NEW YORK LAW SCHOOL

NYLS Law Review

Volume 55
Issue 3 *The Seventh Annual Adoption Policy Conference Permanency for Children*

Article 8

January 2011

The Re-Invention of Adoption Law: A Reflection

Diane B. Kunz
Center for Adoption Policy

VOLUME 55 | 2010/11

DIANE B. KUNZ

The Re-Invention of Adoption Law: A Reflection

ABOUT THE AUTHOR: Dr. Diane B. Kunz, Esq., a lawyer and historian, is Executive Director of the Center for Adoption Policy, a 501(c)(3) corporation that has become a preeminent legal and policy institute engaged in adoption issues. The Center for Adoption Policy was honored in 2008 by the Congressional Coalition on Adoption Instutute as an Angel in Adoption. The adoption law and policy conference organized by the Center for Adoption Policy and New York Law School has become a key event for practitioners, officials, and scholars of adoption issues. Dr. Kunz was honored in 2010 by the Centers for Disease Control (CDC) for her work in advising the CDC on safe and timely tuberculoisis testing procedures for internationally adopted children. Dr. Kunz holds degrees from Yale University, Oxford University, Cornell University, and Barnard College of Columbia University.

> *Traditions which appear or claim to be old are often quite recent in origin and sometimes invented.*[1]

Just as a November Thanksgiving or a December Christmas tree are not age-old Puritan American customs but in historical terms were recently manufactured, the fields of children's law in general and adoption law in particular have greatly changed over the last 150 years. What is generally accepted today was anathema only yesterday, as societal recognition of adoption by singles or transracial adoption demonstrates.

A decade ago, lawyers and adoption professionals worked within a welcoming environment where international adoption appeared to be an accepted and growing method of family creation. The number of children adopted internationally into the United States had soared from around 7000 in 1990 to almost 20,000 in 2001.[2] The countries sending children to the United States included nations with longstanding adoption programs, such as South Korea, and countries that had never been open to international adoption, such as Russia and China, both of which soared in popularity as a source for internationally adopted children in the United States. This transformation was mirrored abroad as potential adoptive parents from France, Spain, or Italy reached out to children in Eastern Europe, Asia, and Africa.

While the United Nations Convention on the Rights of the Child (UNCRC) of 1989 may have contained less than a ringing endorsement of international adoption, the Hague Adoption Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"), concluded in 1993, and entered into force in 1995, provided an agreed-upon framework for international adoption, with rules for ensuring that international adoption takes place in accordance with "the best interests of the child," giving due respect to "his or her fundamental rights as recognized in international law."[3] Better yet, the ratification and implementation of the Hague Adoption Convention superseded the UNCRC's debatable stance on international adoption.[4] Although the scope of the Hague

---

1. Eric Hobsbawm, *Introduction: Inventing Traditions*, *in* The Invention of Tradition 1, 1 (Eric Hobsbawm & Terence Ranger eds., 1983).

2. *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 (last visited Mar. 8, 2011).

3. The Convention's principle goals are as follows:

> (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 Convention.

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).

4. For the United Nations Convention on the Rights of the Child (UNCRC) position on international adoption, see Richard Carlson, *Seeking the Better Interests of Children with a New International Law of*

Adoption Convention was limited because it only covered adoptions from one Hague Adoption Convention country to another, advocates in the international adoption community hoped that, within a short period of time, most nations would come under the Hague Adoption Convention umbrella. Faith in the importance of the Hague adoption system increased further when the United States enacted the Hague Adoption Convention through the Intercountry Adoption Act (IAA) of 2000,[5] and began progressing down the road towards Hague Adoption Convention effectiveness, reached on April 1, 2008.[6] The Hague Adoption Convention's scaffold of protective laws built on the foundation of a central authority, initially a difficult sell in the United States, had been accepted; the Department of State, albeit reluctantly, had agreed to assume this role. Individual private sector adoption service providers, a component of international adoption unique to the United States among receiving countries, had become Hague accredited in a lengthy and seemingly transparent process.

As we survey the legal and policy landscapes surrounding international adoption at the beginning of the second decade of this century, an altogether different picture emerges. The number of children adopted internationally has plummeted: U.S. statistics show that the high watermark of international adoption was reached in 2004 (22,990) and then declined rapidly thereafter (in 2009 the total was 12,753).[7] Often as not it seems that Hague Adoption Convention enactment in various countries has become a pretext for drastically shrinking, if not virtually closing, international adoption programs.[8] Moreover, the nature of children who are being adopted internationally has changed. Program after program now focuses on special needs or hard-to-place children as opposed to the as-young-as-possible Asian baby girls whose omnipresence in certain areas has become a media cliché.[9]

Adoption, 55 N.Y.L. Sch. L. Rev. 733 (2010–11). For the primacy of the Hague Adoption Convention over the UNCRC, see Laura Kaufmann, *Resolving Conflicts Between the UN Convention on the Rights of the Child and the Hague Convention on Intercountry Adoption*, Ctr. for Adoption Pol'y Stud., *available at* http://www.adoptionpolicy.org/pdf/hague.pdf.

5. 42 U.S.C. § 14901 (2006).

6. *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).

7. *Total Adoptions to the United States*, *supra* note 2. Note that the statistics are for federal fiscal years that end on September 30. For example, 2009 statistics cover October 1, 2008 through September 30, 2009. *Id.*

8. *See, e.g.*, Elizabeth Bartholet, *International Adoption: The Child's Story*, 24 Ga. St. U. L. Rev. 333 (2007). Professor Bartholet also has eloquently made this crucial point at the annual *Adoption Policy Conference* held by the Center for Adoption Policy and New York Law School on March 5, 2010. Video of all conference proceedings are available online. *Adoption Policy Conferences*, N.Y.L. Sch., http://www.nyls.edu/centers/harlan_scholar_centers/justice_action_center/annual_conferences/adoption_conference (last visited Mar. 25, 2011).

9. International adoption from China (the largest sending country to the United States) is now around 60% waiting children, defined as children with an identified medical need or over the age of six. This ratio continues to increase in direct proportion to the ever-increasing waiting time for a foreign couple

If you believe, as the contributors to this volume clearly do (and as does this author), that international and domestic adoption are desirable and necessary methods of family creation for unparented children, two questions come to mind: What legal and policy considerations drastically altered the environment for international adoption, and what can we do, legally and politically, to change the dismal outlook for international adoption? Each of the authors included has her or his own response to these questions. It is my privilege to discuss these contributions that hopefully will move the discussion of international adoption from the played-out debates of the present to a new plane, which will enable laws to be reoriented so that the ability of all children to find permanent, loving homes can be legally sanctified and practically enhanced. The "tradition" of the twentieth century's last decade can and should become the renewed tradition of the next decade.

I

Professor Elizabeth Bartholet encompasses the spirit of this volume with her piece, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*.[10] Bartholet has literally written the books on adoption, both international and domestic. She has been something rarer than an accomplished teacher and author: she has been a public intellectual who continues to work for the right of children to have a permanent, loving family.[11] Her work on the Multiethnic Placement Act[12] contributed to a legislative second chance for children who, for reasons of race-matching, were relegated to a life of substandard care.

Having recognized the crisis in international adoption, Bartholet insists that "we must maintain hope for the future."[13] Because the path of history is contingent, rather than fixed, we should work to revive international adoption, rather than write its obituary. Bartholet also recommends that international adoption proponents look for allies outside their usual comfort zone. Indeed, the track record of the Haitian Humanitarian Parole Program illustrates just how effective the U.S. government can be at helping children unite with their adoptive families when its officials so choose.

---

to adopt a non-special needs child from China. Currently it takes close to five years to bring home a non-special needs child from China, as opposed to under a year for a waiting child. Moreover, the requirements for potential adoptive parents are much more relaxed in the waiting child program. Guatemala, long one of the largest sending countries to the United States, in contemplating reopening its international adoption program, has made it clear that any such new program will be restricted to special needs children. Bulgaria, to give a third example, reopened its international adoption program as a special needs program.

10. Elizabeth Bartholet, *Permanency Is Not Enough: Children Need the Nurturing Parents Found in International Adoption*, 55 N.Y.L. Sch. L. Rev. 781 (2010–11).

11. *See generally* Elizabeth Bartholet, Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative (1999); Elizabeth Bartholet, Family Bonds: Adoption, Infertility and the New World of Child Production (1999).

12. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(1), 208 Stat. 3518, 4506 (codified as amended at 42 U.S.C. § 1996(b) (2000)).

13. Bartholet, *supra* note 10, at 783.

II

Whitney Reitz is Branch Chief of Programs, International Operations Division, U.S. Citizenship and Immigration Services (USCIS), Department of Homeland Security (DHS). She was a key person in the U.S. government decision, in the wake of the devastating earthquake that hit Haiti on January 12, 2010, to use the USCIS humanitarian parole program to admit over 1100 Haitian children who were in the process of being adopted by American families.[14] Her article details the careful way USCIS officials vetted each application by potential adoptive parents (PAPs) for both suitability of the parents and availability of the child.[15] Reitz's account of the equally meticulous work done by various other branches of DHS, such as Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), as well as diplomats from the Department of State, U.S. military officers, and officials from the Department of Health and Human Services, belies the ill-informed criticism of this program popular in some circles.[16] As Reitz points out, rather than a wholesale baby lift, the Humanitarian Parole Program was narrowly aimed and carefully administered; in the end almost one-third of the applications were denied, either because the criteria for eligibility were not met or because the documents and evidence introduced in some way did not make the grade.

Reitz was able to help these Haitian children because, in her words, "adoption is a form of immigration," and she is an official in USCIS.[17] Her job was a stroke of fortune for the Haitian parolees, but the intersection of adoption and immigration can also become a great problem for potential adoptive children. The political untouchability of immigration reform casts blight on any legislative action that involves international adoption because, by definition, it will have an immigration nexus. Nowhere is this more clearly seen than in the tortured path of the Help Haiti Act of 2010.[18] This legislation was designed to help the Haitian parolees obtain U.S. legal permanent residency and eventually citizenship—neither status being conferred by humanitarian parole. Because these Haitian children were in the process of being adopted into the United States, absent the earthquake they would have received citizenship in the normal course of events through the granting of the IR-3 or IR-4 visas necessary for internationally adopted children whose PAPs are seeking to bring

14. *Secretary Napolitano Announces Humanitarian Parole Policy for Certain Haitian Orphans Fact Sheet*, U.S. Citizenship & Immigration Servs., http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD&vgnextoid=9c22546ade146210VgnVCM100000082ca60aRCRD (last updated Jan. 18, 2010).

15. Whitney A. Reitz, *Reflections on the Special Humanitarian Parole Program for Haitian Orphans*, 55 N.Y.L. Sch. L. Rev. 791 (2010–11).

16. *See, e.g.*, Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. Times, Aug. 4, 2010, at A1. Compounding the egregiousness of this account was the failure of *The New York Times* to publish any letters that pointed out the errors of fact and omissions that characterized this account.

17. *See* Reitz, *supra* note 15, at 792.

18. H.R. Res. 5283, 111th Cong. (2010) (enacted); S. Res. 3411, 111th Cong. (2010) (enacted).

them to the United States Therefore, the Help Haiti Act was not conferring any extra benefits but simply returning these particular children to the legal status they would have had but for the earthquake.

Yet, the Help Haiti Act, rather than reaching President Obama quickly, instead became mired in legislative objections to immigration reform as well as worries about fraud. Initially, congressional opposition arose largely from fears that the Help Haiti Act potentially created another exploitable immigration "loop-hole." Months passed and finally the Help Haiti Act seemed assured of passage in the lame duck session. It was again thwarted, this time because pro-immigration politicians tried to link the Help Haiti Act with the Dream Act, a bill which would permit certain classes of undocumented adults who came to the United States as minors to qualify for citizenship. Only the magnitude of the disaster in Haiti and the dedicated drive of many people in the public and private sectors allowed the Help Haiti Act to be uncoupled from the Dream Act and achieve passage on December 2, 2010.[19]

Ironically, "fraud" is also a fighting word for international adoption opponents who generally support other aspects of immigration reform. These adversaries are so shocked by any hint of fraud that the mere whisper of such a possibility, in their view, demands a total program shutdown.[20] The subject of fraud will be addressed below, but in the context of Reitz's article it is important to recognize that U.S. government officials, working with Haitian counterparts, were able to expeditiously and sensitively admit the children who qualified while, with sadness but acting properly, excluding children who did not meet the qualifications for the program. The successful balancing act demonstrated during the Haitian crisis should not be excoriated but rather should become a model for how governments administer international adoption programs.

Reitz also addresses the question of whether international adoption deprives a child of his or her authentic culture. This issue, passionately declaimed by critics of international adoption, is today a red herring. For children of ethnic minorities and special needs adoption, increasingly the focus of international adoption, the choice was not between a loving family in their birth country and one in the receiving country, but a pitiful, straitened existence in their home country versus a fulfilling family life abroad.

Undeniably, the question of denying a child his or her birth culture may have been valid half a century ago when adoptive parents were routinely advised to immerse children in their new countries' customs and leave their past behind. Today, the environment of internationally adopted children is radically different. From the multi-chaptered adoptive parents' organizations such as Families for Children from China and Families for Russian and Ukrainian Adoption, to heritage adoption trips,

19. President Obama signed the Help Haiti Act into law on December 9, 2010. Help Haiti Act of 2010, Pub. L. No. 111-293, 124 Stat. 3175.

20. Why is international adoption a field of human endeavor where the best are called upon to destroy the good? Doctors are lauded despite malpractice claims and super bugs, highways are built although they lead to tragic road accidents, and family law policy focuses on reunification despite the documented tragedies that have ensued.

to sending country-focused assistance charities such as Half the Sky and Love without Borders, birth cultures are exalted as never before in the United States. The paradigmatic example has switched from the lamentable quotes from 1950s and 1960s anecdotes, "they told me not to say I came from Asia," to the families that bring their children's birth country celebrations to schools and social events throughout the country.

III

Our belief that the existence of fraud should not trigger closure of international adoption programs makes it more important to provide punitive measures to be taken against those who betray the responsibilities of working in the adoption field. While the number of children victimized outside of international adoption by sex-traffickers, child-servitude employers, and the like far exceeds the number of children stolen, bought, or kidnapped for the purpose of adoption, those who work in the field of adoption should rightly be held to higher standards than the standards of practice applied in commercial law fields.[21] The federal nature of our legal system, and the division of responsibility between DOS and private sector ASPs, combined with the transnational legal questions that arise in international adoption, make finding applicable legal remedies to prosecute perpetrators of adoption fraud a far from easy task. *Imperfect Remedies: The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, by Katie Rasor, Richard M. Rothblatt, Elizabeth A. Russo, and Julie A. Turner, provides critical weapons for officials who seek to punish guilty adults without damaging the futures of the innocent children who were victimized yet again by the adults entrusted with their care.[22] As Rasor et al. point out, criminal prosecution of international adoption is rare.[23] Their article provides important tools to remedy this disgraceful fact.

The authors thoroughly discuss how the IAA might be used to prosecute adoption fraud. The suggestion that the IAA be expanded to cover all international adoption to the United States, rather than just Hague Adoption Convention adoptions, is a key point and one with which we entirely agree. While the authors are correct that the ideas they proffer will not "require a significant overhaul of the statute,"[24] enacting these legislative amendments and the consequent regulatory changes suggested by the authors will, if past experience is any guide, be a difficult feat. The tortured process of Hague Adoption Convention ratification with its fifteen-year path to U.S.-effectiveness illustrates what happens when a niche bill that excites great passion

21. One example is the Haitian practice of *restavec*, a French word that translates into "staying with" but is really a form of slavery. A moving account of a boy's flight from *restavec* can be found in Jean-Robert Cadet, Restavec: From Haitian Slave Child to Middle-Class American (1998).

22. Katie Rasor, Richard M. Rothblatt, Elizabeth A. Russo & Julie A. Turner, *The Arsenal of Criminal Statutes Available to Prosecute International Adoption Fraud in the United States*, 55 N.Y.L. Sch. L. Rev. 801 (2010–11).

23. *Id.*

24. *Id.*

and involves many bureaucracies and interest groups wends its way through the legislative and executive process.

Rasor et al., in the second part of their article, discuss how other statutes might be used to prosecute adoption fraud. The Foreign Corrupt Practices Act, the Travel Act, and "tack-on" criminal statutes all provide avenues for prosecution of dishonest adoption professionals. Their analysis first demonstrates the deterrent possibilities presented by these statutes. When Karen and Scott Banks and their fellow scam artists who operated in American Samoa saw their charges reduced from prison-worthy felonies to probation, it gave new meaning to the phrase "slap on the wrist."[25] Just as importantly, the fact that these existing statutes can and should be utilized against bad actors in the international adoption field will, we hope, separate genuine pro-ethical international adoption advocates who advocate country closures out of despair from ideological opponents of international adoption who use the existence of fraud to disguise their complete rejection of any international adoption per se.

IV

The discussion of possible prosecutions of adoption fraud malefactors leaves unanswered an equally more important question: What should the legal treatment of improper adoptions be? Elena Schwieger addresses this exact point.[26] The children involved have not participated in any adoption fraud themselves; as a community we must do as much as possible to ensure that they are not subject to the trauma of disruption. The overlapping international, national, and state statutes and regulations appear to provide conflicting answers to the question of what the legal treatment and practical fate should be of a child who has been fraudulently adopted. Schwieger's exploration of U.S. and international law serves as an excellent basis for discussion. The Banks case cited above provides ballast, were any needed, of the relevance of this article; worries about the fate of the adopted children living in the United States played a role in the disposition of charges against the Banks.

One of the points that emerge from this article is that the UNRCR, according to Schwieger, tilts towards the returning of a child of an "improper adoption" to his or her birth country.[27] The "other Hague Adoption Convention treaty," the Hague Adoption Convention on the Civil Aspects of International Child Abduction (HCCH), takes a similar approach.[28] The HCCH was completed in 1980; the

25. Karen and Scott Banks ran Focus on Children, a Utah based adoption agency that deceived Samoan birth parents into thinking their children would come to the United States for free education while telling U.S. PAPs that these children were available for adoption. The Banks and two employees were sentenced to five years probation and banned from working in the adoption field for life. The pain and heartache they caused were incalculable. *U.S. Couple Sentenced Over Samoan Adoption Scam*, ABC News (Feb. 27, 2009, 6:07 PM), http://www.abc.net.au/news/stories/2009/02/27/2503646.htm.

26. *See generally* Elena Schwieger, *Getting to Stay: Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. Sch. L. Rev. 825 (2010–11).

27. *Id.* at 828.

28. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

negotiations that preceded the treaty served as precedent for the Hague Adoption Convention.[29] As the HCCH pertains to wrongful child snatching by non-custodial parents, its bias against international adoptions is understandable. However, that does not mean that its approach is the correct one for dealing with adoption cases generally.

By contrast, U.S. statutes, in particular the IAA and related regulations as well as the Hague Adoption Convention, as opposed to the UNCRC, tilt in favor of the right of the child of a wrongful adoption to stay with his or her adoptive parents in the receiving country. Notwithstanding the evolution in human rights laws that we have witnessed over the last half century, children still have a restricted arsenal of acknowledged rights. Indeed, even the child-centered Hague Adoption Convention denigrates children's rights; terms such as sending country and receiving country make a child sound like a package rather than a person. Fortunately, Professors Paulo Barrozo and Richard Carlson have addressed these very issues.

V

Professor Paulo Barrozo has taken a grand approach in *Finding Home in the World: A Deontological Theory of the Right to Be Adopted*.[30] The widespread assumption that human rights law represents a hallowed tradition of policy formation and practice, as well as a legal framework for analysis, is an ahistorical one. As recent works of scholarship make clear, the muscular, instrumental view of human rights is a new development whose takeoff period can be traced to the Nuremberg trials, the Universal Declaration of Human Rights of 1948, and the Helsinki Accords of 1975.[31] Brick by brick, the stance that a government as a whole and that an individual official in particular is free to act against fellow citizens with impunity has been dismantled. We are present at the creation of a replacement body of law and unsettled issues abound.

If the invention of human rights law is new, the nature and content of human rights laws applying to children is even more unclear. What those of us who view international adoption as a vital method of family formation have long needed is a definition of human rights that will include and justify "a human right of the

29. The Office of Children's Issues in the Department of State is the central authority for both Hague Adoption Convention treaties. *Our Role*, U.S. Dep't of State, Office of Children's Issues, http://adoption.state.gov/about_us/role.php. That these treaties were drafted under the aegis of the Hague Permanent Bureau which is more commonly charged with dealing with commercial issues also explains some of the difficulties surrounding logistics of Hague adoptions.

30. Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y.L.Sch. L. Rev. 701 (2010–11).

31. The Final Act of the Conference on Security and Co-operation in Europe, known as the Helsinki Final Act, Helsinki Accords or Helsinki Declaration, was the final act of the Conference on Security and Co-operation in Europe held in Helsinki, Finland during July and August of 1975. It provided the basis for Soviet and other dissidents to mount the campaigns which helped undermine the Soviet Union. *See* Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 14 I.L.M. 1292 (never entered into force).

unparented to be adopted."[32] Barrozo has supplied both the juridical basis of such a right and a method of analysis which transforms our understanding of international adoption from the anecdotal and consequentiality adoption case study method to the legal and principled level. That children have a right to adoption seems clear; Barrozo has demonstrated that it actually is. En route he makes evident the tension between the traditional liberal concentration on the rights of an individual versus the current "liberal" view which privileges the rights of the group over any one person's particular position. The deadening effect of the latter view on free speech may be seen in the revised Dutch penal code, which proscribes punishment for anyone who insults "a group of people because of their race."[33] In the realm of international adoption, this clash is reflected in the view, expressly or implicitly held, between those who view children within the prism of the sending country's rights and those who judge international adoption by how it benefits each single child. The "group" version of human rights thinking also propels the belief that international adoption represents the victimization of developing world birth mothers by first world child-snatching potential adoptive parents and therefore must be stopped, irrespective of the effect that would have on the fate of individual children.

VI

Professor Richard Carlson, in *Seeking the Better Interests of Children with a New International Law of Adoption*,[34] provides the practical analysis that complements Barrozo's work. Carlson divides critics of international adoption into three groups: (1) vigorous supporters; (2) cynical critics; and (3) moderate critics, and gives us a method of examining each of the interest groups within these categories.[35] To complete his analysis, I would suggest a fourth group: ideological, diehard opponents. Individuals representing themselves as well as national and international organizations (usually the latter) that fall into this category are among the most intractable opponents of international adoption. To say that these true believers are honestly convinced of their stance is not necessarily a compliment—to be sincere is not to be correct. They believe that international adoption is flawed ab initio and have used international and national organizations to implement and fund their views. Opponents who fall into this category include Professor Twila Perry and Baroness Emma Nicholson. When Carlson includes these actors in his groups of "cynical critics" he does us, and them, a disservice. It is their rigid ideological armor, rather than their belief in the prevalence of fraud and corruption, that makes these

32. Barrozo, *supra* note 30, at 714.

33. Article 137C of the Dutch penal code states that anyone "who publicly, verbally or in writing or image, deliberately expresses himself in any way insulting of a group of people because of their race, their religion or belief . . . will be punished with a prison sentence." Ayaan Hirsi Ali, *In Holland, Free Speech on Trial*, Wall St. J., Oct. 11, 2010, http://online.wsj.com/article/SB10001424052748704657304575539872944767984.html.

34. Carlson, *supra* note 4.

35. *See generally id.*

intractable enemies of international adoption impossible to compromise with or confront.[36]

Although Carlson is correct that critics of international adoption come to their "abolitionist" stance from differing paths,[37] they are united in a single goal: ending international adoption. Advocates of international adoption, by contrast, often seemingly have more disagreements than common ground. The ideological and policy variations among the programs of international adoption proponents means that international adoption supporters generally offer only scattered resistance to the current onslaught against international adoption. Most dramatically, over the last two years, with little fanfare, the Obama administration has largely spun off U.S. international child welfare policy to UNICEF.[38] International adoption supporters have so far proved helpless against this takeover.[39]

Carlson's discussion of the number of children who could potentially be adopted internationally clarifies another aspect of the debate over international adoption. His conclusion is a just one: that the number of children who could benefit from international adoption surely exceeds the number of children who are unparented.[40] Carlson also gives important examples of the gaps in adoption statistics and parenthetically discusses a crucial element of the anti-international adoption stance: international and national welfare groups depend on victims of tragedy for their existence. Just as Carlson makes the point that raising the price of international adoption will make it a self-fulfilling prophecy of the "stereotype of the wealthy Westerner 'shopping' for children,"[41] lessening the number of children who need to be in a non-governmental organization's (NGO) care will decrease the amount of money and staff these NGOs can request.

Finally, Carlson proposes a reorientation of international law from a focus on the best interests of the child to the "better interests" of the child. Surely this is a very important restatement. As he says: "Despite what the best interests standard might seem to suggest, no court in America upholds the interests of any child without at

36. Another member of this group is Professor Laura Briggs, whose work is reflective of this viewpoint par excellence. Laura Briggs, Sex, Reproduction and Foreign Policy: From Abu Ghraib to Transnational Adoption (Oct. 4, 2004) (unpublished article), *available at* http://www.u.arizona.edu/~lbriggs/adoption.html.

37. Carlson, *supra* note 4, at 756–59.

38. The administration, through the United States Agency for International Development (USAID), delegated the Haitian post-earthquake assistance for children to be distributed by UNICEF, which also has the responsibility for co-coordinating the billions of dollars of foreign assistance to be given to and on behalf of Haitian children in the coming years.

39. Even more discouraging, organizations whose mandate is international adoption increasingly appear to be accepting the paradigm used by international adoption opponents. *See, e.g.*, Kathleen Strottman, *Renewed Promise: The Welfare of Children in Haiti*, Cong. Coal. on Adoption Inst. (Jan. 12, 2011), http://www.ccainstitute.org/images/stories/renewed_promise_the_welfare_of_children_in_haiti_jan_12_11.pdf.

40. *See generally* Carlson, *supra* note 4.

41. *Id.* at 771.

least some regard for the interests of other parties, including parents most of all."[42] And increasingly, I would add, the interests of nation states and national groups that claim the child, irrespective of the particular child's needs.[43] Carlson's new formulation, "promot[ion of] laws and policies that will achieve 'better' outcomes for children in general," gives us a new paradigm upon which to build our analysis of the law and practice of international adoption.[44] Not a moment too soon.

VII

Several years ago, the Center for Adoption Policy co-sponsored a conference on the crisis in international adoption. Since then, the situation has only gotten worse. We were privileged to have Ambassador Jerome Shestack, past president of the American Bar Association, as one of the attendees. Ambassador Shestack, long a warrior in the fight for human rights, is not a habitué of the adoption wars. After listening incredulously to many different speakers, he asked "what's wrong with international adoption?" For many years we in Professor Carlson's community of "vigorous supporters" have been posing this same question. Thanks to the excellent contributions in this issue, we know what is right about using international adoption to save children in crisis, know better how to deal with fraudulent international adoptions, and have been given the legal tools to rescue international adoption from the fate it seemingly awaits. These articles give an intellectual and legal foundation to our hope that the current decline of international adoption represents the trough before the crest. A new tradition that would embrace families for as many unparented children as possible would be one certainly worth keeping.

42. *Id.* at 772.

43. The Indian Child Welfare Act (ICWA) of 1978 ably demonstrates the U.S. adoption law application of group rights over individual interests. ICWA, Pub. L. No. 95-608, 92 Stat. 3269 (codified at 25 U.S.C. §§ 1901–1963 (2006)).

44. Carlson, *supra* note 4, at 775.