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## Seeking the Better Interests of Children with a New International Law of Adoption

Richard Carlson  
*South Texas College of Law*

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RICHARD CARLSON

## Seeking the Better Interests of Children with a New International Law of Adoption

ABOUT THE AUTHOR: Richard Carlson is a Professor of Law at the South Texas College of Law. He was a member of the U.S. State Department Study Group on Intercountry Adoptions from 1990 to 1994.

## I. INTRODUCTION

Intercountry adoption is in the midst of an identity crisis. Its character, its mission, and its morality are subjects of anguished and even angry debate. Most participants in the debate assert that they are seeking the “best” interests of children, but the paths they describe seem to lead anywhere but to common ground. Statistics showing the annual number of intercountry adoptions have marched consistently downward since 2004, as if to signal spreading disillusionment.<sup>1</sup>

This is not the end for intercountry adoption, it is a transition. Intercountry adoption has never been free from controversy, except perhaps in a distant past when it was the eccentric and rarely seen cousin of “domestic” adoption. The intensity of today’s debate is a function of the spreading practice and awareness of intercountry adoption, and of its extension to regions that are only beginning to develop the cultural, legal, and physical infrastructure for adoption. Intercountry adoption has evolved from an off-beat and episodic “American” phenomenon into a highly visible global phenomenon,<sup>2</sup> a major aspect of modern family law, and therefore an attractive target for a wider circle of academics, journalists, and politicians with a diversity of agendas. The debate has also been fueled by real malfeasance and scandal of the sort that periodically visits “domestic” adoption.<sup>3</sup> But adoption—whether domestic or intercountry—is not inherently flawed. For all the risks it might pose in any individual case, it remains the best way to match many thousands of children in need with prospective parents wanting and willing to accept the joys and burdens of parenthood. The answers to adoption’s current malaise are the same that they have always been: vigilance, continued search for practical and workable safeguards against unethical conduct, and realism about the purposes, benefits, and risks of adoption.

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1. See Scott Baldauf et al., *International Adoption: A Big Fix Brings Dramatic Decline*, CHRISTIAN SCI. MONITOR, Mar. 14, 2010, <http://www.csmonitor.com/World/Global-Issues/2010/0314/International-adoption-A-big-fix-brings-dramatic-decline>. According to statistics compiled by the Office of Children’s Issues of the U.S. State Department, the annual number of intercountry adoptions by U.S. residents reached a peak in 2004 at just under 23,000. By 2009 the number had declined dramatically by well over 40% to 12,753. *Total Adoptions to the United States*, U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited Feb. 23, 2011). The United States is the nation of origin in over 40% of intercountry adoptions. See *International Adoption Statistics*, AUSTRALIAN INTERCOUNTRY ADOPTION NETWORK, <http://www.aican.org/statistics.php?region=0&type=receiving> (last visited Feb. 23, 2011) [hereinafter *Int’l Adoption Statistics*].
  2. For an early history of intercountry adoption, see Richard Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317 (1988). Today, the United States is only one of many “receiving” nations in intercountry adoption. In most intercountry adoptions, the receiving nation is a nation other than the United States. Calculated on a per capita basis, the United States is now *twelfth* on a list of major receiving nations. *Int’l Adoption Statistics*, *supra* note 1.
  3. One recent and widely publicized scandal involved a missionary group’s misguided effort to remove a number of non-orphan children from Haiti, possibly for the purpose of adoption. Marc Lacey, *Haiti Charges Americans with Child Abduction*, N.Y. TIMES, Feb. 4, 2010, <http://www.nytimes.com/2010/02/05/world/americas/05orphans.html>. A second involved a U.S. adoptive parent’s rejection and return of her adopted son to Russia. Clifford Levy, *Russia Calls for Halt on American Adoptions*, N.Y. TIMES, Apr. 9, 2010, <http://www.nytimes.com/2010/04/10/world/europe/10russia.html>.

The purpose of this article is to evaluate the arguments against intercountry adoption, weigh proposals for regulatory reform, and offer a plan for restating international law with respect to adoption. Part II summarizes the debate by presenting the arguments of various factions, and it includes an evaluation of the prospect, advisability, and limits of regulatory reforms proposed by some factions.

Part III addresses the debate over a particular fact: Are there a significant number of “orphans” who might benefit from adoption? It might seem the answer to this question should be easy to discover and verify, but the answer involves not just hard facts but also the interpretation of facts. Proponents for adoption see many millions of children in need of adoption; skeptics dismiss the proponents’ statistics as a “myth.”<sup>4</sup> The certainly true and important answer is that the number of children who would almost certainly benefit from adoption far exceeds the number of prospective adoptive parents.

Finally, Part IV proposes a restatement of international law regarding adoption. There are three parts to this restatement. First, for purposes of international law, we should avoid the “best interests of the child” standard. The best interests standard is mainly an adjudicatory standard with implicit qualifications. Its use as a standard for promoting and evaluating child welfare policies is misleading and unhelpful. Future international law should substitute a more meaningful standard: nations should seek policies that achieve the “better interests” of children. Second, international law should decisively endorse adoption as an essential feature of any nation’s child welfare policies. The international community should endorse adoption regardless of its view of *intercountry* adoption. Finally, international law should reject the strict view of “subsidiarity,” which requires that a “sending” nation must exhaust all possibilities of local placement before releasing a child for adoption by parents from a “receiving” nation.<sup>5</sup> Strict subsidiarity, crudely applied, leads unnecessarily to institutionalization or abusive forms of foster placement. It is time for international law to move forward with a more sophisticated approach to placement options.

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4. See, e.g., Fiona Bowie, *Adoption and the Circulation of Children: A Comparative Perspective*, in CROSS-CULTURAL APPROACHES TO ADOPTION 3, 14 (Fiona Bowie ed., 2004); Claudia Fonseca, *The Circulation of Children in a Brazilian Working-Class Neighborhood*, in CROSS-CULTURAL APPROACHES TO ADOPTION, *supra*, at 165.

5. Some critics of intercountry adoption have described this as a rule that makes intercountry adoption the “last resort.” See, e.g., Benyam Mezmur, *Intercountry Adoption as a Measure of Last Resort in Africa: Advancing the Rights of a Child Rather Than a Right to a Child*, 10 INT’L J. HUM. RTS. 83, 83–84 (2009) (describing nationalist views against intercountry adoption).

## II. THE INTERCOUNTRY ADOPTION DEBATE

## A. Overview

Adoption has been a subject of controversy since the enactment of the earliest adoption laws<sup>6</sup> and long before the first intercountry adoptions.<sup>7</sup> While the context of adoption controversies has changed over time, the essential issues have not. Supporters and critics of adoption have argued whether adoption serves the “best interests” of children, whether it results in an unsavory “baby market,” whether it is sufficiently protective of birth parents or adoptive parents, and whether the rules of adoption can be reformed to achieve the legitimate goals of adoption and to prevent unethical conduct. Within the United States, these issues have propelled the evolution of adoption law over a period of more than 160 years. The concept, law, and process of adoption continue to be works in progress.<sup>8</sup>

Like the debate over domestic adoption, the debate over intercountry adoption has deep roots and shifting contexts over time. Much of today’s debate is connected to two important instruments of international law: the United Nations Convention on the Rights of the Child<sup>9</sup> (CRC) and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption<sup>10</sup> (the “Hague Convention” or the “Convention”). These two documents disagree over the proper role of intercountry adoption in addressing the needs of children and their families.

The CRC condones but does not demand adoptive placement for a child who is deprived of his or her “family environment.”<sup>11</sup> Adoption is merely one alternative for such a child. Other alternatives include foster care or a “suitable institution.”<sup>12</sup>

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6. A Massachusetts law dated 1851, the Adoption of Children Act, 1851 Mass. Acts ch. 324, is widely regarded as the first U.S. law on formal adoption. See *Timeline of Adoption History*, ADOPTION HISTORY PROJECT, UNIV. OF OREGON, <http://www.uoregon.edu/~adoption/timeline.html> (last updated July 11, 2007) [hereinafter *Timeline of Adoption History*]. The first adoptions laws were at least partly in response to controversies that preceded formal adoption: the potential abuses of informal placement that might be mainly for labor, the use of indentured servitude as a form of placement for children in need of homes, and the lack of secure legal bonds between children and their long-term de facto caregivers. See Rebecca Trammell, *Orphan Train Myths and Legal Reality*, 5 MODERN AM. 3, 6–7 (2009); Legate v. Legate, 28 S.W. 281 (Tex. 1894) (involving resolution of competing claims between de facto parents and legal father). One of the earliest controversies involved the so-called “orphan trains” that first launched in 1854 and continued until 1929. See Trammell, *supra*.

7. See Carlson, *supra* note 2, at 321–34.

8. For example, the debate over the extent to which adoptive children should be completely severed from their birth families lingers as an issue. One semi-recent change in the law of one U.S. state authorizes a court to grant birth grandparent “access” to or “reasonable possession” of an adoptive child, despite the termination of the birth parents’ parental rights. TEX. FAM. CODE ANN. § 162.017(d) (West 2005).

9. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC], *available at* <http://www2.ohchr.org/english/law/crc.htm>.

10. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *concluded* May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter Hague Convention], *available at* [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=69](http://www.hcch.net/index_en.php?act=conventions.text&cid=69).

11. CRC, *supra* note 9, art. 20.

12. *Id.*

Properly interpreted, the CRC does appear to favor adoption, or at least foster care over institutionalization.<sup>13</sup> However, the CRC's mild approval of adoption is mainly for adoption *within* a child's nation of origin. The CRC endorses *intercountry* adoption *only* if the child cannot be placed in "any suitable manner" in the child's nation of origin.<sup>14</sup> According to some interpretations, "suitable" placement within the nation of origin might include an institution or an undefined form of foster care.<sup>15</sup> The CRC's preference for any "suitable" local placement over intercountry adoption is sometimes referred to as the "principle of subsidiarity."<sup>16</sup> The strict view of subsidiarity is that intercountry adoption is the *last resort* for a child for whom there is no "suitable" local placement.<sup>17</sup>

The other major international adoption law, the Hague Convention, adopts a modified version of subsidiarity that moves the rank of intercountry adoption up one notch, at least for a limited number of nations that have signed the Convention. The Preamble states that "intercountry adoption *may* offer the advantage of a permanent family to a child for whom a suitable *family* cannot be found in his or her State of origin."<sup>18</sup> In other words, family placement (adoptive or foster; local or intercountry) is favored over institutionalization in most cases, but "suitable" local family placement (foster or adoptive) trumps intercountry adoption. The Hague Convention's endorsement of adoption is not as powerful as one might expect given the Convention's principle purpose of facilitating intercountry adoption by a set of international rules and procedures.<sup>19</sup> Naturally, a blanket endorsement of adoption for all children in all situations of need would be inappropriate. Still, the Hague Convention falls short of speaking clearly to the issues of *what* constitutes suitable local family placement or *when* efforts at local adoption should be abandoned in favor of intercountry adoption.<sup>20</sup>

These two documents—the CRC and the Hague Convention—frame the debate: Does international law fail children by improperly encouraging, discouraging, or ranking intercountry adoption, and is the law sufficiently protective of children and other parties involved in adoption? The major participants in the debate can be

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13. *Id.*

14. *Id.* art. 21(b).

15. See, e.g., Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 379 (2007).

16. See, e.g., Lisa M. Katz, Comment, *A Modest Proposal? The Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, 9 EMORY INT'L L. REV. 283, 304 (1995) (citation omitted).

17. *Id.* at 303–04.

18. Hague Convention, *supra* note 10, at pmb1. (emphasis added).

19. See Richard Carlson, *The Emerging Law of Intercountry Adoption: An Analysis of the Hague Conference on Intercountry Adoption*, 30 TULSA L.J. 243, 255–65 (1994).

20. "Suitable local family placement" might refer to a wide range of delayed adoption, extended family or non-family foster placement, or household service arrangements that are not in a child's best interests. See *infra* Parts II.C.7–D.1., IV.B.

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divided roughly into three groups: cynical critics of intercountry adoption, moderate critics of intercountry adoption, and vigorous advocates for intercountry adoption.

For cynical critics, any endorsement of intercountry adoption is suspect. Cynical critics are a diverse group and are not necessarily all on the same page when it comes to a discussion about whether adoption is in “a child’s best interests.” Many cynical critics admit that they are motivated by ideologies, causes, or service to interest groups that may not be aligned with the best interests of “adoptable” children. This is not to say that all of the cynical critics find the interests of children to be irrelevant. Some reject or discount evidence that institutionalization is harmful to children. Others elevate the interests of *other* parties, such as those of the child’s community of origin or other children who will *not* be adopted under any circumstances. In this regard, it is important to note that supporters and critics of intercountry adoption might have different constituencies in mind when they speak of “children’s interests” or social justice.

Moderate critics, on the other hand, generally support a qualified endorsement of intercountry adoption such as that expressed in the CRC’s or the Hague Convention’s version of subsidiarity. They are not ideologically predisposed against adoption, and they agree that many children might be well served by intercountry adoption. However, moderate critics are especially concerned about corruption and regulatory vacuums or breakdowns that taint the process. In contrast with the more cynical critics, moderate critics are more likely to place adoptable children’s interests at the forefront of their analysis, but this analysis is counterbalanced by the interests of birth families, local communities, and the non-adoptable children left behind by the adoption process.

Finally, vigorous advocates for intercountry adoption give the greatest weight to the interests of adoptable children. They are more optimistic about the benefits of intercountry adoption for children who are adopted, and more emphatic about the need to promote adoption. Like moderate critics, advocates for intercountry adoption recognize the risks of errors, corruption, and potential unfairness to birth families, but their analysis tips the scales somewhat more in favor of adoptable children and somewhat less in favor of birth families. Advocates also frequently argue that the subsidiarity principle is destructive to children’s interests in actual practice because it delays or completely prevents family placement for thousands of children in need, diverting many into unhealthy institutions or questionable “foster” arrangements.

Of course, the participants in this debate are not truly divisible into three simple and distinct groups. The opinions of some are quite complex and may overlap from one group to the next. Still, for the purpose of summarizing the arguments of different factions, it is convenient to organize critics and advocates into different categories, starting with the most vigorous supporters of intercountry adoption, then moving to the extreme opposite position of cynical critics such as Baroness Emma Nicholson, and ending with the moderate critics who fall somewhere in the middle.

*B. Vigorous Supporters of Intercountry Adoption*

Vigorous proponents of intercountry adoption are represented by Professors Elizabeth Bartholet<sup>21</sup> and Sarah Dillon,<sup>22</sup> who argue that the interests of children worldwide would best be served by a stronger endorsement of intercountry adoption. Professor Dillon proposes a child's human right to adoption—including intercountry adoption—for children who might otherwise be without family placement.<sup>23</sup> She also calls for new empirical research into the conditions of children around the world to determine the true scale of the need for adoptive placements.<sup>24</sup> Professor Bartholet seeks a reordering of placement priorities that would place intercountry adoption clearly ahead of institutionalization and foster care, and possibly on par with domestic adoptive placement.<sup>25</sup>

The notion that the opportunity for intercountry adoption should gain a priority clearly ahead of institutionalization and foster care may be at odds with the CRC's subsidiarity principle, depending on one's interpretation. It is certainly at odds with the view that subsidiarity makes intercountry adoption "the last resort." However, Professor Bartholet worries that a broad or vague preference for local placement will encourage local and national public officials to engage in practices that deny quick intercountry placement while authorities search for "appropriate" foster care or for local adoptive parents who, in many nations, remain in short supply.<sup>26</sup> Delayed placement is a serious harm because it interferes with a child's bonding with a parental caregiver at a critical period in the child's mental and emotional development.

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21. See, e.g., Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333 (2007) [hereinafter Bartholet, *The Child's Story*]; Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151 (2007) [hereinafter Bartholet, *Thoughts on the Human Rights Issues*].

22. See, e.g., Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179 (2003); see also Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters*, 4 WHITTIER J. CHILD & FAM. ADVOC. 323 (2005).

23. Dillon, *supra* note 22, at 200, 253; see also Wardle, *supra* note 22, at 323, 336.

24. Dillon, *supra* note 22, at 182–85.

25. Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 192–93.

26. *Id.* Professor Bartholet proposes a concurrent planning model, in which

adoption professionals work simultaneously to reunite children in foster care with their birth parents, while they work to prepare for adoption. At the point that a decision is reached not to reunite, the child can immediately move forward to adoption. Adapted to international adoption, this model would mean that adoption officials in the sending country would plan simultaneously for the international adoption, while they checked to see if any domestic placement would be possible, rather than planning the international adoption only after exhausting the possibility of domestic adoption.

*Id.* at 194. She also proposes time limits for holding children in institutions or foster care, following the model of current U.S. law. *Id.* at 194–95.



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The lack of early bonding can have long-term and seriously detrimental effects on the child's emotional and physical well-being.<sup>27</sup>

This very pronounced focus on avoidance of harm to the child—and on the potential gains of adoption—means more than merely overturning the subsidiarity principle. It also means a much more frequent elevation of a child's interests over the interests of parents, family, community, and the state in determining whether to move forward with new adoptive placement or to await some substantial improvement in the ability or willingness of the birth parents, extended family, or community to provide a healthy family environment for a child.<sup>28</sup>

Pro-adoption advocates such as Professors Bartholet and Dillon can also seem like moderate critics. They concede that adoption can go wrong and that adoption agencies and officials have sometimes engaged in serious wrongdoing in child placement. However, these advocates worry less about impropriety—a problem they believe is frequently overstated<sup>29</sup>—and more about the harm to children who linger in institutions because of delayed family placement.<sup>30</sup> For example, in weighing the harm of an indeterminate number of unethical or illegal inducements for the relinquishment of children, Professor Bartholet considers the empirical evidence that the resulting family placements are not directly harmful to children, who might have been placed for adoption regardless of inducement, or who might gain a better life situation regardless of the inducement.<sup>31</sup> Professor Bartholet employs a “surrogacy” analogy in analyzing the problem of illicit payments:

There are no doubt some number of birth parents in sending countries who are getting payments that indeed do function to persuade them to surrender children for adoption that otherwise they might have kept, and even to get pregnant in order to surrender the children born. The latter practice we call surrogacy and in the U.S. it is legal today in almost all states, with an enormous surrogacy industry primed to expand the practice as we move forward to the future. I myself would prohibit commercial surrogacy both here and abroad, and I also believe we should maintain the existing prohibition on payments to already-pregnant women designed to induce surrender of the child. However I think we need to acknowledge that such payments are not the ultimate evil that they are often assumed to be. They may on balance be wrong, but they need to be weighed against other evils as regulators decide how to shape policy on international adoption.<sup>32</sup>

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27. *Id.* at 179–80 & nn.73–76, 191–92; Dillon, *supra* note 22, at 193 & n.46, 206 & n.96, 238 & n.201.

28. *See* Bartholet, *The Child's Story*, *supra* note 21, at 337–38; Dillon, *supra* note 22, at 221–26.

29. *See* Bartholet, *The Child's Story*, *supra* note 21, at 374–75; Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 156–57.

30. *See* Bartholet, *The Child's Story*, *supra* note 21, at 338, 342–47; Elisabeth M. Ward, *Utilizing Intercountry Adoption to Combat Human Rights Abuses of Children*, 17 MICH. ST. J. INT'L L. 729, 743–45 (2009).

31. *See* Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 186–88.

32. *Id.* at 188.

In Professor Bartholet's view, overzealous and miscalculated regulatory responses to reports of corruption are to be feared more than the corruption because regulatory reaction invariably results in a shutdown of intercountry adoption and denial of family placement to thousands of children.<sup>33</sup> Professor Bartholet's distrust of governmental management of adoption also leads her to favor a relatively open field for private intercountry adoption agencies and professionals.<sup>34</sup>

### C. Cynical Opponents of Intercountry Adoption

#### 1. *The Extreme Position: An Absolute Ban Against Intercountry Adoption*

Baroness Nicholson, a former European Parliament Rapporteur for Romania, is probably the most prominent advocate against intercountry adoption, mainly because of her role in leading a drive in the European Parliament to require Romania's complete prohibition against intercountry adoption of children as a condition of its accession to the European Union.<sup>35</sup> Her nearly absolute opposition to intercountry adoption is based on a belief that intercountry adoption "has been hijacked by the child traffickers"<sup>36</sup> and that adoptive parents are "unwittingly supporting crime."<sup>37</sup> In opposing intercountry adoption of children in Romania, Baroness Nicholson asserted that "[c]hildren exported abroad—often against their will—are often subjected to paedophilia, child prostitution or domestic servitude."<sup>38</sup> Her sensational charges attracted considerable attention within Romania, the European community, and the global community. Baroness Nicholson and her supporters succeeded in obtaining a complete ban on intercountry adoption in Romania.<sup>39</sup>

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33. See Bartholet, *The Child's Story*, *supra* note 21, at 372–74; Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 188–91 (citing examples from Latin America).

34. See Bartholet, *The Child's Story*, *supra* note 21, at 341–44, 368–70; Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 176–77, 188–90.

35. See Bartholet, *The Child's Story*, *supra* note 21, at 341; Dillon, *supra* note 22, at 250–51 (noting that Romania's ban on intercountry adoptions remains in effect to this day); Jennifer Ratcliff, *International Adoption: Improving on the 1993 Hague Convention*, 23 NYSBA INT'L L. PRACTICUM, Spring 2010, at 55; Charles Tannock, *European Parliamentarians Break the Nicholson Monopoly on Intercountry Adoption*, BUCHAREST DAILY NEWS (Mar. 8, 2006), <http://www.charlestannock.com/pressarticle.asp?ID=1190> (noting that the European Parliament has changed its position and now favors intercountry adoption).

36. Marie Hourihane, *Does Going West Really Mean a Better Life?*, THE TRIBUNE (IRELAND), Jan. 5, 2003, <http://www.tribune.ie/article/2003/jan/05/does-going-west-really-mean-a-better-life/?q=/>.

37. *Id.* (noting that one special exception to Baroness Nicholson's opposition to intercountry adoption is Kenya, the one nation which she believes does have children in need of family placement by intercountry adoption).

38. Emma Nicholson, *Red Light on Human Traffic*, GUARDIAN.CO.UK, July 1, 2004, <http://www.guardian.co.uk/society/2004/jul/01/adoptionandfostering.europeanunion> (noting that most of Baroness Nicholson's sweeping public statements regarding intercountry adoption of Romanian children were without reference to any particular cases or facts, and are now widely rejected). See also Tannock, *supra* note 35.

39. See Carrie Rankin, *Romania's New Child Protection Legislation: Change in Intercountry Adoption Law Results in Human Rights Violation*, 34 SYRACUSE J. INT'L L. & COM. 259, 263 (2006) (noting that the ban remains in effect today); Ratcliff, *supra* note 35, at 57.

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In retrospect, it is clear that the data on which Baroness Nicholson relied did not support, and in some very important ways contradicted, her most shocking accusations. For example, Baroness Nicholson presented no evidence that Romanian children were ever sent abroad for adoption “against their will.” The single case she cited as an example was, in fact, very much to the contrary.<sup>40</sup> Nor does it appear that adoptive children were “often subjected to paedophilia, child prostitution or domestic servitude.” In a later defense of her statements, Baroness Nicholson offered three reports by other authors and organizations to support her allegations.<sup>41</sup> A close and complete examination of those reports, however, reveals nothing to support Baroness Nicholson’s charge that adoptive children were being placed in servitude or used for criminal enterprises.<sup>42</sup> One report stated, “We found nothing that would indicate

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40. In stating that children were being adopted and removed from the country against their will, Baroness Nicholson cited one particular case involving two young Romanian children, “Florentina” and “Marina,” a case that reached the European Court of Human Rights. See Nicholson, *supra* note 38. The facts in those two adoption cases are summarized in two of the Court’s opinions.

According to the court, Italian couples obtained adoption decrees for Florentina and Marina in September 2000. *Pini v. Romania*, 2005-XII Eur. Ct. H.R. 313, 317 (2004). However, over the next three years, the children’s home (referenced herein as the “CEPSB”) where Florentina and Marina resided in Romania successfully resisted transferring custody to the adoptive parents, sometimes hiding the children from police, and thereby preventing any contact between the children and adoptive parents over an extended period of time. *Id.* at 321. Despite over three years of litigation between the adoptive parents and CEPSB, there does not appear to have been any evidence or allegation that the children’s birth families were resisting the adoption or that the adoption decrees were procured by fraud or bribery. *Id.*

Nevertheless, after CEPSB’s successful separation of the children from the adoptive parents, further proceedings determined that the children, one of whom was then ten years old, did not wish to leave CEPSB or be adopted by persons they “did not know.” *Id.* at 326. For this reason, and not because of any irregularity in the original adoptions, the European Court of Human Rights determined that the adoptions should be revoked. *Id.* at 346. Thus, the children were *not* removed from Romania against their will. The court noted further: “[T]he sole cause of the failure to execute the applicants’ adoption orders has been action taken by the CEPSB staff and its founder members, who have consistently opposed the children’s departure for Italy by making various applications to prevent enforcement and preventing the court bailiffs from carrying out their tasks effectively.” *Id.* at 348. Although the court held that the adoptions should be revoked, it also found that Romania had violated the adoptive parents’ rights by disrupting the adoptions, and it awarded damages in favor of the adoptive parents. *Id.* at 351–53.

41. Baroness Emma Nicholson, *A Battle Fought, and Won*, TRANSITIONS ONLINE (Mar. 29, 2006), <http://www.tol.org/client/article/16148-a-battle-fought-and-won.html>.

42. The first report, written by Jonathan Dickens, addressed the question of whether intercountry adoption was providing or diverting resources for other family services, such as local foster placement. Jonathan Dickens, *The Paradox of Inter-Country Adoption: Analysing Romania’s Experience as a Sending Country*, 11 INT’L J. SOC. WELFARE 76 (2002).

The second report, written by Michael Ambrose and Anna Marie Coburn, and prepared for the U.S. Agency for International Development (USAID), is a broader analysis of the adoption system in Romania. MICHAEL W. AMBROSE & ANNA MARY COBURN, REPORT ON INTERCOUNTRY ADOPTION IN ROMANIA (2001), available at [pdf.usaid.gov/pdf\\_docs/PNACW989.pdf](http://pdf.usaid.gov/pdf_docs/PNACW989.pdf). Again, the chief problem identified by this report is that intercountry adoption diverts resources away from local placement efforts. *Id.* at 2, 13.

The third report, entitled *Re-Organising the International Adoption and Child Protection System*, is no more than what its title suggests—a discussion of the need to reorganize the adoption system in

that intercountry adoptions of Romanian children do not usually represent good placements for the children.<sup>43</sup> Two of the reports alluded to the serious but separate problems of whether some adoption agencies or intermediaries had gained relinquishments for adoption by the payment of money to birth families or other persons, and whether agencies had properly verified the availability of some children for adoption.<sup>44</sup> As those two reports indicate, these problems were mainly the result of lax regulation, which was later cured at least in part by legislative reforms, and those reforms were in place *before* Baroness Nicholson's allegations of criminality.<sup>45</sup> One of the two reports did not even investigate whether unethical practices continued to be a serious problem.<sup>46</sup> The other concluded, "We did not receive any information about any individual child being exchanged for money or other value."<sup>47</sup>

Baroness Nicholson is not an academic; she is a politician, and one might question whether an analysis of her rhetoric deserves close inspection in a mainly academic debate. The obvious answer is that the debate is one that has influenced and will continue to influence real policy decisions, as it did in the case of Romania. Moreover, Baroness Nicholson's use and misuse of rhetoric to affect the development of family law offers important lessons for the academic debate.

First, the terms that we use—"trafficking," "baby-selling," "laundering," and "exploitation"—are heard in an audience larger than academia. While the use of such terms may be accurate in the right context, the larger audience may not understand the limits of our use of these words. A casual description of adoption as the "trafficking"<sup>48</sup> or "laundering"<sup>49</sup> or "commodification"<sup>50</sup> of children, without careful

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Romania. See INDEP. GRP. FOR INT'L ADOPTION ANALYSIS, RE-ORGANISING THE INTERNATIONAL ADOPTION AND CHILD PROTECTION SYSTEM (2002), available at [http://www.afaener.org/Rapport\\_FINAL\\_ang.doc](http://www.afaener.org/Rapport_FINAL_ang.doc). It contains no investigation or discussion of improper financial inducements for adoption or other criminality. See *id.*

43. AMBROSE & COBURN, *supra* note 42, at 2. See also Dickens, *supra* note 42, at 76 ("Whilst it is still too early to say for sure that these adoptions have been 'successful'—adoption being a life-long, rather than a short-term, project—the evidence so far does point to many positive outcomes for them.")
44. See AMBROSE & COBURN, *supra* note 42, at 2. The first report indicates that these problems were probably very serious sometime before 1997. Thereafter, Romania adopted a more effective regulation of adoptions. After that time, the more serious issue facing Romania was whether intercountry adoption tended to divert attention and resources away from programs for in-country placement. See Dickens, *supra* note 42, at 76–80.
45. Dickens, *supra* note 42, at 78; AMBROSE & COBURN, *supra* note 42, at 2.
46. See Dickens, *supra* note 42.
47. AMBROSE & COBURN, *supra* note 42, at 2.
48. See, e.g., David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004) [hereinafter Smolin, *Intercountry Adoption*].
49. See, e.g., Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 437 (2009); David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2006) [hereinafter Smolin, *Child Laundering*].
50. See, e.g., Bowie, *supra* note 4, at 3, 14; Esben Leifsen, *Person, Relation and Value, Cross-Cultural Approaches to Adoption*, in CROSS-CULTURAL APPROACHES TO ADOPTION, *supra* note 4, at 192–93.

qualification, is useful ammunition to politicians whose real agenda may be different from the best interests of children or who have an uninformed sense of the best interests of children.

Second, the tendency to generalize and stereotype to avoid the task of close investigation is, unfortunately, not unique to politicians or other non-academics. The academic literature of intercountry adoption includes many careless and negative stereotypes of adoptive parents, supporters of adoption, and the adoption process.<sup>51</sup> In some instances, the use of negative stereotypes might be intended to shock the system into reform or to shock its participants into new ways of thinking. Other stereotypes are the result of a misunderstanding of the law of adoption, frequently by non-lawyer sociologists who misunderstand the law or the legal history of adoption.<sup>52</sup>

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51. Cynical critics of intercountry adoption routinely generalize in negative terms about the motives and attitudes of adoptive parents. See, e.g., Kathleen Ja Sook Bergquist, *International Asian Adoption: In the Best Interest of the Child?*, 10 *TEX. WESLEYAN L. REV.* 343, 343–47 (2004). Commenting as to the post Korean War adoptions, Professor Bergquist declares that “[p]rospective parents tended to make their decisions based on religious or moral dictates to save the children from their fate as orphans and to rescue them from the poverty and third-worldness of their country.” *Id.* at 344. Professor Bergquist grants that the motivations of adoptive parents have changed over time, but only from one negative stereotype to another. Describing the period of the 1970s, she writes that “[t]he charitable inclinations to provide families for parentless children seemed to transition to a more pseudo-altruistic need to make a social statement about participation in and responsibility to crossing racial boundaries.” *Id.* at 346. None of these statements about early intercountry adoptive parents appears to have been based on any empirical evidence. However, after having conducted her own survey of later adoptive parents of Korean children, Professor Bergquist found that the primary motivations for adoption from Korea were “(1) shorter waiting periods, and (2) an interest in international adoption.” *Id.* She interprets these results to show “the pragmatism and parent-centered motivations in adoption and perhaps suggest a romanticization or exoticization of the country of origin.” *Id.* at 346–47. See also Fonseca, *supra* note 4, who states that the rhetoric of proponents of adoption “indirectly asserts the birth parent’s irresponsibility, absence of moral fiber (inability to ‘plan’ their family), or lack of sexual constraint.” *Id.* at 176. Ms. Fonseca cites no particular proponent or source for this “rhetoric.” Later, Ms. Fonseca describes adoptive parents as having “little compunction in linking their affluence to their right to adoptive parenthood,” and that “adoptive parents also implied that considering the high price they were willing to pay . . . they expected to get high quality goods: light skinned babies in good mental and physical health.” *Id.* (emphasis added).

52. For example, sociologists and social workers who comment on intercountry adoption frequently compare the “open” nature of informal family placements in traditional cultures with the closed nature of U.S. adoption law, in which records are sealed to prevent an adoptive child from learning of his adoptive origins. Critics rely on this difference in practices to support their views that the typical American adoptive parent seeks to hide the fact of adoption from an adoptive child, and to completely remove the child from his or her cultural origin. See, e.g., Bowie, *supra* note 4, at 9; Melissa Demian, *Transactions in Rights, Transactions in Children*, in *CROSS-CULTURAL APPROACHES TO ADOPTION*, *supra* note 4, at 97, 99. These descriptions are misleading for a number of reasons. First, intercountry adoptive parents have, as a matter of choice, chosen a method of family building that usually makes “concealment” of adoption impossible—especially if the adoption is interracial. Second, even in the case of domestic adoptions in the United States there is a trend toward open adoption. See Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Adoption Agency Fees*, 8 *SEATTLE J. FOR SOC. JUST.* 729, 739 (2010). This trend is matched by the development of “heritage tours” and other programs to help adoptive children and their families maintain a link to their child’s cultural origin. See Bowie, *supra* note 4, at 14–15; Dietrich Treide, *Adoptions in Micronesia: Past and Present*, in *CROSS-CULTURAL APPROACHES TO ADOPTION*, *supra* note 4, at 127, 138. Third, the critics assume wrongly that adoptive parents resist open adoption out of shame or to preserve the appearance of a biological family. However,

Still, other stereotypes are circulated by observers who read too much into advertising by adoption agencies that invoke the theme of rescuing children. Such advertising is typical not just of adoption agencies, but of many other non-governmental organizations that attract attention to their existence and their causes through the image of the impoverished or orphaned child. It is wrong, however, to assume from such advertising that all or most adoptive parents naively pursued adoption overseas out of a sense of mission to “rescue” children from an inferior society.

For the vast majority of adoptive parents, adoption is probably first and foremost a personal, individual, and entirely natural decision to build a family. Beyond this core purpose, the variety of collateral motivations and values that may guide an adoptive parent’s choice of and attitude toward intercountry adoption is neither fairly nor productively reduced to stereotype.<sup>53</sup> Nor is the adoption process the same in every nation or community. Stereotypes are convenient evasions of the real complexity of life, but they can cause harm to the people who are labeled, to our analysis of the problems of adoption, to the public’s ability to understand the issues, and to the process of reform. For example, it has now become common for the media to equate “intercountry adoption,” or adoption in general, with “trafficking,” as if all adoptions were part of a “child trade” based on the sale of children.<sup>54</sup> Rhetoric and stereotyping such as this are rarely good bases for educating the public or for policy-making.

Finally, the use of stereotypes and sensational but false or exaggerated charges robs critics of credibility. Constructive reform is very much needed in intercountry adoption, particularly in countries that are making a difficult transition into a new stage of development. Sensational charges gain the public’s attention quickly, particularly when children are at stake, but they lead to stiffened resistance to constructive change when a falsehood is revealed.

Baroness Nicholson is an extreme case in point. She alleged that an immediate ban against intercountry adoption was needed to stop “paedophilia, child prostitution or domestic servitude.”<sup>55</sup> Her charges were unfounded and distracted attention from real issues, problems, and solutions. The subjects of the reports she cited related mainly to the fact that Romanian social workers and orphanages seemed to favor intercountry adoption over local placement because of the greater financial clout of intercountry adoption agencies, the lack of resources for local placement, and a

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rules that result in a termination of the legal relationship between the birth parent and the child are not necessarily to make the adoption secret. Termination rules nurture bonding between the adoptive parents and child by insuring against the risk that a birth parent might seek to reclaim possession and custody, and they preserve the adoptive parents’ authority and prevent the possibility of a managerial conflict between two sets of parents. These rules will likely continue to be needed no matter how “open” adoption may become.

53. See Demian, *supra* note 52, at 100. This characterization is not only mean-spirited, it is altogether unlikely. Parents seeking a “perfect baby” in the modern era are much more likely to pursue parenthood by assisted reproduction.

54. See Steve Farrar, *Child Trade on Rise, Study Finds*, TIMES HIGHER EDUC., Aug. 30, 2002, <http://www.timeshighereducation.co.uk/story.asp?storyCode=171346&sectioncode=26>.

55. Nicholson, *supra* note 38.



shortage of applicants for local foster or adoptive parenting. The resulting diversion of children to foreign destinations is a problem if a child should generally be placed within the culture, language, and ethnicity of the child's birth, or if local placement deserves at least a preference.<sup>56</sup> Romania's *complete* ban against intercountry adoption was, in retrospect, the wrong solution because it was aimed at a different and apparently non-existent problem.

## 2. *The Argument for Preserving a Child's Heritage*

The argument for preserving every child's assigned national, ethnic, or cultural heritage is popular among nationalist politicians who oppose intercountry adoption of children from their own communities.<sup>57</sup> Proponents of the nationalist argument assert that their position is supported by Article 20 of the CRC, which states that "*due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background*" in any decision about a child's placement.<sup>58</sup>

The CRC does not explain the purpose or rationale of Article 20.<sup>59</sup> According to one argument for the preservation of heritage rule, children are personally harmed by being separated from their place or culture of origin. Some opponents of intercountry adoption argue that even the youngest adoptee—a newborn infant, for example—may suffer psychological harm as a direct result of separation from his or her cultural origin. Of course, there is no evidence that children are genetically predisposed to a particular cultural identity.<sup>60</sup>

For infants, the more plausible "loss of identity" argument is that intercountry adoption frequently results in mixed-race adoption, and that mixed-race adoption is harmful to a child's racial identity and development of coping skills against discrimination.<sup>61</sup> This argument does not necessarily lead to opposition to all intercountry adoption. It relates only to intercountry adoption that results in a mixed-race family. However, studies of the impact of interracial adoption on child development invariably show favorable outcomes as a statistical matter, at least in the

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56. See Hourihane, *supra* note 36.

57. See Bartholet, *The Child's Story*, *supra* note 21, at 358–59; see also Dillon, *supra* note 22, at 217 & n.136.

58. CRC, *supra* note 9, art. 20 (emphasis added).

59. *Id.* at pmb1. The Preamble states simply that the parties to the Convention have reached agreement after "[t]aking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child." *Id.*

60. See Bartholet, *The Child's Story*, *supra* note 21, at 360–61 (summarizing evidence that children are not born with an innate sense of culture).

61. Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 103 & n.12, 104 (1998) (describing, but not necessarily subscribing to, this position).

case of children adopted early enough to gain the best advantages of permanent family placement.<sup>62</sup>

The argument that a child might be injured by separation from his or her cultural origin is somewhat more plausible in the case of older children. One can imagine that older children who have begun to develop a linguistic, cultural, ethnic, or religious identity would normally be served best by true *family* placement within the same group.<sup>63</sup> On the other hand, if the choice is between continued local institutionalization versus intercountry adoption, the problem is much more complex, which is why Article 20 does not state an absolute rule. It calls for “due regard.” For an older child, the challenges of late adoption and the stress of a new setting may or may not be more harmful than a few more years in an institution.<sup>64</sup> However, Baroness Nicholson’s extreme version of the cultural heritage argument goes well beyond any requirement of “due regard.” For example, Baroness Nicholson has asserted that children should remain in *institutions* if necessary to prevent their removal by intercountry adoption.<sup>65</sup> In her view, “due regard” should always lead to a decision against intercountry adoption.

Commitment to an institution for the sake of heritage in all cases is an acceptable outcome for the extreme view if one believes that preservation of heritage—even in an institution—is in the national or cultural interest, whether or not it is in any particular child’s interest.<sup>66</sup> For some proponents of cultural or ethnic solidarity, the argument needs no further explanation. However, the cultural preservation argument is more complex and variegated than it might seem. The sections that follow explore some of the variations of this argument.

### 3. *The Argument for Group Solidarity Against Out-of-Country Placement of a Child*

At least some proponents of the argument for preserving a child’s heritage are impelled by a sense that members of a nation, culture, or ethnic group *belong* to the group, and that intercountry adoption diverts some of the group’s children—the

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62. Arnold R. Silverman & William Fiegelman, *Adjustment in Interracial Adoptees: An Overview*, in THE PSYCHOLOGY OF ADOPTION 187, 193 (David Brodzinsky & Marshall D. Schechter eds., 1990). Other studies are summarized in Barthelet, *The Child’s Story*, *supra* note 21, at 347–48, 360–61.

63. Unfortunately, “family” placement does not always mean adoption or even appropriate “foster” or analogous care. What constitutes “family” placement can vary from society to society. In Haiti, for example, “family” placement might be indentured servitude, which can run the gamut from work within a nurturing relationship to work within a brutal relationship. See *Haiti’s Dark Secret: The Restavecs*, NAT’L PUBLIC RADIO (Mar. 27, 2004), <http://www.npr.org/templates/story/story.php?storyId=1779562>.

64. See Barthelet, *The Child’s Story*, *supra* note 21, at 360–61.

65. Hourihane, *supra* note 36 (discussing Baroness Nicholson’s views on the adoption of Romanian children).

66. For further discussion of such national or group rights views, see Barthelet, *The Child’s Story*, *supra* note 21, at 360–61. See also Benyam D. Mezmur, *From Angelina (To Madonna) to Zoe’s Ark: What Are the ‘A–Z’ Lessons for Intercountry Adoptions in Africa?* 23 INT’L J.L. POL’Y & FAM. 145, 153 (2009) [hereinafter Mezmur, *From Angelina (To Madonna)*] (noting the absence of discussion or reference to the children’s interests in local media and public discussion of the Angelina Jolie and Madonna adoptions of African children); Mezmur, *supra* note 5, at 88 (describing nationalist views against intercountry adoption).



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group's "future"—to the benefit of some other group. Proponents of this sort of group solidarity often describe intercountry, interracial, or interethnic adoption as an act of exploitation or assault. Characterized in this way, intercountry adoption often serves as a reminder of historical grievances a group feels against a "dominant" group, foreigners, or other outsiders.<sup>67</sup>

Unfortunately, history offers a number of precedents in which dominant cultures have used child welfare policies to undermine or eradicate minority or economically dependent cultures,<sup>68</sup> and these historical facts can seem to justify suspicion of and resistance to modern intercountry adoption. The problem is exacerbated by another clash of cultures between local or international aid workers committed to ideas of social justice versus affluent Westerners who aspire mainly to be parents, but who seem to aid workers to be "shopping" for children.<sup>69</sup> But prejudice against outplacement of children need not be rooted in any record of exploitation or oppression. It might simply be the product of everyday ethnocentrism or a natural human tendency to view foreign culture, race, values, or lifestyle as alien influences against which we must protect our children.<sup>70</sup> One can easily imagine that some Americans would object if large numbers of American-born children were being placed with Turkish, Chinese, Mexican, or Nigerian couples.<sup>71</sup>

The fear that intercountry adoption deprives a child of his or her identity and robs a nation or society of its children is a theme useful mainly to local politicians in "sending" nations, but it echoes in "receiving" nations in the more sophisticated critiques of some academicians. Professor Shani King, for example, is one of a number of Western critics who believe that intercountry adoption is an act of exploitation or an expression of neocolonialism or "monohumanism."<sup>72</sup> Professor King writes:

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67. See, e.g., King, *supra* note 49; Bergquist, *supra* note 51, at 349–50.

68. PETER READ, *THE STOLEN GENERATIONS: THE REMOVAL OF ABORIGINAL CHILDREN IN NEW SOUTH WALES 1883 TO 1969* (Dep't Aboriginal Affairs New South Wales Gov't 2006) (1981), available at <http://www.daa.nsw.gov.au/publications/StolenGenerations.pdf> (describing Australian child welfare policies that led to the removal of Aborigine children from their families); Melissa Eddy, *Stolen: The Story of a Polish Child Germanized by the Nazis*, STAR NEWS ONLINE (May 8, 2007, 3:30 AM), <http://www.starnewsonline.com/apps/pbcs.dll/article?AID=/20070508/NEWS/705080331/-1/State> (describing the Nazis' removal of Polish children from their families to be raised as Germans); Matthew Fletcher, *Origins of the Indian Child Welfare Act: A Survey of the Legislative History*, MICH. ST. UNIV. C. OF L., INDIGENOUS L. & POL'Y CTR. (Apr. 10, 2009), <http://www.law.msu.edu/indigenous/papers/2009-04.pdf> (describing the policies of local officials in the United States for the placement of Native American children in non-tribal families).

69. Demian, *supra* note 52, at 99–100; see also Dillon, *supra* note 22, at 256–57 (noting Professor Dillon's description of an exchange between prospective adoptive parents and a UNICEF official).

70. Perry, *supra* note 61, at 115–16 (describing the reaction of black women to white women who adopt black children).

71. In fact, some American children are placed overseas for adoption, mainly in Western Europe. Anne-Marie O'Neill, *Why Are American Babies Being Adopted Abroad?*, PEOPLE MAG., June 6, 2005, <http://www.people.com/people/archive/article/0,,20147746,00.html>.

72. King, *supra* note 49, at 413–14. See also Christine W. Gailey, *Race, Class and Gender in Intercountry Adoption in the USA*, in *INTERCOUNTRY ADOPTION: DEVELOPMENTS, TRENDS AND PERSPECTIVES* 295, 298 (Peter Selman ed., 2000); Ryah Lilith, *Buying a Wife But Saving a Child: A Deconstruction of Popular*

The Convention on the Rights of the Child (CRC) provides a legal framework that establishes a child's right to be raised in the context of her family and her culture. We regularly violate this most fundamental right of children because we fail to come to terms with our imperialist orientation toward the world. This failure has been caused, in part, by how we have constructed our way of thinking about intercountry adoption.<sup>73</sup>

Professor King's argument is not necessarily a rejection of intercountry adoption *per se*. The harm, he believes, stems from "our way of thinking" about adoption. Still, his article includes a suggestion that adoption—and not just intercountry adoption—has been an act of exploitation by one society against another. For example, Professor King writes that "[t]he movement of children into the colonies through slavery and indenture, and the so-called 'orphan trains' in the late nineteenth century and early twentieth century, were a precursor to modern-day ICA [intercountry adoption]."<sup>74</sup>

Professor King cites no facts and explains no theory to support his assertion of a historical connection between slavery and intercountry adoption. There *is* a historical connection between indentured servitude and *domestic* adoption, but the link does not support a portrayal of adoption as an instrument of exploitation. To the contrary, social workers promoted modern adoption in the nineteenth century partly to *prevent* indentured servitude of homeless children. Thus, adoption is a solution to, not an evolutionary progression from, servitude. And servitude is not a "precursor" to adoption, except in the sense that moral outrage over the servitude of children led to campaigns to promote adoption. The orphan trains, of course, were a fact,<sup>75</sup> but they were no more connected to intercountry adoption than to domestic adoption. One of the chief failings of the orphan trains is that they sometimes led to informal servitude of children *rather than* adoption.

Professor King's comparison of intercountry adoption with slavery and indentured servitude is more likely intended as a metaphor than as a statement of fact. "Slavery" incites an emotional response useful to the main theme of Professor King's argument, which is that intercountry adoption is exploitative. The exploitation is both a matter of attitude and action. Professor King describes a belief system that he attributes to adoptive parents and adoption agencies, which is that adoptive parents are part of a superior nation, class, or society, and that they are rescuing orphans from a subordinate class. Professor King also calls for "more attention to the possibility" that receiving nations are in fact "exploiting developing countries and stealing their national resources, i.e., their healthy children."<sup>76</sup>

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*Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions*, 9 BUFF. WOMEN'S L.J. 225, 229 (2001).

73. King, *supra* note 49, at 414.

74. *Id.* at 419.

75. See Trammell, *supra* note 6, at 3–7.

76. King, *supra* note 49, at 436.

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Like the nationalist argument, the anti-exploitation argument focuses mainly on national interests, historical wrongs, and the unequal relationships among nations, and it avoids much consideration of how any individual child's interests might favor or disfavor intercountry adoption.<sup>77</sup> Professor King, for example, appears simply to dismiss scientific evidence that prolonged institutionalization is harmful to children. He believes that the medical argument for early adoption disguises the real motive of Western adoptive parents, which is to “launder” children of their natural origins:

Legal scholars actively promote the notion that the younger children should be taken away from their country conditions as soon as possible, in order to avoid mental and physical problems that develop with age. This, in turn, creates an urgency to extract infants and young children from the developing world. This could also be characterized as the desire for a clean slate: a baby or young child unconditioned by his or her native environment. And, after a “quick extraction,” the ICA bureaucracies allow the infant or child adoptee to gain expeditious citizenship in the United States, which completes the process of “laundering” the child for the parents who may desire an unadulterated newborn child.<sup>78</sup>

Despite Professor King's belief that the current practice of intercountry adoption is a form of neocolonialism or monohumanism, he concedes that there may be a valid but limited role for intercountry adoption in a world cleansed of colonialism. However, he proposes that intercountry adoption should be preceded by transfers of wealth from receiving nations and adoptive parents on a scale sufficient to substantially reduce or eliminate the economic reasons why children around the world may need new families.<sup>79</sup>

Another advocate for the view that intercountry adoption is an act or expression of exploitation is Professor Twila Perry.<sup>80</sup> Professor Perry's recent work regarding adoption relates mainly to the problem of domestic interracial adoption by white adoptive parents of black adoptive children, but she finds that intercountry adoption presents some analogous political issues of oppression by one group against another. Like Professor King, she seeks a new way of thinking and speaking about intercountry adoption, not necessarily a blanket prohibition.

Professor Perry begins her analysis by stating, “I am not opposed to transracial or international adoption . . . [F]or some children, transracial or international adoption may be the option that is in their best interests at the particular time.”<sup>81</sup> Still, like Professor King, Professor Perry believes that the right priority for scholars—particularly feminist scholars—is to develop a correct political framework for adoption. Her analysis is based “not on the social science data exploring the social

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77. See Perry, *supra* note 61, at 134–35, 141–42.

78. King, *supra* note 49, at 437.

79. See *id.* at 464–65.

80. See Perry, *supra* note 61, at 105.

81. *Id.* at 107–08.

adjustment of transracially adopted Black children, but on the political implications of the legal discourse surrounding the issue.”<sup>82</sup>

Professor Perry views interracial and intercountry adoption as part of a continuing act of exploitation by dominant societies against weaker societies.<sup>83</sup> And like other critics who focus on themes of exploitation, she finds the issue of children’s interests to be subordinate to the political and racial connotations of different types of adoption. Thus, she writes:

The emphasis on the need of individual children for adoptive homes in which they will be nurtured on a one-on-one basis comes at the expense of thinking harder about the political and economic circumstances that shape the lives of so many more children in this society and in the world . . . . For feminists, adoption, like marriage, must be analyzed as a political institution in which issues of rights, inequality and the potential for exploitation must be central.<sup>84</sup>

There are several responses to this sort of group solidarity against the outplacement of children. First, children raised in institutions or other non-family environments are very likely to be released into the community as older teenagers with little or no family support, and often with serious physical and emotional disabilities caused or exacerbated by institutionalization.<sup>85</sup> They might become more of a burden than a resource for their communities. Second, the CRC—the same document that demands “due regard” for a child’s original culture—also recognizes the importance of family placement and states that “the best interests of the *child* shall be a primary consideration.” But proponents of group solidarity against adoption fail to accord *any* weight to children’s interests. Third, the number of children placed out of their nations of origin by intercountry adoption is quite small. The total number of intercountry adoptions does not appear ever to have exceeded 50,000 in a single year for the *entire world*.<sup>86</sup> The total for any single nation is unlikely to pose a major threat to any nation’s future demographics.

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82. *Id.* at 114.

83. *Id.* at 135.

84. *Id.* at 147.

85. In Moldova, for example, a law for adoption is evidently rarely used. Orphaned children are more likely to be raised in institutions until they are fifteen or sixteen years of age and then released with the equivalent of seventy dollars. UNICEF, TRAFFICKING IN HUMAN BEINGS IN SOUTH EAST EUROPE 82 n.128 (2004), available at [http://www.unicef.org/media/files/2004Focus\\_on\\_Prevention\\_in\\_SEE.pdf](http://www.unicef.org/media/files/2004Focus_on_Prevention_in_SEE.pdf).

The problem of release upon “adulthood” is not just a problem for developing nations, and it is not just a problem for institutionalization. Foster care frequently leads to the same outcome. Human Rights Watch recently reported that, in California, many children raised in foster care are often released as adults with little or no family or public support, and 20% become homeless adults. HUMAN RIGHTS WATCH, MY SO-CALLED EMANCIPATION: FROM FOSTER CARE TO HOMELESSNESS FOR CALIFORNIA YOUTH 1 (2010), available at <http://www.hrw.org/en/reports/2010/05/12/my-so-called-emancipation-0>.

86. See *Int’l Adoption Statistics*, *supra* note 1; see also Peter Selman, *Intercountry Adoption in the New Millennium: The “Quiet Migration” Revisited*, 21 POPULATION RES. & POL’Y REV. 205, 217 (2002) (on file with author) (showing the number of adoptions per 100,000 children under the age of five in various sending nations).

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Finally, if the notion of a rule promoting the “best interests” of children means anything, it includes a limit on the degree to which children may be sacrificed for anyone’s religion, political ideology, or theory of group solidarity.<sup>87</sup> Theories of historical injustice or group interests that are premised on the irrelevance of the interests of this generation of children do not remedy injustice. They substitute one injustice for another.

### 4. *Discounting the Benefits of Intercountry Adoption*

Cynical critics who elevate group interests over the interests of children have another argument that is less an attack against intercountry adoption than an effort to deflect criticism of their own position: intercountry adoption may be beneficial for the child who is adopted, but it does nothing to benefit other children who are not adopted.<sup>88</sup> When presented as an independent reason to oppose adoption, it is a peculiar view that we should deny a child’s adoption if he or she is the only child who will benefit. Of course, adoption is designed to benefit one child at a time. Sadly, some children who might benefit from adoption will not be adopted due, at least in part, to political and ideological resistance to adoption. When international aid organizations make the limited benefit argument, it is even more peculiar. Would an international aid group deny medical care to one child because another child, on the other side of the village, might not get care he also needed?

There are a number of reasons why there might be some appeal in opposing adoption because of its limited benefits. From the point of view of an international aid worker, an adoptive parent’s expenditure of tens of thousands of dollars to adopt only one child—and many, many thousands more for health care, education, and other living expenses for that one child—might seem wasteful.<sup>89</sup> International aid workers deal with a never-ending critical shortage of resources for children. The money that wealthy or middle-class Westerners spend on many other things for themselves and their children must seem frivolous in comparison with the paltry resources that children remaining in institutions receive. Instead of bearing the costs of adoption and years of child rearing for one particular child, why not forbear that child’s adoption and donate the same money to an orphanage to provide a modest level of institutional support for that child and other institutionalized children?

But the choice presented by this line of thought is misleading. It serves only to erect a false moral ground for opposition to intercountry adoption. Intercountry adoption is not a choice “not to save” children who remain in institutions. It is a fulfillment of one parent’s or one couple’s desire for a child, happily matched with one child’s need. If the prospective parents did not seek to adopt a child, their money

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87. See *Prince v. Massachusetts*, 321 U.S. 158, 169–70 (1944).

88. See, e.g., Bergquist, *supra* note 51, at 349–50.

89. By one estimate, the cost of intercountry adoption now ranges from \$15,000 to \$40,000. Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 168.

would go elsewhere, perhaps to assisted reproduction<sup>90</sup> or purely self-indulgent, non-parental expenditures. Not having sought to adopt, these non-adoptive parents would be no more likely than anyone else to have developed any connection or commitment with any particular orphanage or aid organization. They would be no more obliged than anyone else to send any amount of their money to orphanages. The fact that some wealthy or middle-class Westerners choose to have children and are willing to pay for intercountry adoption is not ground for moral condemnation. If it were, all of us who are parents by any means should be ashamed for having children instead of sending our surplus funds to orphanages.

There is at least one other reason why cynics might believe it is important that intercountry adoption save one child but not others. The argument might seem to rebut a claim that intercountry adoption is an answer for *all* children in need of proper family care.<sup>91</sup> However, this imagined claim is nothing but a diversionary straw man. The promotion of intercountry adoption has not been based on an argument that intercountry adoption will provide an answer for *all* children in need.<sup>92</sup> Supporters often refer to statistics showing that large numbers of children—probably many millions—lack effective family care,<sup>93</sup> but these numbers simply establish that there really are likely to be some lesser, but still large, number of children who could benefit from intercountry adoption.<sup>94</sup> Citing statistics of need is not a commitment to address the problem by any single means. Indeed, it is very unlikely that adoption could ever be available for more than a fraction of these children, even under the most liberal legal regimes. But there is no rule that a practice or social policy beneficial to some persons should be barred unless it benefits all. If there were such a rule, why should it apply only to adoption and not to any other form of aid that reaches some but not all children and families?

### 5. *Effects on Children Left Behind*

The fact that intercountry adoption does not reach all children is an irrational reason to oppose it. A more important issue is whether intercountry adoption harms or benefits parties other than adoptive parents and adopted children. If intercountry adoption were harmful to some unadopted children, for example, one might well question whether intercountry adoption is in the best interest of children at large, even if it benefits only adopted children. Indeed, some cynical critics of adopters

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90. Adoption competes with other methods of becoming a parent, such as sperm donation, donated embryo implantation, and surrogate motherhood. See John E. Buster, *The First Live Birth Donation*, 6 SEXUALITY, REPROD. & MENOPAUSE 23 (2008), available at [http://www.obgmanagement.com/srm/pdf/first\\_live\\_birth\\_donation.pdf](http://www.obgmanagement.com/srm/pdf/first_live_birth_donation.pdf) (reporting that in 2006, there were 6,480 live births from embryo/oocyte donation in the United States alone, and that the frequency of this procedure is trending strongly upward).

91. Professor Shani King, for example, appears to use this line of reasoning. King, *supra* note 49, at 425.

92. Of course, it is impossible to prove a negative. The author is unaware of any supporters of adoption who have claimed that it will solve the problems of all children in need.

93. See, e.g., Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 182–83.

94. See *infra* Part III.



have argued that adoption does affect other children, and that its effects are generally bad. However, the argument that intercountry adoption harms unadopted children rests on highly speculative and probably erroneously assumed links between intercountry adoption and the suffering of children who remain in institutions or other desperate situations. The “harm to other children” argument also ignores the many ways intercountry adoption indirectly benefits children who are not adopted.

As the Romanian episode demonstrated, a substantial part of the cynical attitude toward intercountry adoption derives from a natural concern for the welfare of children who will not be adopted. Social workers are particularly prone to worry that intercountry adoption might indirectly worsen the condition of children left behind.<sup>95</sup> Social workers responsible for the ongoing care of children—not just for adoptions—naturally see children’s interests quite broadly as including all the children under their care, most of whom will never gain the benefit of intercountry adoption. Sending nations are likewise legitimately concerned about those who remain.

Intercountry adoption might affect the children left behind in two ways. First, the sorting of children into “most adoptable” and “least likely to be adopted” stigmatizes children left behind.<sup>96</sup> Whether the situation of children left behind is really any worse than it otherwise would have been is difficult to know. Social workers who work in the context of this process are understandably disturbed by it. Nevertheless, it is likely that any system of placement—even one exclusively for local placement—is likely to involve some sorting of children. Nations that have successfully promoted domestic adoption have witnessed the same sorting process, and local cultural practices might cause local adoptive parents to be even more particular than foreign parents about the traits they are seeking in a child.<sup>97</sup> In fact, in some sending nations, the most highly favored children are now reserved for local placement, and only children who are unadoptable under local standards are placed through intercountry adoption.<sup>98</sup> Thus, the classification and stigmatization that intercountry adoption might seem to cause is probably no different from the classification and stigmatization that domestic placement can and will cause wherever it is a viable option. Classification caused by intercountry adoption is simply more obvious, especially to local social workers, if affluent foreign adoptive parents seem to be “shopping.”

The other way in which intercountry adoption might affect children left behind is if intercountry adoption actually diverts money and resources from other social services, including local family placement. The diversion might occur because intercountry adoption produces substantial revenue for orphanages, which then focus

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95. See AMBROSE & COBURN, *supra* note 42, at 2; Dickens, *supra* note 42, at 76.

96. Some writers have called this the commodification of children because it assigns monetary values to them based on particular traits. I believe “stigmatization” better captures the real problem.

97. See Barbara Yngvesson, *National Bodies and the Body of the Child: “Completing” Families Through International Adoption*, in CROSS-CULTURAL APPROACHES TO ADOPTION, *supra* note 4, at 211, 217–18; see also Dillon, *supra* note 22, at 196 n.52 (describing the situation in Brazil).

98. See Baldauf et al., *supra* note 1; Yngvesson, *supra* note 97, at 217–18.

on adoption, not family preservation or other services.<sup>99</sup> However, what appears to be diversion might simply be a matter of comparison. In other words, the resources devoted to intercountry adoption make the resources available for other services seem small by comparison, raising a suspicion of diversion. But appearances can be deceiving. Intercountry adoption might in fact be generating more funds for competing services than it diverts. Indeed, many sending nations now require adoption agencies or adoptive parents to pay extra fees or “donations” to support orphanages or for other social services, and these fees appear to have been helpful in improving conditions in the orphanages.<sup>100</sup> Moreover, prospective adoptive parents who visit orphanages appear to have been important forces in campaigns to correct deficient conditions at some orphanages, to raise money or public allocations for orphanages, and to improve the management and care of children in orphanages.<sup>101</sup> In the case of Romania, the improvement in the conditions at many orphanages, the development of local foster care, and the reform of child welfare laws are inseparable from the phenomenon of intercountry adoption.<sup>102</sup>

Thus, fears that intercountry adoption might harm children left behind appear to be unfounded. Intercountry adoption has actually been a positive force not only for children placed out of their home countries, but also for those who remain. A properly designed and regulated system of intercountry adoption really is in the best interests of *all* children. Efforts to bar intercountry adoption will deprive some children of a needed opportunity and are more likely to perpetuate than alleviate deleterious conditions in local orphanages.

#### 6. *Effects on Birth Parents*

The most credible and important argument against intercountry adoption is related to the effect of adoption on the birth family. It begins with a proposition with which all critics and supporters of adoption probably agree: the process of qualifying a child for adoption should not cause unnecessary or unjustifiable loss or harm to the birth parent. One could also speak of possible harm to the larger birth family: grandparents, aunts and uncles, and so on. For purposes of the present analysis, the focus will be on harm to birth parents, whose interests with respect to their own child are properly and universally recognized. Harm to an extended family is also a problem that deserves attention, but resolving that problem involves an extremely complex task of definition and weighing interests. For example, should we account for the interests

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99. Dickens, *supra* note 42.

100. See, e.g., Jane Gross & Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES, June 4, 2007, [http://www.nytimes.com/2007/06/04/us/04adopt.html?\\_r=1&pagewanted=2](http://www.nytimes.com/2007/06/04/us/04adopt.html?_r=1&pagewanted=2).

101. See Bowie, *supra* note 4, at 14–15 (providing examples from India and China); see also Barthelet, *The Child's Story*, *supra* note 21, at 351.

102. See generally INDEP. GRP. FOR INT'L ADOPTION ANALYSIS, RE-ORGANISING THE INTERNATIONAL ADOPTION AND CHILD PROTECTION SYSTEM (Mar. 2002) (on file with author). Russia may be another case in which intercountry adoption spurred reform of the local child welfare system. See also Baldauf et al., *supra* note 1.



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of grandparents in deciding whether to uphold a birth parent's relinquishment of a child for adoption by non-family members? Defining the circle of persons whose interests are worthy of protection and imagining a process for protecting those interests are problems acknowledged but beyond the scope of this paper.<sup>103</sup>

In some adoption cases, there is little or no possibility of loss to a birth parent because she is dead or in some sense unavailable (as the father may be in some cultures or circumstances). In these situations, an adoption cannot be said to cause any loss to the birth parent.<sup>104</sup> In other situations, the birth parent may suffer a loss, but the loss is due to his or her conduct, such as where a court has justifiably terminated the parent-child relationship because of abuse or neglect. In these cases, adoption or other family placement might be essential to protect the child from serious harm or death, regardless of the loss to the birth parent. The loss the birth parent suffers in this sort of case is widely acknowledged to be necessary and unavoidable. However, there are two other situations in which the birth parent's loss is a matter of real concern for the adoption system.

First, the relinquishment might not be voluntary because it was obtained by corruption caused directly or indirectly by the local system or practice of adoption. The problem of corrupted relinquishments is discussed at length in Part II.D because it is mainly an issue for the moderate critics of intercountry adoption. If the problem of corruption can reasonably be limited, it calls for reform, not outright prohibition.

Second, even a truly voluntary placement could be a loss to the birth parent if she would have kept the child but for economic distress, and she grieves the relinquishment. This loss probably does occur to some degree in most voluntary relinquishments. Whether the loss requires us to abandon adoption, except in the case of deceased or terminated birth parents, depends on whether the loss is otherwise avoidable. If the birth mother would have failed to find the minimum means to care for the child and prevent the child's death or severe illness, or if the birth mother would have placed the child in an orphanage or lost the child to true "traffickers,"<sup>105</sup> then we should grieve with the birth mother, but we should not deny her the option to place the child for adoption.

Professor David Smolin has considered the problem of voluntary relinquishment in one of his critiques against intercountry adoption.<sup>106</sup> Professor Smolin might best

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103. The interests of an extended family might be the true heart of the debate over group interests claimed by clans, tribes, villages, and even nations. In the Western world, we tend to think in terms of an extended family. In some parts of the developing world, a clan might be the more important concept. See, e.g., Demian, *supra* note 52, at 105.

104. I am laying aside, for the moment, the situation in which the birth parents are lost with some hope of rediscovery, perhaps because of war or natural disaster.

105. See Donna M. Hughes et al., *Nepal, Trafficking*, COAL AGAINST TRAFFICKING IN WOMEN, <http://www.uri.edu/artsci/wms/hughes/nepal.htm> (last visited Jan. 18, 2011). Professor Hughes estimates that in Nepal alone, several thousand young girls are sold into prostitution every year. *Id.* Parents sell their daughters at prices ranging from \$200 to \$600. *Id.*

106. See David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 426 (2007) [hereinafter Smolin, *Intercountry Adoption and Poverty*].

be described as a moderate critic because most of his arguments lean toward reform, not an outright ban or condemnation of intercountry adoption. His chief concerns are with unethical practices such as financial inducements, bribery, and kidnapping of children.<sup>107</sup> However, his argument about a birth parent's loss in a voluntary relinquishment could lead to the conclusion that adoption—particularly intercountry adoption—is frequently unethical even if it passes the usual tests of legality. It might be a perfect argument for a cynical critic or absolute opponent of intercountry adoption.

Professor Smolin's argument rests on a comparison of the cost of adoption with the cost of helping the poor *remain* parents. It is indisputable that many birth parents who voluntarily place their children for adoption do so because of poverty. With financial aid, some might remain parents. One might say that the loss such birth parents suffer is avoidable by providing financial aid. Is this the sort of loss that makes adoption wrong? Professor Smolin reasons, "As an ethical matter, it is perverse to spend thousands of dollars taking a child from the birth family, when a much smaller sum would have kept the family intact."<sup>108</sup> Taken to its logical conclusion, Professor Smolin's argument might suggest that many domestic adoptions as well as intercountry adoptions are unethical. Even in domestic adoptions, economic circumstances are likely to be a major cause of voluntary relinquishment.

The ethical dilemma described by Professor Smolin's hypothetical is not necessarily one faced by the adoptive parents. Adoptive parents do not "take" a child from a birth parent. In a proper adoption, the birth parent relinquishes the child for adoption without financial inducement or coercion by any party—most especially the adoptive parents. In an ideal adoption system, the adoptive parents are completely removed from the birth parent's decision and her act of relinquishment.<sup>109</sup> One or more "intermediaries" counsel the birth parent, receive the relinquishment and the child, and place the child with adoptive parents. The "ethical" decision imagined by Professor Smolin is faced by the intermediary: Should he offer money to discourage the relinquishment, or should he simply accept the relinquishment with no payment of money?<sup>110</sup>

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107. See Smolin, *Intercountry Adoption*, *supra* note 48, at 310; David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 403–04 (2005) [hereinafter Smolin, *The Two Faces of Intercountry Adoption*]; Smolin, *Intercountry Adoption and Poverty*, *supra* note 106, at 433–34.

108. Smolin, *Intercountry Adoption*, *supra* note 48, at 310.

109. In some jurisdictions that permit independent or direct placement, including some U.S. states, adoptive parents may in fact be involved in the relinquishment decision and act. See Andrea Carroll, *Re-Regulating the Baby-Market: A Call for a Ban on Payment of Birth Mother Living Expenses*, U. KAN. L. REV. (forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1597216](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1597216). However, this is not a problem inherent in adoption—intercountry or otherwise.

110. See Smolin, *Intercountry Adoption*, *supra* note 48, at 314–18. There is of course a third option: to pay the birth parent to relinquish the child, but selection of this option is neither ethical nor lawful. There is an important issue of whether financial inducements play a significant role in relinquishments, either in violation of the law or by opportunistic use of loopholes in the law. *Id.*

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This hypothetical choice would be important if it actually demonstrated that a birth mother's loss is avoidable and that her loss is *caused* by the adoption system when the system denies the necessary aid. However, Professor Smolin does not propose to prohibit intercountry adoption. Instead, he proposes a cure: “[W]here the birth parents live under or near the international poverty standard of \$1 per day, family preservation assistance must be provided or offered as a condition precedent for accepting a relinquishment that would make the child eligible for intercountry adoption.”<sup>111</sup> Professor Smolin estimates that \$300 would typically be enough to enable a birth family to avoid relinquishment of the child. The cost would be funded by adoption fees necessarily exceeding more than \$300 per application. Most birth parents—Professor Smolin estimates about 90%—might choose not to relinquish after receiving aid. In other words, each adoptive parent or couple would need to pay for the cost of processing one binding relinquishment *plus* a proportionate cost of financially inducing some number of revocations. Professor Smolin estimates that the total cost of aid per application might be \$3300.<sup>112</sup>

Professor Smolin's hypothetical works as a sensitizing device, but not as a practical proposal. Whatever final shape the proposal might take, it would necessarily be carried out by local authorities, and in that regard there are some precedents for what Professor Smolin has proposed. In the United States, for example, a “maternity home” connected with an adoption agency might offer unconditional room, board, and medical services for pregnant women in need. The home's costs are born to some degree by adoptive parents who pay fees to adopt children whose birth mothers accepted the home's services. Adoptive parents also probably bear some part of the cost of services for women who decide after a lengthy stay not to place their children for adoption through the agency that sponsors the maternity home. This arrangement may be an important factor in the extraordinary expense of domestic adoption. Overseas, orphanages and local governments sometimes require the payment of extra fees for adoption services. The funds collected by such fees are intended to provide for a variety of projects, including the upgrading of orphanages and family services. Again, extra fees increase the cost of intercountry adoption.

Experience gained by many international family aid services sheds some light on the likely challenges of a proposal to provide more aid for preserving families and preventing relinquishment. Suppose, for example, that the allocation of funds raised by adoption fees goes directly to local authorities, orphanages, and other intermediaries. First, there are the usual problems of corruption.<sup>113</sup> If the problem of corruption in gaining relinquishments is as grave as many moderate critics believe it is, the process of distributing an even greater amount of funds to *avoid* relinquishment is likely to be at least equally corrupt. Second, if the funds were used to provide for the construction and improvement of local orphanages—which tend to benefit local

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111. Smolin, *Intercountry Adoption and Poverty*, *supra* note 106, at 415.

112. *See id.* at 445.

113. *See* Celia W. Dugger, *Aid Gives Alternative to African Orphanages*, N.Y. TIMES, Dec. 5, 2009, <http://www.nytimes.com/2009/12/06/world/africa/06orphans.html>.

officials and draw still more international aid—this may *increase* long-term institutionalization of children because desperately poor families, rightly or wrongly, come to view orphanages as a better environment than their own family environment.<sup>114</sup> Moreover, to the extent the availability of such funding is clearly linked to intercountry adoption, local officials are all the more likely to favor intercountry adoption over the development of local family placement.<sup>115</sup>

Alternatively, the money intended to avoid relinquishment or institutionalization might be paid directly to birth families. Early experience with direct cash benefits shows some promise when the funds are distributed simply on the basis of need.<sup>116</sup> However, considering that there are millions of children in orphanages around the world and many more in desperately poor family environments,<sup>117</sup> it would probably take a very large sum of money to put more than a small dent in the number of children being institutionalized, relinquished for adoption, or simply abandoned.

Finally, one might distribute money directly to a smaller group of birth parents: those who we know or predict would otherwise place their children for adoption. The problems of managing such a program would be staggering. If the money were paid as an inducement *not* to relinquish, what would be the price for non-relinquishment? Would it be an amount sufficient to overcome an immediate crisis, or an amount sufficient to change the birth parent's life for the long term? Will the birth parent have a legal obligation not to institutionalize or place the child for adoption if she has received an earlier non-relinquishment payment? What if a birth parent never really intended to place the child for adoption, but was simply appealing for a fee? Is it fair to distribute money to an impoverished birth family we know or predict will otherwise relinquish their child, but no money at all to an equally impoverished family we predict will not relinquish their child?

Professor Smolin's proposal could not succeed in the real world. Nevertheless, it serves as a reminder that the difference between desperation and subsistence is very small in the developing world, especially when compared with what affluent Westerners might spend on any number of things—including the adoption of children. Perhaps the Western world *should* do more to fund family services throughout the world. However, there is no reason why adoptive parents should bear this burden alone. They have already made a much larger contribution in accepting the burden of raising a child to adulthood. Moreover, raising adoption fees to fund new social welfare initiatives will accelerate the extinction of the middle class from the world of adoption. If we owe the world better funding for family services, we should all bear that burden as taxpayers.

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114. *Id.*

115. See D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 398 (2005). For a further discussion of this problem, see *infra* Part II.C.7.

116. See Dugger, *supra* note 113.

117. See *infra* Part III.

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To come full circle, the harm that birth parents suffer when they relinquish a child solely because of economic despair is not a harm the *adoption* system can avoid. The adoption system did not cause the birth parent's despair, and any effort to use the adoption system to lift birth parents from poverty is very likely to fail, or even to backfire. If the adoption system seems "perverse," it is because of a paradox that one family's tragedy becomes the cause of another's joy. Adoptive parents should know this, but knowing it is no reason to abandon a pursuit that may be the birth parent's last and best option.

### 7. *Effects on Local Prospective Adoptive Parents*

Children and birth families are not the only persons who might arguably feel the effects of intercountry adoption. Local prospective adoptive parents are another group on whose behalf cynical critics frequently raise an objection. Intercountry adoption might divert adoptions away from local prospective adoptive parents to foreign adoptive parents. Foreign adoptive parents might be able to pay higher fees, and the money they offer might incentivize orphanages or other intermediaries to favor intercountry adoption.<sup>118</sup> As noted in Part II.C.5, this sort of diversion was a key issue in the reaction against intercountry adoption in Romania, and it has been a key part of the cynical critics' ongoing argument against intercountry adoption.

Sending nations might also see any such diversion of placements as a problem. If a local government is accountable at all to its citizens, it may have no choice but to address complaints of local parents who want to adopt but who believe their efforts are or will be frustrated by foreign adoptive parents, especially if it appears that the greater wealth of foreigners—rather than comparative parenting skill—is the reason for the diversion.

Protecting and facilitating the opportunity of local parents to adopt can be consistent with the goal of family placement and the best interests of adoptable children. However, it is bad policy and detrimental to the best interests of children to promote local placement by prohibiting or unduly restricting intercountry adoption.

Restricting intercountry adoption could be counterproductive because there might not be any real diversion. There might, in fact, be a significant shortage of local parents wanting or willing to adopt unrelated children.<sup>119</sup> Critics of intercountry adoption tend to be very optimistic about the possibilities for local placement even for nations in which there is no tradition or culture of "adoption" as we know it in the Western world. Optimists typically suggest that the lack of formal adoption in some communities is an illusion, that substitute parenting is a universal practice having many cultural forms, and that communities that do not practice Western-style formal

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118. See Dickens, *supra* note 42, at 76, 80; Blair, *supra* note 115, at 374–79.

119. See, e.g., Rankin, *supra* note 39, at 285–86 (describing the continuing shortage of local adoptive parents in Romania); Chloe Arnold, *Russia: More Parents Sought for Domestic Adoption*, RADIO FREE EUR./RADIO LIBERTY (July 13, 2007), <http://www.rferl.org/content/article/1077616.html> [hereinafter Arnold, *Russia*]; Clifford J. Levy, *Russian Orphanage Offers Love, But Not Families*, N.Y. TIMES, May 3, 2010, <http://www.nytimes.com/2010/05/04/world/europe/04adopt.html>.

adoption do practice other forms of child placement outside the nuclear family.<sup>120</sup> These assertions miss the heart of the problem. Many of the cultural variations for child placement involve informal arrangements for the care of a child within an extended family, clan, or otherwise related group.<sup>121</sup> For any of a variety of reasons, some children fall outside effective social networks. Moreover, in some settings even the concepts of extended family, clan, or other social units have dissolved because of urbanization or social upheaval.<sup>122</sup> These forms of child care might be sufficient where they are available, but they have obviously failed children who languish in orphanages around the world.<sup>123</sup>

Part of the problem may be economic. There are not enough substitute parents with sufficient resources and motivation to support another family's child. However, another large source of the problem is that long-term substitute parenting of completely unrelated children is *not* a universal cultural practice.<sup>124</sup> For many children who are in or destined for institutions, the local variations of family placement have fallen short. Local variations based on an extended family or clan are simply not available for these children for any of a multitude of reasons, including war, urbanization undermining family values, or other social factors eroding traditional or idealized ways of life. Whatever the reasons, millions of children in institutions have not benefitted at all from alternative forms of family placement. For some number of these children, intercountry adoption might be an option—and the only alternative—to long-term institutionalization.

When there are not enough local prospective adoptive parents, a ban on intercountry adoption sentences otherwise adoptable children to prolonged institutionalization.<sup>125</sup> In Romania, for example, authorities understandably sought to promote local family placement for many children in orphanages, but a shortage of local foster or adoptive parents resulted in the continued institutionalization of thousands of children.<sup>126</sup> Other countries have sought to transition gradually to local placement by granting various forms of preference for local parents and against

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120. See, e.g., Bowie, *supra* note 4, at 14; Demian, *supra* note 52, at 97–110; Treide, *supra* note 52, at 127–41; Ernst Halbmayer, “The One Who Feeds Has the Rights”: Adoption and Fostering of Kin, Affines and Enemies Among the Yupka and Other Carib-Speaking Indians of Lowland South America, in CROSS-CULTURAL APPROACHES TO ADOPTION, *supra* note 4, at 145–64.

121. Demian, *supra* note 52, at 105.

122. See Arnold, *Russia*, *supra* note 119.

123. See Dillon, *supra* note 22, at 183–85; Mezmur, *supra* note 5, at 94–95.

124. See Dillon, *supra* note 22, at 223 & nn.158–59; see also Leifsen, *supra* note 50, at 207. Cultural differences regarding adoption are not limited to a comparison between the “developed” world versus the “developing” world. Even some Western nations do not have a culture or tradition that is strongly supportive of adoption. See Bowie, *supra* note 4, at 10–11 (describing a continued “anti-adoption” culture in the United Kingdom and a tendency to mask or deny adoption).

125. See Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 193 (describing the effect of Russia's six-month waiting period and India's domestic/intercountry quota system).

126. See Rankin, *supra* note 39, at 280 (describing the continued institutionalization of children because of a lack of local adoptive parents); see also Blair, *supra* note 115, at 400–01.



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foreign parents.<sup>127</sup> However, restrictions can have the effect of delaying placement of a child as authorities wait for a final determination that all local options are exhausted before turning to intercountry adoption.<sup>128</sup> Delay for the sake of local adoptive placement increases the risk of harm to the child's mental and physical development, and makes the child's later transition and attachment to a new family even more difficult.<sup>129</sup>

A policy of discouraging intercountry adoption combined with a persistent shortage of local adoptive parents can also seem like a justification for local authorities to promote "foster" care in lieu of adoption. As noted earlier, international law could be interpreted to encourage preferences for local foster care over intercountry adoption. Whether this is consistent with the best interests of children placed in foster care depends on what constitutes foster care,<sup>130</sup> whether foster parents are available in sufficient numbers, and whether there are sufficient safeguards against bad foster care. In Romania, a preference for local foster care resulted in continued institutionalization of children because of a shortage of foster as well as adoptive parents.<sup>131</sup> In Haiti, what might pass for foster care is actually a form of indentured servitude.<sup>132</sup> Even in the Western world, foster care has not always been equated with nurturing family care. In some cases, foster care might be only a very short step removed from institutionalization.<sup>133</sup> One inherent difference between foster care and adoption is the lack of permanency and stability in a foster relationship.<sup>134</sup> This

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127. Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 192–93.

128. *Id.*

129. Dr. Dana Johnson, Dir. Int'l Adoption Clinic, Univ. of Minn., *In the Best Interest of the Children? Romania's Ban on Intercountry Adoption: Helsinki Commission Hearing Before the United States Commission on Security and Cooperation in Europe* (Sept. 14, 2005), available at [http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewWitness&ContentRecord\\_id=677&ContentType=D&ContentRecordType=D&ParentType=H&CFID=49170199&CFTOKEN=13813725](http://csce.gov/index.cfm?FuseAction=ContentRecords.ViewWitness&ContentRecord_id=677&ContentType=D&ContentRecordType=D&ParentType=H&CFID=49170199&CFTOKEN=13813725) ("[I]n infancy, hospital or orphanage care for longer than 4–6 months can cause permanent alterations in cognitive, emotional and behavioral development. A reasonable estimate is that an infant loses about 1–2 IQ points/month, and sustains predictable losses in growth as well as motor and language development between 4 and 24 months of age while living in an institutional care environment."). See also Blair, *supra* note 115, at 394–95.

130. See generally Wardle, *supra* note 22 (discussing the wide range of what constitutes "foster care"). Professor Wardle notes that foster care is sometimes a "euphemism for cottage-industry-level institutionalization, with children being farmed out to live with a band of parentless children in a small-scale orphanage run by a small staff of under-resourced adults." *Id.* at 341.

131. See Rankin, *supra* note 39, at 277–78.

132. See *Child Trafficking and Abuse in Haiti: IOM Efforts to Rescue Restaveks*, INT'L ORG. FOR MIGRATION, 1, <http://www.iom.int/unitedstates/Home/Restavek%20info%20sheet.pdf> (last visited Feb. 28, 2011) [hereinafter IOM, *Child Trafficking & Abuse in Haiti*].

133. See Michael Bohman & Soren Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, in THE PSYCHOLOGY OF ADOPTION, *supra* note 62, at 93–95, 105; John Triseliotis & Maclom Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in THE PSYCHOLOGY OF ADOPTION, *supra*, at 107, 111–15.

134. See Rankin, *supra* note 39, at 278 (describing a study of Romanian foster care that found that "foster caregivers tend to adopt a professional relationship with the child, which is 'not in the best interest of the child, as professionalism does not imply sacrifice or total commitment like that of a parent'").

lack of stability affects the strength of the emotional commitment between a child and his or her foster parents, and it also undermines the child's sense of security.<sup>135</sup> Thus, a preference for local foster care over intercountry adoption can be nearly as bad as a preference for institutionalization, unless authorities can assure that there are in fact sufficient numbers of foster parents and that foster care really qualifies as nurturing "family" care.

It is also doubtful whether *foster* parenthood represents an aspiration or demand that local authorities ought to seek to fulfill. Unless prospective foster parents have a pre-existing connection with the child, their service as foster parents might be more analogous to employment than a family relationship, especially if they have declined to adopt a child and their offer to be foster parents depends on significant compensation.<sup>136</sup> The government's payment for such foster care in lieu of intercountry adoption might be an unnecessary drain on resources that could otherwise be used for other children and family services.

Foster care best deserves a special preference over intercountry adoption when the child is old enough to have developed an emotional attachment with the local community or culture, or when the birth parents are not really out of the picture because they have not completely abandoned their interest in the child and thus maintain contact with the child, but remain unable to provide care. In this case, however, the child is an unlikely candidate for intercountry adoption.

In sum, it is understandable that sending nations might prefer to satisfy an actual demand for local placement, particularly local *adoptive* placement, over intercountry placement. It is much less clear whether sending nations should grant a preference for foster care, except to maintain a real, continuing relationship with the birth family, or to maintain an older child's real attachment to a language and culture. In any event, the continuing availability of intercountry adoption need not stand in the way of the goal of local placement. When a child needs family placement, either local adoptive parents are immediately available or they are not. A rule that requires that the child must be placed on hold for any significant length of time while authorities continue to search for potential local adoptive parents harms the child without fulfilling any current and genuine local parental demand. If intercountry adoption really does divert placements to foreigners because of greater financial rewards to intermediaries, the solution is to strengthen the enforcement of the rights of local aspiring adoptive parents.

#### *D. Moderate Critics of Intercountry Adoption*

##### *1. Overview*

Between the supporters and cynical critics of intercountry adoption are the moderate critics. Moderate critics do not oppose intercountry adoption in principle,

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135. See Triseliotis & Hill, *supra* note 133, at 111–15.

136. See *infra* note 179; see also Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL LAW 181, 202, 206 (1996).



but they worry that intercountry adoption is tainted by some amount of illegal and unethical conduct, much more so in some sending nations than in others. In comparison with vigorous supporters of intercountry adoption, moderate critics are more likely to err in favor of more stringent regulation or moratoria to prevent illegal or unethical practices, even if this means suspending or severely curtailing the opportunity for perfectly legal adoptions. Professor Smolin, for example, has catalogued and described a number of illegal or unethical practices that have actually occurred on some scale, that taint the adoption process, and that lead to real harm to children who are adopted.<sup>137</sup> He and a number of other writers, including Johanna Oreskovic, Trish Maskew, and Professor Marianne Blair, have also proposed a number of needed reforms.<sup>138</sup>

The illegal or unethical practices moderate critics cite can be divided roughly into two types. First, intermediaries sometimes use financial inducements to obtain a birth mother's relinquishment for adoption.<sup>139</sup> The relinquishment might still be "voluntary" in some sense.<sup>140</sup> Perhaps if the birth parent had not relinquished the child for adoption in return for money she would have relinquished the child for no money at all, left the child in an institution, or delivered the child to real traffickers. She might have viewed the acceptance of money in return for a relinquishment for adoption as the best option for her and her child. Voluntary or not, a financial inducement makes the relinquishment invalid under U.S. law and possibly criminal under local or U.S. law, depending on the circumstances.<sup>141</sup> Prohibiting financial inducement in all cases is probably the best policy because an occasional practice of financial inducement can grow into something much worse: a true market for children in which there is real value in securing, collecting, and distributing children for adoption. The intermediaries in such situations may regard the children they trade as little more than livestock.<sup>142</sup> A practice of financial inducement may also affect personal relations between the parties in some disturbing ways, and it could be severely disturbing to the child if he or she later understands that he or she was "bought."

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137. See Smolin, *Child Laundering*, *supra* note 49, at 125–26.

138. See *id.* at 171–86; Johanna Oreskovic & Trish Maskew, *Red Thread Or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 121–27 (2008); see also, e.g., Blair, *supra* note 115.

139. Blair, *supra* note 115, at 356–64, 366–67 (describing alleged financial inducements to women to relinquish their children in Cambodia and Guatemala); see also Smolin, *Child Laundering*, *supra* note 49, at 161; Oreskovic & Maskew, *supra* note 138, at 115.

140. There is a legitimate debate whether the "purchase" of the right to adopt a child *should* be illegal. E.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978). However, for purposes of this article I will assume that the sale of the right to adopt a child is wrong.

141. Not all sending nations have enacted criminal laws against financial inducement. See Mezmur, *From Angelina (To Madonna)*, *supra* note 66, at 151–52.

142. See Smolin, *Child Laundering*, *supra* note 49, at 154–55.

The second general class of illegal or unethical practices involves a purposeful or neglectful misrepresentation of a child's status or availability for adoption. If a true market for children for adoption or other purposes has evolved in a community, an intermediary might actually kidnap a child or obtain the child by making various misrepresentations or false pretenses to the birth family. For example, an intermediary might mislead birth parents by saying that he will arrange for the child's temporary shelter, care, and schooling in an orphanage.<sup>143</sup> In order to place or distribute the child for adoption—probably for a fee—this intermediary must create a false record and a new identity for the child. The child's real status and identity are “laundered.” A variation of this problem occurs by neglect or mistake. A birth parent in economic or other distress might leave her child with an orphanage for temporary care until the child is older or the birth parent has overcome some problem and is able to care for the child. A variety of mistakes—or opportunistic behavior by the orphanage if money is involved—may lead to this child's placement for adoption as an “abandoned” child.<sup>144</sup>

As in the case of financial inducements, not all cases of “laundering” are equally bad. It is reported that in Ecuador, corruption exists among public officials in multiple layers of bureaucracy who stall adoptions in order to collect bribes, essentially holding children hostage and playing on the emotions of adoptive parents who are psychologically connected with the children assigned to them.<sup>145</sup> According to these reports, intermediaries sometimes manufacture paperwork to circumvent corrupt officials and expedite the release of children who might truly be available for adoption.<sup>146</sup> The creation of forged documents might also be a way of cutting corners for an otherwise well-intended adoption. UNICEF estimates that each year more than fifty million children are not registered at birth.<sup>147</sup> The complications of providing documentary evidence of the status for such children might lead some intermediaries to circumvent regulations requiring documents.

The fact that corruption, financial inducement, and the misrepresentation of status occur is undeniable, and some of this malfeasance causes actual harm to children, birth families, and adoptive families. The question is whether reform can effectively deal with these problems without strangling intercountry adoption. The answer to this question depends on the degree to which corruption problems are either inherent and systemic in adoption per se or in the existing process for adoption.

If adoption by its very nature leads unavoidably to an intolerable degree of corruption, then reform would be hopeless. Fortunately, there are good reasons to believe the problem of corruption is not that bad. Some sending nations such as

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143. Blair, *supra* note 115, at 365–66 (describing scandals in India involving the alleged misrepresentation made to parents that their children would be cared for in orphanages, coercion, and fraudulent creation of new identity documents for children to be released for adoption).

144. See, e.g., Fonseca, *supra* note 4, at 172 (describing this problem in Brazil).

145. See Leifsen, *supra* note 50, at 190–92.

146. *Id.* at 187–92.

147. UNICEF, THE STATE OF THE WORLD'S CHILDREN 24 (2009), available at [http://www.unicefusa.org/news/publications/state-of-the-worlds-children/SOWC\\_2010.pdf](http://www.unicefusa.org/news/publications/state-of-the-worlds-children/SOWC_2010.pdf).

Korea seem to have successfully avoided the corruption that has afflicted Cambodia and parts of India. This difference suggests that “trafficking” or “laundering” are not inherent features of adoption, and that these problems might depend mainly on local conditions. Moreover, critics who have undertaken a careful study of actual cases, the conditions under which they occurred, and the law and procedure as they exist appear to be in wide agreement that reform is possible—or at least worth the effort.

## 2. *Proposed Reforms*

With regard to specific reforms, little could be added to what other writers have already identified as measures that might greatly reduce the potential for illegal and unethical practices.<sup>148</sup> There are two sides to the reform equation: (1) changing the law and procedure in sending nations to assure the existence of laws and competent authorities to investigate and verify a child’s status and the legitimacy of the relinquishment, and (2) changing the law in the United States and other receiving nations to provide a *second* opportunity for verification, especially where the sending nation’s investigation and verification is suspect.

Naturally, there are limits to what the United States can do to impose reform on other nations. The simplest and most direct route is to promote ratification and implementation of the Hague Convention in nations that are not yet signatories. The Convention requires the implementation of laws and procedures and the creation of central authorities, which, if sufficiently and competently staffed and funded, can be a safeguard against corrupt practices.<sup>149</sup> Unfortunately, many sending nations have not ratified the Convention, in some cases because they lack resources to implement the Convention, and perhaps in others because they lack interest in promoting intercountry adoption. To make the problem worse for non-Convention nations, some of the best safeguards of U.S. immigration law apply only to adoptions from sending nations that are parties to the Convention.<sup>150</sup> In other words, U.S. regulation is weakest where it might be needed the most. The United States should apply the same or similar safeguards to adoptions from all nations, not just those that have ratified the Convention. In the view of some critics, even the U.S. regulations for Convention adoptions are not strong enough.<sup>151</sup> For example, the United States could strengthen its own rules for licensing and review of U.S. adoption agencies and for scrutiny of adoption fees and costs.<sup>152</sup>

Strengthening U.S. regulations alone cannot compensate for all shortcomings in law and enforcement in sending nations, especially with respect to non-Convention nations. For nations unwilling or unready to ratify the Convention, the United States

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148. See Oreskovic & Maskew, *supra* note 138, at 95–109; Smolin, *Child Laundering*, *supra* note 49, at 174–200.

149. Hague Convention, *supra* note 10, arts. 4, 6–11, 16, 22; see also Smolin, *Child Laundering*, *supra* note 49, at 174–200.

150. See Smolin, *Child Laundering*, *supra* note 49, at 173–74.

151. See, e.g., Oreskovic & Maskew, *supra* note 138, at 95–109.

152. Smolin, *Child Laundering*, *supra* note 49, at 176–87.

could seek bilateral agreements to establish procedures and safeguards under an alternative set of rules.<sup>153</sup> For non-Convention nations unwilling or unable to enter into bilateral agreements, U.S. authorities must bear more than the usual responsibility for investigation and verification, especially when there are special reasons to believe that local protections against corruption are inadequate.

### 3. *The Limits of Reform*

Many of the proposed reforms will likely increase the cost of intercountry adoption. Regrettably, the cost of intercountry adoption already exceeds the reach of most of the middle class. Higher costs may be the unavoidable price of assuring the legitimacy and reputation of intercountry adoption. However, a major goal for reform must be regulation that does not needlessly increase costs. Some reforms might *reduce* the cost of adoption to the extent they eliminate the misfeasance and malfeasance that tend to drive costs higher, but most regulation does increase the cost of any regulated activity. Reformers should remain conscious of this problem as they search for the right balance between protective regulation and freedom of private initiative. New regulations should target the greatest need. For example, it appears that patterns of corruption sprout mainly in non-Convention nations. If so, raising regulatory costs and barriers for adoptions under the Convention might be unnecessary. Over-regulation of Convention adoptions might also be counterproductive if it drives more adoptions to nations outside the Convention, particularly those where local law and enforcement are weakest. Reformers should also concentrate on small measures that have the potential for large impact, such as the use of DNA testing to discourage some types of corruption.<sup>154</sup>

Reform must also be tempered with clear-eyed realism about what we can expect to accomplish. Corruption in foreign nations will sometimes be beyond our control or detection. There are limits to our ability to pressure other nations, especially very poor nations, to improve their laws or enforcement. Measures that succeed for one nation or one set of conditions might fail in other nations or under another set of conditions. It appears that some reform efforts overseas have actually backfired because the bureaucracies created to combat corruption became corrupt themselves.<sup>155</sup> Moreover, the United States is not the only receiving nation. The measures the

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153. See, e.g., Agreement Regarding Cooperation of the Adoption of Children, U.S.-Viet., June 21, 2005, State Dep't No. 06-10, 2005 WL 3826041; see also Lindsay K. Carlberg, Note, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of The Hague Convention on Intercountry Adoption Or Just Another Road to Nowhere Paved With Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 124 (2007) (discussing some drawbacks of the bilateral treaty approach).

154. For example, the United States now requires DNA testing as a condition of adoptions out of Guatemala. McKinney, *supra* note 15, at 404–05; Katherine Sohr, Comment, *Difficulties Implementing the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption: A Criticism of the Proposed Ortega's Law and an Advocacy for Moderate Adoption Reform in Guatemala*, 18 PACE INT'L L. REV. 559, 566 (2006).

155. Blair, *supra* note 115, at 392–93 (describing the situation in India).

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United States adopts might not be embraced by other receiving nations. U.S. safeguards might then be undermined by persistent abuses by intermediaries who serve mainly adoptive parents from other nations.<sup>156</sup> Finally, no amount of regulation or investigation is a guarantee that there will be no corruption. Unfortunately, a single corrupt agency or intermediary can cause enormous damage to persons involved in adoption and to the popular image of intercountry adoption. In Cambodia, for example, it appears that a very large part of that nation's adoption scandals occurred under the direction of a single individual.<sup>157</sup>

What if it becomes clear that our efforts to guard against unethical or illegal practices have not completely succeeded? In some cases, the United States has taken the extreme measure: a moratorium against approval of adoption of children from nations where there are particularly grave concerns about adoption. Such a moratorium is now in effect for Nepal.<sup>158</sup> Moratoria is a measure of last resort because they block both legitimate and illegitimate adoptions under the assumption that U.S. authorities are no longer able to distinguish one from the other. They bar even adoptions between parties who found each other by means other than the suspect agencies or processes that led to the moratorium.<sup>159</sup> When corruption is isolated or traceable to particular agencies or persons, the question then becomes whether we should allow intercountry adoption to continue, or whether we should avoid the risk of even a single illegitimate relinquishment.

In answering this question, we should remember that U.S. adoption law has survived and progressed despite many adoption scandals. In the very earliest days of adoption before modern regulation, some unknown number of children were placed by notorious "baby farms" that purchased infants born to prostitutes or unwed mothers.<sup>160</sup> Somewhat more recently, the domestic adoption scene was rocked by the Tennessee Children's Home scandal. Between 1924 and 1950, Georgia Tann managed an adoption service that placed thousands of children, including children adopted by Hollywood stars Joan Crawford, June Allyson, and Dick Powell.<sup>161</sup> Tann's methods were as depraved as those of any of the foreign intermediaries involved in modern-day scandals overseas. Her tactics included deceiving young mothers into

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156. See, e.g., Leifsen, *supra* note 50, at 187–88 (describing aspects of Spanish law that may tend to increase the likelihood of corruption in Ecuador).

157. Oreskovic & Maskew, *supra* note 138, at 114–16.

158. *Important Information Regarding Adoptions from Nepal*, OFFICE OF CHILDREN'S ISSUES, U.S. DEP'T OF STATE, <http://adoption.state.gov/news/nepalalerts.html> (last visited Feb. 28, 2011).

159. We should remember that whatever model we imagine as describing "intercountry adoption," there are an infinite variety of circumstances in which members of the adoption triad come together. See, e.g., Godula Kosack, *Adopting a Native Child: An Anthropologist's Personal Involvement in the Field*, in *CROSS-CULTURAL APPROACHES TO ADOPTION*, *supra* note 4, at 21.

160. See Ellen Herman, *Baby Farming*, THE ADOPTION HISTORY PROJECT, <http://www.uoregon.edu/~adoption/topics/babyfarming.html> (last updated July 11, 2007).

161. See Fredric Koepfel, *Author Spent 16 Years Delving into the Power Georgia Tann Wielded and the Victims She Left*, MEMPHIS COMM. APPEAL (Sept. 25, 2007, 12:03 AM), <http://www.commercialappeal.com/news/2007/sep/25/the-baby-thief/>.

believing that their infants had died in the hospital, when in fact they had been placed for adoption or sold to other agencies.<sup>162</sup>

The scandals that have occurred within the United States are instructive in this way: there were no moratoria. Instead, state legislatures, courts, and child welfare authorities continued the process of reform that has never really ended. To be sure, corrupt practitioners caused real damage to an untold number of birth families, adoptees, and adopters. Adoption still occurs in the United States, however, because it is the best option for a much larger number of people. Moreover, not every birth parent, child, or adoptive parent snared by a corrupted adoption was worse off for it. For some birth mothers, the only real option was adoption, perfectly legitimate or otherwise. For some adoptive children, the trauma of learning some secret and possibly dark side to the dissolution and reformation of their family is not as harmful as what they might have suffered if they remained with birth parents unable to provide care. The practice of adoption persists in the United States because the good that adoption offers for all the parties exceeds the risks of Georgia Tann, although we should never stop worrying about Georgia Tann.

### III. ARE THERE ORPHANS?

The argument that intercountry adoption offers benefits for all the parties—especially children—depends on a premise: there are children who are available for, and in need of, adoption. Surprisingly, a debate has emerged about whether there are significant numbers of “orphans”<sup>163</sup> in the world. Some cynical critics have asserted that the existence of orphans is a myth,<sup>164</sup> although they may have meant only that the existence of *extremely large numbers* of orphans is a myth. However, even some moderate critics now claim that there is some aspect of “mythology” about orphans in the argument for promoting intercountry adoption.<sup>165</sup> If these attacks were only against the advertising of child welfare agencies soliciting monetary donations or applications for adoption, they might have some degree of merit. However, the mythology argument has been leveled directly at the academic debate as whether there is a role for adoption as a solution for some children in need.

At first glance, the argument seems mainly one of splitting hairs about how *many* millions of “orphans” there are in the world. Professor Bartholet has said that there are “millions on millions” of “[homeless] children.”<sup>166</sup> Johanna Oreskovic and Trish Maskew have taken issue with Professor Bartholet’s statement.<sup>167</sup> They note

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162. *Id.*

163. The term “orphan” can be misleading in the context of the intercountry adoption debate. Strictly speaking, an “orphan” is a child “deprived by death of one or usually both parents.” *Orphan Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/orphan> (last visited Jan. 20, 2011).

164. See Bowie, *supra* note 4, at 14; Fonseca, *supra* note 4, at 165.

165. See Oreskovic & Maskew, *supra* note 138, at 74.

166. Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 158.

167. See Oreskovic & Maskew, *supra* note 138, at 79.



that UNICEF statistics show that *only* 2.6 million children are housed in institutions.<sup>168</sup> Perhaps 2.6 million (counting only institutionalized, and not street, children) is not yet “millions on millions,”<sup>169</sup> but the rebuttal misses the point. As Professor Bartholet emphasized, presently there are not enough adoptions of any sort to serve more than a tiny fraction of these children.<sup>170</sup> If the greatest number of intercountry adoptions in any one year has been something less than 50,000, it is likely to be a very small fraction indeed.

The important fact is that the number of children who might be well served by the opportunity for adoption greatly exceeds the number of adoptions that are being processed. This is true even if most of the millions of children not being raised in families are, in fact, *not* adoptable because they still have an attachment to their birth families, or because they have become so old or of such poor mental, emotional, or physical health that most prospective adopters are unwilling or unable to bear the special challenges and sacrifices of raising them in their homes. Even if Professor Bartholet has overestimated the number, even if there are *only* two or three million and not “millions on millions,” and even if only *one in twenty* of these children is “adoptable,” there are still more adoptable children than there are likely to be prospective adoptive parents under present conditions.

In truth, Professor Bartholet’s estimate of the “millions on millions” of children in distress who might benefit from adoption is much closer to the truth than Oreskovic’s and Maskew’s rebuttal. UNICEF—an agency not known for promoting intercountry adoption<sup>171</sup>—estimates that about 145 million children around the world have lost one or both parents.<sup>172</sup> An earlier UNICEF survey of a *limited* number of nations showed that there were nearly 10 million “double orphans” who had certainly lost *both* parents.<sup>173</sup> UNICEF does not collect such statistics to support any argument in favor of intercountry adoption. UNICEF is at best neutral and frequently discourages intercountry adoption.<sup>174</sup> However, the “orphan” statistics are important to UNICEF because they suggest the magnitude of an unknowable number of children who are at risk of the loss of an effective family environment because of the death of parents.<sup>175</sup> Of course, children counted as “orphans” by their local governments are only half the story.

168. *See id.* at 78.

169. Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 158.

170. *Id.* at 164.

171. In its latest report, for example, UNICEF refers to a child’s right not to be illegally adopted and says nothing of a right to an opportunity for lawful adoption. UNICEF, *THE STATE OF THE WORLD’S CHILDREN*, *supra* note 147, at 25.

172. *Id.*

173. UNICEF ET AL., *CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES & PROGRAM STRATEGIES 7* (2002), *available at* [http://pdf.usaid.gov/pdf\\_docs/PNACP860.pdf](http://pdf.usaid.gov/pdf_docs/PNACP860.pdf).

174. UNICEF’s report lists many projects and measures to better the situation of children around the world. It does not include adoption—domestic or intercountry—among these initiatives. UNICEF, *THE STATE OF THE WORLD’S CHILDREN*, *supra* note 147, at 24.

175. UNICEF, *CHILDREN ON THE BRINK*, *supra* note 173, at 9.

Another large number of children are placed by living parents in precarious situations, including institutions, which house about 2.6 million children.<sup>176</sup> Those who end up in institutions are not necessarily the least lucky. UNICEF estimates that 150 million children as young as five years old are engaged in child labor.<sup>177</sup> In Haiti alone, it is estimated that 173,000 children are trafficked for domestic servitude.<sup>178</sup> In Sri Lanka alone, estimates of the number of children employed as prostitutes or sold into the sex trade range upward to 100,000.<sup>179</sup> To say that most of these children were not “orphans,” or that many have missed their chance for adoption because they are now too old for adoption, misses the point. Many of these children might have enjoyed a better situation if adoption had been an alternative.

The disparity between the numbers of children in distress and the number of intercountry adoptions is startling. Intercountry adoption is extraordinarily expensive and difficult, but given the number of children potentially well served by adoption, it should not be. Why have the costs of intercountry adoption risen so much that only the wealthy and the more affluent members of the middle class can afford it? Why has the effort to adopt become so difficult, including, for example, international travel and lengthy stays of weeks or months in foreign countries? The answer might be that there are severe impediments to matching children in need with parents willing and desiring to accept parenthood by adoption. The current system does a poor job of linking potential adoptive parents to real needs. A paradox has emerged: there are many, many children who might benefit from adoption, but they are so scarce that adoption agencies can charge high fees, orphanages can demand large donations, and national governments can impose procedural requirements that contribute mainly to the local tourist economy rather than to child welfare.

In a perverse way, there may be a point at which the fear of corruption and overzealous and misplaced regulatory response breeds even more corruption. Already, adoptive parents might be taking more and more risks in the frontiers of the developing world and paying large sums of money for adoption because they have no choice. As more nations prohibit intercountry adoption or raise costs and regulatory hurdles, the cost of adoption soars upward, making it even more likely that there *will* be corruption in an ever smaller number of nations that do permit intercountry adoption. Moreover, if the reform measures we adopt raise the price of adoption even higher, the stereotype of the wealthy Westerner “shopping” for children in poorly developed, “exploited” nations might become self-fulfilling. Adoption will become an exclusive reserve for the rich, and it will occur mainly in countries that lack the ability to have any regulation at all.

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176. See Oreskovic & Maskew, *supra* note 138, at 79; Bartholet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 183.

177. UNICEF, *THE STATE OF THE WORLD'S CHILDREN*, *supra* note 147, at 24.

178. IOM, *Child Trafficking & Abuse in Haiti*, *supra* note 132.

179. Sri Lanka—*The Paradise for Paedophiles and Child Prostitution*, LANKANEWSPAPERS.COM, Dec. 18, 2008, [http://www.lankanewspapers.com/news/2008/12/36809\\_space.html](http://www.lankanewspapers.com/news/2008/12/36809_space.html).



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Regulatory reform is one half of the answer to illegal and unethical practices. The other half is to make sure that children who could benefit from adoption are not denied the opportunity.

### IV. RESTATING INTERNATIONAL LAW FOR INTERCOUNTRY ADOPTION: SEEKING THE BETTER INTERESTS OF CHILDREN

#### A. From “Best” to “Better” Interests

As noted earlier, the debate over intercountry adoption is framed in part by two international documents, the CRC and the Hague Convention.<sup>180</sup> Together, these documents make important contributions to family law in general and adoption law in particular. They are, however, only intermediate steps toward the development of better laws for the protection of children and promotion of their interests. There are three more steps that could improve the welfare of children by advancing the law of adoption: (1) the substitution of a new international standard for evaluating child welfare policies; (2) a more decisive endorsement of adoption, both domestic and intercountry; and (3) a clearer statement of what subsidiarity requires in intercountry adoption.

First, international law needs a better standard for evaluating national policies for the protection of children. The CRC states what is widely known as the “best interests” standard: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>181</sup> The “best interests” standard, or at least the phrase, appears to have its origins in U.S. and British family law.<sup>182</sup> To American and British lawyers trained in family law, the term “best interests” is greatly restricted by implicit limits and by acknowledged uncertainty about what “children” we are protecting and what we mean by “best.”

Despite what the best interests standard might seem to suggest, no court in America upholds the interests of any child without at least some regard for the interests of other parties, including parents most of all.<sup>183</sup> If children’s interests were all that counted, the state would have authority to intervene and transfer custody of a child—and possibly place the child for adoption—whenever it found that birth parents were not as capable as other potential parents or caregivers. In part, this is because courts “presume” that a parent acts in the best interests of his or her child even if a judge or jury might reasonably disagree with a parent’s decisions regarding

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180. See *supra* Part I.A.

181. CRC, *supra* note 9, art. 3, sec. 1.

182. See generally Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337 (2008) (discussing the background and foundation of the best interests standard in British and U.S. common law).

183. See *Santosky v. Kramer*, 455 U.S. 745 (1982) (requiring clear and convincing evidence of a parent’s unfitness as basis for termination of parental rights).

the child.<sup>184</sup> It is only when a court *must* resolve a dispute between *two* parents—as in a custody dispute in a divorce or when something extraordinary happens such as the parent’s serious abuse or neglect of the child—that a court reaches a question about the child’s best interests.<sup>185</sup> Moreover, the best interests standard is essentially an adjudicatory rule for resolving a dispute between two parties over a single child. There is no law in the United States that requires that legislatures or other law or policymaking bodies always place the child’s interests ahead of the interests of parents or other parties. Laws that grant parents wide discretion in managing a child’s education, religious instruction, and medical treatment or that restrict the grounds for state intervention in the family tip the scales in favor of parental interests.

Despite what the CRC says in its Preamble, even the CRC grants that a child’s interests do not prevail over a parent’s interests in all situations—especially when it comes to adoption. Article 21 provides that if a nation permits adoption (and it is not required to do so), living parents or even other members of the extended family might have the right to veto the child’s adoption, regardless of whether local authorities might find that adoption would be in the child’s best interests.<sup>186</sup> Of course, proponents of group solidarity would also argue that national, community, or other group interests should trump the interests of the child.

The best interests standard can also be unhelpful, particularly in international law, because it is so vague about the “child” or the “children” we have in mind. The “child” might be a particular child before a tribunal making a decision about that child, or the “child” might represent the class of children or some subclass of children. Article 3 of the CRC highlights this uncertainty by stating that “in all actions concerning *children* . . . the best interests of the *child* shall be a primary consideration.”<sup>187</sup> The question of whether we should focus exclusively on the interest of the child in any proceeding versus the interests of children as a class is commonplace in U.S. family law cases. This is because the courts or policy makers frequently act based on generalization rather than individuation. Legal proceedings are rarely if ever capable of an exhaustive and definitive determination of the interests of a particular child. Decision makers must rely on generalizations or value judgments they assume work for most children in the usual run of cases. Thus, decisions follow rules or presumptions that are usually in the best interests of children even though they are bound to fail many individual children.

For example, a judge might believe that a relative is a better caregiver for a child than a non-relative because the relative will love the child more and will also be bound by “family duty” to bear the responsibility of caring for the child. In some cases—perhaps in a great many—this generalization is unfair to particular parties,

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184. See *Troxel v. Granville*, 530 U.S. 57 (2000) (finding that a court must presume mother is acting for child’s best interests in limiting contact with paternal grandparents).

185. See *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding that it is unconstitutional for a state to terminate the parental rights of an unmarried father without proof of his abuse or neglect of his children).

186. See CRC, *supra* note 9, art. 21.

187. *Id.* art. 3 (emphasis added).

but the truth might not be discoverable in any reasonably efficient fact-finding procedure. A similar issue of generalizations is at work in intercountry adoption. The CRC presently describes the importance of preserving a child's heritage in a family placement decision.<sup>188</sup> As noted earlier, for older children the generalization might be reasonably valid as a way of doing what is best for the child. However, blind adherence to this generalization will deny many individual children their better chances in intercountry adoption.

One could also say that the best interests of an individual child are sometimes disregarded in order to protect the best interests of children as a class. Thus, we resist the urge to intervene in families that are merely less than satisfactory because government intervention on such a scale would breed uncertainty and insecurity that would be unhealthy for families and their children in general. In the debate over intercountry adoption, some opponents of adoption make a similar argument: that intercountry adoption may be good for the child who is adopted, but the availability of adoption undermines the interests of the children who are left behind.<sup>189</sup>

Finally, the best interests standard is misleading to the extent it suggests that the law will achieve an ideal outcome. When American or British lawyers invoke the best interests standard, they understand that the "best" is not really attainable. A court, child placement authority, or other decision maker normally has a limited set of choices before it at the time it makes its decision for the child. In a child custody decision, for example, there are only two parents, or one parent and one or more non-parents, from which to choose. The decision maker cannot search beyond this small circle of persons in search of the "best."

It might seem that adoptive placement offers a decision maker a greater range of decisions, and that he or she really can seek the "best" of all placements for a child, but in this regard the best interests standard is misleading and potentially harmful. An authority making a placement decision might be tempted to wait for "still better" or the "very best." If an adoptive family that is ready now to adopt appears imperfect because they are of a different culture, race, or nationality, because they are fundamental Baptists instead of Unitarians, or because they are affluent and materialistic instead of socially conscious and spiritual, the decision maker might be tempted to wait. To a limited extent, "waiting" can be an option in adoptive placement. It is possible that the next set of applicants will be a better match or better parents in the authority's view. Nevertheless, waiting can cause real harm to children if they remain too long in institutions or substandard foster care and lose their opportunity for early family bonding. After a point, they will simply become one more of the millions on millions who are too old for adoption.

The best interests standard is a puzzle, but probably a harmless one for American lawyers who understand its limits and who know the issues that lurk beneath the phrase. On the international stage, however, the "best interests" standard has extra potential for misinterpretation, misunderstanding, and misdirection. For one thing,

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188. See *supra* Part II.C.2.

189. See *supra* Part II.C.5.

it seems to lead some critics to believe that adoption should not go forward unless there is proof that it will result in the “best” for every child. Of course, no child welfare policy can make this guarantee. The broad policies we enact can only *better the odds* for children. Laws that make adoption possible and that preserve the opportunity for adoption better the odds for children even if they cannot guarantee the same result for each child, and even if the result is not the “best” that could be imagined for every child. Some adoptions will fail, and some will even be corrupt. But not permitting adoption can also be harmful to children who lose the opportunity to escape a desperate situation. The odds for children left in institutions are certainly much, much worse than the odds for children released for adoption.

For purposes of international law, the best interests standard should be retired as a basis for drafting broad child welfare policies. It should be replaced by a statement that we should promote laws and policies that will achieve “better” outcomes for children in general. Among the policies that achieve better outcomes for children as a class are policies that preserve the opportunity for adoption. International law should also clarify that, in making individual placement decisions, time is an important factor. At some point, authorities making the decision must accept that immediate family placement is the better option.

#### *B. Endorsement of Adoption or Equivalent Forms of Parenthood*

The CRC takes only a half-step toward recognizing the importance of a family environment for children. It states in the Preamble that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.”<sup>190</sup> But what if the family is unable to care for the child for any reason? Article 20 provides that if a child is “deprived of his or her family environment,” the state’s obligation is to “ensure alternative care.”<sup>191</sup> The CRC does not define or limit “alternative care.” It provides only examples: “Such care *could* include, *inter alia*, foster placement, kafalah of Islamic law, adoption or if necessary placement in *suitable institutions* for the care of children.”<sup>192</sup> Article 20, by its terms, does not exhaust the possibilities of what a state might deem to qualify as “alternative care.” If adoptive or foster care (or kafalah in Muslim communities) is unavailable because of a shortage of parental applicants or funds to pay for foster care, institutional care will likely be “necessary.” The fact that millions of children remain in institutions may be unfortunate, but it is completely consistent with what the CRC deems to be in the best interests of children. A nation can choose to store its children in institutions without encouraging or even allowing adoption.

Remarkably, the CRC creates no obligation for a state even to *authorize* adoption. It is important to emphasize that this is not just a failure to promote intercountry

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190. CRC, *supra* note 9, at pmb1.

191. *Id.* art. 20.

192. *Id.* (emphasis added).

adoption. It is a failure to promote any kind of adoption, including adoption by parents of the same nation or community. The CRC's acquiescence in child welfare policy that rejects adoption is verified by Article 21.<sup>193</sup> The purpose of Article 21 is to protect children from certain illicit or unethical practices of adoption. In restricting adoption, the drafters of Article 21 were careful to indicate that the CRC does not require that children must have any opportunity for adoption. The rules it provides apply only to states that have decided, without obligation, to permit children to be adopted.

Major international organizations have validated the CRC's rejection of adoption as an essential part of local child welfare policy. UNICEF's position on adoption could be described as neutral at best.<sup>194</sup> It has consistently missed one opportunity after another to include adoption law as the kind of local reform nations should undertake to improve the care and welfare of children in need. UNICEF's recommendations for child-welfare policies consistently call for vigilance against illicit adoption or "trafficking," but fail to encourage legitimate adoption as any part of child welfare policy.<sup>195</sup>

The failure to require all nations to authorize adoption and promote adoptive placement for children in need is a major and inexcusable shortcoming in the CRC given our current knowledge of child development. There may be a considerable range of opinions regarding when and under what circumstances children should be placed for adoption. However, the United Nations should take at least the first essential step of recognizing that adoption in some form is an essential part of child welfare policy.

The promotion of adoption necessarily invites the question: Under what circumstances should the law provide for a child's adoption? The issue is particularly important with respect to children who are in orphanages but not relinquished for adoption by living parents. Some critics of intercountry adoption appear to argue that children in institutions do not count as available for adoption if a parent is alive. They note that impoverished parents often place their children in institutions because they are unable to care for them. These children remain attached to their parents in

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193. *See id.* art. 21.

194. *See* Dillon, *supra* note 22, at 198 & n.58.

195. UNICEF's many missed opportunities to include adoption as a part of a recommended child-welfare policy include: INTER-PARLIAMENTARY UNION & UNICEF, COMBATING CHILD TRAFFICKING 13–17, 39 (2005), *available at* [http://www.unicef.org/protection/files/IPU\\_combattingchildtrafficking\\_GB.pdf](http://www.unicef.org/protection/files/IPU_combattingchildtrafficking_GB.pdf); UNICEF ET AL., TRAFFICKING IN HUMAN BEINGS IN SOUTH EASTERN EUROPE 82 & n.128 (2004), *available at* [http://www.unicef.org/media/files/2004Focus\\_on\\_Prevention\\_in\\_SEE.pdf](http://www.unicef.org/media/files/2004Focus_on_Prevention_in_SEE.pdf); UNICEF, 1 HANDBOOK ON LEGISLATIVE REFORM: REALISING CHILDREN'S RIGHTS 170 (2008), *available at* [http://www.unicef.org/crc/files/Handbook\\_on\\_Legislative\\_Reform.pdf](http://www.unicef.org/crc/files/Handbook_on_Legislative_Reform.pdf); UNICEF, SUPPORTING THE REALIZATION OF CHILDREN'S RIGHTS THROUGH A RIGHTS-BASED APPROACH TO LEGISLATIVE REFORM 58, 111–12 (Jan. 2007), *available at* [http://www.unicef.org/Supporting\\_the\\_Realization\\_of\\_Childrens\\_Rights\\_Through\\_a\\_Rights\\_Based\\_Approach\\_To\\_Legislative\\_Reform.pdf](http://www.unicef.org/Supporting_the_Realization_of_Childrens_Rights_Through_a_Rights_Based_Approach_To_Legislative_Reform.pdf); Vanessa Sedletzki, UNICEF, LEGISLATIVE REFORM FOR THE PROTECTION OF THE RIGHTS OF CHILD VICTIMS OF TRAFFICKING 1, 39 (Nov. 2008), *available at* [http://www.unicef.org/policyanalysis/files/Legislative\\_Reform\\_for\\_the\\_Protection\\_of\\_the\\_Rights\\_of\\_Child\\_Victims\\_of\\_Trafficking.pdf](http://www.unicef.org/policyanalysis/files/Legislative_Reform_for_the_Protection_of_the_Rights_of_Child_Victims_of_Trafficking.pdf).

some way. The parents' dilemma is a cruel one, just as it is for some parents who opt to place their children for adoption. As noted earlier, the parents do have some rights in the matter of the child's disposition. Even in the United States, there are legal safeguards against an involuntary termination of parental rights for the purpose of adoption. However, institutionalization of children—particularly infants and very young children—may be so destructive to a child's health and development that the child's need for family placement supersedes the parents' interests.<sup>196</sup> The fact that this issue is difficult and complex should not deter the United Nations or UNICEF from beginning to lead the world toward a resolution of the issue as a matter of basic human rights.

A separate question is whether the United Nations or other international organizations should recognize a duty for every nation to authorize *intercountry* adoption. Local political considerations aside, every nation should authorize intercountry adoption and participate in international efforts to safeguard against abuse, at least to the extent that local family placement is not possible. A more complete answer to this question involves a look at the idea of subsidiarity.

### C. Clarification of Subsidiarity

Subsidiarity is a principle recognized in the CRC and the Hague Convention that authorizes, and arguably requires, a nation to pursue local placement ahead of intercountry adoption.<sup>197</sup> The question of whether and how the principle of subsidiarity should be described by international law requires an exploration of rules that might better the odds for children in need, but the answer is ultimately limited by politics in sending nations. It is one thing to urge nations to authorize and promote adoption by their own citizens. It is another to require them to permit foreigners to adopt children.

Local politics aside, intercountry adoption should be part of any nation's child welfare policy, as it is in the United States, both as a receiving and sending nation.<sup>198</sup> Intercountry adoption serves two important roles for child welfare policy. First, for a child for whom local family placement is not available, intercountry adoption offers an alternative to institutionalization or substandard foster care, and the opportunity for intercountry adoption should be regarded as the child's right. The United Nations should join the Hague Convention in forthrightly recognizing that institutionalization is never the better option for very young children, and might not be in the interest of some older children. The United Nations should also address the troubling question of what constitutes appropriate foster care. Considering the wide range of what might

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196. For a discussion of U.S. law on this issue, see Bartholet, *The Child's Story*, *supra* note 21, at 359–60.

197. See *supra* text accompanying notes 11–20. UNICEF is one international organization that appears to interpret the CRC to require that local law should allow intercountry adoption only as a last resort. See, e.g., *supra* notes 147, 173, 195 and accompanying text.

198. See 42 U.S.C. § 14901 (2006) (describing the purpose of the law as to “improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad *and residents of other countries party to the Convention seeking to adopt children from the United States*”) (emphasis added).



## SEEKING THE BETTER INTERESTS OF CHILDREN

constitute such care, it is unacceptable to grant a blank license for whatever a nation might deem to be foster care.

Second, intercountry adoption can be a catalyst for domestic adoption. Intercountry adoption creates a demand for the establishment of local institutions and laws for adoption. Foreigners demonstrate the example of adoption as an acceptable means of family building. Local authorities who deplore intercountry adoption are incentivized to resist by creating a real alternative: domestic adoption. But international law should discourage hard national preferences and should demand early family placement by any means, including intercountry adoption, so that children do not wait in institutions to the point of physical and emotional harm while authorities search for local parents.<sup>199</sup>

### V. CONCLUSION

Three different groups—cynical critics, moderate critics, and vigorous advocates—are struggling over the future of intercountry adoption. Vigorous advocates seek to promote a larger role for intercountry adoption in international child welfare policy. On the other side of the debate, the most extreme cynical critics would ban intercountry adoption, while less extreme cynical critics would be content to discourage adoption or allow its decline into insignificance. Moderate critics forming a third group seek to reform intercountry adoption to prevent abuses.

The best approach lies somewhere between the positions of vigorous advocates and moderate critics. The cynical arguments against intercountry adoption are based on agendas distinctly different from the best interests of children, or on erroneous assumptions about the harms of intercountry adoption. Adoption scandals are very real and they do cause harm to some number of parents and children, but a complete ban on or end to intercountry adoption would harm a much greater number of children who would be abandoned to institutionalized care, or worse.

The answer is careful regulation, not prohibition. Indeed, regulation designed to prevent real abuse is as necessary in the intercountry arena as it is in domestic adoption, but too much regulation can backfire. Overregulation will strand thousands of children in institutions, raise costs beyond the reach of many prospective adopters, and drive other prospective adopters into nations where costs are low and adoptions are “possible” but legal protection for any of the parties is weak. The “right” level of regulation will be no guarantee that every child’s adoptive placement will be perfect, ideal, or even lawful. Adoption is no more capable of perfection than any other worthy child welfare policy. However, the benefits that adoption offers, and the many children who would almost certainly benefit by adoption, make it a policy that deserves our efforts.

To promote a balanced approach to intercountry adoption, reform is required not only in local and national law, but also in international law. This article has proposed

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199. See Barthelet, *The Child’s Story*, *supra* note 21, at 361–62 (describing the tendency of sending nations to require lengthy and potentially harmful holding periods to enforce preferences for local adoptive parents); see also Barthelet, *Thoughts on the Human Rights Issues*, *supra* note 21, at 193–95.



three particular reforms for international law. First, the “best interests” standard borrowed from British and American family law should be abandoned in international law in favor of a standard or set of standards that translates more meaningfully as a goal of child welfare policy and as an accommodation of various family interests. Second, international law should decisively endorse adoptive family placement—domestic or otherwise—as a solution for children who will otherwise likely be without emotional and material family support. In other words, international law should make it clear that long-term institutionalization or other placements that fail to build a true “family” are generally not the best option for children. Third, international law should address the role of intercountry placement within a policy of favoring adoption, to state clearly that sending nations may prefer their own local adoptive family placements, but that intercountry adoption will often be the next best alternative.