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Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States

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I. INTRODUCTION

In the wake of the devastating January 12, 2010 earthquake in Port-au-Prince, Haiti, a group of American missionaries transported nearly three dozen Haitian children into the Dominican Republic with the apparent intention of arranging for their adoptions in the United States.[1] The problem was that these children were not orphans—in fact, each child had at least one parent who had survived the destruction in Haiti.[2] Once the Haitian authorities learned of the situation, the missionaries were detained and charged with kidnapping. Almost all of the missionaries were released without charges nearly three weeks after detention upon a court finding that the parents had given their children away voluntarily.[3] The group leader, however, was convicted of the lesser crime of "organization of irregular trips" for coordinating the transportation of the children to the Dominican Republic and was sentenced to time served, which totaled three months and eight days in a Haitian prison.[4]

Despite this outcome, the debate about the missionaries' true motivation remains largely unresolved. The missionaries asserted they were on a humanitarian mission with purely altruistic motives to rescue children they believed to have been orphaned by the earthquake.[5] Some reports contradicted this claim, alleging that the missionaries had offered to buy the children from their parents or had misled the parents with the promise that their children would be sent to receive an education and could be visited at any time.[6]

While we may never know what really happened in Haiti, we do know that children from third-world countries are frequently stolen, bought, or kidnapped from their birth families and subsequently processed through the adoption system as orphans.[7] Western families pay what they believe to be administrative fees or donations to orphanages in the hope of successfully arranging an intercountry adoption. In doing so, these families unwittingly provide a strong financial incentive

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1. *See* Ginger Thompson & Shaila Dewan, *Parents Tell of Children They Entrusted to Detained Americans*, N.Y. Times, Feb. 2, 2010, http://www.nytimes.com/2010/02/03/world/americas/03orphans.html.

2. *Haiti Frees Last U.S. Missionary*, MSNBC.com, May 17, 2010, http://www.msnbc.msn.com/id/37194964/ns/world_news-haiti_earthquake/.

3. *See 8 Baptists Freed by Haiti Arrive in Miami*, CBSNews.com, Feb. 18, 2010, http://www.cbsnews.com/stories/2010/02/18/world/main6218621.shtml.

4. *Haiti Nixes Kidnapping Charge Against Americans*, CBSNews.com, Apr. 27, 2010 (internal quotation marks omitted), http://www.cbsnews.com/stories/2010/04/27/world/main6435252.shtml; *see also Haiti Frees Last U.S. Missionary*, *supra* note 2.

5. *See Haiti Frees Last U.S. Missionary*, *supra* note 2.

6. *See* Karl Penhaul, *Americans Jailed in Haiti Tried Taking Other Kids, Officer Says*, CNN.com, Feb. 8, 2010, http://www.cnn.com/2010/CRIME/02/08/haiti.border.arrests/index.html?iref=allsearch; Emma Murphy, *Baptist Group Denies Trafficking in Haitian Kids*, MSNBC.com, Feb. 1, 2010, http://www.msnbc.msn.com/id/35162046/ns/world_news-haiti_earthquake/.

7. *See generally* 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 (2006).

for unscrupulous actors, both in the United States and abroad, to manufacture "orphans" for adoption.[8]

Although these schemes are regrettably common, criminal prosecution of those involved is rare.[9] Furthermore, it appears that in only one domestic prosecution of such a scheme to manufacture "orphans," that of Lauryn Galindo, did a defendant receive jail time.[10] Galindo's fraudulent scheme, coined "Operation Broken Hearts" by the federal government, involved three different sets of actors: (1) recruiters in Cambodia who were paid a $50 commission for each child they located, (2) buyers who took children from their families promising bags of rice or a temporary education in the United States, and (3) individuals who prepared false documents to make these babies appear to be orphans.[11] The government alleged that Galindo and her associates in the United States received over $8 million from Operation Broken Hearts.[12] On June 23, 2004, Galindo pleaded guilty in federal court in the Western District of Washington to visa fraud, money laundering, and currency structuring.[13] She was sentenced to eighteen months in federal prison.[14]

Galindo's scheme is the tip of the iceberg; thousands of children are trafficked into the United States every year,[15] and, as such schemes are uncovered, there could be more prosecutions like hers in the future. The major impediment to the prosecution of similar facilitators of illegal intercountry adoption, however, is the imperfect nature of available federal criminal statutes.

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8. *Id.* at 175.

9. *See, e.g.*, *Defendants Sentenced in Samoan Adoption Scam*, U.S. Immigration & Customs Enforcement (Feb. 25, 2009), http://www.ice.gov/news/releases/0902/090225saltlakecity.htm (describing four U.S. individuals sentenced for their roles in facilitating fraudulent adoptions in Samoa); Maureen O'Hagan, *Guilty Plea in Federal Adoption Fraud Case*, Seattle Times, June 24, 2004, http://seattletimes.nwsource.com/html/localnews/2001963987_adoptions24m.html (explaining that defendant Lauren Galindo plead guilty to visa fraud, money laundering, and currency structuring for a scheme involving the adoption of Cambodian babies). *Cf.* D. Marianne Blair, *Wells Conference on Adoption Law: Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 Cap. U. L. Rev. 349, 390–91 (2005) (explaining the difficulty in prosecuting child trafficking in adoptions).

10. *See* Sara Dillon, *Adoption and Children's Rights: Getting it So Very Wrong*, Ctr. for Adoption Pol'y, 18 (Apr. 28, 2005), http://www.adoptionpolicy.org/pdf/4-28-05CAPSaraDillonadoptionarticle.pdf.

11. U.S. Immigration & Customs Enforcement, Backgrounder: Operation Broken Hearts 2 (Nov. 19, 2004), *available at* http://www.brandeis.edu/investigate/gender/adoption/docs/galindo_backgr.pdf.

12. *Id.* at 1.

13. O'Hagan, *supra* note 9.

14. Smolin, *supra* note 7, at 141.

15. *See* U.S. Dep't of Justice et al., Assessment of U.S. Government Activities to Combat Trafficking in Persons 9 (June 2004) [hereinafter Assessment of Activities to Combat Trafficking], *available at* http://www.justice.gov/archive/ag/annualreports/tr2004/us_assessment_2004.pdf; Special Rapporteur on Trafficking in Persons, Especially Women and Children, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, ¶ 8, Human Rights Council, U.N. Doc. A/HRC/10/16 (Feb. 20, 2009) (by Joy Ngozi Ezeilo) [hereinafter Special Rapporteur on Trafficking in Persons], *available at* www2.ohchr.org/english/issues/trafficking/docs/HRC-10-16.pdf.

The most prominent weapon federal prosecutors currently have at their disposal in the fight against adoption fraud is the Intercountry Adoption Act (IAA) of 2000,[16] which was specifically designed to address the problem of fraudulent intercountry adoption. As discussed in Part II, however, the IAA is flawed with respect to enabling prosecutions. Until these shortcomings are addressed, federal prosecutors can target intercountry adoption fraud by use of either the IAA, with its limitations, or through novel applications of existing federal criminal statutes—statutes that were not originally designed to address adoption fraud.

This article will explore the possibility of criminal prosecution of illegal intercountry adoption under both the IAA and other federal laws. In Part II, we discuss the nature, purpose, and elements of the IAA. We also analyze the IAA's flaws from a prosecutorial perspective and propose possible solutions to those deficiencies. In Part III, we focus on other criminal statutes that may be successfully applied to illegal intercountry adoption prosecutions, including the Foreign Corrupt Practices Act, the Travel Act, and visa fraud, even though those statutes were not created for the purpose of such prosecutions. Next, in Part IV, we address other potentially applicable, but less severe "tack-on" statutes, including money laundering, currency structuring, and mail and wire fraud. Finally, in Part V, we evaluate certain other statutes, including the Racketeer Influenced and Corrupt Organizations Act, trafficking statutes, and alien smuggling statutes, which on a superficial level may appear relevant to the prosecution of adoption fraud, but are likely inapplicable in practice.

II. INTERCOUNTRY ADOPTION ACT OF 2000

A. Introduction to the Intercountry Adoption Act

The Intercountry Adoption Act (IAA) of 2000 was passed as part of a long history of collaboration between the United States and the international community on adoption issues. Illegal intercountry adoption has been an international concern for decades, going back at least as far as the Hague Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (the "1965 Hague Convention").[17] The Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (the "Hague Adoption Convention")[18] was developed out of the recognition that the 1965 Hague Convention had become outdated and there were new problems in the world of intercountry adoption that needed to be addressed.[19] The Hague Adoption

16. Intercountry Adoption Act (IAA) of 2000, 42 U.S.C. § 14901 (2006).

17. *See* Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption, Nov. 15, 1965, 1107 U.N.T.S. 38.

18. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption art. 2, *concluded* May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995) [hereinafter Convention on Protection of Children].

19. *See* G. Parra-Aranguren, Explanatory Report on the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, ¶ 6 (1994), *available at* http://hcch.e-vision.nl/upload/expl33e.pdf.

Convention essentially gave effect to Article 21 of the United Nations Convention on the Rights of the Child[20] and has been ratified and entered into force by over fifty Hague member states and almost thirty non-member states.[21]

The stated purposes of the Hague Adoption Convention are:

> (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law; (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children; (c) to secure the recognition in Contracting States of adoptions made in accordance with the [Hague Adoption] Convention.[22]

The Hague Adoption Convention applies to all adoptions between countries that have joined the Hague Adoption Convention ("Convention countries"), which are commonly known as "Convention adoptions."[23] Although the United States joined the Hague Adoption Convention in March of 1994, it was another six years before Congress enacted implementing legislation in the form of the IAA. The IAA, however, did not come into full effect until April 2008, after the United States ratified the Hague Adoption Convention in December 2007.[24]

B. Statutory Analysis of the Intercountry Adoption Act

The stated purposes of the IAA are:

> (1) to provide for implementation by the United States of the [Hague Adoption] Convention;

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20. 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).

21. *See Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, Status Table, Hague Conf. on Private Int'l Law, http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Feb. 7, 2011). The countries that have joined the Hague Adoption Convention are: Albania, Andorra, Armenia, Australia, Austria, Azerbaijan, Belarus, Belgium, Belize, Bolivia, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Cape Verde, Chile, China (and Hong Kong), Colombia, Costa Rica, Cuba, Cyprus, Czech Republic, Denmark, Dominican Republic, Ecuador, El Salvador, Estonia, Finland, France, Georgia, Germany, Greece, Guatemala, Guinea, Hungary, Iceland, India, Israel, Italy, Kenya, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malta, Mali, Mauritius, Mexico, Moldova, Monaco, Mongolia, Nepal, Netherlands, New Zealand, Norway, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, San Marino, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Togo, Turkey, United Kingdom, United States, Uruguay, and Venezuela. *Id.*

22. Convention on Protection of Children, *supra* note 18, art. 1.

23. *Id.*

24. *Overview*, U.S. Dep't of State, Office of Children's Issues, http://www.adoption.state.gov/hague/overview.html (last visited Feb. 8, 2011); *see also* U.S. Dep't of State, Office of Children's Issues, Intercountry Adoption From A to Z 11 (2009), *available at* http://adoption.state.gov/pdf/Intercountry%20Adoption%20From%20A-Z.pdf.

> (2) to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the [Hague Adoption] Convention, and to ensure that such adoptions are in the children's best interests; and
>
> (3) 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 [Hague Adoption] Convention seeking to adopt children from the United States.[25]

The IAA has many sections, but only the few discussed here are relevant for purposes of the criminal prosecution of those who facilitate illegal intercountry adoption. Section 201 of the IAA sets forth the basic standard that "no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person—(1) is accredited or approved in accordance with this title; or (2) is providing such services through or under the supervision and responsibility of an accredited agency or approved person."[26]

Under section 404(a)(1) of the IAA, any person who violates section 201 "shall be subject, in addition to any other penalty that may be prescribed by law, to a civil money penalty of not more than $50,000 for a first violation, and not more than $100,000 for each succeeding violation."[27] More significantly, under section 404(c), "[w]hoever knowingly and willfully violates . . . [section 201] shall be subject to a fine of not more than $250,000, imprisonment for not more than 5 years, or both."[28]

Section 404(a)(2) sets forth additional offenses that are punishable by the same civil and criminal penalties as are provided for violations of section 201. These additional offenses are making a false or fraudulent statement or misrepresentation of a material fact, or offering, giving, soliciting, or accepting inducement by way of compensation, that is

> intended to influence or affect in the United States or a foreign country—(A) a decision by an accrediting entity with respect to the accreditation of an agency or approval of a person . . . ; (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case

25. 42 U.S.C. § 14901(b) (2006).

26. *Id.* § 14921(a). *See also* U.S. Dep't of State, Office of Children's Issues, The Hague Convention on Intercountry Adoption: A Web-Guide from the United States to Another Convention Country 17 (2008), *available at* http://www.adoption.state.gov/pdf/web_guide_state_authorities.pdf. The IAA designated the Department of State as the central authority in the United States, and in July 2006, the Department of State named the Counsel on Accreditation as the accreditor for Hague Convention accreditation and approval. *Id.*

27. 42 U.S.C. § 14944(a)(1). According to IAA section 404(b)(2), the factors to consider when imposing civil penalties are "the gravity of the violation, the degree of culpability of the defendant, and any history of prior violations by the defendant." 42 U.S.C. § 14944(b)(2). The IAA does not provide similar guidance regarding considerations for criminal penalties. *Id.* § 14944(c).

28. *Id.* § 14944(c).

> subject to the [Hague Adoption] Convention; or (C) a decision or action of any entity performing a central authority function.[29]

Finally, it is worth noting that section 404(a)(3) prohibits the engagement of "another person as an agent, whether in the United States or in a foreign country, who in the course of that agency takes any of the actions described in" sections 201 and 404(a)(2).[30] This offense, however, is only punishable by the civil money penalties described above.

C. Requirements for Criminal Prosecution and Penalties Under the Intercountry Adoption Act

The elements required for criminal prosecution and penalties under the IAA may not always be present in intercountry adoption cases in which arguably illegal acts have occurred. These necessary elements include the requirement in section 201 that the other country involved in the adoption be a Convention country, and the knowing and willful requirement set forth in section 404(c).

Both civil and criminal enforcement under the IAA require that the interaction involves Convention countries and either: (1) the offering or providing of adoption services without the proper accreditation or approval or without proper supervision, as set forth in section 201; or (2) the making of a false statement or misrepresentation regarding a material fact or the offering, giving, soliciting, or accepting material inducement intended to influence an accrediting agency's decision, the giving of parental consent, or a decision by an entity acting as a central authority.[31] The criminal portion of the statute, however, also has a scienter requirement.[32]

Offenders may only be criminally punished for violations of sections 201 and 404(a)(2) based on the presence of scienter, i.e., where the violations were "knowing" and "willful."[33] As there is no statutory definition of either of these terms, interpreting exactly what each term means in this context may prove difficult.

For example, an individual providing adoption services may believe that she is being supervised by an accredited agency when, in fact, that agency has misrepresented its accreditation. This is unlikely to be considered a knowing and willful violation of section 201 of the IAA, as the individual lacks scienter. A more difficult case would present itself should the individual mistakenly believe that she, herself, is a properly accredited agent, but her accreditation has actually expired. Presumably, at one point she knew the expiration date, which may be a sufficient showing of knowledge. The willfulness argument in that instance, however, would be more tenuous.[34]

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29. *Id.* § 14944(a)(2).

30. *Id.* § 14944(a)(3).

31. *See id.* § 14944(a)(2).

32. *Id.* § 14944(c).

33. *Id.*

34. The Report of the House of Representatives Committee on International Relations, in House Report 691, which examined the draft IAA before passage, commented, "The Committee believes that in the

A similar point could be debated with respect to the section 404(a)(2) provision regarding making a false or fraudulent statement. It is possible that an individual making a statement could mistakenly believe it to be true, even if it is not. What is harder to mistake in section 404(a)(2) is the offering, giving, soliciting, or accepting of a compensatory inducement. Such actions, by their nature, would generally need to be knowing and willful in order to occur at all. Likewise, acting with intent to influence is inherently a knowing and willful act. Therefore, the IAA offenses most likely to be prosecuted and punishable with criminal penalties are the ones involving compensatory inducement with the intent to influence.

As illustrated in the above examples, one of the biggest hurdles of the scienter requirement is that without a clear definition of "knowingly" there is room for instances of conscious disregard, willful blindness, or deliberate ignorance to go unprosecuted. In order to avoid culpability, an agent in the United States may simply claim that he did not have actual knowledge or was unaware of any illegal acts occurring in a foreign country involved in the adoption. Furthermore, requiring knowledge *and* willfulness in the conjunctive creates an additional prosecutorial burden that would be difficult to satisfy in many instances of illegal intercountry adoptions.

D. Recommended Changes to the Intercountry Adoption Act

Criminal prosecutions of international adoption fraud can be better facilitated by amending the IAA in two ways: (1) amending the scienter requirement, and (2) removing the need for Hague-country involvement. Neither of these suggested changes would require a significant overhaul of the statute.

First, with respect to scienter, the IAA should be amended in a manner that would help eliminate the practice of conscious disregard, willful blindness, or deliberate ignorance. One way to accomplish this would be to define the term "knowingly" within section 3, the "Definitions" section of the IAA. The term could be defined along the same lines as it is in the Foreign Corrupt Practices Act (discussed more fully in Part III), which provides that:

> (2)(A) A person's state of mind is "knowing" with respect to conduct, a circumstance, or a result if—
>
> (i) such person is aware that such person is engaging in such conduct, that such circumstance exists, or that such result is substantially certain to occur; or
>
> (ii) such person has a firm belief that such circumstance exists or that such result is substantially certain to occur.

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exercise of [the discretion provided in § 404] the Attorney General should not seek civil money penalties in the case of unintentional or harmless failures to comply with the requirements of the Convention, this Act, or implementing regulations issued under this Act." H.R. Rep. No. 106-691, pt. 1, at 31 (2000), *available at* 2000 WL 805400. The Report, however, does not contemplate similar leniency when exacting criminal penalties. *Id.* Perhaps this is because it does not view unintentional or harmless acts as falling into the knowing and willful category.

> (2)(B) When knowledge of the existence of a particular circumstance is required for an offense, such knowledge is established if a person is aware of a high probability of the existence of such circumstance, unless the person actually believes that such circumstance does not exist.[35]

Defining knowledge in a manner that does not require *actual* knowledge would help prevent agents in the United States from deliberately ignoring the illegal acts that frequently occur in other countries during the course of the adoption process.

Also, should knowledge be more broadly defined to include awareness of a "high probability" or "substantial certainty," the inclusion of an additional willfulness requirement would seem to undercut the lowered element of intent needed in the more expansive definition of knowledge. Eliminating the willfulness element of section 401(c), as Congress did in the process of amending the currency structuring statute in 1994 (discussed more fully in Part IV), would both promote clarity within the IAA and allow for the prosecution of those who turn a blind eye to illegal intercountry adoption.

Second, while the initial intent of the IAA was to ratify the Hague Adoption Convention, there is no reason for the IAA to be limited strictly to Convention countries. Of course, the Hague Adoption Convention itself does not have the power to regulate beyond Convention countries, but there is no reason for a United States law to be similarly limited. The United States has the right and authority to regulate all adoptions that involve its citizens and soil, as illustrated by its regulation of non-Convention adoptions through procedures surrounding the visa applications for adopted children being brought into the country from non-Convention countries.[36] Therefore, in order to be an effective enforcement mechanism against *any* illegal intercountry adoptions, the IAA should be expanded to include all adoptions with a nexus to the United States.[37]

In addition to considering the above recommendations, another change to the IAA that should be contemplated is an increase in the criminal penalties. Arguably, the IAA's criminal penalties of imprisonment for five years and/or a $250,000 fine are insufficient deterrents of the practice of illegal intercountry adoptions. Because the IAA is a new prosecutorial tool that has yet to be effectively tested, amending the criminal penalties is an issue that should be revisited as the IAA becomes a more fully utilized weapon in the battle against illegal intercountry adoption.

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35. 15 U.S.C. § 78dd-1(f)(2) (2006).

36. *See, e.g.*, Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 Fla. L. Rev. 47, 82 (2010).

37. *See, e.g.*, Blair, *supra* note 9, at 391.

III. OTHER VIABLE STATUTES FOR PROSECUTING ILLEGAL INTERCOUNTRY ADOPTION

A. Introduction

For cases of illegal intercountry adoption in which the requisite elements of the IAA are not present, such as when the adoption involves a non-Convention country, or for prosecutors wary of pioneering the use of a statute as new and untested as the IAA, three other federal statutes may prove effective in prosecuting adoption fraud—the Foreign Corrupt Practices Act, the Travel Act, and the visa fraud statute.

B. Foreign Corrupt Practices Act

In certain circumstances, the Foreign Corrupt Practices Act[38] (FCPA) may be a viable alternative to the IAA for the purposes of prosecuting illegal intercountry adoption. In 1977 Congress passed the FCPA in response to public reports that U.S. corporations had been paying bribes to government officials in order to secure business in developed and developing countries.[39] Although intended as a tool to prosecute bribery overseas, the elements required for an FCPA prosecution may also be present in certain instances of adoption fraud.

1. Statutory Analysis

To understand the possible application of the FCPA to illegal intercountry adoption, we provide an analysis of the elements of the statute. Among other things, the statute prohibits "domestic concerns" from making corrupt payments to foreign government and political officials in order to secure or retain business in a foreign country.[40] In addition, the statute contains a broad array of recordkeeping and accounting provisions,[41] the purpose of which is to "fight accounting devices—which include off-book accounts and slush funds—designed to hide the existence of bribery payments."[42] For purposes of adoption fraud, these anti-bribery provisions are the most relevant.

There are five elements that comprise a violation of the anti-bribery provisions of the FCPA. First, the FCPA applies to "domestic concerns and their agents and employees acting on their behalf."[43] Domestic concerns include individuals who are

38. 15 U.S.C. §§ 78dd to -3.

39. *See* Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *in* The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks 711, 715 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1665, 2008).

40. 15 U.S.C. §§ 78m(b), 78dd-1 to -3.

41. *See id.* § 78m(b).

42. Low et al., *supra* note 39, at 727.

43. 15 U.S.C. § 78dd-2. The FCPA also applies to "issuers," which are corporations with securities registered in the United States or corporations that must file periodic reports with the Securities and Exchange Commission (SEC). *Id.* §§ 78dd-1, 78m(b). Because adoption agencies or individuals who facilitate adoptions are highly unlikely to qualify as issuers, we do not address this application of the FCPA.

citizens or residents of the United States, and businesses incorporated or organized in the United States.[44] Second, there must be a payment to a foreign official, political party, or candidate.[45] The term "foreign official" includes "any officer or employee" of a foreign government. Employees of a company in which a foreign government is the majority owner would also fall under the FCPA.[46] The FCPA, however, "was not intended to, and does not address bribes or kickbacks paid to employees of private nongovernmental entities."[47] Third, the domestic concern must "make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of an" illicit payment.[48] The term "interstate commerce" covers trade, commerce, transportation, and communication among states or between any state and any place outside the United States.[49] Fourth, the payment must be made with corrupt intent. "Corrupt intent" connotes "an evil motive or purpose, an attempt to wrongfully influence the recipient."[50] Fifth, the payment must be made to influence an official "in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person."[51] This is often referred to as the "business purpose" or "business nexus" element of the FCPA because it requires that the payment be made for a business reason.

2. Requirements for Prosecution as Applied to Illegal Intercountry Adoption

Certain elements required for prosecution under the FCPA may not be present in all cases of adoption fraud. The first element—that the defendant be a domestic concern—would be satisfied in any international adoption case involving a U.S. company or individual from the United States. Similarly, the third element—that the defendant use the mail or other instrumentality of interstate commerce—would exist in most instances of illegal intercountry adoption as offenders would likely engage in interstate or international communications, including by telephone or mail.[52]

The fifth element of the statute, which requires that the bribe be made to obtain, retain, or direct business,[53] might prove more elusive in the adoption fraud context, but it is highly possible that it, too, could be satisfied in many cases. Although

44. *Id.* § 78dd-2(h)(1); Donald Zarin, *The Foreign Payments Provision*, *in* The Foreign Corrupt Practices Act 2008, *supra* note 39, at 27, 34.

45. The payment need not be mandatory—the FCPA prohibits giving "anything of value" to foreign officials. 15 U.S.C. §78dd-2(a).

46. Zarin, *supra* note 44, at 52.

47. *Id.* at 48.

48. 15 U.S.C. § 78dd-2(a).

49. Zarin, *supra* note 44, at 42.

50. *Id.* at 45.

51. 15 U.S.C. § 78dd-2(a)(1)(B).

52. *See id.* § 78dd-2(h)(5).

53. *Id.* § 78dd-1(a)(1) to (2).

"[t]here is no definition of obtaining or retaining business in the FCPA,"[54] courts have noted that "[t]he business nexus element serves to delimit the scope of the FCPA by eschewing applicability to those bribes of foreign officials that are not intended to assist in getting or keeping business."[55] A broad reading of the statute, however, prohibits "payments made to an official with the purpose of inducing the official to take action that assists the U.S. company in carrying out its existing business."[56]

Although no court has considered whether paying a bribe in order to facilitate the adoption of a child meets the business nexus test, under a broad reading of the FCPA, a court could conclude that it does, at least in cases where the defendant is a company engaged in the business of intercountry adoptions. In such instances, payment to secure a child might also be characterized as a payment with a business purpose, as procuring children is necessary to the continued business operation of illegal intercountry adoption schemes.

The second and fourth elements are more problematic for the prosecution of illegal intercountry adoption and might not be present in all cases. The second element—that the bribe be paid to a foreign official—would be satisfied only in cases where payment was directed to a foreign government official or employee. Even in cases where payments might be routed through a private intermediary, if the United States actor knew that the payment would eventually reach a foreign government official, liability is possible. According to the FCPA's legislative history, the prohibition against corrupt payments includes those "made by third parties, where the corporation pays the third party knowing that the payment will be passed on . . . to a foreign official for a proscribed purpose."[57]

The fourth element—that the defendant have corrupt intent—would only be satisfied in cases where the domestic concern that directed the payment to a foreign official knows that the payment is being used to influence that official. As discussed above, for purposes of the FCPA, a defendant "knows" that a payment is being made to influence an official if he thinks there is a "high probability" that a payment is improper, or if he consciously disregards or deliberately ignores circumstances that should have reasonably alerted him to a high probability of improper payments.[58]

54. United States v. Kozeny, 493 F. Supp. 2d 693, 705 (S.D.N.Y. 2007), *aff'd*, 541 F.3d 166 (2d Cir. 2008).

55. United States v. Kay, 359 F.3d 738, 761 (5th Cir. 2004). This is one of the only cases to consider the scope of the FCPA's business nexus requirement. *Id.* at 745 n.21.

56. *See* Donald Zarin, *The Foreign Payments Provision*, *in* The Foreign Corrupt Practices Act 2010, at 114–15 (PLI Corp. Law & Practice, Course Handbook Ser. No. 1814, 2010). In *Kay*, the Fifth Circuit explained that "[e]ven a modest imagination can hypothesize myriad ways that an unwarranted reduction in duties and taxes in a large-volume rice import operation could *assist* in obtaining or retaining business." *Kay*, 359 F.3d at 759. The court speculated that a company could be assisted in obtaining business if the bribe resulted in a favorable financial condition that reduced the company's cost of doing business so as to allow it to underbid on contracts or provided the company with a profit margin that allowed it to "fend off potential competition." *Id.* The court held that "Congress intended for the FCPA to apply broadly to payments intended to assist the payor." *Id.* at 755.

57. *See* Zarin, *supra* note 44, at 46.

58. *Id.* at 69.

This element could be proven by using circumstantial evidence to show that an agency or individual deliberately ignored that payments sent overseas would be paid as bribes.

In sum, in a case where a foreign official received a bribe in the course of an international adoption, it is likely that the FCPA would apply. The biggest challenge to using the FCPA to prosecute adoption fraud is that the FCPA does not apply to bribes or kickbacks given to non-governmental entities. This would present a problem in cases where payments were made to a private foreign company or a private foreign individual not employed by a government agency.

Additionally, the FCPA would be of limited use in prosecuting foreign individuals who facilitate illegal intercountry adoption. Although some provisions of the statute apply to foreign actors, in order to be liable the foreign person must have committed an act in furtherance of an FCPA violation "while in the territory of the United States."[59] The U.S. Department of Justice has interpreted this provision rather broadly, extending it to foreign defendants who "caused" an improper payment to be made from the United States, even where the foreign defendant was not physically present in the United States.[60] Even this broad interpretation, however, may not apply in certain scenarios. Furthermore, FCPA charges against foreigners may lead to a long and difficult extradition process. Due to these limitations, the FCPA is better suited for the prosecution of domestic adoption agencies and individuals engaged in fraudulent adoption activities overseas.

C. The Travel Act

Another statute that might be of use in the adoption fraud context is the Travel Act, which "federalizes" certain crimes that take place across state or national boundaries.[61] In particular, the Travel Act prohibits the use of "any facility in interstate or foreign commerce, with intent to . . . promote, manage, establish, carry on, or facilitate" a number of predicate crimes.[62] It is also illegal to use a facility of interstate commerce to distribute the proceeds of these predicate crimes.[63]

While there are many predicate crimes under the Travel Act, one more likely to arise in the adoption fraud context is a violation of state law bribery provisions.[64] For example, in New York, it is illegal to confer a benefit upon an employee or agent without the consent of his employer or principal "with the intent to influence his conduct in relation to his employer's or principal's affairs."[65] Thus, if an adoption agency in New York bribed an orphanage employee overseas to procure a child

59. 15 U.S.C. § 78dd-3(a) (2006).

60. *See* Zarin, *supra* note 44, at 41.

61. *See* 18 U.S.C. § 1952 (2006).

62. *Id.* § 1952(a)(3).

63. *Id.* § 1952(a)(1).

64. *See id.* § 1952(b)(i)(2).

65. N.Y. Penal Law § 180.00 (McKinney 2010).

illegally without the orphanage's knowledge, the Travel Act would apply. The hypothetical conduct described is illegal under New York law, and because the bribe crossed state and national boundaries, the state law crime is "federalized" and is thus also a violation of the Travel Act.

Whether the Travel Act would apply in a particular adoption involving bribery would depend on the exact specifications of the anti-bribery laws in the state in which the agency or individual engaged in bribery is located. If the conduct meets the specifications of that state's laws and the money for the bribe crossed state or national boundaries (which would be the case in virtually any instance of illegal intercountry adoption), then the Travel Act would be a viable prosecutorial option. This could be particularly useful in cases where the FCPA is inapplicable because the bribe went to a nongovernmental entity or individual, as many states have commercial bribery laws that criminalize bribery in the private sector.[66]

D. Visa Fraud

Another useful statute in prosecuting those who facilitate illegal intercountry adoptions is the visa fraud statute.[67] Among other things, the statute prohibits obtaining, possessing, or using an immigrant visa for entry into the United States, knowing that the visa was obtained by means of a false claim or statement, or otherwise obtained by fraud.[68] In virtually any case where the perpetrators of a fraudulent adoption arrange for a child's immigration paperwork, it is likely that this statute would apply. For example, in the Galindo case (discussed in Part I), the defendant pleaded guilty to visa fraud, admitting that she caused false statements to be made on certain immigration forms regarding the fact that the adopted children were orphans, when in fact she knew that the children had at least one living parent.[69] In other cases where United States actors make similar knowing misrepresentations in order to obtain visas, prosecutors should be able to utilize the visa fraud statute.

IV. "TACK-ON" CRIMINAL STATUTES

A. Introduction

Historically, prosecutions of illegal intercountry adoption have not been brought under statutes that directly address the wrongs of the adoption fraud. Instead, prosecutors have creatively used other statutes that address additional crimes that may be perpetrated in the course of illegal intercountry adoption. Although those

66. *E.g.*, Cal. Penal Code § 641.3 (West 2010); N.Y. Penal Law § 180.00.

67. 18 U.S.C. § 1546 (2006). Visa fraud might also be prosecuted using 18 U.S.C. § 1001, which prohibits using falsified documents in matters that are within the jurisdiction of the U.S. government, and 18 U.S.C. § 1028, which prohibits the use, production, transfer, or possession of false identification documents.

68. 18 U.S.C. § 1546.

69. Plea Agreement at 6, United States v. Galindo, No. CR03-0187Z (W.D. Wash. June 23, 2004), *available at* http://www.ethicanet.org/GalindoPLEA.pdf.

statutes do not address the underlying crime of illegal intercountry adoption, they may be used to prosecute likely effects of such transactions. In particular, four statutes—money laundering, currency structuring, mail fraud, and wire fraud—are likely to be violated in the course of an adoption fraud and, therefore, may be used as additional tools to prosecute the perpetrators.

B. Money Laundering

The phrase "money laundering" describes the process of taking illegally obtained funds and manipulating them to appear legal and "clean."[70] Money laundering was first regulated by the Bank Secrecy Act of 1970, which established requirements for recordkeeping and reporting by banks and individuals.[71] Money laundering, however, did not become a crime until 1986 when the Money Laundering Control Act criminalized monetary transactions in which the individual knew that the funds involved were derived from criminal activity.[72] Additional statutes have since expanded the definition of money laundering, but the basic premise remains—an individual violates the law by knowingly conducting a financial transaction designed to conceal the location or ownership of the funds.[73]

The current money laundering statute, codified at 18 U.S.C. §§ 1956 and 1957, has many sub-parts, most of which are inapplicable to adoption fraud.[74] In general, § 1956 is violated when a defendant conducts a financial transaction with money that he knows came from an illegal activity in order to conceal the nature or location of the money, to avoid taxes, or to promote illegal activity.[75] Section 1957 is violated where the defendant engages in a financial transaction with a value of more than $10,000 that involves property the defendant knows to be criminally derived.[76]

70. Emin Akopyan, *Money Laundering*, 47 Am. Crim. L. Rev. 821, 821 (2010).

71. Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended at 12 U.S.C. §§ 1951–1959 (2006), 31 U.S.C. §§ 321, 5311–5314, 5316–5322 (2006)).

72. *See* Money Laundering Control Act of 1986, Pub. L. No. 99-570, § 1352(a), 100 Stat. 3207, 3218 (codified as amended at 18 U.S.C. §§ 1956–1957 (2006 & Supp. III 2009)).

73. *See* 18 U.S.C. § 1956. A number of statutes have described or refined aspects of the crime of money laundering. *See* Bank Secrecy Act of 1970, 84 Stat. 1114; Money Laundering Control Act of 1986, §§ 1352–1367; Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 4702, 102 Stat. 4181, 4401 (codified as amended at 18 U.S.C. § 4247 (2006)); Annunzio-Wylie Anti-Money Laundering Act of 1992, Pub. L. No. 102-550, §§ 1500–1565, 106 Stat. 3672, 3680–75 (1992) (codified as amended in scattered sections of 12 U.S.C.); Money Laundering Suppression Act of 1994, Pub. L. No. 103-325, §§ 401–413, 108 Stat. 2160, 2243–55 (1994) (codified as amended at 31 U.S.C. § 5313 (2006)); Money Laundering and Financial Crimes Strategy Act of 1998, Pub. L. No. 105-310, 112 Stat. 2941 (codified as 31 U.S.C. § 5342 (1998)); Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, §§ 301–377, 115 Stat. 272, 297–342 (codified in various sections of the U.S. Code); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 6101–6205, 118 Stat. 3638, 3640–748 (codified as amended in scattered sections of 18 U.S.C.).

74. *See* 18 U.S.C. §§ 1956, 1957.

75. *See id.* § 1956(a)(1).

76. *See id.* § 1957(a).

Money laundering is an attractive way to prosecute adoption fraud because most fraudulent schemes involve the accumulation of illegal proceeds that an individual or group will attempt to hide in order to avoid liability. One possible impediment to applying this statute to adoption fraud, however, is the heightened requirement that the defendant must know that the money is derived from illegal activity. It may be particularly difficult for prosecutors to prove this requisite element of scienter when foreign, unknown actors are involved in the fraudulent scheme.

One benefit to using the money laundering statute to prosecute individuals engaged in adoption fraud is that it carries hefty penalties. Section 1956 provides for imprisonment of up to twenty years and a fine of up to $500,000.[77] Section 1957 provides for imprisonment of up to ten years and a fine of up to twice the amount of criminally derived property.[78] Such large penalties may serve as a persuasive deterrent.

C. Currency Structuring

The currency structuring statute, enacted by Congress in 1986 as part of the Money Laundering Control Act, criminalizes engaging in transactions in order to avoid mandatory reporting requirements.[79] The statute created requirements for financial institutions and businesses to file a report if they receive or transfer $10,000 or more or sell a bank check, cashier's check, traveler's check, or money order for $3000 or more.[80] Additionally, any person who knowingly sends or receives $10,000 or more to the United States from another country or from the United States to another country must file a report.[81]

The statute is violated when an individual, for the purpose of avoiding the reporting requirements, causes a financial institution or business to fail to file a required report or to file a report with a material omission or misstatement of fact.[82] Thus, in order to violate the currency structuring statute, the defendant must know that a financial institution, business, or person is legally obligated to report a particular kind of currency transaction and must have the intent to evade that reporting requirement.[83] Just as individuals who engage in adoption fraud may violate

77. *Id.* § 1956(a)(i).

78. *Id.* § 1957(b).

79. *See* 31 U.S.C. § 5324 (2006). The statute points to other sections of the U.S. Code that define the reporting requirements and their exemptions. *See, e.g.*, *id.* §§ 5313(a), 5316, 5325, 5326, 5331; 12 U.S.C. § 1953 (2006).

80. *See* 31 U.S.C. §§ 5325, 5331.

81. *See id.* § 5316(a).

82. *See id.* § 5324(a)(1)–(2).

83. Congress has modified the currency structuring statute, eliminating "willfulness" as an element of the crime. The Second Circuit has concluded that "knowledge" will suffice as the mens rea requirement. *See* United States v. MacPherson, 424 F.3d 183, 188–89 (2d Cir. 2005) (requiring "knowledge" of the reporting requirements with the intent to avoid them, but not requiring knowledge that the conduct is unlawful).

the money laundering statutes during the course of the fraud, they may also violate the currency structuring statute by configuring their banking transactions in order to avoid reporting requirements.

The main limitation on using the currency structuring statute to prosecute those who engage in adoption fraud is that it can only be used on the subset of individuals who purposefully participate in structuring. The statute's scienter requirement imposes a high burden—knowledge of the law and the intent to circumvent it.[84] Individuals can only be prosecuted for violating the currency structuring statute if they have knowledge of the complex reporting requirements, which vary based on the type of institution and currency involved.[85] Thus, as with money laundering, currency structuring is a tool that *can* be used to prosecute and increase the penalties for some individuals engaged in adoption fraud, but it is hardly ideal.

A violation of the currency structuring statute carries up to five years' imprisonment and a fine of up to $250,000.[86] Additionally, the penalty may be enhanced where the individual violates the currency structuring statute "while violating another law of the United States or as part of a pattern of any illegal activity involving more than $100,000 in a 12-month period."[87] If the violation is "aggravated," the penalty is enhanced to imprisonment for not more than ten years and a fine of up to $500,000.[88]

D. Mail Fraud and Wire Fraud

Individuals engaged in illegal intercountry adoption who attempt to hide their fraudulent proceeds may also violate the mail fraud and wire fraud statutes. The mail fraud statute is violated when an individual uses the mail for executing a scheme to defraud.[89] The Second Circuit has established that the necessary elements of mail fraud are: "1) a scheme or artifice to defraud 2) for the purpose of obtaining money or property . . . and 3) use of the mails in furtherance of the scheme."[90] The scheme to defraud element has been broadly defined since 1896 when the U.S. Supreme Court interpreted it to include "everything designed to defraud by representations as to the past or present,

84. *See* 31 U.S.C. § 5324.

85. *See id.*

86. *See id.* § 5324(d)(1); 18 U.S.C. § 3571(b)(3) (2006) (setting the fine at not more than $250,000 for an individual committing a felony); *id.* § 3559(a)(5) ("An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is . . . (5) less than five years but more than one year, as a Class E felony.").

87. *See* 31 U.S.C. § 5324(d)(2).

88. *See* 18 U.S.C. § 3571(b)(3); 31 U.S.C. § 5324(d)(2).

89. *See* 18 U.S.C. § 1341 (2006 & Supp. II 2008); Schmuck v. United States, 489 U.S. 705, 721 (1989).

90. United States v. Altman, 48 F.3d 96, 101 (2d Cir. 1995) (citation omitted).

or suggestions and promises as to the future."[91] Additionally, the mailing element requires only that "use of the mails is a part of the execution of the fraud."[92]

The broad reach of the statute allows it to be easily adapted to new kinds of schemes or frauds. Thus, the mail fraud statute is often used to prosecute frauds that are not yet criminalized in their own right. Because of its malleability, former Chief Justice Burger characterized the statute as the government's "first line of defense" against fraud.[93]

Similarly, the wire fraud statute is flexible enough to apply to fraudulent conduct that is not criminalized under any other specific statute. The elements of wire fraud essentially parallel those of mail fraud, with most circuit courts finding that the wire fraud statute requires two elements: (1) a scheme to defraud, and (2) the use of interstate wire communication to facilitate the scheme.[94]

Both the mail and wire fraud statutes carry heavy penalties of imprisonment for up to twenty years and a fine of up to $250,000, making these statutes attractive deterrent tools.[95] Additionally, the wide breadth of the activities covered by the mail and wire fraud statutes makes them promising candidates for prosecuting adoption fraud. As long as the defendant uses the mail or electronic wire communications to perpetrate the fraud—almost a necessity in order to facilitate an intercountry adoption—these statutes can be used to prosecute adoption fraud. While these statutes do not address the underlying issues of illegal intercountry adoption, they do provide a viable opportunity to punish and deter the perpetrators of such acts.

V. LESS VIABLE STATUTES FOR PROSECUTING ILLEGAL INTERCOUNTRY ADOPTION

The possibility exists that prosecutors could employ certain other federal statutes that were not specifically intended for the prosecution of illegal intercountry adoption in order to pursue those engaged in adoption fraud. These statutes include the Racketeer Influenced and Corrupt Organizations Act and trafficking and alien smuggling statutes. Unfortunately, however, these laws contain near-fatal or fatal aspects that inhibit them from being effective tools to prosecute illegal intercountry adoptions.

A. Racketeer Influenced and Corrupt Organizations Act

91. *See* Durland v. United States, 161 U.S. 306, 313 (1896).

92. Kann v. United States, 323 U.S. 88, 95 (1944).

93. United States v. Maze, 414 U.S. 395, 405–06 (1974) (Burger, J., dissenting).

94. *See* 18 U.S.C. § 1343. *Compare* United States v. Ames Sintering Co., 927 F.2d 232, 234 (6th Cir. 1990) (per curiam), *and* United States v. Frey, 42 F.3d 795, 797 (3d Cir. 1994), *and* United States v. Hanson, 41 F.3d 580, 583 (10th Cir. 1994), *and* United States v. Faulkner, 17 F.3d 745, 771 (5th Cir. 1994), *and* United States v. Maxwell, 920 F.2d 1028, 1035 (D.C. Cir. 1990) (all stating that the two elements of wire fraud are a scheme to defraud and the use of interstate communication), *with* United States v. Cassiere, 4 F.3d 1006, 1011 (1st Cir. 1993), *and* United States v. Briscoe, 65 F.3d 576, 583 (7th Cir. 1995), *and* United States v. Profit, 49 F.3d 404, 406 (8th Cir. 1995) (all requiring an additional element that defendant knowingly and willfully participated in the scheme with intent to defraud).

95. *See* 18 U.S.C. §§ 1341, 1343, 3571.

In 1970, Congress enacted the Organized Crime Control Act and, specifically, section 901(a): the Racketeer Influenced and Corrupt Organizations Act (RICO).[96] RICO criminalizes "racketeering activity" or "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year," or, any act indictable under numerous provisions of federal law.[97] Such racketeering activity is performed by a criminal "enterprise," defined as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[98] Two acts of racketeering activity performed by a criminal enterprise constitute a "pattern."[99] Criminal penalties for violations of RICO are steep—twenty years for each act of racketeering activity or life imprisonment, if applicable.[100]

RICO has been roundly criticized since its inception as an overly broad statute that lacks clearly articulated standards.[101] Its breadth, though, could be seen as an asset in applying its criminal provisions to illegal intercountry adoption. Congress has already linked RICO and illicit international trafficking by expanding the scope of RICO's underlying predicate statutes. In 2003, the Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003 amended RICO such that "trafficking in persons" became an offense prosecutable under § 1961(1)(B).[102] Some commentators have recommended increasing the application of civil provisions of RICO to child sex trafficking to serve both as a deterrent and a form of restitution.[103] As discussed below, however, there are certain aspects to trafficking statutes that make their use less appealing in the intercountry adoption context.

Structurally and linguistically, RICO does not constrain its application to new arenas as long as the criminal actors constitute an enterprise engaging in racketeering

96. Organized Crime Control Act of 1970, 18 U.S.C. §§ 1961–1968 (2006 & Supp. III 2009).

97. *Id.* § 1961(1).

98. *Id.* § 1961(4).

99. *Id.* § 1961(5).

100. *Id.* § 1963(a).

101. *See* Thane Rehn, Note, *RICO and the Commerce Clause: A Reconsideration of the Scope of Federal Criminal Law*, 108 Colum. L. Rev. 1991, 1992 (2008) ("[RICO], a broad-reaching statute directed at organized crime, is one of the most prominent federal criminal statutes. Many RICO prosecutions target large-scale criminal operations conducting interstate commercial activities. But the statute has also been applied to small-scale localized enterprises that do not engage in economic activity at all.").

102. *See* 18 U.S.C. § 1961(1)(B); Ellen L. Buckwalter et al., *Modern Day Slavery in Our Own Backyard*, 12 Wm. & Mary J. Women & L. 403, 412–13 nn.79–82 (2006).

103. Stacey Mathews, *International Trafficking in Children: Will New U.S. Legislation Provide an Ending to the Story?*, 27 Hous. J. Int'l L. 649, 699 (2005). Matthews notes that the requirements of RICO are such that it "may be difficult for trafficking victims to prove [liability] because their limited resources may create an inability to uncover an organized crime ring or demonstrate loss to property or business." *Id.* Perhaps a plaintiff-victim's institutional limitations provide further justification for the government to seize RICO as a broad tool to combat illegal intercountry adoption.

activity. Arguably, those engaging in illegal intercountry adoption endeavor as a "group of individuals" and engage in activity prohibited by § 1961(1)(B), including, among other things, kidnapping, bribery, fraud in connection with identification documents, mail fraud, wire fraud, and the reproduction of naturalization or citizenship papers.[104] As discussed in Part IV, mail fraud and wire fraud are potential tack-on charges, which will likely apply in most adoption fraud cases.

RICO was initially implemented to combat organized crime in the United States and has seen a gradual expansion of its scope.[105] This expansion has been met with vocal opposition, which might be amplified by broadening RICO to include illegal intercountry adoption.[106] Although proving racketeering activity by a criminal enterprise might be possible in the illegal intercountry adoption context, the numerous required elements may cause prosecutors concern about confusing jurors.

B. Trafficking

Criminal trafficking statutes punish those who treat human beings as commodities by sending people across international borders against their will for the trafficker's own financial gain.[107] This nefarious practice involves a plethora of human rights violations and has become an international epidemic—there are fourteen to seventeen thousand people trafficked into the United States alone on an annual basis.[108] Although illegal intercountry adoption would intuitively seem to be a form of international trafficking of innocent children, federal criminal statutes narrowly define trafficking in a manner likely to exclude intercountry adoption fraud. Under federal law, trafficking entails the recruiting, enticing, harboring, and transporting of people primarily for the purposes of engaging in commercial sex acts and/or peonage.[109] As such, the U.S. Department of State has not included intercountry adoption as exploitive conduct regulated by trafficking statutes.[110]

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104. *See* 18 U.S.C. § 1961(1)(B).

105. *See* Daniel Huynh, *Preemption v. Punishment: A Comparative Study of White Collar Crime Prosecution in the United States and the United Kingdom*, 9 J. Int'l Bus. & L. 105, 112–13 (2010) (tracking the evolution of RICO from a statute targeting the mafia to a broadly used prosecutorial weapon).

106. *See id.* at 115–16.

107. *See* Patricia J. Meier, Note, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, 12 J. Gender Race & Just. 185, 186, 220–23 (2008).

108. *See* Assessment of Activities to Combat Trafficking, *supra* note 15, at 5; Special Rapporteur on Trafficking in Persons, *supra* note 15, at 6, 9–11.

109. *See generally* 18 U.S.C. § 1591 (2006) (sex trafficking of children); *id.* § 2421 (1998) (transportation); *id.* § 2422 (2006) (coercion and enticement); *id.* § 2423 (2006) (transportation of minors).

110. *See* David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 Vt. L. Rev. 1, 2 (2007). Smolin argues that illicit intercountry adoption is quite exploitive, damaging the birth and adoptive families' sense of legitimacy and highlighting the "commodification of the human person." *Id.* at 3–4, 11.

Similarly, the Victims of Trafficking and Violence Protection Act (TVPA) of 2000 criminalizes "severe forms of trafficking in persons."[111] In so doing, however, Congress has limited the definition of "severe" trafficking to include only trafficking in persons for commercial sexual conduct, violence against women, and forced servitude.[112] Through this legislation, along with the TVPRA, Congress provided law enforcement with tools focused on the protection of victims and the prevention and prosecution of such crimes.[113] Prior to the implementation of those statutes, however, prosecutors strained pre-existing criminal statutes to target traffickers, much like the dilemma facing illegal intercountry adoption prosecutions today.[114]

As celebrated as federal trafficking statutes may be, they do not encompass the conduct involved in international adoption fraud. Unless the intercountry adoption took on a commercial sexual nature or involved forced labor, federal trafficking statutes would be inapplicable. Accordingly, Congress's definition of "severe forms of trafficking" limits the power of the Office to Monitor and Combat Trafficking and prevents prosecutors from enforcing trafficking statutes against those who facilitate illegal intercountry adoption.[115]

C. Alien Smuggling

The federal alien smuggling statute is similarly unhelpful as a tool to combat illegal intercountry adoption. The most recent iteration of this statute, passed in 2005, is directed more towards the domestic transportation of illegal immigrants than as a weapon against those who illegally obtain children abroad for adoptive purposes. For example, the definition of "unauthorized alien" includes an employment aspect: "[W]ith respect to the employment of an alien at a particular time . . . the alien [is neither] . . . (A) an alien lawfully admitted for permanent residence, [n]or (B) authorized to be so employed by this Act or by the Attorney General."[116] The statute and its abutted sections further define the contours of alien smuggling, emphasizing its focus on the illegal hiring of unauthorized aliens.[117]

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111. Victims of Trafficking and Violence Protection Act (TVPA) of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. § 7101 (2006)). *See also* Meier, *supra* note 107, at 212–13.

112. *See* 22 U.S.C. § 7101.

113. Trafficking Victims Protection Reauthorization Act (TVPRA) of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (codified in scattered sections of 8, 18, and 22 U.S.C.) (implementing TVPA provisions into the TVRPA). *See also* Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 Cumb. L. Rev. 87, 120–21 (2008–2009).

114. *See The Trafficking Victims Protection Act*, 118 Harv. L. Rev. 2180, 2196 (2005).

115. *See* Smolin, *supra* note 110, at 49.

116. 8 U.S.C. § 1324a(h)(3) (2006).

117. *See id.* §§ 1324(a)(3)(A), 1324b.

Alien smuggling prosecutions similarly focus on the transporting of undocumented aliens with respect to employment and illegal immigration.[118] One crucial aspect to the notion of alien smuggling is the involvement of the "alien" in the process. As opposed to illegal intercountry adoption, where a child is treated no differently than a commodity without any dominion over his or her life, "the smuggled alien initiates his or her own smuggling in search of better economic opportunities."[119]

Even the most aggressive and creative prosecutor would struggle to argue that the federal alien smuggling statute applies to illegal intercountry adoption. Although there is a strained textual argument that one is guilty of alien smuggling by merely arranging for the importation of babies who are neither admitted for permanent residence nor authorized to be employed,[120] the history, purpose, and use of the alien smuggling statute militate against an interpretation that includes illegal intercountry adoption.

VI. CONCLUSION

As recent scandals demonstrate, illegal intercountry adoption is a prevalent and serious problem. Currently, there is no definitive statutory method that fully regulates this criminal conduct. Most of the federal statutes that can theoretically be used to prosecute this crime—the FCPA, the Travel Act, and the visa fraud, money laundering, currency structuring, and mail fraud and wire fraud statutes—do not address the underlying wrongs of adoption fraud. Recent prosecutions of illegal intercountry adoption have resulted in plea agreements to charges of visa fraud, money laundering, and currency structuring, which rendered penalties too minimal to serve as effective deterrents. Furthermore, the statute that is directly applicable—the IAA—has not been utilized by prosecutors and contains troubling limitations.

Ultimately, a statutory solution must be fashioned to address this problem because prosecutors' creative use of existing statutes can only go so far. Congress should amend the IAA to enable the more effective prosecution of illegal intercountry adoption. Changes to the IAA and an even more aggressive use of applicable criminal statutes are necessary in order to successfully deter and punish those who turn innocent children into high-priced commodities.

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118. *See* United States v. Sanchez-Vargas, 878 F.2d 1163, 1168–69 (9th Cir. 1989) (detailing the history of smuggling statutes and focusing on congressional efforts to combat illegal immigration).

119. Mohamed Y. Mattar, *State Responsibilities in Combating Trafficking in Persons in Central Asia*, 27 Loy. L.A. Int'l & Comp. L. Rev. 145, 167 (2005); *see also The Trafficking Victims Protection Act*, *supra* note 114, at 2184 (defining smuggling as "an autonomous decision to buy illegal entry into a foreign country").

120. *See* United States v. Anaya, 509 F. Supp. 289, 297 (S.D. Fla. 1980) ("The Court concludes, therefore, that § 1324 was designed by Congress to prevent aiding and abetting the illegal entry of aliens into the United States in a fraudulent, evasive, or surreptitious manner. To effectuate that end, subsection (a)(1) was directed toward those who are directly involved in the physical ingress and subsection (a)(4) toward those who otherwise act as accessories."), *aff'd sub nom*. United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982).