50 YEARS, *supra* note 22, at 150 (describing Mao's directive to "all 'progressive cultural workers' to serve cause of revolution and mass education"); see generally JULIA ANDREWS, PAINTERS AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA, 1949-1979, at 1 (1994) (discussing Chinese Communist Party's eradication of "artistic styles and techniques of which it disapproved"); ELLEN LAING, THE WINKING OWL: ART IN THE PEOPLE'S REPUBLIC OF CHINA 58-60 (1988) (discussing artistic policy set by Chinese Communist Party).

²⁸² See, e.g., Sullivan, *supra* note 281, at 151 (describing criticism of traditional ink painting as "bourgeois, elitist and of no use in a revolutionary society").

²⁸³ See, e.g., Metropolitan Museum of Art, *Introduction to Asian Art*, at <http://www.metmuseum.org/collections/department.asp?dep=6> (last visited Oct. 14, 2003) (stating that Asian Art collection at Metropolitan Museum of Art in New York City carries the "largest and most comprehensive" Asian art collection "in the West").

²⁸⁴ For an analytic justification of this approach, see Martha C. Nussbaum, *A Plea for Difficulty*, in BAD FOR WOMEN?, *supra* note 143, at 105, 112-13. Nussbaum adapts a constitutional analysis to assessing cultural practices:

their Chinese daughters, while rejecting Confucian ideas about family hierarchy and patriarchy.²⁸⁵ Even if the girls are exposed to more authentic—and more misogynist—forms of Chinese culture when they are older, it will not have the same effect.

B. *The Laws*

As explained in Part II, adoption law is governed by national law, and different national laws are coordinated by the Hague Convention and subject to international human rights law. In general, adoption laws protect the rights of biological families, and protect adoptive parents from subsequent claims, by requiring the freely given consent of the biological parents. At the same time, adoption law seeks to provide adoptive parents with necessary biological and social information. The brief overviews of Chinese and U.S. adoption law reveal two very different legal approaches to these issues. The dilemma is that information and consent are only available if they are provided by the biological parents. Biological parents are often loathe to do so, however, for the same reasons they are surrendering or abandoning their children; that is, because of the stigma or even criminal penalties accompanying the child's birth. Laws requiring disclosure are useless when there are such deterrents and often unnecessary when there are not.

Human rights law, in a similar paradox, both pervades and is conspicuously absent from adoption. It is pervasive on its insistence on consent and its prohibitions against baby-selling. At the same time, children are often abandoned or surrendered because their parents *lack* human rights, including reproductive and economic rights.²⁸⁶

We should ask, on the one hand, whether a proposed law (a law banning child marriage or polygamy, for example) really does impose a 'substantial burden' on people's free exercise of their religion. If the answer to this question is 'no,' the law may go forward. . . . If the answer is 'yes,' then we must look at the interests on the other side.

Id.

²⁸⁵One mother, for example, describes her horror upon coming across the following poem in a Chinese children's book: "We keep a dog to guard the house;/ A pig will make a feast or two;/ We keep a cat to catch a mouse;/ But what is the use of a girl like you?" EVANS, *supra* note 72, at 97; *see also* Okin, *supra* note 143, at 13. Okin explains that since

[r]eligious or cultural groups often are particularly concerned with 'personal law'—the laws of marriage, divorce, child custody . . . the defense of 'cultural practices' is likely to have much greater impact on the lives of women and girls than on those of men and boys, since far more of women's time and energy goes into preserving and maintaining the personal, familial, and reproductive side of life.

Id.

²⁸⁶*See, e.g.,* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987) (exploring role of women's economic and reproductive rights in United States as they relate to abortion and divorce rates); *see also supra* Part I.C.2 (describing limits on reproductive rights in China); *supra* Part I.B (describing birth-parent narratives).

1. *The Hague Convention*²⁸⁷

Under the Hague Convention, adoption can take place in either the sending or the receiving country. Article 4 of the Convention sets out strict requirements for obtaining the consent of those “whose consent is necessary for adoption.”²⁸⁸ Consent must be given “freely, in the required legal form, and expressed or evidenced in writing.”²⁸⁹ Article 4(4) strictly prohibits the inducement of consent “by payment or compensation of any kind.”²⁹⁰ The carrots-and-sticks of the one-child policy²⁹¹ would arguably vitiate “consents” implied by abandonment and would probably trigger objections from other parties, if China became a party to the Hague Convention.

The Convention further requires identifying information to be obtained from the birth parents²⁹² and sent, along with the child’s medical records, to the receiving country.²⁹³ Whether this information is disclosed is left to the law of the country where the child and her adoptive parents will reside.²⁹⁴ This reflects both the recognition that general medical information may be useful, even critical, and the lack of consensus regarding the use of specific identifying information, that is, the actual identities of the biological family. Identifying information is unlikely to be available in most countries where there is still a stigma on unwed births.²⁹⁵ In China, the overwhelming majority of abandoned baby girls are “unauthorized” children who would fill or exceed their parents’ quota under the one-child policy.²⁹⁶

²⁸⁷See *supra* note 23 (referencing Hague Convention and providing additional interpretation).

²⁸⁸Hague Convention, *supra* note 23, art. 4(c), 1870 U.N.T.S. at 184. This article also requires that such persons “have been counseled as may be necessary.” *Id.* art. 4(d)(3), 1870 U.N.T.S. at 184.

²⁸⁹*Id.* art. 4(d)(3), 1870 U.N.T.S. at 184.

²⁹⁰*Id.* This is an ongoing problem in part because of the enormous economic disparities between some sending and receiving countries. See, e.g., Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, at 42, 47 (describing coercive economics of adoption in Cambodia, where woman sold her baby to stranger for \$50 and her sister bought child back going into substantial amount of debt to do so); see also *What’s New—World Trade*, WALL ST. J., March 24, 2003, at 1 (ten people arrested in China for scheme to sell and smuggle babies, “28 of which were found in gym bags, possibly sedated, on a Guangxi bus”).

²⁹¹See *supra* Part I.A.3 (describing one-child policy).

²⁹²Hague Convention, *supra* note 23, art. 16-1(a), 1870 U.N.T.S. at 187.

²⁹³*Id.* art. 16-2, 1870 U.N.T.S. at 187.

²⁹⁴*Id.* art. 30, 1870 U.N.T.S. at 191. See generally Blair, *Identities and Heritage*, *supra* note 229, at 656–57 (discussing requirements of Hague Convention).

²⁹⁵See TESSLER ET AL., *supra* note 6, at 7 (“The donor countries that supply infants and children typically have traditional family values that do not accommodate nontraditional family formations, which may make domestic adoptions less of an option. . . . Islamic law does not recognize adoptions.”). The Hague Convention seems to contemplate a world in which such stigmas do not exist, or are manageable. As the stigma diminishes, however, so do the number of children placed for adoption. There is still a stigma attached to out-of-wedlock births in China, but these accounted for only three of the 237 families studied. Johnson et al., *supra* note 62, at 473.

²⁹⁶The penalties for unauthorized children, including fines, sterilization, and the refusal to register them, see *supra* notes 51–55 and accompanying text, are arguably as onerous as the

In theory, if China were a party to the Hague Convention, its failure to provide any of the required information could be cited by a receiving state as a reason for halting adoptions. In practice, however, virtually all sending states have similar problems with abandoned infants. If the United States were to decide that China's failure to provide identifying information was a problem, moreover, it could simply restrict parent visas to China for the purposes of adoption. In fact, the United States recently took steps to simplify adoptions from other countries, including China, by passing the Child Citizenship Act of 2000,²⁹⁷ which streamlines the process by which foreign-born children of U.S. citizens can become U.S. citizens.

2. Chinese Adoption Law

In 1991, the Chinese National People's Congress approved the China Adoption Law,²⁹⁸ permitting adoptions by childless persons over thirty-five, whether married or not,²⁹⁹ and establishing the China Center for Adoption Affairs ("CCAA").³⁰⁰ Because the Adoption Law explicitly incorporates the laws and

sanctions traditionally accompanying the stigma of illegitimacy. The extent, if any, to which these penalties have been internalized, producing a feeling of shame in the parents, is an open question. See *infra* Part III.B.1 (describing rejection of stigma of illegitimacy in West, in China, and in human rights law).

²⁹⁷Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended in scattered sections of 8 U.S.C.) (amending § 320 of Immigration and Nationality Act, 8 U.S.C.A. § 1431 (Thompson West Supp. 2003)). This became effective February 27, 2001. Before passage of this law, the parents of internationally adopted children had to apply to the Immigration and Naturalization Service for a Certificate of Citizenship for their children, which was a lengthy and complicated process. See Jordana P. Simov, Comment, *The Effects of Inter-country Adoption on Biological Parents' Rights*, 22 LOY. L.A. INT'L & COMP. L. REV. 251, 256-64 (describing INS requirements prior to enactment of Child Citizenship Act); see also Sara Goldsmith, Recent Development, *A Critique of the Immigration and Naturalization Service's New Rule Governing Transnational Adoptions*, 73 WASH. U. L.Q. 1773, 1782-90 (1995) (describing and critiquing former INS requirements). An American parent could not apply for a visa for the child to leave the country of origin and enter the United States until the adoption was complete. As Professor Bartholet notes, "[Y]ou may find at that point that you cannot satisfy the legal requirements for obtaining the visa, so although you are now the legal parent of a child with whom you have lived for some months, you are not free to take the child back to the United States." BARTHOLET, *supra* note 8, at 137.

²⁹⁸Zhong Hua Ren Min Gong He Guo Shou Xiang Fa (Adoption Law of the People's Republic of China), Dec. 29, 1991, (P.R.C.), translated in 18 ANN. REV. POPULATION L. 424 (1991) [hereinafter China Adoption Law].

²⁹⁹*Id.* at 5.

³⁰⁰The CCAA has recently advised that "adoption applications from homosexual families are not acceptable." See U.S. Dep't of State, *International Adoption—CHINA (Mainland)*, at http://travel.state.gov/adoption_China.html (last visited Oct. 8, 2003). Cf. Hillis, *supra* note 179, at 251 (noting that Bulgaria and Romania "expressly prohibit adoption by homosexuals as unmarried cohabitants or singles"). It remains to be seen whether this will deter or preclude one of the partners in a gay or lesbian couple from adopting a Chinese baby girl as a single parent. Carol Austin, *Latent Tendencies and Covert Acts*, in THE ADOPTION READER, *supra* note 182, at 105 (describing decision of lesbian couple to adopt as single parent); cf. Louis Bayard, *Two Men and a Baby*, WASH. POST

regulations on family planning, adoption cannot be used to circumvent the one-child policy. Biological parents cannot legally surrender a healthy child and consent to her adoption. Even if they could, doing so would defeat the purpose of the surrender; that is, to try for a boy.³⁰¹ Adoptive parents, similarly, are allowed to adopt only one child, whom they are then required to register.³⁰²

(a) *The New Law*

In 1998, the China Adoption Law was amended to add that “abandoned infants and children whose parents cannot be ascertained or found and who, under the care of a social welfare institution, may be adopted irrespective of restrictions that the adopter shall be childless and that he or she may adopt one child only.”³⁰³ The amended law also lowered the minimum parental age from thirty-five to thirty,³⁰⁴ and explicitly prefers placement with parents of the same race or ethnicity.³⁰⁵ The new laws are unlikely to significantly increase the number of adoptions within China, since adoption still carries a stigma in China.³⁰⁶ Even if more children are adopted, as long as the one-child policy remains in effect, there are likely to be hundreds of thousands of baby girls abandoned and still available for adoption.³⁰⁷

MAG., June 17, 2001, at 14–27 (describing gay couple’s adoption of baby from Vietnam).

³⁰¹ See *supra* Part I.B (describing decision-making process that leads to abandonment of these girls).

³⁰² “A person putting a child up for adoption may not use the adoption exception as an excuse to beget another child in violation of family planning regulations.” China Adoption Law, *supra* note 298, art. 19, at 426. An exception was made only for parents adopting “orphans,” children whose parents were both dead, or disabled children. See U.S. Dep’t of State, *supra* note 300.

³⁰³ Amendments to the Adoption Law of the People’s Republic of China, Nov. 4, 1998 (P.R.C.), available at http://www.fwcc.org/china_adoption_law_98.htm (last visited Oct. 3, 2003) [hereinafter New China Adoption Law].

³⁰⁴ Crystal J. Gates, Trend Paper, *China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 388 (1999) (describing amendments to Chinese adoption law which came into force in April 1999).

³⁰⁵ New China Adoption Law, *supra* note 303, art. 2. Cf. *supra* Part II.A.1.(b)(i) (noting hesitancy of researchers and social workers to place black children in white homes). See also Lilani, *supra* note 94, at 23, 23 (noting “increased effort . . . on the part of the Indian Government . . . to promote the adoption of Indian children by Indian parents. The current intercountry guidelines state that prospective adoptive parents of Indian origin residing in foreign countries will be given priority over other foreign nationals . . .”).

³⁰⁶ Adoptive parents often pretend that the child is their biological child. Thus, in general, only very young infants are adopted. Cf. Lilani, *supra* note 94, at 24 (describing historically “widespread, but secretive practice” of “adoptions” in India, usually in order to “have a male heir to carry on the family name”).

³⁰⁷ Male babies are more likely to be adopted in Asian societies. *Id.*

(b) Medical and Social Histories

Because the overwhelming majority of babies available for adoption in China are abandoned, the orphanages have no information regarding their medical or social histories. American adoptive parents seeking information regarding the child may be stymied by differences in culture as well as language barriers. One New York mother observed a two-inch scar on her baby's foot as if from a sharp object.³⁰⁸ Concerned about possible early trauma in her daughter's life, she asked the orphanage caregiver what had caused the scar. "You don't want this baby?" was the curt response, interpreting the question as a complaint about damaged goods. The caregiver went off to discuss the matter for several minutes with her colleagues. Finally, she returned: "It was an insect bite."³⁰⁹

The Chinese legal system often seems similarly opaque. Babies cannot leave China until they are legally adopted by their new parents³¹⁰ and this requires a daunting amount of paperwork.³¹¹ Parents adopting from China are required to spend weeks there in order to finalize the adoption.³¹² The parents' sojourn in China, which may include a visit to their child's orphanage, provides the only clues regarding their daughter's origins. Three weeks in China with a new baby is exhausting,³¹³ but many adoptive parents resolve to provide their daughters with a similarly vivid experience of their native country. Some have already returned to China with their daughters.³¹⁴

3. U.S. Adoption Law

Although foreign adoptions are recognized by the United States, most American parents adopt their children again in the United States. In the United States, adoption law (like most family law) is governed by state rather than federal law.³¹⁵ Although state law varies widely, two recent trends in state adoption law

³⁰⁸Interview with Janice Howard, *supra* note 1.

³⁰⁹*Id.*

³¹⁰New China Adoption Law, *supra* note 303, art. 15.

³¹¹See *id.* art. 21 (listing China documentary requirements); PRAGER, *supra* note 266, at 4.

³¹²PRAGER, *supra* note 266, at 10 (estimating time in China between two and three weeks). This brings American dollars to the region, particularly around the White Swan Hotel in Guangzhou, where the CCAA, the central agency for all Chinese adoptions, is located.

³¹³For heartwarming stories of adoptive parents' journeys, see NANCY D'ANTONIO, *OUR BABY FROM CHINA: AN ADOPTION STORY* (1997); ROSE LEWIS, *I LOVE YOU LIKE CRAZY CAKES* (2000).

³¹⁴See, e.g., YING YING FRY & AMY KLATZIN, *KIDS LIKE ME IN CHINA* (2001) (describing Chinese adoptee's story of her return to China and her visit to orphanage where her American parents adopted her); PRAGER, *supra* note 266 (describing Chinese adoptee's experience upon first return to China). Parents of Korean adoptees, in contrast, adopted their babies in the United States. These parents had never been to Korea and had little desire to bring their children to what remained a remote and abstract country, a page in an atlas. TESSLER ET AL., *supra* note 6, at 10–13.

³¹⁵As Justice Rehnquist observed in *Sosna v. Iowa*, "[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by this Court over a period of more than a century bear witness to this historical fact." 419 U.S. 393, 404 (1974). See

are worth noting, both because of their potential impact on American demand for baby girls from China, and because they show how American and Chinese perspectives differ on infant abandonment³¹⁶ and disclosure of information identifying the biological parents.³¹⁷

(a) *Safe Haven Laws*

At least thirty-five states have passed “safe haven” laws, under which infants may be left at specified locations without identifying information being demanded of the person abandoning the infant.³¹⁸ Nor can that person be subject to criminal prosecution under most versions of these laws.³¹⁹ While some require personnel at the designated location to attempt to obtain medical histories of the abandoned infants, the failure to do so does not affect the abandoner’s immunity from prosecution.³²⁰

The purpose of these safe haven laws, most of which were passed within the past five years, is to deter mothers from leaving newborns in dumpsters and other places which seem to offer secrecy and safety to a panicked mother,³²¹ but offer

IRA ELLMAN ET AL., *FAMILY LAW* 1389 *passim* (3d ed. 2001) (overview of adoption law). Intercountry adoptions are also subject to federal law, however, especially since the United States is in the process of ratifying the Hague Convention and implementing the necessary domestic legislation. *See, e.g.*, 8 U.S.C. § 1154(d) (2000) (requiring adoptive parents to undergo home study); The Intercountry Adoption Act of 2000, § 102, 42 U.S.C.A. § 14912(b)(2) (Thomson West 2003 Pamph.) (requiring Secretary of State to inquire if other countries impose restrictions on eligibility for adoption).

³¹⁶*Cf. supra* Part I.B (describing Chinese study offering reasons for abandonment).

³¹⁷*See supra* notes 170–72 and accompanying text (describing adoptive parents’ concerns about claims of biological parents); *see generally* CARP, *supra* note 177, at 233 (describing trends and counter-trends, resulting in “compromise solutions like search and consent systems and voluntary adoption registries, where the privacy of all members of the triad is protected”).

³¹⁸Tanya Amber Gee, *South Carolina’s Safe Haven for Abandoned Infants Act: A “Band-Aid” Remedy for the Baby-Dumping “Epidemic”*, 53 S.C. L. REV. 151, 153 (2001) (describing recent laws “decriminaliz[ing] ‘safe abandonments’ in an effort to decrease the number of discarded infants found dead”); *see also* Nat’l Abandoned Infants Assistance Res. Ctr., at <http://socrates.berkeley.edu/~aiarc/> (last visited Oct. 20, 2003) (“enhanc[ing] the quality of social and health services [for abandoned children]”); *but see* Bastard Nation, *Bastard Nation Action Alert!*, at <http://www.bastards.org/alert/nh-alert.html> (March 14, 2003) (urging members to mobilize against “Baby Dump Law in NH . . . the latest attempt to bring legalized baby dumping to NH” and criticizing such laws for “encourag[ing] irresponsibility . . . [and] strip[ping] the abandoned infants of their identities and provid[ing] no recourse for fathers or other family members who may not be aware of the infant’s existence”).

³¹⁹*See, e.g.*, Gee, *supra* note 318, at 154–56 (describing various safe haven laws). Abandoning an infant at a non-designated location, in contrast, including hospitals, may subject the person abandoning the infant to criminal prosecution. *See, e.g.*, S.C. CODE ANN. § 20-7-50 (West Supp. 1999) (making abandonment a felony).

³²⁰Gee, *supra* note 318, at 155.

³²¹*Id.* at 160 (describing mother who decided to “anonymously abandon [her] infant rather than fill out paperwork necessary for relinquishment”).

little chance of survival for a fragile new baby.³²² Like those mothers who abandon babies in China, most who do so in the United States are under tremendous social pressure.³²³ Unlike parents in China, however, parents in the United States may surrender an infant for adoption without any legal impact on their future families.³²⁴

If these safe haven laws are successful, one consequence will be an increase in the number of infants without identifying information, resulting in relatively little risk of later "Baby Jessica"-type claims by birth parents.³²⁵ The number of babies actually abandoned at safe havens is very small, however. It is unlikely to increase dramatically because of the low birth rate in the United States, the decreasing stigma for unwed mothers, and the available alternatives, including independent adoptions.³²⁶

(b) *Retroactive Disclosure Laws*

A few states³²⁷ have retroactively opened their adoption files, making formerly confidential identifying information available to adult adoptees.³²⁸ Such

³²²The U.S. Department of Health and Human Services found "105 babies were discarded in public places in 1998." *Id.* at 152. *Cf.* Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 654-56 (1991) (noting prevalence of infanticide in nineteenth century and linking it to women's "[b]locked mobility" in slums of big cities).

³²³Here, like there, poverty may also be a factor. Parents in China may be unable to afford an unauthorized child without state support, including the subsidized health care and education provided for authorized children. *See* Elisabeth J. Croll, *Social Welfare Reform: Trends and Tensions*, in THE PRC AFTER 50 YEARS, *supra* note 22, at 122, 128 (noting that "the social welfare package in the countryside has been . . . much more restricted . . . with no social insurance, few subsidized services available . . . and little more than a minimal safety net guaranteed for the childless elderly and other vulnerable categories of lone persons"). In the United States only a small percentage of parents are eligible for any state support and then, only for a limited period of time and at levels well below the mean. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

³²⁴*See supra* notes 299-307 and accompanying text (describing incorporation of family planning policy in Chinese adoption law).

³²⁵There is also little chance of such infants finding their birth parents. Thus, such laws are opposed by adoptee-rights groups. *See* Bastard Nation, *Bastard Nation Action Alert!*, *supra* note 318 (urging opposition to proposed New Hampshire Law).

³²⁶"The greater availability of abortion and contraception, as well as a new willingness of unwed mothers to keep their babies, all but dried up the supply of traditionally adoptable children." Garrison, *supra* note 239, at 443.

³²⁷These are Tennessee, Alaska, and Kansas. ALASKA STAT. § 68.50.510 (Supp. 1997); KANSAS § 65-24-2-3 (Supp. 1997); TENN. CODE ANN. §§ 36-1-125 to -129 (1996). *Cf.* ALMA v. Mellon, 601 F.2d 1225 (2d Cir. 1979) (refusing to repeal laws regarding sealed adoption records). For an analysis of constitutional arguments and legislative measures, see Debra D. Poulin, Note, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395 (1987-88).

³²⁸*See* M. Christina Reuff, *A Comparison of Tennessee's Open Records Law with Relevant Laws in Other English-Speaking Countries*, 37 BRANDEIS L.J. 453, 453 (1998-99). For a practical

information is available in most western European countries³²⁹ and, with mutual consent, in almost half of the states.³³⁰ But the American birth mothers were assured confidentiality at the time they gave their children up for adoption. This retroactive change has been justified by the adoptee's interest in obtaining information about their biological families for medical reasons, including genetic risks, and for psychological closure.³³¹ Courts have rejected the argument that such disclosure violates birth mothers' privacy on the ground that confidentiality was never absolute: files could always be opened upon a showing of medical necessity.³³² Thus, birth mothers were on notice that confidentiality was not guaranteed.³³³

If such laws become increasingly popular,³³⁴ and as they become more publicized,³³⁵ they could become an increasingly important factor in the decisions of birth mothers. Those birth mothers who want contact with the adoptive parents can already opt for independent adoptions, which allow them to select the parents of their children³³⁶ and to maintain ongoing contact, if they choose.³³⁷ If

guide, see Monica Allie, *The New Adoption Law in Tennessee: A Controversial Sweeping Reform*, 32 TENN. B. J. 18, 21 (1996).

³²⁹Those countries include France, England, Wales, Scotland, Germany, Denmark, Iceland, Norway, Sweden, Netherlands, Greece, and Poland. Blair, *Identities and Heritage*, *supra* note 229, at 605–06 n.91.

³³⁰As Professors Jana Singer and Naomi Cahn note: “At least twenty-one states have enacted some form of mutual consent registry, which allows persons directly involved in an adoption to register their willingness to meet and exchange information.” Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 162–63 (1999) (citation omitted).

³³¹See *Doe v. Sundquist*, 106 F.3d 702 (6th Cir. 1997); PAUL SATCHDEV, UNLOCKING THE ADOPTION FILES 58–59 (1989) (stating that adoptees have basic moral right to know their genealogy). See also D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health Related Information in Adoption*, 70 N.C. L. REV. 681, 685 (1992) (justifying disclosure of medical histories of natural parents to help adoptees deal with medical and psychological conditions).

³³²*Doe v. Sundquist*, 943 F. Supp. 886, 892 (M.D. Tenn. 1996); *Doe v. Sundquist*, 2 S.W.3d 919, 924–25 (Tenn. 1999).

³³³For a rigorous analysis of the Tennessee decisions, agreeing with the outcome, see Cahn & Singer, *supra* note 330, at 169–72.

³³⁴See Cahn & Singer, *supra* note 330, at 153 (proposing “a presumption of open records, at the election of an adult adoptee, to replace the secrecy requirement”).

³³⁵For a list of “how-to” books on open adoption and birth family searches, see CARP, *supra* note 177, at 220–21. For a list of direct search sites, see Bastard Nation, at <http://www.bastards.org/library>, at 2 (last visited Oct. 8, 2003).

³³⁶See, e.g., Lisa Belkin, *Now Accepting Applications for My Baby*, N.Y. TIMES MAG., Apr. 5, 1998, at 58 (describing process through which birth mother selected parents of child she was surrendering). For a feminist analysis supporting open adoption, see Dowd, *supra* note 6, at 931.

³³⁷For a compelling argument that children who have lived with their biological parents should continue to have visitation with them after adoption, see Garrison, *supra* note 239, at 461–69.

confidentiality is important for a birth mother, however, abandonment at a safe haven carries less risk.³³⁸

Some adoptive parents, similarly, might not want their children to be contacted by their birth parents, even as adults.³³⁹ Such parents might seek children abandoned at safe havens or from countries, such as China, where such information is not available.³⁴⁰

4. *Disruption*

Adoptive parents go to China for healthy babies with no strings, that is, babies without litigious birth parents or antagonistic communities. The girls disrupt the “no strings” story by binding their adoptive parents with an invisible, red thread to Chinese culture.³⁴¹ They disrupt the story of Chinese culture itself replacing it with a gender-neutral, Americanized version.

The Girls similarly disrupt the law. Because the surrender of a healthy child by her biological parents is illegal in China, the consent and disclosure of information required under the Hague Convention or U.S. law is impossible. Instead of receiving a social and medical history of their child, adoptive parents receive a vivid impression of China, indelibly linked with their first weeks of parenthood. While U.S. law addresses both the issue of infant abandonment and disclosure of information, it does so inconsistently. The Baby Girls disrupt these laws, however, by making them irrelevant. They have no impact on the Girls, except, perhaps, to the extent that they encourage prospective adoptive parents to go abroad.

³³⁸The fact that more than half the states do *not* make such information available indicates that this is still an open public-policy question. If identifying information must be provided, and if confidentiality requirements may be jettisoned by some future legislature, the birth mothers' privacy rights may be impossible to secure in any other way.

³³⁹Empirical studies suggest that most adoptive parents are anxious about such contact, fearing they will lose their child's love. After contact is made, however, they are generally reassured. See, e.g., Janet H. Dixon, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 985–86 (1991) (discussing positive trend that birth parents have greater control over adoption process including continuing contact with child or requirements for adoptive home). See generally Carolyn Burke, *The Adult Adoptee's Constitutional Right to Know His Origins*, 48 S. CAL. L. REV. 1196, 1212–13 (1975) (developing several legal arguments for why adoptees should be allowed to access their birth certificates).

³⁴⁰Even where such information is available from other countries, domestic law may bar the adoptee from obtaining it. See Hague Convention, *supra* note 23, at 182–96. Adoptee-rights groups lobby vigorously against such laws. See, e.g., Bastard Nation, *Immediate Action Needed—Amend Texas HB806*, at <http://www.bastards.org/alert/tx-alert.html> (Mar. 16, 2003) (urging amendment of Texas law which seals foreign-born adoptees' birth documents so as to allow foreign-born adoptees access to birth documents without court order, upon majority).

³⁴¹See *supra* Part II.A.2 (noting examples of adoptive parents' promotion of Chinese culture).

III. THE THIRD TELLING—"BECOME WHO YOU ARE"³⁴²

In a cartoon captioned "Vlad the Impaler's Descendants,"³⁴³ three panels show three very self-satisfied people. The first puts toothpicks in hors d'oeuvres; the second picks up trash by piercing it with a sharp pole; and the third holds a hotdog on a stick over a campfire. All exclaim at the *rightness* of their activity: "This feels *really good*, but I'm not sure why," says the character with the toothpicks.

It is generally accepted that we are hardwired to some extent, that even as infants we have temperaments and potentials. But it is equally clear that even if we are not blank slates, the process of "becom[ing] who you are," or self-realization,³⁴⁴ varies as a function of culture, geography, gender, history, and serendipity. Recent research suggesting that genes change in response to environmental factors throughout our lifetimes both clarifies the debate, by indicating the importance of ongoing interaction, and complicates it, by exponentially increasing the range of possible outcomes.³⁴⁵

This Part does not attempt to predict the Baby Girls' stories. Rather, it explains why this cannot be done. Although their tales cannot be told, this Part shows how the hopes of the First Telling and the dreams of the Second are likely

³⁴²See *supra* note 18 (providing alternative translations of Pindar's exhortation).

³⁴³Roz Chast, *Vlad the Impaler's Descendants*, NEW YORKER, Aug. 23, 1993, at 152, available at <http://www.cartoonbank.com> (last visited Oct. 8, 2003). See also CHILDREN OF THE REVOLUTION (Buena Vista Pictures 1996) (depicting fraternity of son of free spirit, whose lovers included Stalin and British spy, who becomes all too clear when young man grows moustache and begins ordering murder of large groups of people).

³⁴⁴There are several terms referring to this process, most of them having been appropriated by various schools of psychology, but none of which I rely upon exclusively. Erikson, for example, drew on the *stage theory* of Freud and Jean Piaget for his idea of development as "progression toward a more complex and wiser self." Marjorie Fisk, *Changing Hierarchies of Commitment in Adulthood*, in THEMES OF WORK AND LOVE IN ADULTHOOD 238, 241 (Neil J. Smelser & Erik H. Erikson eds., 1980). Theories of "*self-actualization* or *self-realization*," in which growth is understood as an ongoing process, are linked to the work of Abraham Maslow and Charlotte Bühler. I use these terms as they are commonly understood, rather than as terms of art. I rely instead on Pindar's emphatic, but unspecified, exhortation to avoid what I view as a very modern idea, namely, the notion that there is a single best model of human development. The *eclectic* school of David Norton and David McClelland is the closest to this view, see *id.* at 242, but is still modern in its quest for "scientific" paradigms. See generally THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (discussing objective to urge change in perception and evaluation of familiar scientific data).

³⁴⁵Matt Ridley, *What Makes You Who You Are*, TIME, June 2, 2003, at 55 (cover story) ("Which is stronger—nature or nurture? The latest science says genes and your experience interact for your whole life.").

Distinct, but related, is the larger, even more contested question of the kind of society most conducive to the project of self-realization. Human-rights literature refers to this, even more ambiguously, as "human flourishing." Other standards include, for example, divine law. See Aa Oba, *Islamic Law as Customary Law: The Changing Perspective in Nigeria*, 51 INT'L & COMP. L.Q. 817, 822 (2002).

to be realized,³⁴⁶ even if their precise form is unknowable. The birth parents' hope, that their daughters will survive, is obviously realized by the Girls' live presence in New York. Less obvious is the fulfillment of the promise of Chinese state feminism of a better life for the next generation of girls.³⁴⁷ The dreams of the Second Telling—of healthy girls growing up in nurturing communities, with a positive sense of themselves as ethnic Chinese—are also being realized, albeit ironically. Coming of age in postmodern America may preclude the kind of organic embeddedness that Erikson saw eroding even in the 1970s.³⁴⁸ “Becoming who [they] are” may well entail becoming shape-shifting, self-inventing Americans, skeptical about ideology and prone to shop.³⁴⁹

A. Adoptee Narratives

The threshold problem here is that it is simply too soon to tell the Baby Girls' stories. First, they are too young.³⁵⁰ Second, the birth parent narratives in Part I and the adoptive parent narratives in Part II only became coherent narratives in hindsight—the narrators defined by their common drives (to bear a son or adopt a child) and the measures they took to achieve them (abandoning their birth daughters or going to China). This Part focuses on the process through which the Baby Girls develop their own identities,³⁵¹ and the ways in which they do so are likely to vary. Not all adoptees seek out their families of origin, for example, and it is not clear which adoptees will.³⁵²

This Part, accordingly, draws on the accounts of other adoptees who have grappled with origin stories. Notwithstanding the cheerful rhetoric of “chosen babies” and biculturalism, most adoption stories are problematic.³⁵³ There are

³⁴⁶BROOKS, READINGS FOR THE PLOT, *supra* note 19, at 1–7 (explaining how end of story gives meaning to beginning and middle).

³⁴⁷See *supra* Part I.A.2 (discussing role of women under Communism).

³⁴⁸See ERIKSON, IDENTITY: YOUTH AND CRISIS, *supra* note 240, at 69–72.

³⁴⁹While a previous generation in China would have readily repudiated such a future as bourgeois and decadent, sentiment seems to be shifting with the recent “it is glorious to be rich” campaign. See, e.g., FRY & KLATZIN, *supra* note 314 (depicting children's books dealing with many types of children in China and their experiences).

³⁵⁰Most of the baby girls from China are under ten. They are a precocious group, however, and are already beginning to publish accounts of their adoptions. See, e.g., FRY & KLATZIN, *supra* note 314. There is no data on their teenage and later years yet.

³⁵¹This process is likely to be illuminated, as well as affected, by the ongoing empirical studies tracking the girls, watching for signs of pathology, aptitude, and documenting their relationships with their parents. See Families with Children from China, at www.fwcc.org (last modified Sept. 14, 2003) (inviting participation in range of studies).

³⁵²For demographic data summarizing twelve studies of adoptees who searched for their biological parents, see Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search*, in PSYCHOLOGY OF ADOPTION, 62, 66–67 (David M. Brodzinsky et al. eds., 1990).

³⁵³The birth mother, too, may learn of events that are painful. See, e.g., Harris, *supra* note 19, at 14 n.7 (describing discovery by birth parent that child has spent extended period in foster care). See also Jody Lannen Grady, *Talk of Babies*, in THE ADOPTION READER, *supra* note 182, at 10, 16 (recounting phone call during which birth mother learned that son she had put up for adoption

many reasons for giving up a baby, and most of them are unhappy ones. Most adoption stories, accordingly, have a dark side.³⁵⁴ There are risks as well as benefits in disinterring these stories, including the not insubstantial risk that they are untrue.

1. *Frames and Disruption*

Parts I and II show how the stories of birth parents and adoptive parents are framed, focusing on the role of the law. Biology, changing social norms, and often complex legal regimes leave many birth parents in China and many prospective adoptive parents in the United States with narrowly circumscribed choices. Chinese birth parents can accept the sex ratio probabilities of biology, comply with the one-child policy, and avoid or terminate any pregnancies after one son or two children. Or they can violate the one-child policy and pay the penalties. White prospective adoptive parents in the United States can put their names on waiting lists, advertise for a compatible birth mother, or seek the challenge of transracial adoption. These frames may be like nesting dolls, in which the traditional imperative to bear sons persists, for example, despite official denial. Or they may be more like puzzle boxes, where a chance encounter leads to an open adoption, but in either case they function as constraints.

As explained above,³⁵⁵ the Baby Girls disrupt both frames as well as the metaphors that describe them. They create slippage, outcomes unanticipated (or even inconceivable) within the original frames. The laws of their parents' respective countries are no longer the whole picture. Abandoning a baby does not consign her to life in an orphanage (if she is lucky). Adopting a healthy baby is not a hopeless dream for older or single Americans. The baby girls disrupt the stories into which they enter by providing alternatives beyond the frames of national laws and norms, which are neither accepted nor rejected, but left behind.

"Nature" and "nurture" are also frames. Nature may be more like nesting dolls,³⁵⁶ the child shaped by her biological parents' DNA. Nurture may be more

fifteen years before had died as baby).

³⁵⁴The stories of international adoptions are complex. There are recurring themes of a state of origin unable to provide homes for certain children, whether because of poverty, culture, or war. See generally TESSLER ET AL., *supra* note 6, at 9 (explaining that Korean infants were available because of Korean War). See also Linowitz & Boothby, *supra* note 104, at 182. The authors note that

[c]ritics of transcultural adoption believe that the practice offers, at best, a short-term solution to the problems of homeless children; it ultimately provides neither long-term solutions to the struggles of developing nations nor permanent security to individual children. To the peoples of Third World countries, it reinforces the message that they are unable to care for their own children. For children adopted in Western countries, it creates a situation in which they are likely to suffer confusion about their origins, personal histories, and places in their adoptive families.

Id. (citation omitted).

³⁵⁵See *supra* Parts I and II (discussing adoption of Baby Girls from perspective of both parents and states).

³⁵⁶*Cf. supra* note 13 and accompanying text (stating that people doing genealogy are

like a puzzle box,³⁵⁷ a carefully crafted receptacle for holding and protecting what we choose to encourage and for containing, sealing off, that which we prefer to suppress. Nurture should follow nature; we assume the talents we are born with should be identified early and carefully fostered. The upsurge of interest in the disclosure of medical and social information, as well as contact with birth parents, is justified in part by the notion that adoptees, like biological children, are framed by nature. They need to know about that frame, the thinking goes, to become who they really are.

Adoption disrupts the frames of nature and nurture.³⁵⁸ Precisely *because* their parameters are far from clear, these frames may be especially susceptible to simplistic assumptions. Parents soon learn, however, that behavior and development resist facial classifications. "Nurture," it seems, is less a science than a crap shoot.³⁵⁹ "Nature" is exposed, in part, as a social construction. A recent article about adoptee twins separated at birth began by noting that they brought each other identical gifts for their reunion (teddy bear refrigerator magnets, with the words "For a dear sister"). Perhaps there is a gene for kitsch, but the article glossed over their very different career and life paths. Ascribing characteristics to "nature" or "nurture" may well be impossible for the Baby Girls' adoptive parents. They know little about their daughters' biological parents,³⁶⁰ and often less about her first year or more in a Chinese orphanage.³⁶¹

uncovering familial facts unknown to them before, thereby supporting inference that biological ties are not really "ties," nor do they bind children to their ancestors).

³⁵⁷ Cf. *supra* note 14 and accompanying text (describing origin of Chinese puzzle boxes).

³⁵⁸ As my friend and colleague Judy Cornett recently observed on her way to China to meet her new daughter, many of us see ourselves as defined in large part by our parents, whether by traits we inherit or emulate, or those we lack or reject.

³⁵⁹ For an illuminating survey of the contradictory advice given American parents in general during the past century, see ANN HULBERT, *RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN* (2003).

³⁶⁰ Although the Girls' parents were probably rural farmers, there are no courses to develop any innate aptitude for agriculture offered on the Mall. See *supra* note 267. Rather, it is tacitly understood that one generation's lack of choices is not genetic, which is equally true (but less obvious) in domestic adoptions.

³⁶¹ As psychologist Rosemary Burr has pointed out, however, some of these babies are undoubtedly learning how to form healthy bonds in Chinese orphanages. Interview with Rosemary Burr, Ed.D., in Knoxville, Tenn. (July 7, 2003). Susan Harris, who spent her first fourteen months in foster care, has described the numbness she feels when she looks at "parents playing with their babies . . . I am happy for them, though at the same time I feel numb inside. I now know that the numbness has a lot to do with my not having any memories or voices for that period of my life, the time spent in [foster care]." Harris, *supra* note 19, at 11.

2. *Not Exactly Bedtime Stories*³⁶²

*I was ready for whatever came to me, I thought.
But I was not ready for the truth of my beginnings.*³⁶³

(a) "Nurture" as Problematic

This story is grounded in a lawsuit against the Louise Wise Agency in New York,³⁶⁴ which specialized, for a time, in placing babies of institutionalized women. The lawsuit was brought by the parents of a schizophrenic young man who had committed suicide when he was in his early twenties. His adoptive parents had never been told that his biological mother was a lobotomized schizophrenic,³⁶⁵ and that his biological father was also a mental patient.³⁶⁶

Michael Juman had been adopted in 1965, when

³⁶²Cf. Jeremy Paul, *A Bedtime Story*, 74 VA. L. REV. 915, 928–34 (1988) (showing how process of legal reasoning is as natural as strategies employed by children to manipulate babysitters).

³⁶³LOUISE ERDRICH, *THE LAST REPORT ON THE MIRACLES AT LITTLE NO HORSE* 319 (2002).

³⁶⁴*Juman et al. v. Louise Wise Servs.*, 663 N.Y.S.2d 483 (N.Y. 1997). For an account of the first successful wrongful-adoption action, see CARP, *supra* note 177, at 192 (summarizing *Burr v. Board of County Commissioners*, 491 N.E.2d 1101 (Ohio 1986), in which adoption agency lied to adoptive parents about birth mother's institutionalization and family history of Huntington's Disease).

³⁶⁵Lisa Belkin, *What the Jumans Didn't Know About Michael*, N.Y. TIMES MAG., Mar. 14, 1999, at 42.

³⁶⁶The Jumans were able to obtain this information because of a 1983 New York law requiring "agencies to provide adopted children and adopted parents with non-identifying medical information, including, 'all available information setting forth conditions or diseases believed to be hereditary . . .'" *Id.* at 47. The Jumans did not prevail in the lawsuit, in part because Michael's mother was unable to testify that she would not have adopted her son had she known about his biological mother's condition. *Id.* at 45.

Nature/nurture is still an open question. See Natalie Angier, *Getting Into Our Genes*, N.Y. TIMES BOOK REV., Apr. 6, 2003, at 15. Angier notes that

[a]fter all, there are only 35,000 human genes, many of them virtually indistinguishable from counterparts in yeast cells and fruit flies. What's left seems too skimpy to spell out anything but a skeletal script for being human. Which means precisely . . . I haven't the foggiest idea. And neither does anybody else, despite the boldness of [their] many predictions . . .

Id. More recently, humans have been found to have fewer than 25,000 genes: "That means we're playing with a smaller genetic deck than mustard weed." Sharon Begley, *Just How Many Genes Does It Take to Make a Human? Wanna Bet?*, WALL ST. J., May 22, 2003. For an almost Greek account of family tragedies, which wisely avoids the temptation to attribute nature or nurture, see Artemis OakGrove, *Full Circle*, in *THE ADOPTION READER*, *supra* note 182, at 39, 40–41. OakGrove's piece describes a legacy of family dysfunction going back to a great grandmother, "a religious fanatic [who] disdained physical contact with her children." Her grandmother abandoned her mother and her mother abandoned her. *Id.* She put her own daughter in foster care when the child was a few months old and when her daughter was five, she surrendered her for adoption: "I have to believe that her life has been many times better with these people than it would have been with me." *Id.* at 43.

privacy was the cornerstone of all adoption There was thought to be no reason to share information as unpleasant as a history of mental illness. At best, it would somehow "taint" the child. At worst, it would influence the way the parents treated that child, and since environment was thought to be all-powerful, that would create a self-fulfilling prophecy.³⁶⁷

The notion that mental illness was a function of nurture, or environment, rather than nature, or heredity,³⁶⁸ was part of the horrified reaction to the eugenics experiments of the Nazis.³⁶⁹ Although it was generally recognized between 1918 and 1935 that schizophrenia ran in families,³⁷⁰ after World War II all research on the heredity of mental illness was abruptly terminated. Rather, "between 1959 and 1966 . . . were the years of the schizophrenogenic-mother theory, the belief, now discredited, that a mother's inability to nurture her child properly was the root of the disease."³⁷¹ Michael Juman was adopted during this period. As he grew up, the linkages predicted by geneticists fifty years earlier became evident.³⁷²

³⁶⁷Belkin, *supra* note 365, at 46.

³⁶⁸Lea Wait, *Expectations . . . and Realities*, in *THE ADOPTION READER*, *supra* note 182, at 48, 150–57 (describing years of crises after adoptions by single mother of four Asian daughters from Thailand, Hong Kong, Calcutta, and Korea, ranging in ages from four to ten, from orphanages and abusive homes with confidence that "nurture was stronger than nature").

³⁶⁹The Nazi law for the Prevention of Hereditary Diseased Offspring of July 14, 1933 provided for sterilization if medical experts decided that offspring were likely to "suffer from 'serious hereditary defects' . . . [which eventually led] up to 400,000 people [who] were subjected to involuntary sterilization." D.A. Jeremy Telman, *Abortion and Women's Legal Personhood in Germany: A Contribution to the Feminist Theory of the State*, 24 N.Y.U. REV. L. & SOC. CHANGE 91, 111 (1998).

³⁷⁰See Remi J. Cadoret, *Biologic Perspectives of Adoptee Adjustment*, in *PSYCHOLOGY OF ADOPTION*, *supra* note 352, at 25, 37–38 (describing studies showing genetic factors in schizophrenia). See also Belkin, *supra* note 365, at 42. Belkin notes that:

In the decades between the agency's seemingly matter-of-fact decision to lie and his parents' agonizing discovery of that lie, the nature versus nurture pendulum swung from one extreme to the other. In 1964, genetic history could be dismissed as so meaningless as not to be mentioned. Now genes are thought to predict everything—from personality traits to intelligence to risk for disease. Our present assumptions are not likely to weather the decades unchallenged, either, but it was through the lens of the present that the Jumans went looking into the past.

Id.

³⁷¹Belkin, *supra* note 365, at 46. The agency presented evidence that it was not until 1968 that it was accepted that there was a genetic component to schizophrenia. Juman et al. v. Louise Wise Servs., 663 N.Y.S.2d 483, 486 (N.Y. 1997). No one argues for compulsory sterilization of schizophrenics today. Whether pregnant women should be forcibly restrained from behavior that puts their babies at risk remains controversial. Compare Louise Erdrich, *The Broken Cord*, in *THE ADOPTION READER*, *supra* note 182, at 97, 103 (arguing against "right" of pregnant woman to drink alcohol) with Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1420, 1481 (1991) (arguing that any "policy that attempts to protect fetuses by denying the humanity of their mothers will inevitably fail").

³⁷²See Belkin, *supra* note 336, at 60–62; David Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in *THE PSYCHOLOGY OF ADOPTION*, *supra* note 352, at 3, 15 (1990) (noting

Even if genes matter, however, the extent to which they matter is usually an open question.³⁷³ As Professors Rochelle Dreyfus and Dorothy Nelkin point out, it is important to distinguish “single gene disorders, such as Huntington’s Disease, cystic fibrosis, and hemophilia,” from “complex conditions and behaviors”³⁷⁴ Many children placed with Louise Wise by institutionalized mothers did *not* become schizophrenic suicides.³⁷⁵ Women have been (and are) institutionalized, moreover, for a wide range of reasons, many of which have a great deal more to do with their societies (“nurture”) than with their genes (“nature”).³⁷⁶ Finally, even institutionalized women have other characteristics besides their illnesses.

My biological mother, for example, was an academic³⁷⁷ in between bouts of narcolepsy so severe that she “fell asleep while taking a shower or riding a bicycle.”³⁷⁸ My adoptive parents were not told about her narcolepsy when they adopted me from Louise Wise. Nor were they contacted when my biological

frequent finding “that psychopathology in adoptees is more strongly related to psychopathology in the biological parents as opposed to the adoptive parents”).

³⁷³Rochelle C. Dreyfus & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 318 (1992) (noting that “books and articles written for adoptees stress the importance of finding one’s natural or birth parents and suggest that knowing one’s genetic heritage is a way to define identity. The very concept of identity is defined more in biological than in social terms.”).

³⁷⁴*Id.*

³⁷⁵Belkin, *supra* note 336, at 46–48.

³⁷⁶See Physicians for Human Rights, *Women’s Health and Human Rights in Afghanistan: A Population-Based Assessment*, available at http://www.phrusa.org/campaigns/afghanistan/exec_sum.html (last visited Oct. 7, 2003) (noting, for example, 76% percent of women in Taliban-controlled areas suffered from “extremely high rates of major depression”).

³⁷⁷She was a perpetual teaching assistant, accumulating degrees and never obtaining a tenure-track position. I had considered an academic career when I graduated from college, but my parents persuaded me that law school was much more practical. My biological mother’s connection to academia, however tenuous, somehow made it seem a possibility. She was not a lawyer, but her brother graduated from Harvard Law School the year I was born. For an account of how biological parents can affect future decisions of their descendants, see Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R. – C.L. L. REV. 401, 418–19 (1987) (describing rape of her then eleven-year-old great-great-grandmother by thirty-five-year-old lawyer who had bought her, and quoting her mother’s encouraging words when she decided to go to law school, “the Millers were lawyers so you have it in your blood.” (citation omitted)).

³⁷⁸Interview with my biological mother, April, 1980 (New York, N.Y.). I do not know, of course, whether this is true. Even if it is, I do not know what she left out. Narcolepsy is not now considered a mental illness. Rather, it is considered a neurological condition. Stanford Sch. of Med.: Ctr. for Narcolepsy, available at <http://www-med.stanford.edu/school/psychiatry/narcolepsy> (last visited Oct. 22, 2003). Diagnoses and categories change, however. In *Buck v. Bell*, 274 U.S. 200 (1927), for example, the Supreme Court upheld a Virginia law authorizing sterilization of those suffering from hereditary insanity or imbecility. As Justice Holmes declared, “[T]hree generations of imbeciles are enough.” *Id.* at 207. But see Robert J. Cynkar, *Buck v. Bell*, “*Felt Necessities*” v. *Fundamental Values*?, 81 COLUM. L. REV. 1418, 1418 (1981) (describing social pressures involved in *Buck* case and how they affected decision and law); Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30, 61–62 (1985) (arguing that phrase, “Three generations of imbeciles are enough,” and tremendous scholarly criticism of it, ignore other societal pressures (other than eugenics movement) resulting in Virginia law authorizing sterilization of *Buck* family).

mother sent the agency the study showing that narcolepsy has a genetic component. Nor have I ever had any symptoms of narcolepsy, which generally shows up in adolescence.³⁷⁹

It is unclear whether my parents would have adopted me if they had been told of my biological mother's condition. I am glad that they adopted me and that I did not become a "hard to place" child in the foster care system.³⁸⁰ I am also glad that I was not raised in the shadow of mental illness, anxiously watched for any signs of deviance.³⁸¹

Under current laws requiring medical and social history, such information would be provided, and I am not suggesting that it should not be. My point is simply that we view the conventional wisdom with some skepticism, keeping in mind that we have been breathtakingly wrong before.³⁸²

³⁷⁹Only 1–2% percent of the children of narcoleptics suffer from it, but this represents a twenty to forty-fold increase in the relative risk, compared to the general population. Ctr. for Narcolepsy, *supra* note 378.

³⁸⁰*See supra* notes 188–90 and accompanying text (describing "hundreds of thousands" of children in foster system).

³⁸¹As a 1974 Stanford experiment suggests, such signs tend to appear when they are expected. Eight volunteers, including three psychologists, were instructed to admit themselves to a mental institution complaining that they heard voices. The next day, they were instructed to report that the voices had stopped and to act normally. They were hospitalized, on the average, nineteen days and given over two thousand pills. The hospital never realized the ruse. Malcolm Gladwell, *Connecting the Dots*, NEW YORKER, Mar. 10, 2003, at 83, 86. I might feel differently, of course, if I were narcoleptic, or if I had a narcoleptic child.

³⁸²In 1964, genetic history could be dismissed as so meaningless as not to be mentioned. Now genes are thought to predict everything—from personality test to intelligence to risk for disease. Our present assumptions are not likely to weather the decades unchallenged, either" Belkin, *supra* note 365, at 46. *See generally* Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 877 (1997) (describing "confident," albeit bogus, pseudo-science of phrenology in nineteenth century).

(b) "Nature" as Problematic

Historically, the origin story in American adoptions was a non-story.³⁸³ Rather, adoptions were informal,³⁸⁴ hidden, or secret.³⁸⁵ A mother unable to take care of an infant would give her child to a sister, a cousin, or a friend of a friend. Even when formal agency adoptions became more common, agencies tried to match children with parents whom they physically resembled, so that they could "pass" for a biological family.³⁸⁶

It is now widely accepted among adoption professionals that origin stories are important both for the adoptee's psychological adjustment (her ability to be comfortable in her own skin) and her social adjustment (her ability to be a productive member of a larger society).³⁸⁷ This is a result of adoptee activism

³⁸³For a rigorous and detailed account of the actual operation of adoption law following the first adoption statutes in the United States, see Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-creating Families*, 43 AM. J. LEGAL HIST. 235 (1999). Private ordering was more the norm than the exception. See Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counter-History of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 264 (2002). See also generally Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743 (1956) (explaining that adoption was legal fiction that began in ancient societies as way of preventing extinction of family).

³⁸⁴Perry, *supra* note 186, at 111 (noting that "Black children orphaned by the sale or death of their parents were often taken in by the families of slaves or former slaves—among Blacks informal adoption has a very long history. At the same time, relinquishment of children for adoption because of birth outside marriage has been rare." (citations omitted)). The lack of regulation in adoptions led to concerns about child selling. See, e.g., Huard, *supra* note 383, at 761 (noting that "[t]he evidence is that unknown thousands of children are sold each year to persons eager to have children in their families").

³⁸⁵CARP, *supra* note 177, at 102–06 (attributing dearth of adoption history in United States to practice of sealing adoption records and thus depriving historians of original sources); cf. Lilani, *supra* note 94, at 23, 24 (describing historically widespread, but secretive, practice of adoptions in India, usually in order to "have a male heir to carry on the family name").

³⁸⁶Cadore, *supra* note 370, at 29 (noting efforts to match adoptees with parents of same hair or eye color). "Closed adoption policies evolved in the mid-twentieth century, at the same time that single adoptive parents were cut out of the loop and professionals argued an adoptive family should mimic a biological one." Nichols, *supra* note 11, at 5. This remains the approach in some countries. Romania, for example, has banned "independent" or "direct" adoptions from private Romanian families. Zugravescu & Iacovescu, *supra* note 88, at 43. Cf. Cahn & Singer, *supra* note 330, at 175–80 (describing contemporary "Rejection of the Sameness Model"). The personal, of course, is political. See, e.g., Lorraine Dusky, *Family Reunions*, in THE ADOPTION READER, *supra* note 182, at 3, 8–9. Dusky notes that:

In New York in the '30s, Governor Herbert H. Lehman was behind the legislation that sealed birth records in that state, and in 1980 the late Senator John Tower cast the vote that killed a provision that would have opened the records to all adoptees and natural mothers in the country. Both Lehman and Tower were adoptive fathers.

Id.

³⁸⁷See, e.g., Euthymia D. Hibbs, Ph.D., *Parental Responses to the Developmental Stages of Adopted Children*, in ADOPTION: INTERNATIONAL PERSPECTIVES, *supra* note 95, at 15, 23 (describing desire of adopted children to seek out their roots); Paul Sachdev, Ph.D., *The Triangle of Fears: Fallacies and Facts*, in ADOPTION: INTERNATIONAL PERSPECTIVES, *supra* note 95, at 249, 249–53

(including that grounded in the broader search for roots), the proliferation of blended families,³⁸⁸ and recent trends in social sciences.³⁸⁹ It is hoped that these stories will enable the adoptee to deal with medical problems³⁹⁰ and to find a place for herself.³⁹¹ This is not universally accepted, however,³⁹² and it is relatively recent.

(reporting and interpreting studies on disclosure and reunion). For a description of empirical studies by psychoanalysts and other psychologists about the benefits and risks of telling a young child about adoption, see CARP, *supra* note 177, at 127–31. This may be understood as part of a broader quest for “identity.” As Radhika Coomaraswamy notes, “For the last three decades, the concept of ‘identity’ has taken center place in political, social, and cultural debates.” Radhika Coomaraswamy, *Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women*, 34 GEO. WASH. INT’L. L. REV. 483, 483 (2002). For a dazzling exposition on identity, see CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

³⁸⁸Blended families refer to families of second and third marriages, in which children may well have more than one home with more than one parent. The conventional wisdom is that the adults should cope with awkward social situations as best they can, for the sake of the children. See *supra* note 239 and accompanying text (comparing situation of divorce to adoption).

³⁸⁹See, e.g., Cadoret, *supra* note 370, at 25, 29 (observing that “[i]t was not until the mid-1960s, starting with Heston’s paper on schizophrenia (1966), that interest swung toward elucidation of genetic factors in adoptee psychopathology”).

³⁹⁰Cahn & Singer, *supra* note 330, at 162 & n.54 (“Most states [and the Uniform Adoption Act] now allow for the release of non-identifying information to adoptees and adoptive parents.”). “Non-identifying” information typically includes medical information. Hague Convention, *supra* note 23, art. 16, 1870 U.N.T.S. at 182–96. But see Belkin, *supra* note 365, at 42 (describing anxiety of adoptees who have learned of hereditary conditions and worry not only about themselves but their children). The idea that medical history will help, moreover, assumes a medical condition that can be cured or dealt with constructively in a particular society. This is not always the case. See, e.g., ROBERT WHITAKER, *MAD IN AMERICA: BAD SCIENCE, BAD MEDICINE, AND THE ENDURING MISTREATMENT OF THE MENTALLY ILL*, xiii–xiv (2002) (describing treatment of mentally ill in United States and citing WHO studies showing that recovery rates for schizophrenics are dramatically higher in developing world).

³⁹¹See, e.g., Dusky, *supra* note 386, at 3, 6–7 (“We [the adoptive parents and biological mother] all wanted what was best for Jane. And there were no jealousies about who could best provide that. Whatever—or whoever—would work was what we were after. On one of those calls, Mary referred to Jane as ‘our daughter.’”); Harold Grotevant, Ph.D., *Coming to Terms with Adoption: The Construction of Identity from Adolescence into Adulthood*, 1 ADOPTION Q. 3 (1997). But see Ando, *supra* note 188, at 187 (describing trip to orphanage in Korea from which she was adopted and letdown of being handed white index card that contained all information agency had about her). See generally CARP, *supra* note 177, at 121–23 (describing shift in 1950s from caseworkers arguing about relative merits of total disclosure and total withholding, to arguments about “how much and what kind of family information should be withheld” as result of growing influence of psychoanalysis).

³⁹²Tzankova, *supra* note 180, at 54. Tzankova notes that:

Generally, an adopted child adapts himself well to the new family environment, and since the secret of the adoption is traditionally kept, he believes the adopters to be his natural parents. In cases where an adoption is revealed, damage to the parties involved can be great and lead to a severe family crisis.

Id.

Unlike the social workers at Louise Wise, who lied to the Jumans,³⁹³ social workers and other adoption professionals are now explicitly forbidden to fabricate. They are also taught to be as objective as possible in obtaining social histories. But their perceptions, and their objective, which is to place a child, inevitably color their reports.

Much of the medical history and virtually all of the social history is provided by the birth parents or their near relatives. They are unlikely to be trained to achieve even the questionable objectivity of the social worker. Medical history, moreover, is often based on observations of physiology which may be wrong. When I met my biological mother, for example, she pointed out that she and I had the same heavy eyelids. She explained that all the women in her family had them, which she interpreted as an unbroken line of narcoleptics, their heavy-lidded eyes always ready to close. "Mine aren't," I told her.

It is difficult to unpack "nature" and "nurture," and our conclusions may well change over time. I was perplexed for years after meeting my biological mother by what seemed to me an inexplicable gap. Since middle school I had been increasingly drawn to the civil rights, anti-war, and later, women's movement, all of which eventually came together in law school as "human rights." Part of this can be traced to growing up in the 1960s and 70s. But it resonated so deeply, as in the "Vlad the Impaler's Descendents" cartoon,³⁹⁴ and it was so alien to my parents, that I believed it must be in my blood. Surely there was a "Bernie the Labor Organizer" somewhere in my genes. My biological mother was doubtful.

Years later, during a conversation with human rights scholar Jack Donnelly, I traced this deep feeling to my experience of adoption itself, growing up physically and temperamentally different from the rest of my family, but accepted and loved nonetheless. My affinity for the emancipatory narratives of human rights law is grounded, in part, in my personal experience of adoption as emancipatory.³⁹⁵

³⁹³Juman et al. v. Louise Wise Servs., 663 N.Y.S.2d 483 (N.Y. 1997).

³⁹⁴Chast, *supra* note 343, at 152.

³⁹⁵See Bartholet, *supra* note 187, at 99-101; Dowd, *supra* note 6, at 914; Hillis, *supra* note 179, at 247 (suggesting that "children raised by homosexual parents may have a greater appreciation for other minority groups"). Others have noted the ways in which the great (or dire) expectations of nature and nurture can chafe. See CAROLYN G. HEILBRUN, WRITING A WOMAN'S LIFE 119 (1988) (quoting Samuel Butler's proposal "that all children be deserted at birth, wrapped in a generous portion of pound notes").

*B. The Laws*1. "Stand up for bastards!"³⁹⁶

Historically, the illegitimate child was *filius nullius*, the child of no one, a nonperson.³⁹⁷ The child obviously had a mother, but an unmarried mother had no more legal status than her child. As feminist historian Gerda Lerner has explained, the law of legitimacy is grounded in patriarchy, in the idea of children as the property of the father.³⁹⁸

This has been firmly repudiated in contemporary law. Under the Children's Convention,³⁹⁹ as well as under the family law of the United States⁴⁰⁰ and

³⁹⁶"I grow, I prosper; Now, gods, stand up for bastards!" WILLIAM SHAKESPEARE, *KING LEAR* act 1, sc. 2, ln. 21–22 (Kenneth Muir ed., 1951) (1608) (Edmund speaking). Edmund was despicable, but it is still a rousing line. See HAROLD BLOOM, *SHAKESPEARE: THE INVENTION OF THE HUMAN* 479 (1998) ("The play's great villain, the superb and uncanny Edmund, is ice-cold [and] indifferent . . . [while] Edmund and Lear . . . are apocalyptic antitheses: the king is all feeling, and Edmund is bare of all affect.").

³⁹⁷HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *DOMESTIC RELATIONS: CASES AND PROBLEMS* 255 (6th ed. 2000)

³⁹⁸See GERDA LERNER, *THE CREATION OF PATRIARCHY* 170–71 *passim* (1986). The corollary is that children have no right to the property of the father unless they are his legitimate heirs.

Early in the nineteenth century, Chancellor Kent stated the harsh common-law doctrine this way: 'A bastard being in the eye of the law *nullius filius* [child of no one], . . . he has no inheritable blood, as is incapable of inheriting as heir, either to his putative father, or his mother, or to anyone else, nor can he have heirs but of his own body.'

DOUGLAS E. ABRAMS & SARA H. RAMSEY, *CHILDREN AND THE LAW* 47 (2001) (quoting JAMES KENT, *COMMENTARIES ON AMERICAN LAW*). "[A]ll states [now] permit illegitimate children to inherit from their fathers under certain circumstances." CLARK & ESTIN, *supra* note 397, at 256.

³⁹⁹Children's Convention, *supra* note 103, art. 2.

⁴⁰⁰"We start from the premise that illegitimate children are not 'non-persons.' They are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Levy v. Louisiana*, 391 U.S. 68, 70 (1968) (citations omitted). Holding that the mother of an illegitimate child could recover for his wrongful death, the U.S. Supreme Court further held that:

we see no possible rational basis for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy will be served . . . [Barring such suits] hardly has a causal connection with the 'sin,' which is, we are told, the historic reason for the creation of the disability.

Glon v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73, 75 (1968) (citation omitted). See also *Gomez v. Perez*, 409 U.S. 535 (1973) (striking state support law that discriminated against out-of-wedlock children). See generally William N. Eskridge, Symposium: *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (describing how social movements change twentieth century constitutional law); Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992) (arguing that decisions by parents to have illegitimate children should not adversely affect those children). But see Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2181–83 (1995) (arguing that current "family" construct still impedes equality for single and divorced women with children because of emphasis on concepts of "independence" and autonomy" and apparent historical appropriation of, rather than economic reward for, their caretaking labor).

China,⁴⁰¹ the adopted child is entitled to the same rights and legal status as a legitimate biological child.⁴⁰² The rejection of illegitimacy as a status is grounded both in the recognition of women's equality⁴⁰³ and in the larger human rights project⁴⁰⁴ of which women's equality is a part. This project, in turn is part of a larger normative shift from patriarchal authoritarianism to rights-centered egalitarianism.⁴⁰⁵ This shift is evident not only in the law, but in the burgeoning numbers of out-of-wedlock births in the United States⁴⁰⁶ and western Europe.⁴⁰⁷

⁴⁰¹In 1980, children born out of wedlock in China were given equal rights. CHOW, *supra* note 22, at 359–60. *See also* China Adoption Law, *supra* note 298, art. 4 (reiterating policy of nondiscrimination against illegitimate children).

⁴⁰²Columbia, Bolivia, Honduras, and Panama similarly consider all children "legitimate." Simov, *supra* note 297, at 260.

⁴⁰³*See supra* notes 139–45 and accompanying text (describing women's equality under Women's Convention).

⁴⁰⁴"Human rights" are not synonymous with "legal rights." Thus, the state—subject to human rights law—cannot discriminate between children because of the circumstances of their birth, but their parents can. Such discrimination, however, is subject to domestic family law. In the United States, for example, the father of a child born out of wedlock is required to support her. ELLMAN ET AL., *supra* note 315, at 497 *passim*.

⁴⁰⁵This transition has been going on for some time. Framed philosophically, it can be traced to the American Revolutionary era. *See* LOUIS HENKIN, *THE AGE OF RIGHTS* ix (1990). Framed historically, from an American perspective, it is grounded in the relationship between the governed and the state established in the U.S. Constitution. *See* MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996). From an international perspective, it is rooted in the *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), which explicitly provides that: "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* at 72.

⁴⁰⁶Most first births in the United States "are now conceived or born to unmarried women." CLARK & ESTIN, *supra* note 397, at 257 (citing Census Bureau report released in 1998). Thirty percent of births in the United States and 29% in Canada are to unmarried parents. ABRAMS & RAMSEY, *supra* note 398, at 128 (citation omitted). *See* ELLMAN ET AL., *supra* note 315, at 1035 (noting comparable figures in 1986); Perry, *supra* note 186, at 112 (noting that "[b]ecause of the rape and sexual exploitation of Black women by their white masters during slavery, historically Black children born out of wedlock have never been stigmatized in the same way as the children of white women").

Note that the legal classification of children born outside legal marriage as 'illegitimate' may or may not correspond to social concepts of legitimacy. . . . Note, too, that the legal category of 'illegitimacy' may include children who are living in families with both of their parents, while the set of 'legitimate' children includes many who are living with only one parent."

MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 9 n.16 (1989).

⁴⁰⁷Thirty-three percent in France, 46% in Denmark, and 50% in Sweden are to unmarried parents. ABRAMS & RAMSEY, *supra* note 398, at 128. *See also* GLENDON, *supra* note 406, at 144. Abrams and Ramsey note that:

'In barely twenty years [since 1965] the birth rate and the marriage rate have tumbled while divorces and illegitimate births have increased rapidly. All these changes have been substantial with increases or decreases of more than fifty percent . . . and they have been general, because all industrialized countries have been affected beginning around 1965.'

While laws renouncing illegitimacy are widespread, in practice the stigma remains strong in some parts of the world. International adoption enables babies born into a society where such a stigma still exists to grow up in a society where that stigma is less.⁴⁰⁸ The once-scorned objects of the law have become self-defining legal subjects.⁴⁰⁹ These subjects, not surprisingly, have a range of views on adoption. Some, such as the adoptee-rights group⁴¹⁰ Bastard Nation, defy the notion of stigma and insist on their right to know their biological families.⁴¹¹ Others argue that adoption is *about* fresh slates.⁴¹² Like the immigrant, the adoptee is given a new start, in a new place, with a new identity.⁴¹³ As Barbara Ehrenreich observes in an essay on “roots,” her ancestors were “none of the above.”⁴¹⁴ Rather, they were the ones who repudiated the traditions of a blood-soaked, class-entrenched feudalism, those who fled the Old Country with its pogroms and prejudices. The archetypical American origin story is one of self-invention.⁴¹⁵ The Baby Girls, it could be argued, are part of its latest iteration.⁴¹⁶

2. Human Rights

The rejection of illegitimacy as a status is necessary, but not sufficient, for such self-invention. Other human rights are also necessary. The United States has

Id. (citing Louis Roussel, “Demographie: Deux Decennies de Mutations,” paper presented at the Fifth World Conference of the International Society on Family Law, July 8–14, 1985, Brussels, Belgium).

⁴⁰⁸But see Coomaraswamy, *supra* note 387, at 487 (noting that because of colonial legacy, “any struggle for women’s equality and dignity in third world cultures is seen as the secret weapon of western imperialism”).

⁴⁰⁹See William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221 n.249 (1988) (explaining how *Gomez* changed legal status of “illegitimate”); Mark W. Janis, *Individuals as Subjects of International Law*, 17 CORNELL INT’L L.J. 61, 61 (1984) (explaining how individuals have emerged as active—and accountable—subjects of international law). By rejecting illegitimacy, however, we not only reject the notion of a worthless, subhuman “bastard,” but the notion of an enlightened rescuer who saves her.

⁴¹⁰For a lively history of the adoption-rights movement, see CARP, *supra* note 177, at 138–56.

⁴¹¹See Bastard Nation, *supra* note 19 (“The right to know one’s identity is primarily a political issue Please join us in our efforts to end a hidden legacy of shame, fear, and venality.”).

⁴¹²See Jackson & McKinley, *supra* note 182, at 193 (“I remarked to one of my favorite professors that I really had no family. I will never forget her words: ‘You are lucky then. You can invent some.’”).

⁴¹³Dowd, *supra* note 6, at 916 (noting that “the absence of a genetic link can be liberating, because it encourages us to see children not as property or as mirrors of adults, but instead as independent, unique beings”) (citation omitted).

⁴¹⁴BARBARA EHRENRICH, *THE SNARLING CITIZEN* 24 (1995).

⁴¹⁵See, e.g., F. SCOTT FITZGERALD, *THE GREAT GATSBY* (1953) (showing how Jay Gatz reinvents himself as Old Money). Indeed, commercial empires, like Ralph Lauren, have been built on the same premise.

⁴¹⁶See TESSLER ET AL., *supra* note 6, at 20 (noting that for “children adopted from China who arrive in the United States without network, culture, or capital, [ironically], the older theories of assimilation and the melting pot will probably better explain most adopted children’s experiences [than the model of the diaspora]”).

not ratified the Economic Covenant,⁴¹⁷ the Women's Convention,⁴¹⁸ nor the Children's Convention.⁴¹⁹ While it has ratified the Civil Covenant,⁴²⁰ it has done so in a manner which assures that it has no impact on domestic law.⁴²¹ As a practical matter, however, by emigrating to New York, the baby girls from China immediately improve their overall human-rights situation, with respect to both civil and political rights, on the one hand, and economic, social and cultural rights, on the other.⁴²²

The Girls are in a stronger position with respect to both kinds of rights even without taking into account the protections provided by domestic adoption law.⁴²³ By becoming American citizens,⁴²⁴ the Girls can expect to enjoy civil and political rights still unimaginable in China,⁴²⁵ including constitutional rights to freedom of religion,⁴²⁶ expression,⁴²⁷ association,⁴²⁸ and political participation.⁴²⁹

While the United States has not ratified the Economic Covenant,⁴³⁰ the Girls will be raised in the world's wealthiest country⁴³¹ and their American parents are a self-selected group that can afford to go to China and adopt a child. They are likely to enjoy a standard of living far better than the "adequate standard of

⁴¹⁷Economic Covenant, *supra* note 122, 993 U.N.T.S. at 4.

⁴¹⁸Women's Convention, *supra* note 24, 1249 U.N.T.S. at 14.

⁴¹⁹Children's Convention, *supra* note 103, 1557 U.N.T.S. at 44.

⁴²⁰Civil Covenant, *supra* note 21, 999 U.N.T.S. at 172.

⁴²¹*See supra* note 21 (stating that some states have no mechanisms for enforcement). Because of reservations through which the United States qualifies its acceptance of the treaty by exempting itself from certain provisions, the girls may also be subject to the death penalty for crimes committed as juveniles, at least in theory. *See* U.S. RUDs, in HUMAN RIGHTS, *supra* note 21, at 784–85. Article 6.5 provides in pertinent part: "Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age . . ." (No females have, in fact, been executed in the United States for crimes committed as juveniles.) The girls may also be subject to intentionally discriminatory speech because the United States has taken a reservation to Article 20.2, which prohibits hate speech. *See id.*

⁴²²*See supra* notes 91–104 and accompanying text (explaining limited rights available to Chinese children).

⁴²³*See supra* Part II.B.3 (discussing U.S. adoption law and its influence on intercountry adoption).

⁴²⁴*See supra* note 297 (discussing recent legislation that simplifies process for adoptees).

⁴²⁵They are unimaginable for the vast majority of Chinese, especially, according to some commentators, since the crackdown following Tiananmen Square. *See, e.g.,* Robert Benewick, *The Tiananmen Crackdown and its Legacy*, in CHINA IN THE 1990s 5, 20 (Robert Benewick & Paul Wingrove eds., 1995) (using Tiananmen Square as proof of China's desire to preserve current regime). *But see* John P. Burns, *The People's Republic of China at 50: National Political Reform, in THE PRC AFTER 50 YEARS*, *supra* note 22, at 18 (citing Edward Friedman for proposition that regime must inevitably democratize).

⁴²⁶U.S. CONST. amend. I.

⁴²⁷*Id.*

⁴²⁸*NAACP v. Alabama*, 357 U.S. 449, 462 (1958) (finding right to association in Due Process Clause of Fourteenth Amendment).

⁴²⁹U.S. CONST. art. I, § 2; U.S. CONST. amend. XV, § 1 (extending right to vote to black men); U.S. CONST. amend. XIX (extending right to vote to women).

⁴³⁰Economic Covenant, *supra* note 122, 993 U.N.T.S. at 4.

⁴³¹*See supra* note 5 (showing that United States has highest GDP in world).

living” set out in the Economic Covenant.⁴³² Even though the United States does not recognize the human rights to health care⁴³³ and to education,⁴³⁴ similarly, they are likely to enjoy a high standard of both.

The Girls cannot exercise their right under the Children’s Convention to grow up in their country of origin.⁴³⁵ This is related to, but distinct from, the “right to culture,”⁴³⁶ which is considered a group right in international human rights law, typically claimed by an ethnic minority within a larger society. While the parameters of the right to culture are not precise, it generally encompasses the right to “a way of life”—language, customs, music, celebrations, food, and rituals—customarily practiced by the group.⁴³⁷ Group rights assume that the group’s traditions offer the richest, most satisfying way of life for its members, as well as a sense of pride and identity which may be particularly important for those living within a majority culture that marginalizes them.⁴³⁸ The right to culture is also crucial to the group’s survival as a group, enabling it to maintain a distinct cultural identity and resist pressure to assimilate.⁴³⁹

⁴³²Economic Covenant, *supra* note 122, art. 11, 993 U.N.T.S. at 7.

⁴³³*Id.* art. 12, 993 U.N.T.S. at 8.

⁴³⁴*Id.* art. 13, 993 U.N.T.S. at 8.

⁴³⁵See Children’s Convention, *supra* note 103, art. 21(b), 1557 U.N.T.S. at 51 (requiring States Parties to “recognize that intercountry adoption may be considered as an alternative means of child’s care, if the child *cannot be cared for in the child’s country of origin*”) (emphasis added); Jaime Sergio Cerda, *The Draft Convention on the Rights of the Child: New Rights*, 12 HUM. RTS. Q. 115, 118 (1990) (explaining Article 21’s requirement in part as means of assuring determination in “the best interests of the child”). This preference for institutionalization in the country of origin over intercountry adoption is echoed in the African Charter on the Rights and Welfare of the Child. OAU Doc. CAB/LEG/24.9/49 (1990) *entered into force* Nov. 29, 1999. Under Article 24(b), intercountry adoption is a last resort, considered only if the child cannot be placed in a foster or adoptive family or “in any suitable manner”—including institutionalization—be cared for in the country of origin. Adoption is further restricted under the African Charter to those states which have ratified the Children’s Convention or the African Charter. Only 137 African children were adopted by U.S. citizens between 1979 and 1987. Perry, *supra* note 186, at 130 n.110. *But see* Minister for Welfare & Population Dev. v. Fitzpatrick 2000 (3) SA 422 (CC); 2000 (7) BLUR 713 (CC) (prohibiting non-South Africans from adopting South African child because South Africa Constitution required that best interest of child supersede all other matters or interests related to child).

⁴³⁶Economic Covenant, *supra* note 122, art. 15(1), 993 U.N.T.S. at 9 (“The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life.”).

⁴³⁷In Sweden, for example, the right to culture of the indigenous Sámi has been recognized and linked to their traditional reliance on reindeer. *Kitok v. Sweden*, Human Rights Committee, 1988, UN Doc. A/43/40 at 221 (cited in HUMAN RIGHTS, *supra* note 21, at 452). Thus, under Swedish law, the Sámi are assured the land needed to sustain a herd and continue their traditional practices.

⁴³⁸For a rigorous and thought-provoking inquiry into the social and genetic construction of identity, see Woodhouse, *supra* note 190, at 109–16.

⁴³⁹Yale Tamer, *Siding With the Underdog*, in *BAD FOR WOMEN?*, *supra* note 143, at 47, 51 (“A great deal of paternalism is imbedded in the assumption that while . . . ‘we’ can repeatedly reinvent ourselves, our culture, our tradition . . . ‘they’ must adhere to known cultural patterns. These assumptions are particularly damaging for women who can improve their social status only by challenging traditional norms.”).

The right to culture assumes a collective, a group, within which the individual can thrive. Chinese Americans neither claim the Baby Girls nor protest their adoption by whites.⁴⁴⁰ As explained above, moreover, the Baby Girls in New York probably enjoy more of the benefits of community than most Americans,⁴⁴¹ and more access to Chinese culture than most Chinese.⁴⁴²

3. *Disruption*

Parts I and II showed how the Baby Girls from China disrupted the stories into which they entered. Here, they become conscious disrupters, although there is no telling how they will do so.⁴⁴³ Like all adoptees, they disrupt the story of nature (by leaving that frame behind) and the story of nurture (by showing that they are not blank slates). The Baby Girls go further, however, by having no records to disclose, no files to unseal, and by appearing in a new cultural context, without the associations that would accompany them in China.⁴⁴⁴

They also, again, disrupt the law. Like all female adoptees, they disrupt the law of illegitimacy, in which females were historically nonpersons, irrelevant for purposes of identity or inheritance. The Baby Girls further disrupt the notion of “illegitimacy” in the traditional sense because their parents are married. Rather, the Girls are only “illegitimate” by government edict. Thus, they disrupt the legitimacy of the law itself insofar as it depends on embeddedness in social norms. Finally, the Baby Girls disrupt the assumptions of human rights law by enjoying a full range of human rights in a state that does not even pay lip service to those rights that arguably matter most to people of their age, gender, and ethnicity.

IV. CONCLUSION

This thrice-told tale has shown why the story of the Baby Girls from China in New York requires multiple tellings. First, multiple tellings expose the multiple contexts and perspectives that drive these adoptions, from those of the desperate birth mothers in rural China to those of the hopeful adoptive parents in New York. Second, multiple tellings destabilize and problematize our understandings of law. Laws enacted in China to promote women’s equality led, paradoxically, to an

⁴⁴⁰Nor, unsurprisingly, is there any protest from mainland China regarding the adoption of Chinese nationals by Americans. Protests are not encouraged in the PRC. Benewick, *supra* note 425, at 20.

⁴⁴¹See, e.g., ROBERT BELLA ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 282 *passim* (1985) (describing “erosion of meaning and coherence in our [American] lives”).

⁴⁴²See, e.g., *supra* Part II.A.2.(c) (showing how American culture depicts some aspects of Chinese culture).

⁴⁴³See *supra* note 1 and accompanying text (stating that Lisa Lu will decide when and whether to tell her story).

⁴⁴⁴See *supra* note 285 (citing poem as example of misogynist trend in Chinese culture).

increase in abandoned baby girls. Multiple tellings may not answer the question of well-intentioned human rights activists, but they remind us of the brutal prerogatives of state sovereignty, and the risks of feel-good responses.⁴⁴⁵

Finally, multiple tellings show us how each story is constructed by state and non-state actors for a wide range of personal and political reasons. This includes the ways in which the needs of the present shape our understandings of the past, as shown by retroactive disclosure laws regarding the identities of birth parents⁴⁴⁶ and laws requiring agencies to provide medical information once considered prejudicial.⁴⁴⁷

This thrice-told tale has also shown how the Baby Girls disrupt each telling. In the First Telling, the one million missing baby girls disrupt the official story of gender equality, an explicit objective of the one-child policy. At the same time, the Baby Girls who come to the United States, along with the international attention they focus on those left behind,⁴⁴⁸ disrupt the equation of abandonment with infanticide.⁴⁴⁹ In the Second Telling, adoptive parents seeking healthy babies without strings find themselves tied not only to a problematic *family* of origin, but to an entire *country* of origin,⁴⁵⁰ by an apparently unbreakable red thread.⁴⁵¹ Those who hoped to avoid the race card find themselves on the frontlines in the culture wars.⁴⁵²

As the Third Telling suggests, the Baby Girls disrupt each telling for the same reason their stories demand multiple tellings; that is, at every juncture they transgress boundaries.⁴⁵³ Their mere arrival challenges the stories into which they

⁴⁴⁵See *supra* notes 89–104 and accompanying text (describing abrupt closings of adoption programs). See also Zhang, *supra* note 34, at 593 (arguing that “conflict in China between the individual’s right of procreation and the state’s need to control population growth . . . can only be resolved in China by the Chinese people; pressure from outside will likely have little impact”). But see Human Rights Watch, *supra* note 90 (depicting follow-up to article by MUNRO & RIGSBY, *supra* note 87, noting some positive changes).

⁴⁴⁶See *supra* Part II.B.3.(b).

⁴⁴⁷See *supra* Part II.B.1.

⁴⁴⁸See Bartholet, *supra* note 183, at 1164–67, 1235; see also *supra* note 214 and accompanying text (describing FWCC aid to Chinese orphanages).

⁴⁴⁹See also Johnson et al., *supra* note 62, at 475–77 (describing importance of daughters in Chinese family life).

⁴⁵⁰See *supra* notes 274–77 (describing red thread).

⁴⁵¹See *supra* notes 271–80 (describing American appropriation of Chinese folklore).

⁴⁵²And they are delighted to be there. See *supra* Part II.A.2 (describing adoptive parents’ promotion of Chinese culture with their baby girls from China).

⁴⁵³Cf. Brodzinsky, *supra* note 372, at 24. Brodzinsky deplores the:

historical (and conceptual) gap that exists between social service fields, which traditionally have dominated adoption (and foster care), and more research-based disciplines such as psychology, psychiatry, and sociology. Until the boundaries between these fields and disciplines can be made more flexible and a productive level of cross-fertilization of ideas and objectives can be achieved, our understanding of the adjustment problems of adopted children and our capacity to meet their case work and clinical needs will surely be inadequate.

Id.

enter. The Baby Girls' irreducible identities as Third-World females, like the key to a Chinese puzzle box, suggest one explanation.

Ratna Kapur, one of India's leading feminists,⁴⁵⁴ has written about a "peripheral subject," a Third World female, and her "moments of resistance."⁴⁵⁵ Professor Kapur "center[s] the peripheral subject and her multiple historically, culturally, and socially-determined subjectivities,"⁴⁵⁶ honing in on the "traveling subject," whose "very movement across borders, whether legal or illegal, challenges normative arrangement of gender . . . and culture." The Baby Girls from China, it can be argued, are precisely such "peripheral subjects." Their repeated disruptions can be understood as "moments of resistance,"⁴⁵⁷ "challeng[ing] normative arrangements of gender and culture."⁴⁵⁸ However varied their personal trajectories, their "very movement across borders" has already radically transformed their lives, the lives of their adoptive families, and the ways in which many of us think about families and international adoption.

The Girls' equally irreducible identities as active subjects, like Russian nesting dolls replicating very American stories of self-invention, suggest a second explanation. They can be counted on to disrupt whatever stories they are part of because they are not metaphors, grids, or any other neat, abstract, infinitely malleable construct.⁴⁵⁹ They are *humans*, and when we actually enter into a story, we transform it and make it our own. Disruption is what we do.⁴⁶⁰ We achieve this

⁴⁵⁴GlobalLaw: The Newsletter of the Global Law School Program, New York University School of Law, Spring 2001, at 2–3 (describing Kapur as "India's leading feminist scholar and activist").

⁴⁵⁵Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the 'Native' Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 29 (2002). Professor Kapur is particularly interested in this subject's central role in a "more progressive movement for women's rights . . . within the area of human rights." *Id.*

⁴⁵⁶*Id.* This Article has attempted to do the same with respect to the baby girls from China.

⁴⁵⁷These are made possible by a small army of non-state actors, especially their adoptive parents. Their birth parents, as well as FCC and even Disney, a world leader in the commodification of culture, will contribute.

⁴⁵⁸*Id.* As Karin Evans concludes *The Lost Daughters of China*,

Whenever I see one/ I know there will someday be/ this incredible sorority/ of women brought here/ as babies from China . . . Maybe on the basis of/ collective cultural hybrid/ strength which they'll/ find many ways to cultivate/ (the strength of their stories)/ these women of the world's/ first international/ female diaspora/ will inherit the earth./ And do something good with it.

Penny Callan Partridge, *For all the Little girls from China*, in EVANS, *supra* note 72, at 250. Alan Pertman describes Partridge as adoption's "poet laureate." PERTMAN, *supra* note 16, at 232. Perhaps some of the baby girls from China, like Mulan on the top of the mountain in the Disney version of the epic folk tale, MULAN (Disney Pictures 1998), will swoop down to rescue not only their counterparts left behind in China, but the baby girls left behind everywhere. Indeed, the earliest antecedents for international human rights law have been found where religious or ethnic groups in one state have become champions for their counterparts abroad. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 586–90 (4th ed. 2001).

⁴⁵⁹Schlag, *supra* note 26, at 1105–17.

⁴⁶⁰They are also *babies*, and thus especially disruptive. As Queen Latifah explained the bizarre antics of hip-hop's latest superstar, "a foul-mouthed eighteen month old" in a recent skit on

disruption, in part, by what we choose to replicate, and what we choose to leave behind, and the stories we tell about the process of doing so.⁴⁶¹ These stories, like laws and the families they define, are socially and culturally constructed. They are always subject to reconstruction and reinvention by a multitude of state and non-state actors, including, of course, the Baby Girls from China in New York.

Saturday Night Live, “[H]e’s a baby!”. *Saturday Night Live Transcripts*, available at <http://www/snltranscripts.jt.org/02/02nbabyk.phtml>.

⁴⁶¹ As Dumbledore, the headmaster of the Hogwarts’ wizardry school, tells Harry Potter, “It is our choices, Harry, that show us what we truly are, far more than our abilities.” J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* 333 (1999).

