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ELIZABETH BARTHOLET

Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption

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PERMANENCY IS NOT ENOUGH

This conference has as its central theme the importance of achieving permanency for children.¹ But permanency is not enough. Permanency for children often exists in institutions and in dysfunctional families that commit abuse and neglect. Permanency in these contexts is harmful to children. Permanency for children can be achieved in foster care, although, generally, foster care is characterized by moves back and forth between the foster home and the home of origin, and between different foster homes. Even when children remain in the same foster home for the duration of their childhood, this form of permanency generally serves them badly as compared to adoption.

For children to flourish, they need true, nurturing parenting, and they need permanency in the form of stable parenting from early infancy through adulthood. So our goal should be to provide all children with early, permanent, and nurturing parenting.²

We are appallingly far from reaching this goal. Many millions of unparented children exist worldwide, growing up in institutions, on the streets, in group homes, in foster care, and in families of origin in which they suffer ongoing abuse and neglect.³

International adoption can serve as only part of the solution to this enormous problem. But it should at least serve as that. At its peak in the early years of the twenty-first century, international adoption provided homes for roughly 40,000 children annually, including more than 20,000 homes in the United States.⁴ This occurred despite the severe restrictions on such adoption that have always existed. The world could easily multiply that number by 10, 100, or more by reducing those restrictions and by developing facilitative regulation that promotes the placement of children across national lines, if that is where prospective parents are to be found. We would, of course, still need to pursue other options to solve the overall problem of unparented children, but international adoption would at least help address that problem. It would make a dramatic difference for the children placed, transforming almost all those 40,000 to 4 million lives in enormously positive ways, giving children who might have died or had their life prospects hopelessly ruined the opportunity to

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1. This article is based on a talk given by Professor Bartholet at New York Law School on March 5, 2010, at a conference entitled *Permanency for Children*. Many of the ideas contained herein are discussed at greater length, and relevant sources documented, in: ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) [hereinafter BARTHOLET, *NOBODY'S CHILDREN*]; Elizabeth Bartholet, *International Adoption: The Human Rights Position*, 1 *GLOBAL POL'Y* 91 (2010) [hereinafter Bartholet, *The Human Rights Position*]; Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 *GA. ST. U. L. REV.* 333 (2008) [hereinafter Bartholet, *The Child's Story*]; Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 *BUFF. HUM. RTS. L. REV.* 151 (2007).
 2. See generally BARTHOLET, *NOBODY'S CHILDREN*, *supra* note 1.
 3. See generally *id.*; Bartholet, *The Human Rights Position*, *supra* note 1; EINAR A. HELANDER, *CHILDREN AND VIOLENCE: THE WORLD OF THE DEFENSELESS* (2008).
 4. U.N. Dep't of Econ. & Soc. Affairs, *Child Adoption: Trends and Policies*, at 74, 80, 86, 367, U.N. Doc. ST/ESA/SER.A/292 (2009), available at http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

grow up happy, with excellent prospects for the future.⁵ Given the difficulty in finding social interventions that make significant improvements in human lives, this kind of positive impact should be applauded and embraced. International adoption also relieves resource-starved nations of the burden of supporting unparented children and the additional costs those children will predictably exact as they graduate from childhoods of deprivation to adulthood—where they will disproportionately populate the ranks of the unemployed, the homeless, and the incarcerated.⁶ And international adoption brings new resources into countries in the form of adoption fees and charitable contributions.⁷

Most of the people at this conference need no convincing about the positive contribution international adoption can make. Accordingly, I want to address the strategic thinking that I believe we should engage in if we want to make international adoption work for unparented children—work to provide the large numbers of homes that it could provide if we regulated to implement, rather than simply to restrict, such adoption.

First, we must recognize that international adoption is in crisis. Such adoption into the United States has dropped in the short period since 2004, its peak year, to roughly half of what it was. It has dropped in each of these years, and most precipitously in the most recent years.⁸

Second, we must maintain hope for the future. There is no reason to give up on international adoption and assume that it is destined to die out. If it makes sense for children, then we have an obligation to fight for its future.

And there is every reason to believe that international adoption will be embraced in the future as an appropriate way to find homes for children in need. Those attacking such adoption as in conflict with children's heritage rights are speaking a language of a past in which it was common to see people as essentially defined by their race and national origin. Many people still, of course, think this way, but I believe that the trend is in the direction of recognizing that human beings are not defined in meaningful ways by the color of their skin or by whether they were born on one side or the other of a border line. While wars between nations and hostility between different ethnic groups are, sadly, part of our present, so is globalization. The trend is in the direction of more international trade and commerce, of more emigration and immigration, and of more intermarriage between people from different racial, ethnic, and national groups.

5. See, e.g., Bartholet, *The Child's Story*, *supra* note 1, at 344–49 (contrasting the positives of international adoption for children with the negatives of their real-world alternatives).

6. See, e.g., *International Adoption Policy Statement and Supporting Report*, CTR. FOR ADOPTION POL'Y, (2008), available at http://www.law.harvard.edu/faculty/bartholet/IA_Stmnt_Rep2008.pdf.

7. See, e.g., Bartholet, *The Human Rights Position*, *supra* note 1, at 96.

8. See *id.* at 92; U.S. DEP'T OF STATE, FY 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS (2010), available at http://www.adoption.state.gov/pdf/fy2010_annual_report.pdf; *Total Adoptions to the United States*, U.S. DEP'T OF STATE, OFFICE OF CHILDREN'S ISSUES, http://www.adoption.state.gov/news/total_chart.html (last updated Sept. 30, 2009).

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The treaties governing international adoption demonstrate a move in the direction of increased legitimization of such adoption. While the Convention on the Rights of the Child emphasized the importance of placing unparented children in-country at almost all costs, preferring in-country foster and other “appropriate”⁹ care over out-of-country adoption, the more recent Hague Convention on Intercountry Adoption prefers only in-country *adoption* over out-of-country adoption.¹⁰

We should look to the Multiethnic Placement Act (MEPA),¹¹ passed by the U.S. Congress in the mid-1990s, as the model for the future. Prior to MEPA’s passage, every state in the Union had powerful race-matching policies that mirror current restrictive policies governing international adoption. Racial groups, particularly African Americans, were seen as having the right to hold onto their children, and children were said to be better off if kept within their racial group of origin. Transracial adoption was treated as a last resort. MEPA banned such racial matching policies throughout the United States, making any use of race as a factor in placement illegal for all agencies receiving any federal funding.¹²

Third, we must work together. Those of us who believe in international adoption must try to work as a united community. We are a small and fragile group, and our member organizations are limited in funding and influence. We are fighting against forces that are huge and powerful, including organizations like the U.N. Committee on the Rights of the Child, UNICEF, and Save the Children, which to date have treated international adoption as either a last-resort option or a complete non-option. We cannot afford to be divided. We also need to reach out to powerful organizations that agree with us on the core principle that unparented children should be provided early, permanent, and nurturing parenting, including through international adoption if that is where homes are available. I noticed in a recent news article that World Vision, a Christian organization with evangelical roots, now qualifies as the single largest U.S.-based international relief and development organization, with more staff members in other countries than CARE, Save the Children, and the worldwide operations of the U.S. Agency for International Development, combined.¹³ We need to reach out to church organizations regardless of whether we share all their religious beliefs, so long as they agree with our core principle.

Fourth, we need to fight fiercely for our goal—early, permanent, and nurturing parenting for all children—and not compromise with those who promote deference to in-country options at the expense of unparented children. Many powerful forces promote

9. See 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).

10. See 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).

11. Howard M. Metzbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 108 Stat. 3518, 4056 (codified as amended at 42 U.S.C. § 1996(b) (2000)).

12. *Id.*

13. Nicholas D. Kristof, Op-Ed., *Learning From the Sin of Sodom*, N.Y. TIMES, Feb. 28, 2010, at WK11, available at <http://www.nytimes.com/2010/02/28/opinion/28kristof.html>.

deference to nations' alleged rights to hold onto "their" children.¹⁴ These forces regularly argue for developing foster care and small group homes, and for improving institutions, as the solutions for the world's unparented children. They regularly denigrate international adoption as plagued by corruption and other abuses such as baby selling.¹⁵ They argue that children are best served by solutions that keep them in-country where they can have an opportunity to connect with their birth families and can enjoy their national heritage. It is easy to give in because these forces are omnipresent, and they express these views loudly and consistently, while unparented children are generally invisible and silent, hidden away in institutions, growing up on the streets segregated from normal social and political life, often too young to speak out or to demonstrate. We have to stand strong for these children and speak out for their right to grow up with loving parents. We have to reject the false romanticism surrounding birth and national heritage.

These ideas guide me in thinking about the draft Families for Orphans Act¹⁶ that a group known as the FOA Coalition has urged upon Congress. This draft Act would create a new agency in the Department of State focused on finding families for unparented children, including in international adoption. This should be a good thing, focusing positive energy and resources on international adoption at this moment of crisis. But many of us feel that the Act as drafted would risk doing more harm than good. It was apparently drafted in ways designed to appease those who promote in-country options and denigrate international adoption. The Act is, as a consequence, fatally compromised, including, particularly, in the following ways:

- It prioritizes family preservation and reunification, without insisting that such practices be pursued only in cases where families are likely in the near future to provide safe, nurturing, and permanent parenting;
- It prioritizes in-country legal guardianship and legal kinship over out-of-country adoption, without insisting that such options be chosen only if, in the individual circumstances of particular cases, they will serve children's best interests better than adoption;
- It prioritizes domestic over international adoption, without insisting that any such preference be implemented through a concurrent planning system that recruits pools of domestic and international prospective parents simultaneously, thereby placing children in available international adoptive homes if there are no domestic homes immediately available.

14. For a discussion of the nature of these forces, their critique of international adoption, and my response to that critique, see, e.g., Barcholet, *The Child's Story*, *supra* note 1, at 357–76, and Barcholet, *The Human Rights Position*, *supra* note 1, at 92–98.

15. See Barcholet, *The Human Rights Position*, *supra* note 1, at 92, 96–97.

16. Families for Orphans Act of 2009, S. 1458, 111th Cong. (2009).

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My hope is that we who believe in international adoption as a good option for children can move forward as a united community, strengthening this proposed Act so that it truly serves our goal for children—early, permanent, and nurturing parenting.

In conclusion, I want to recount three recent stories to bolster our courage and to strengthen our skepticism about claims made for in-country options.

The first is told by Philip Holmes in an article questioning the priority given to family reunification based on his ten years of work in child welfare in Nepal. International adoption critics often note that a limited number of children in institutions are actually “full orphans.” Holmes speaks of the large number of children in Nepalese institutions who were driven out of their homes by stepparents—up to 90% in one institution—and the risk they would face if returned home, even assuming that financial support could be found for family reunification:

From our first-hand experience, I am . . . deeply skeptical about the rationale and practicalities for providing family support to keep children with families. We tried and it didn't work, even with our adopting the most focused of approaches as we tried to reunite a few individual children with families. We found that, unsurprisingly, financial support just won't buy the love of step parents and, if material support is accepted, can force children to remain in a potentially dangerous domestic environment. They can be trafficked out of there at the drop of a hat to vanish into the abyss of India or the growing domestic sex trade. Moreover, I am very unclear as to who would fund such widespread support and how on earth it could be implemented, monitored and evaluated in some of the source areas for children who end up in orphanages. By contrast, international adoptive parents can offer infinitely better material support and, above all, love.¹⁷

And yet, many say that only full orphans should be considered for adoption, and that for other children family reunification should be the first priority, without regard to the likelihood it will work to serve children's interests.¹⁸

The second story was sent to me by Katherine Tyson McCrea,¹⁹ a professor at the University of Chicago School of Social Work. With her husband, she adopted twin boys from Guatemala who were born into the Mayan community, an indigenous group that has long suffered vicious forms of discrimination by the Guatemalan government. The birth mother was so anxious to give her twins the better life they could find in international adoption that she filmed a video so there could be no doubt about her consent to the adoption. The twins were born healthy, but because of delays due to the impending moratorium on international adoption, they were almost a year old by the time the adoption could move forward. By then, one of the

17. Philip Holmes, *Don't Suspend Inter-Country Adoption*, REPÚBLICA, Feb. 24, 2010, http://www.myrepublica.com/portal/index.php?action=news_details&news_id=15541.

18. See generally Bartholet, *The Child's Story*, *supra* note 1.

19. Katherine Tyson McCrea, “Where's Beebee?” *The Orphan Crisis in Global Child Welfare from an Autoethnographic Perspective*, in AUTOETHNOGRAPHIC PERSPECTIVES ON SOCIAL WORK (Stanley Witkin ed., forthcoming 2012) (on file with author).

boys was lying in a coma in the hospital with meningitis destroying his brain cells. The adopting couple was told this child would never function normally—assuming he even lived—never swallow or eat on his own, and never talk or walk. Had he received appropriate medical care, including basic vaccinations, he would not have contracted meningitis. Had his adoption not been delayed by those who obsess about adoption abuses, he would not have contracted meningitis. Had he stayed in Guatemala permanently after he contracted meningitis, he almost certainly would have died or been so destroyed as to have no meaningful life. He was finally released to live with his twin brother and adoptive parents in the United States. Because of the intensive expert medical and other care his parents have given him, he is now able, at age three, to walk and even run with leg braces, to communicate even if not yet able to talk, to laugh and play with his twin, and to relish his life.

And yet, many say that priority should be given to all in-country options for children, that we should hold children for months and years while pursuing such options rather than allow international placement, and that we should impose moratoria shutting down international adoption altogether in response to adoption law violations.²⁰ The moratorium that delayed these twins' adoptions occurred in response to reports that some birth mothers had been paid in connection with placing their children for adoption, although there was no evidence as to how many of these mostly desperately impoverished women would have kept their children in the absence of these payments.

My final story is an online *New York Times* report on the informal foster care system in Haiti known as *restavek*,²¹ showing that it functions very often simply as a form of child slavery.²² The story quotes a Haitian mother, anxious to place her children for international adoption, saying that she would never let them end up in a Haitian family as *restaveks*: “They . . . force the child to work like an animal. They don't really take care of them.”²³ An estimated 173,000 children live as *restaveks* in Haiti.²⁴

And yet, many say that priority should regularly be given to in-country foster care and other so-called family-like options over out-of-country adoption.²⁵

20. See Barthelet, *The Human Rights Position*, *supra* note 1, at 93; Barthelet, *The Child's Story*, *supra* note 1, at 361.

21. *Restavek* means “to stay with” in Creole. Benedetta Faedi, *The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti*, 44 STAN. J. INT'L L. 147, 168 (2008). In theory, *restaveks* are the children of impoverished families who are sent to live with wealthier families, who “promise to feed, educate, and care for their *restaveks* in exchange [for] domestic help.” *Id.* In practice, these children are effectively slaves. *See id.*

22. Robert Mackey, *Haitian Tradition is Criticized as Child Slavery*, N.Y. TIMES BLOG (Feb. 25, 2010, 5:07 PM), <http://thelede.blogs.nytimes.com/2010/02/25/haitian-tradition-is-criticized-as-child-slavery/>.

23. *Id.*

24. *Id.*

25. See Barthelet, *The Human Rights Position*, *supra* note 1, at 92; Barthelet, *The Child's Story*, *supra* note 1, at 360.

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We know that children need early, permanent, and nurturing parenting to flourish. We know that few of the world's many millions of unparented children will find this kind of parenting in their homes of origin or in domestic adoption. We know that few will find it in foster care because, in today's world, most countries keep their unparented children in institutions, and it will take time and resources to develop foster care as an alternative. We also know that foster care will generally not serve children's interests nearly as well as adoption. We must fight for children's rights to the early, permanent, and nurturing parenting they need, and this means fighting for international adoption.