

**Reestablishing the Humanitarian Approach to Adoption: The Legal and
Social Change Necessary to End the Commodification of Children**

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REESTABLISHING THE HUMANITARIAN APPROACH TO ADOPTION: THE LEGAL AND SOCIAL CHANGE NECESSARY TO END THE COMMODIFICATION OF CHILDREN

INTRODUCTION

A growing amount of children in developing countries are in desperate need of a family. Circumstances such as war, natural disaster, and AIDS render many children orphaned and alone, left to face deplorable living conditions and the chaos of poverty, death, and destruction.¹ Fortunately, a large number of adults are willing and able to provide a home and support for these children in need. The realization of this simple and honest humanitarian effort initially united prospective adoptive parents in the United States with orphaned children in developing countries around the world.

Today, the popularity of international adoptions continues to rise.² While this may appear to be a constructive trend, the rationale fueling the increase in international adoptions is far removed from foundational humanitarian ideals. Evolving social norms regarding contraception, abortion, and single parenting decrease the number of healthy infants available for adoption in the United States, resulting in increased adoptions from alternate countries.³ The large amount of money these individuals are willing to expend in their search has created a veritable “black market” for children, spurring corrupt practices such as child-trafficking, deceit, and kidnapping in the children’s country of origin.⁴

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¹ See generally, UNICEF, *Children on the Brink: A Joint Report of New Orphan Estimates and a Framework for Action* (2004), available at www.unicef.org/publications/index_22212.html (containing information regarding children orphaned because of AIDS and other causes in developing countries).

² See, e.g., E.J. Graff, *The Lie We Love*, FOREIGN POLICY at 1 (Dec. 2008) (“In 2004, more than 45,000 children from developing countries were adopted by foreigners. Americans bring home more of these children than any other nationality—more than half the global total in recent years.”).

³ Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFFAIRS, 115–125 (Dec. 2003).

⁴ Gabriela Marquez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, J. JUV. L. 25–39.

The growing “demand” for adoptable children provides an opportunity for child-traffickers to profit by increasing the “supply” of these children through illicit and unethical means.⁵ These problems may potentially arise in any country where international adoptions occur, but are especially prevalent in those countries weakened by political unrest, war, medical emergency or natural disaster. In addition to the negative implications inherent in immoral adoptive practices, prospective parents often focus their efforts on obtaining a healthy child under the age of five, depriving children in the greatest need of care—older children and those with medical disabilities—from the opportunity of finding a home.⁶

This Note will focus on the consequences resulting from the commodification of children, aiming to extinguish the fallacies and misconceptions upon which such a market is based. Part I of the Note identifies the direct role that prospective adoptive parents have had in increasing the popularity of international adoption—particularly adoption of children under the age of five. Part II examines procedural restrictions inherent in the domestic adoption process in comparison to international adoption methods. Part III of this Note will then evaluate the potential for corruption created by an unnecessarily discriminatory domestic adoption process and the prevalence of adoption agencies unconcerned with the best interests of orphaned children. Finally, Part IV of this note addresses the argument that further regulation of the

⁵ *Id.* at 32–33.

⁶ According to Johanna Oreskovic and Trish Maskew:

[T]he characteristics of the world’s orphans differ significantly from those of children who are adopted internationally. UNICEF and USAID estimate that approximately 88% of the world’s orphans are over the age of five. But a review of the children adopted by U.S. Citizens over the last 11 years shows that on average, 85–89% of children adopted were *under* the age of five.

Red Thread of Slender Reed: Deconstructing Prof. Bartholet’s Mythology of International Adoption, 14 BUFF. HUM. RIGHTS L. REV. 71, 80 (2008) [hereinafter *Deconstructing Mythology*] (referring to statistics generated by the Department of Homeland Security, Yearbook of Immigration Statistics, 1996-2006, available at <http://www.dhs.gov/simgn/statistics/publications/yearbook/sthm> and the U.S. Dep’t of State, *Immigrant Visas Issued to Orphans Coming to the U.S.*, BUREAU OF CONSULAR AFFAIRS, available at http://travel.state.gov/family/adoption/stats_451.html).

international adoption process can only be detrimental, as well as the changes necessary to render both domestic and international law sufficient for thwarting corrupt adoption practices.

Redefining child and human trafficking in the United States will help to clarify the necessity for further legal reform and regulation of the international adoption process. In order to effectively combat corruption in the adoption system as a whole, a clear and definitive line must be drawn between those international adoptions motivated by charitable intentions, and those which are implemented solely for profit at the expense of impoverished children and their families. A successful domestic and international adoption policy should not necessarily result in an increased amount of adoptions worldwide, but rather facilitate adoption of orphaned children in the greatest amount of need while protecting others from being unlawfully removed from their biological families.

I. FACTORS CAUSING THE INCREASED DEMAND FOR INTERNATIONAL ADOPTIONS

A variety of recent social, political, and economic changes in recent U.S. history contribute to the limited number of infant children available for domestic adoption. Legalization of abortion, increased use of birth control and other contraceptives, and the growing acceptance of single and unwed mothers raising children are the factors most responsible for this trend.⁷ Negative media attention and speculation also exacerbate the diminished desirability of domestic adoptions. In *The Littlest Immigrants: Cross-Border Adoption in the Americas, Policy, and Women's History*, Anne Collinson recounted some examples of this effect in the last several decades, stating:

The widespread media coverage of crack babies created fears for adoptive parents and shaped the cultural imagination about the adoption of such children—

⁷ See *Roe v. Wade*, 410 U.S. 113 (1973) (decision resulting in the legalization of abortion in the United States during the earlier months of pregnancy); see also National Center for Health Studies, stating that “teens are more likely in recent years to use contraceptives when they begin having intercourse—79% in 1999-2002, up from 61% in the 1980’s.” NCHS Dataline, available at http://www.publichealthreports.org/userfiles/120_3/120353.pdf.

particularly fears that they would have a host of medical problems and would never develop into capable, responsible adults These fears were coupled with the increasing rights of birth parents . . . and contributed to the already growing trend of intercountry adoption.⁸

The “trend” of international adoption that Collinson refers to is perpetuated largely by motivations far removed from the original “rescue mentality” initiated by soldiers returning from World War II, Korea, and Vietnam.⁹ During this time, soldiers brought back heart-breaking stories of war-torn countries and orphaned children, raising awareness of the need for assistance abroad and spurring the first substantial wave of international adoptions.¹⁰ These ideals stand in stark contrast to the intentions of prospective adoptive parents today, who increasingly turn to international adoption out of frustration with the domestic adoption process rather than compassion for children facing deplorable conditions abroad.¹¹ Many adoption agencies today are driven by economic rather than humanitarian incentives. Instead of seeking to benefit children, they aim to attract prospective adoptive parents willing to pay for their services. Meeting the desires of prospective parents necessitates offering a service which finds infants available for adoption in developing countries.

Partiality towards international adoption can be explained by a culmination of different factors: ignorance, challenges in the domestic adoption process (both perceived and actual), and

⁸ Anne Collinson, *The Littlest Immigrants: Cross-Border Adoption in the Americas, Policy, and Women’s History*, 19 J. WOMEN’S HIST. 132, 137 (2007).

⁹ Patricia J. Meier, *Small Commodities: How Child Traffickers Exploit Children and Families in Intercountry Adoption and What the United States Must Do to Stop Them*, J. GENDER RACE & JUST. 185, 194 (2009).

¹⁰ According to U.S. Immigration and Customs Enforcement (“ICE”), “[u]nder immigration law, an orphan is a child, under age 16, who has lost or become separated from one or both of his/her parents.” The definition of an “orphan” may vary among different organizations, creating ambiguity in the statistics available pertaining to the number of adoptable children in various countries. UN AID, the Joint United Nations Program on HIV/AIDS, for example, bases its statistics on a definition of “orphan” which categorizes children as either “maternal orphans,” “paternal orphans,” “double orphans,” “total orphans,” or “new orphans.” UN AID, *A Joint Report of New Orphan Estimates and a Framework for Action*, 6; see also, *Deconstructing Mythology*, *supra* note 6 at 80 (“Accurate determinations of adoptability that respect the rights of children and birth families require time and resources.”).

¹¹ Marquez, *supra* note 4, at 27.

an overwhelming preference for children of a certain age, sex, and ethnicity.¹² Prospective parents may not be aware of the existence of corruption, or underestimate the extent and severity of the problem due to the comparative ease of procedure associated with the international adoption process.¹³ Compounding these problems is the lack of perceived “desirability” of the population of foster children in the United States.¹⁴ Of that population awaiting adoption in the United States, sixty percent are over the age of six, and forty-two percent are black.¹⁵

A. *WHY FOSTER CHILDREN IN THE UNITED STATES REMAIN IN THE SYSTEM*

Despite the impact that changing social trends in the United States have had on the amount of healthy infants available for domestic adoption, many older children in need of adoptive families still exist within the borders of the country.¹⁶ Thousands of children in foster homes in the United States await adoption, while children that have never seen the inside of an orphanage are being purchased, coerced, or even kidnapped from their birthmothers directly from the hospital for adoption purposes.¹⁷ This seemingly illogical reality brings to light the lack of ethical considerations inherent in the modern adoption process.

Most children placed in U.S. foster care must wait for more than a year before finding a new home—some as long as three to four years. By the time these children reach eight or nine years of age, researchers estimate that their “likelihood of remaining in foster care becomes

¹² Graff, *supra* note 2, at 1.

¹³ See SHAWN C. STEVENS, INTERNATIONAL ADOPTION: A LEGAL RESEARCH GUIDE, 3 (2004) (citing the relative quickness of the international adoption process as well as the promise of little or no contact with the biological family of the adopted child as perceived procedural benefits.)

¹⁴ Graff, *supra* note 2, at 1.

¹⁵ Adoption Institute, *supra* note 11; see also Julie Palermo, *Whose Child is This? A Critical Look at International Adoptions that Fail*, 20 IMMIGR. & NAT'LITY L. REV.

¹⁶ According to the Adoption Institute, in 2000 there were approximately 134,000 U.S. foster children waiting to be adopted. A study conducted by the institute demonstrated that “[a]lmost 70 percent of the children waiting to be adopted had been in continuous foster care for two years or more; twenty-five percent for five years or more.” A large percentage of these children are over the age of five and do not fit within the “infant” status often sought by prospective adoptive parents. Adoption Institute, *Foster Care Facts*, available at http://www.adoptioninstitute.org/FactOverview/foster_print.html.

¹⁷ *Id.* The total foster care population was estimated at 556,000 between 1999 and 2000.

higher than the probability they will be adopted.”¹⁸ However, even with the prevalence of these children in need, prospective adoptive parents continue to adopt from countries like Guatemala, where the majority of children adopted annually are “relinquishments,” or infants who were taken directly from their birthmothers and never placed within an institution.¹⁹ These corrupt practices would cease to exist if they were no longer beneficial to those who perpetuate them, but the irrational demand for infant children continues to provide economic incentive for criminal actions.

B. WHY PROSPECTIVE ADOPTIVE PARENTS ADOPT FROM OTHER COUNTRIES

Among the many children in foster care waiting to be adopted, a great number may require special care and attention due to medical disability, psychological, or emotional needs.²⁰ There are certainly some adoptive parents lacking the financial and emotional resources necessary to meet the special needs of these children, however this fact alone should not prevent all individuals from attempting to adopt domestically. Not every child adopted from foster care will require an elevated standard of care beyond the capabilities of average parents. Additionally, a parent seeking to adopt internationally will likely face unique challenges beyond those typically associated with raising a child, as the adopted child will need guidance maintaining ties to their heritage and adapting to the customs and culture of the United States.

Despite these facts, the children sought by U.S. prospective adoptive parents vary greatly from the population of children who could benefit the most from their help, both within the United States and abroad.²¹ According to Diana Oreskovic, a professor at the University of

¹⁸ *Id.* at 7.

¹⁹ E.J. Graff, *supra* note 2, at 3.

²⁰ Adoption Institute, *supra* note 16, at 7.

²¹ E.J. Graff notes this discrepancy in children available for adoption and those whom individuals are seeking to adopt, referring to the “myth of a world orphan crisis”:

Buffalo School of Law who has taught courses on both domestic and international adoption, “it is unlikely that children languish in orphanages primarily because of anti-adoption sentiment or restrictive state policies but rather because they do not satisfy the well-documented preference of adoptive parents for infant and toddler girls.”²²

The international adoption process is all too often viewed as “shopping” for a child, with parents selectively seeking the child which will best fit their personal needs. Some adoption agencies attempt to “sell” the idea of adopting a child to prospective parents by claiming to cater to their preferences. European Adoption Consultants, Inc., for example, boasts on the availability of “Caucasian and Eurasian children” on their website, while Aurora International Adoptions offers “the unique opportunity to choose a desired child on your own.”²³ These advertisements appear to target a desire to fulfill a material need among prospective parents, eliminating the selfless sense of compassion previously associated with the adoption process.

II. COMPARING PROCEDURAL REQUIREMENTS FOR DOMESTIC AND INTERNATIONAL ADOPTIONS

The procedure for completing any adoption is often time-consuming and emotionally exhaustive for prospective parents. However, the unique challenges inherent in the current domestic adoption process serves to discourage individuals from adopting within the country. An adoption within the United States may take years to complete, and the expanding legal rights granted to biological parents generate concern that even a finalized adoption may be declared

Yes, hundreds of thousands of children around the world do need loving homes. But more often than not, the neediest children are sick, disabled, traumatized, or older than five. They are not the healthy babies that, quite understandably, most Westerners want to adopt. There are simply not enough healthy, adoptable infants to meet Western demand—and there’s too much Western money in search of children.

E.J. Graff, *supra* note 2, at 1.

²² Diana Oreskovic, *Deconstructing Mythology*, *supra* note 6, at 81.

²³ European Adoption Consultants Inc., *Why Choose Russia: Families Adopt From Russia Because...*, available at <http://www.eaci.com/countries/russia.php>; Aurora International Adoptions; *Welcome to Aurora International Adoptions*, available at <http://www.russianadoptions.org> (claiming to be the #1 choice for international adoptions).

invalid. Compared to domestic adoption, the procedure for adopting internationally is quicker, less restricted by state policy, and less likely to be invalidated after finalization.

Parents seeking to adopt a child internationally, under standards set forth by the United States Citizenship and Immigration Service (“USCIS”) begin by submitting a “home study” detailing the social and economic aspects of their lives and analyzing their suitability to raise a child.²⁴ The authorized individual conducting the study proceeds by making a series of recommendations pertaining to the prospective adoptive parent’s ability to raise different “types” of children.²⁵ They may decide, for example, that a single prospective parent in a difficult financial situation will be unable to care for a child with special needs due to his or her lack of assistance and resources.²⁶ Narrowing the options available to prospective parents in this practical matter ensures that the basic needs of adopted children will be met, and should in no way be discouraged.

While these particular regulations serve a legitimate purpose—to guarantee that prospective adoptive parents are fit to raise a child and capable of meeting the child’s basic needs—regulations also exist which unnecessarily prevent individuals from providing a child with the family and home they deserve. Writer Nicole Smith argues that “surface distinctions” such as marital status, sexual orientation, fertility status, and race, hold no purpose in determining whether one is capable of providing for the best interests of a child.²⁷ Such restrictions generally exist under state law, and their existence imposes a higher level of scrutiny on potential parents adopting domestically. Individuals restrained by these “surface distinctions”

²⁴ United States Citizenship and Immigration Service, *Hague Home Study Guidelines*, available at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89234c6a7543f6d1a/?vgnnextoid=6ba1741b78c73210VgnVCM100000082ca60aRCRD&vgnnextchannel=6ba1741b78c73210gnVCM100000082ca60aRCRD>.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nicole Smith, *Questioning Restrictions for Potential Adoptive Parents*, ARTICLE MYRIAD, available at <http://www.articlemyriad.com/2.htm> (2010) (individuals who are unable to bear a child of their own are often given priority to those with no reported fertility problems).

face limited options, causing them to forego adoption altogether or to seek an adoption from another country.

The process of bringing an adopted child from another country back into the United States, is comparatively less complex, consisting of only three basic requirements:

Adoptive parents in the United States must pass through several tiers of requirements and receive approval from each level before the international adoption process becomes official. The prospective adoptive parents must satisfy: 1) the law of the country of the child's birth; 2) U.S. immigration law, procedures and policies; and 3) the laws of the state where the adoptive parent resides.²⁸

Although it would appear that the third requirement demands adherence to state law and regulation, twenty-five states currently recognize foreign adoption decrees "as a matter of comity."²⁹ As a result, adoptions finalized in another country will be accepted "without issue" in state courts utilizing this legal doctrine.³⁰

Approval by the state is of great importance, as "[a]n adoption decree in a state court proceeding signifies the culmination of the international adoption process . . . [F]ederal law governs whether a child may enter and reside in the United States, state courts determine whether the child is the adoptive parents' child under the eyes of the law."³¹ The dichotomy created by these policies allows an individual, deemed unfit or incapable of meeting the basic needs of a child within the United States, to legally assume the role of an adoptive parent for a foreign child.

For the above reasons, many parents seeking to adopt domestically may find themselves encountering numerous obstacles that would not arise if adopting internationally. The incongruence in regulation demonstrates a clear double-standard in adoption policy. If "surface

²⁸ Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT'L & COMP. L.J. 187,198 (1994).

²⁹ *Id.* at 209.

³⁰ *Id.*

³¹ *Id.* at 208.

distinctions” among prospective adoptive parents are truly necessary for the protection of a child, they would be uniformly imposed without prejudice to ensure the best interests of *all* children are met, regardless of whether they were born in the United States or abroad. Two possible explanations can be offered as to why these restrictions are not applied in such an even-handed or consistent manner: 1) the requisite qualifications for adopting domestically are not truly part of an objective standard, but rather a product of social stigmas and cultural values; or 2) children adopted internationally are thought to not require the same level of protection as those adopted domestically. Both of these conclusions are exceptionally disheartening. The former would prevent a capable individual from helping a child in need, while the latter demonstrates a prejudicial method of thinking in direct opposition with the values of justice and equality upon which our nation is based.

III. HOW DEMAND FOR INTERNATIONAL ADOPTIONS CONTRIBUTES TO CHILD-TRAFFICKING

The demand for adoptable children from developing countries creates an opportunity for profit marked by the proliferation of adoption intermediaries, and allows these agencies to charge exorbitant fees for their services.³² “The international adoption industry has become a market often driven by its customers. Prospective adoptive parents in the United States will pay adoption agencies between \$15,000 and \$35,000 . . . for the chance to bring home a little one.”³³ The almost unlimited potential for financial gain continually serves as a catalyst for systematic

³² See Patricia J. Meier, *supra* note 9, at 196. Meier notes that:

Orphanages may pay per-child fees to “finders” who bring in children. Those payments to finders are problematic because they provide incentives for individuals to obtain children by whatever means they can. Some of these means include taking children in place of debts, outright kidnapping, coercion, and trickery. As the demand for babies goes up, the fees increase.

Id. at 197.

³³ Graff, *supra* note 2, at 2.

corruption of the international adoption process.³⁴ However, in spite of all of the foster children in the United States in desperate need of homes, prospective adoptive parents continue to contribute large sums of money to a potentially corrupt system in order to find adoptable children abroad.³⁵

Because decisions to adopt internationally are not always mandated by harsh procedural restrictions, but rather the conscious choice of prospective adoptive parents, it is imperative to maintain an adoption system which emphasizes the “best interests of the child.” Adoptive parents may elect to adopt an infant child in a foreign country as a means to avoid raising an older child, or a child with medical or psychological conditions within the United States. These decisions are likely based on the perceived difficulty of raising such children, however they ignore the potential “special needs” of a child removed from his or her cultural heritage and biological family. In her book *Beggars and Choosers*, Rickie Sollinger elaborates on one possible explanation for the persistence on adopting abroad:

Some observers have remarked that adopters are not, these days, primarily moved by “humanitarian” intentions when they arrive in Ecuador or Mexico looking for babies. Rather, they travel to poor countries because of the “acute shortage of white children” at home, what some analysts have called the “White Baby Famine”. . . . Some have even accused the richer countries of an interest in making sure that child welfare services in the target countries remain undeveloped “so as to ensure a continued supply of babies for the childless rich.”³⁶

³⁴ See Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL’Y 85 (1995). (“High demand for adoptable children encourages these intermediaries to trade children for large amounts of money.”).

³⁵ UN AID, *supra* note 24, at 12.

³⁶ RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE* (2001).

While this may be an extreme account, it does help to demonstrate the necessity of crafting adoption law around the “best interests of the child” rather than focusing on the needs of prospective adoptive parents.³⁷

IV. THE DEBATE OVER REGULATION OF INTERNATIONAL ADOPTION

Those who vehemently support international adoption oppose legal reform, viewing it as an additional and unnecessary bureaucratic hurdle inhibiting children in need from being matched with prospective adoptive parents.³⁸ Elizabeth Bartholet, an advocate of decreased restrictions on international adoption, states that “[z]ero tolerance for adoption abuses may sound good but it will hurt children. The evils involved in such abuses must be weighed against the far more significant evils involved in denying children homes.”³⁹ This statement is further premised on the fact that investigation into potentially corrupt adoption systems in developing countries typically results in a temporary moratorium on adoptions from that country, therefore rendering it impossible for any child from within it to be adopted by a foreigner.⁴⁰

Such an argument only stands if viewed from a purely quantitative standpoint, as it neglects to take into account several important considerations pertaining to systematic abuse. Tailoring the international adoption process to maximize the amount of children adopted fails to consider the possibility that some of those children were not in fact “orphans” in need of adoption, but rather they were wrongly taken from their homes through kidnapping, deceit or coercion. “Without protection, an orphaned child may actually suffer less than a child that is

³⁷ Convention on the Rights of the Child, G.A. Res. 44/25, Art. 3, ¶ 1 (Nov. 20, 1989).

³⁸ Elizabeth Bartholet, *International Adoption: The Human Rights Position*, available at, July 24, 2009 (“UNICEF and others say that most orphanage children are older and suffer disabilities, whereas prospective adoptive parents prefer healthy infants. But many infants are placed in orphanages. It is restrictive adoption policies and the conditions of orphanage life that produce so many older children with disabilities.”).

³⁹ *Id.* at 25.

⁴⁰ *Id.*

abused by the adoption process.”⁴¹ Bartholet argues that corrupt adoption practices are merely an issue of state sovereignty, neglecting to consider the full implications of child trafficking and its ability to render meaningless the rights of birthmothers to raise their own child, and the right of a child to reside with a family that will provide the best care for his or her interests.⁴² These interests are clearly significant enough to require protection through a reevaluation of laws and policy pertaining to the international adoption process.⁴³

There are several other flaws inherent in arguing for the maximization of international adoptions by way of limited government interference. While Bartholet argues that international adoptions produce “significant additional resources for poor countries and their people,” such a view of financial considerations also neglects to take into account the presence of corruption in the system.⁴⁴ A specific example of the potential for abuse can be viewed in an investigation into child-trafficking allegations by U.S. Immigration and Customs Enforcement officials, aptly named “Operation Broken Hearts.”⁴⁵ An overview of the investigation provides as follows:

ICE agents visited several of the “orphanages” associated with the criminal enterprise. They observed rusty cribs, hammocks covered in feces, and torn window screens. Some of the babies were even stored in a “stash house” in the Kompong Som Province where the conditions were horrendous. The dwelling was hot, stuffy, and smelled of human excrement. The babies were naked and

⁴¹ Julie Boatright Wilson, Jeff Katz & Robert Geen, *Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care*, KSG Faculty Research Working Paper Series RWP05-005, Feb. 2005.

⁴² *Id.* at 31. Solinger further advocates for the rights of birthmothers, stating:

In drawing attention to the tragic circumstances under which many poor mothers abroad lose their children, I do not mean to suggest that [international adoption] is simply evil and that “child rescue” should never be under-taken. I mean, rather to highlight the dynamics of this form of child *transfer*, and to underscore how such transfers almost always depends on extremely poor and/or culturally oppressed mothers who utterly lack choices.

SOLINGER, *supra* note 39, at 22.

⁴³ *Id.* at 9. This study on foster care revealed that “any effort to increase the number of waiting children who are adopted must focus not only on improving recruitment efforts but also on improving elements of the adoption process.” *Id.*

⁴⁴ *Id.* at 22.

⁴⁵ U.S. Immigration and Customs Enforcement, *Operation Broken Hearts, Overview*, Nov. 19, 2004, available at http://www.ethicanet.org/galindo_backgr.pdf (citing results of ICE investigation into baby buying in Cambodia).

filthy. Each time an adoption took place, \$3,500 was given to this criminal enterprise by the adoptive parents for the betterment of the orphans left behind in Cambodia. The coconspirators, however, used the donated orphan funds to buy beachfront real estate in Hawaii and other luxury items.⁴⁶

The additional contention that such abusive practices are exceedingly rare does little to compel Bartholet's argument. Numerous instances of corruption have been documented in Latin America, Romania, Cambodia, Vietnam, and Guatemala, with the social, economic, and political characteristics of these countries rendering them and others particularly vulnerable for abuse of this kind.⁴⁷ Recent studies by the Council of Europe Parliamentary Assembly demonstrate the prevalence of child trafficking crimes in European countries as well.⁴⁸ Although acknowledging that "[t]he existing procedure for international adoption and its non-transparency leaves room for [a] variety of corruption schemes," the Parliamentary Assembly still asserts that "intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin."⁴⁹

A. DRAWING A DEFINITIVE LINE BETWEEN INTERNATIONAL ADOPTION AND CHILD-TRAFFICKING

The disconnect between those opposed to legal reform of the international adoption process and those who feel it is necessary if international adoptions are to continue lays in the definitions of "international adoption" and "child trafficking" utilized by these groups.

⁴⁶ *Id.* at 2. According to the overview of this investigation, the "baby buyers" in this investigation used a variety of means to convince parents to forfeit their children, often conveying to the parents that they could "have their child back at any time." Some were even instructed that "[w]hen your child becomes an adult, he can petition for you to immigrate to the United States. *Id.*

⁴⁷ *Deconstructing Mythology*, *supra* note 6, at 106 (citing extreme poverty, recent emergence from war or social unrest, lack of sufficient child welfare infrastructures, and laxly regulated private adoption agencies rather than a centralized, governmentally-run system as potential causes of this vulnerability).

⁴⁸ Council of Europe, Parliamentary Assembly, Social Health and Family Affairs Committee, *Disappearance of Newborn Babies for Illegal Adoption in Europe*, Doc. 11461, Dec. 7, 2007 [hereinafter Parliamentary Assembly]. The Council reports several instances of newborn babies being taken from their mothers in the Ukraine, who are then told that their child had died shortly after birth. The report also notes that in 2006, Moldova prosecuted 61 cases of child trafficking, with instances of illegal adoption becoming so prevalent that newspaper advertisements could be found "inviting unmarried mothers to sell their babies for around 3,000 Euros." *Id.* at 7.

⁴⁹ Parliamentary Assembly, *supra* note 49 at 6. Despite this belief, the Assembly's summary of the report notes that "international adoption should constitute the very last option and . . . there should be no right to parenthood." *Id.*

Individuals who view the system as including only those legitimate adoptions which proceed free of corruption will obviously see no need for limitations—and are in fact likely to oppose further limitation on the process as an evil in itself. However, when international adoption is viewed as a potential venue for other internationally-recognized criminal violations of human rights, a perspective opposing legal reform is likely to change.

The United States has yet to acknowledge corrupt international adoption as a potential form of human trafficking. The Trafficking Victims Protection Act of 2000, for example, applies only to “severe forms of trafficking,” which is limited to those acts which lead to victim exploitation, including prostitution, forced labor, and organ removal.⁵⁰ A review of the Department of State’s rationale for opposing exploitation reveals its unacknowledged applicability to corrupt international adoptions. In their *2009 Trafficking in Persons Report*, they state “[a]mong the repugnant aspects of human trafficking is the commodification of human lives: the assignment of a monetary value to the life of a woman, man, or a child . . . a price is placed on the victim’s freedom.”⁵¹ Is this same repugnant exploitation not evident when a child is kidnapped from her biological parents, denied a relationship with her family and her culture, and sold as a commodity to even the best-intentioned prospective adoptive parents in the United States?

⁵⁰ See Trafficking Victims Protection Act of 2000, Div. A of Pub. L. No. 106-136, § 108, as amended; see also U.S. Dep’t of State, defining the “severe forms of trafficking” it monitors as:

- a. Sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not yet attained 18 years of age; or
- b. The recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt, bondage, or slavery.

Trafficking in Persons Report: 2009, available at <http://www.state.gov/documents/organization/123357.pdf>.

⁵¹ *Id.*

B. RECOMMENDATIONS FOR CHANGES TO LAW AND POLICY WITHIN THE UNITED STATES

Legal reform of the adoption process should not be viewed as being detrimental to children awaiting adoption. Rather, practical changes in law and policy—such as instituting a “cap” on fees charged for adoption services or establishing a more realistic standard of evidence for proving corruption⁵²—must be implicated to safeguard the interests of birthmothers and their children in developing countries by differentiating legitimate international adoption from child trafficking. The serious problems which persist despite reform of current international law make it clear that alone, such changes are not enough. Instead, the creation of additional legislation and regulation in the country creating the highest demand for international adoptions is necessary to effectively resolve child-trafficking problems.⁵³ Redefining “severe forms of trafficking” so as to include corrupt international adoption practices would allow for measures of the Trafficking Victims Protection Act to apply, which could serve as the foundation for further legislation, offering protection from exploitation to an even greater number of children.

A well-defined and uniform definition of legal standards pertaining to the basic elements of the adoption process, even within the United States, will promote the additional benefit of ensuring that equal opportunities remain available for all children in need.⁵⁴ Legislation based upon this rationale is already in effect, but is rendered meaningless by conflicting state regulations and inconsistencies between restrictions in the domestic and international adoption

⁵² Ethica, *Child Trafficking, Why Can't the Immigration Service Prove It?* June 6, 2003, available at <http://www.ethicanet.org>.

⁵³ Wilken, *supra* note 38, at 96. (“As the country receiving the largest number of transnationally adopted children, the United States is presented with a unique opportunity to implement legislation preventing improper financial gain from adoptions.”).

⁵⁴ Absent objective proof that “surface distinctions” have an actual impact on an individual’s ability to raise children, these restrictions should be removed entirely. A great deal of controversy currently exists on this topic—especially in relation to adoption by homosexuals—leading to many inconsistent regulations among different countries and even different states. Even utilizing a perspective which does not take into account the civil rights of the prospective adoptive parents, such inconsistent regulations do little to protect the interests of adopted children. *See, e.g.*, LITA LINA SHWARTZ, *WHEN ADOPTIONS GO WRONG: PSYCHOLOGICAL AND LEGAL ISSUES OF ADOPTION DISRUPTION*, 40–46 (2006).

processes. The Adoption and Safe Families Act of 1997 (“AFSA”) is one such instance of legislation advancing the needs of orphaned children. Section 1305 of the Act expressly states that a child placed in foster care has a right to achieve a safe and permanent home.⁵⁵ The Act, created for the purpose of providing children in foster care with permanent families, offers financial incentives for states to increase the number of adoptions from foster care.⁵⁶ Varying state regulations based on “surface distinctions” such as age, marital status, or sexual preference, frustrate the purpose of this Act by forcing some individuals seeking to adopt to turn to alternate countries. Researchers have previously established this belief, stating, “[a]lthough it is a pleasure to see that so many Americans want to help children in third world countries . . . perhaps the problem of foster children here in America would be improved if going out of the country was not necessary for some.”⁵⁷

Regulations which emphasize accountability and transparency are necessary to ensure that the individuals responsible for perpetuating exploitative adoption practices are recognized and subjected to punishment. This policy would pertain to both individual intermediaries and the adoption agencies largely responsible for instigating illegal activity and problems in the international adoption process. Although most of these agencies are under government regulation, there are a variety of loopholes available which may be utilized to avoid detection of illegal activity. One way to avoid detection is to utilize unlicensed independent intermediaries to “locate” children in developing countries for adoption. The intermediaries remain distant and

⁵⁵ Adoption and Safe Families Act, 42 U.S.C. § 1305.

⁵⁶ Adoption Institute, *supra* note 11, at 1 (“AFSA provides financial incentives for states to increase the number of adoptions from foster care by providing payments of up to \$4,000 per adoption or \$6,000 per special need adoption when states exceed the previous years’ total.”)

⁵⁷ Nicole Smith, *supra* note 31, at 3.

separate from the adoption agencies, allowing them to remain unknown and unquestioned by prospective adoptive parents.⁵⁸ As noted by one researcher:

These intermediaries are not employees or agents of the adoption agency, thus, the agencies assume no legal responsibility for their facilitator's negligent or criminal acts. Adoptive parents, who are not in privity of contract with the facilitator, have no legal recourse against the intermediary or agency when things go wrong.⁵⁹

In addition, the adoption agencies may use exculpatory or “gag” clauses to limit their liability, freeing them from potential repercussions should a child later be discovered as having been illegally brought to the United States.

Alternatively, private agencies free from regulation exist, appealing to prospective adoptive parents hoping to circumvent “unnecessary” restrictions in the adoption process. In these instances, the obligations owed to the adoptive parents by the agency further diminish, as these private organizations view themselves as market actors rather than fiduciaries. Despite their clear connection to organizations in the United States that are profiting from their illegal activity, the actions of both facilitators and private agencies working abroad remain free from regulation. An effective solution to this problem would require facilitators to be licensed employees of adoption agencies, forcing these organizations to take responsibility for their actions abroad. If the use of private adoption agencies is not prohibited altogether, then strict

⁵⁸ Ethica urges that parents take part in preventing child-trafficking, stating:

Adoptive parents, too, must work diligently to ensure, to the best of their ability, that the agencies they hire are practicing ethically. Families must inquire about an agency's practices in acquiring children, its policies on payment of expenses, and what safeguards the agency employs to protect children. Too, families must be willing to ask themselves if they are overlooking “red flags” in order to justify working with an agency that is promising to provide a younger child or a faster adoption than is possible with another agency.

Ethica, *supra* note 59, at 8.

⁵⁹ *Id.* at 86–87.

regulation, oversight, and requirements of documentation from these entities are necessary to ensure the legitimacy of their activities.

Legislation mandating better documentation by all adoption agencies which facilitate international adoptions would also assist the Department of Homeland Security with initiating more effective investigations of potential child-buying activities. In a situation where an individual is attempting to prove the legitimacy of an adoption from another country, having an increased access to information could prove useful for rebutting a Notice of Intent to Deny.⁶⁰ Therefore, although heightened documentation requirements may create an additional bureaucratic “hurdle”, the information documented can also be used to facilitate legitimate adoptions and should not be viewed as an unacceptable hindrance to the adoption process.⁶¹

Even if it is clear that additional regulation of the international adoption process is necessary, implementing effective restrictions that are not harmful to innocent parties is an exceedingly difficult task. Compounding this challenge is the human reality of the situation at hand; the high level of emotion typically involved in the adoption process and the life-altering consequences of denying a child in need a home. In order to be truly effective, reform of the adoption process will likely require changes on behalf of all of the actors involved. This is the only way of reducing the possibility that a prospective adoptive parent will be subjected to the temptation of obtaining a child through illicit means, and will greatly increase the likelihood of these individuals making an ethical adoption decision. “[B]y implementing legislation that

⁶⁰ A Notice of Intent to Deny, or NOID, is issued if an investigation leads DHS to believe that the child in question is not adoptable and should not be allowed to leave the country. This document is rebuttable by the prospective adoptive parent upon proof that the child is in fact adoptable. Ethica, *Child Trafficking, Why Can't the Immigration Service Prove it?* June 6, 2003, available at www.ethicanet.org.

⁶¹ *Id.* (“While the Service views a NOID as a request for more information, families are aware that failure to adequately rebut allegations in a NOID can lead to a full denial of the petition and a months-long appeal procedure.”)

effectively prevents baby-selling, U.S. citizens who wish to adopt internationally will no longer confront potential moral challenges in their efforts to adopt.”⁶²

Targeting the main actors in the international adoption process will require an effort aimed at public awareness, education of prospective adoptive parents, and an effective enforcement mechanism for punishing adoption agencies and intermediaries who contribute to this crime. While the Trafficking Victims Protection Act might further the legal implications of this goal, social constructs which have rendered a false sense of confidence in the adoption system must be abolished for any substantial change to occur.

C. RECOMMENDATIONS FOR CHANGING INTERNATIONAL ADOPTION LAW AND POLICY

International laws have come a long way in stating the ideals sought to be maintained and evils to be avoided in the adoption process, however the lack of an effective enforcement mechanism in treaties such as the Convention on the Rights of the Child (“CRC”) and the Hague Convention prevent the UN from having any substantial impact on the actual deterrence of the crimes they seek to describe.⁶³ As summarized by David Smolin, the CRC seeks to impose:

(a) The use of the “best interests of the child” standard; (b) safeguarding of the process in which adults (such as parents) relinquish children for adoption, through a requirement of governmental approval, use of an “informed consent” standard for relinquishments, and the provision of counseling as “may be necessary”; and (c) government safeguards against improper financial gain in intercountry adoption.⁶⁴

The Hague Convention provides a more in-depth definition of children’s rights and protection against child-trafficking than the CRC, however the Hague Convention is only applicable to the

⁶² Kristina Wilken, *Controlling Improper Financial Gain in International Adoption*, 2 DUKE J. GENDER L. POL’Y 85, 92 (1995).

⁶³ Patricia J. Meier, *supra* note 9, at 202.

⁶⁴ David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 409 (2005).

nations which choose to ratify it.⁶⁵ The Hague Convention calls for “adhering nations to adopt specific means for achieving a system of adoption in accordance with the Convention’s broader ideals.”⁶⁶ By recommending the use of these procedural mechanisms, the Hague Convention broadens the reach of the CRC, granting those nations which ratify the agreement the means necessary to enforce its principles, even against Non-Hague countries. It is for this reason that “[e]ach country must lay its own mantle of rules and regulations upon the framework created by the CRC and Hague Convention to implement and enforce the international policy they articulate.”⁶⁷

Important federal legislation, such as the Intercountry Adoption Act of 2000 (“IAA”)⁶⁸ and the Immigration and Nationality Act (“INA”)⁶⁹ were created to effectuate the humanitarian ideals set forth in the above international treaties. Both acts provide an example of the procedural means specifically called for in the Hague Convention.⁷⁰ The INA is considered to be the only federal law governing international adoptions between the United States and the countries that have not ratified the Hague Convention.

D. REMOVING IMPROPER FINANCIAL INCENTIVES FROM THE ADOPTION PROCESS

Complete protection of children affected by adoption policy will require removal of the problem’s root—the financial incentives fueling corrupt practices. Individuals with even the most charitable intentions may fall victim to a corrupt organization seeking to profit from their desire to raise a child. With the economic conditions plaguing the world today, proper

⁶⁵ See *Intercountry Adoptions: Are the Biological Parents’ Rights Protected?* 5 WASH. U. GLOBAL. STUD. L. REV. 211, 214 (2006) (“The focus of the Hague Convention is to protect the best interests of the child rather than the rights of the biological parents of the child.”). There are currently 22 countries which have been deemed non-member states in reference to the Hague Convention. The World Organization for Cross-Border Co-operation in Civil and Commercial Matters, *Hague Conference on International Private Law: Members of the Organization*, (Jan. 15, 2010), available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24#nonmem.

⁶⁶ *Id.* at 415.

⁶⁷ *Id.* at 203.

⁶⁸ Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000).

⁶⁹ Immigration and Nationality Act, 8 U.S.C. §1181.

⁷⁰ *Deconstructing Mythology*, *supra* note 6, at 95.

implementation of even the most extensive laws against child trafficking will require the removal of financial incentives.

Although the INA reaches countries which the Hague Convention does not, it still lacks the strength and enforcement mechanisms necessary to effectively thwart corruption in the international adoption process.⁷¹ The law's silence on defining "reasonable expenses" is troubling, as improper financial incentives may coerce birthmothers to relinquish their children, passing undetected under the guise of a reasonable payment related to the adoption proceedings. The IAA is equally vague on standards pertaining to expenses, and therefore creates an equal cause for concern.⁷²

Limiting the amount of money expended on international adoption will do more than decrease the likelihood of illegal activities, but may also foster more positive international relations, expanding the ability of the U.S. to assist in improving the lives of children in need. Many countries have developed an "imperialist" image of the United States, and, as a result, have limited the number of children that may be adopted by foreign individuals. Reducing the amount of money involved in international adoptions would help to dispel this image, perhaps providing the additional benefit of improving our relations with developing countries. In regards to adoption, many of these countries feel that "rich Americans have thrown their weight—as well as their money—around when they have found inconvenient rules and regulations blocking foreign adoption."⁷³ Complaints in Vietnam demonstrate that family members with an interest in becoming parental figures are denied the opportunity to do so, despite the best interests of the

⁷¹ E.J. Graff, *supra* note 2, at 5.

⁷² Wilken, *supra* note 38, at 95. ("Although an adoption in which an exorbitant fee is paid is not within the bounds of the Hague Convention, it is not *per se* against current U.S. law.")

⁷³ RICKIE SOLINGER, *supra* note 39, at 22–28.

child, simply because they are unable to offer the same amount of money than an American could for the orphan.⁷⁴

The accuracy and efficiency of investigations into child-trafficking could be aided by expanding current legislation to define set, bright-line standards for financial contributions throughout the adoption process. This will help in enforcement efforts, as an excessively large fee could serve as evidence of illegal activity *per se*, greatly improving the effectiveness of enforcement mechanisms. Large fees increase the likelihood that consent to the adoption will not be given freely and, therefore, that the adoption will not be conducted according to the requirements of the Hague Convention.⁷⁵ Additional oversight, as well as a requirement to itemize all fees charged during the adoption process, may help highlight corrupt practices that might otherwise go unnoticed. A clearer definition of what might constitute a “reasonable fee” under the INA, for example, would aid enforcement efforts, as any fee above a certain value could serve, at the very least, as a “red flag” signaling government officials to investigate further.⁷⁶

The ambiguous definition of improper expenses, coupled with the high standard of evidence demanded by administrative regulations, such as the insistence that “[i]nvestigations of child buying . . . should focus on concrete evidence or an admission of guilt,” render the enforcement mechanism in the INA almost completely unworkable. Direct evidence is difficult, if not completely impossible to find in potentially corrupt adoption situations due to a lack of transparency and improper documentation.⁷⁷ An admission of guilt is also unlikely, as those

⁷⁴ *Id.*

⁷⁵ Kristina Wilken, *supra* note 68, at 85.

⁷⁶ According to [adopting.org](http://www.adopting.org), many states require an itemization of fees charged during the adoption process, with some even requiring court approval. The uniform adherence to these requirements by all states may arguably aid in preventing child-trafficking. Adopting.org, *Quick Guide to Adoption Law*, available at <http://www.adopting.org/AQuickGuidetoAdoptionLaw.html>.

⁷⁷ *Id.*

responsible for the corrupt act are apt to be aware of the lack of incriminating evidence against them, and a birthmother desperate enough to relinquish her child for money will likely withhold from implicating herself so as not to risk forfeiting the illicit financial gain.⁷⁸ Such a high standard of evidence currently serves as a legal loophole, deterring the INA from preventing child-trafficking or any other unethical practices associated with international adoption.

CONCLUSION

Americans began adopting children from other countries as an attempt to reach out to the innocent lives forever disrupted by war. Within the past several decades, the focus of this effort has changed entirely, and for the worse. The exploitative nature of international adoption is often criticized. Individuals against international adoption feel that it “exploits unjust social structures in the ‘sending’ countries from which children are adopted, where they and their biological families have not had access to the freedoms and resources enjoyed by more advantaged families”⁷⁹ Surveys of adoptive parents demonstrate the reality of this belief, as “applicant resources” are often listed as the most important factor in determining the success of applicants seeking to adopt children in foster care.⁸⁰

A misconception exists that overseas orphanages contain an endless “supply” of healthy infants, serving as a catalyst for abusive and coercive adoption practices in developing countries.⁸¹ If adoptive parents truly desire to help a child in need, priority should be given to those children living in state institutions and coping with the instability of constant transitions for

⁷⁸ *Id.*

⁷⁹ Leslie Doty Hollingsworth, *International Adoption Among Families in the United States: Considerations of Social Justice*, 28 SOCIAL WORK (2003); see also Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Theory*, YALE J. L. & FEMINISM 102 (1998) (“One troubling aspect of . . . international adoption is that [it] often results in the transfer of children from the least advantaged women to the most advantaged.”)

⁸⁰ Julie Boatright Wilson, *supra* note 47, at 48 (“Adoption Applicant Placement Patters and Timing in Three Sites”). “Applicant resources” are further described as : income, employment, neighborhood, and status as a homeowner.

⁸¹ See E.J. Graff, *supra* note 2, at 1.

an extended period of time, or those with disabilities which further enhance their need for the assistance, love, and support of a family. An unwillingness to adopt children in foster care not only denies them their “right to a family,” but also perpetuates the view of infant children as “commodities” in developing countries, placing them in danger of becoming the victim of a crime such as child-trafficking.

Children are not commodities, and financial considerations should serve no part in determining what is truly in their best interest. Current policy may render even the best intentions of adoptive parents harmful, and to perpetuate such a system is unethical, immoral, and ultimately detrimental to all parties involved. Despite the lingering presence of ethnocentric beliefs that any child would be “better off” living in the United States, such behavior cannot be viewed as assistance, but rather an assault on the dignity and respect of these nations and the families and cultures within.