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INTERNATIONAL ADOPTION: Thoughts on the Human Rights Issues

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Introduction

Human rights issues are at the core of the current debate over international adoption. Many of us who support international adoption see it as serving the most fundamental human rights of the most helpless of humans – the right of children to the kind of family love and care that will enable them to grow up with a decent chance of living a healthy and fulfilling life. But many who oppose international adoption argue that it violates the human rights of the children placed and of any birth parents that may exist, and serves only the interests of those who should be seen as having no rights – the adults who want to become parents.

Human rights activists in the international adoption arena have spoken with a relatively singular voice – a voice that is generally critical of international adoption, calling either for its abolition, or for restrictions that curtail its incidence in ways that those of us who support it see as very harmful to children, limiting their chances ever to get a nurturing home and a true family, and condemning even those who do get such homes eventually to unnecessary months and years in damaging institutions. This voice has had a powerful impact. In part this is because the international children's rights organizations taking this position include such powerful ones as UNICEF and the U.N. Committee on the Rights of the Child. Also, opposition to international adoption that purports to be grounded in children's human rights tends to be more politically palatable and thus persuasive, than arguments grounded in a country's nationalist claims of ownership rights over its children, or nationalist pride in not appearing unable to care for its children. It is important for those who care about human rights and about children to think through their position on these issues. The future of international adoption, and of many children, are at stake.

International adoption, involving the transfer of children for parenting purposes from one nation to another, presents an extreme form of what is often known as "stranger" adoption, by contrast to relative adoption. Relative adoption refers to situations in which a step parent adopts the child of his or her spouse, or a member of a child's extended biological family adopts the child whose parents have died or become unable or unwilling to parent. Such adoptions are largely uncontroversial: children stay within the traditional biological family network, and the adoptive

parents are generally thought of as acting in a generous, caring manner by taking on the responsibility for these children in need.

By contrast, in international adoption adoptive parents and children meet across lines of difference involving not just biology, but also socio-economic class, race, ethnic and cultural heritage, and nationality. Typically the adoptive parents are relatively privileged white people from one of the richest countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world. International adoption is characterized by controversy. Some see it as an extraordinarily positive form of adoption.² It serves the fundamental need for family of some of the world's neediest children. The families formed demonstrate our human capacity to love those who are in many senses "other" in a world which is regularly torn apart by the hatred of alien others.³ But many see international adoption as one of the ultimate forms of human exploitation,⁴ with the rich, powerful and white taking from poor, powerless members of racial and other minority groups, their children, thus imposing on those who have little what many of us might think of as the ultimate loss.

International adoption has grown significantly over the last few decades, with many thousands of children now crossing national borders for adoption each year. International law as well as domestic law within the United States and other countries have become in many ways more sympathetic to international adoption than they have been in past decades. But the controversy surrounding such adoption continues, and pro-adoption moves seem matched by moves in the opposite direction. In the past two years, adoptions from other countries into the U.S. have gone down in number for the first time since 1992.⁵ The prior increase in numbers reflects to a significant degree the opening up of new countries willing to send some of their homeless children abroad for purposes of finding adoptive homes. However the typical pattern in the past has been for countries that do open up to gradually or suddenly close down, passing restrictive regulation that either prohibits international adoption altogether or limits severely the number of children involved, often at the same time increasing the period of time that such children must spend prior to placement in damaging institutions. This happens without regard to the fact that millions of children in these countries are growing up or dying in horribly inadequate orphanages or on the streets.

Most countries of the world involved in sending or receiving children for international adoption agreed on a new Hague Convention governing such adoption which gave it new legitimacy as compared to any prior international agreement, seemingly a major step forward. However the original goals of the Hague Convention included the idea of *facilitating* international adoption, and expediting the placement of children in need. International children's human rights organizations succeeded in changing the focus of the Hague Convention negotiations so that this goal was eliminated, and the thrust became more single-mindedly oriented toward ensuring against adoption abuses. In addition the Hague seems to date to have functioned in numerous instances to effectively close down rather than open up adoption. See *infra* at ----.

UNICEF has played a major role in recent attempts to restrict international adoption, including efforts to pass an adoption “reform” law in Guatemala which would significantly restrict international adoption.⁶ UNICEF has in recent years issued a variety of statements indicating that large numbers of adoption from any particular country should be seen as an indication of problems, requiring restrictive action.⁷ Along with many others, UNICEF has for years claimed that Guatemalan adoptions are plagued by problems including illegal payments to birth mothers.⁸ However the extent of any illegal activity in Guatemala is subject to debate.⁹ Moreover Guatemala is one of the very few countries that has in recent years kept babies pre-placement in decent foster care rather than in damaging institutions, and one of the few that has placed them for adoption in infancy, conditions that are central to the children’s prospects for healthy, normal development.¹⁰ Guatemala is also one of the countries that has freed up very significant numbers of children for adoption, ranking in 2006 as the second from the top in terms of numbers of children sent to the U.S. for adoption.¹¹ The kinds of “reforms” being discussed would likely reduce to a small trickle the number of children being released, increase their ages, and require that those few released for adoption be kept for the two to three years minimum they are likely to wait, in damaging institutions.

The European Parliament was in recent years dominated by forces committed to making countries in Eastern Europe interested in joining the Union agree to outlaw international adoption as a condition for joining.¹² Romania, where ongoing poverty and dislocation resulting from the disastrous Ceausescu regime mean that vast numbers of children continue to be relegated to orphanages which deny them any decent life prospects, was induced by this pressure to enact in June of 2004, a law eliminating international adoption altogether (except for adoption by a child’s grandparents).¹³

Overall, as of 2003, *almost half of the forty nations that had made the top twenty list of nations sending children to the U.S. for adoption within the previous 15 years were either closed or effectively closed to intercountry adoption.*¹⁴

International adoption is not a panacea. It will never be more than a very partial solution for the problems of the homeless children of the world. There are millions on millions of those children. The best solution in any event would be one that kept as many of those children as possible with their original birth parents. But international adoption does provide a very good solution for virtually all of those homeless children lucky enough to get placed. In my view it also pushes us forward on a path to creating a better world in which more children could be raised by their birth parents. At the moment most of those who matter in determining the world’s policies on international adoption see the issues differently.

History and Current Trends¹⁵

International adoption is largely a phenomenon of the last half century, with the numbers of children from other countries coming into the U.S. rising over the years from negligible to some 22,884 in 2004, dropping slightly to 22,728 in 2005, and then dropping to 20,679 in 2006.¹⁶ See Table 1 illustrating the trend since 1990.

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The numbers and the pattern of international adoption have changed over the years in response not simply to the objective needs of children for homes and of prospective parents for children, but at least as significantly to the politics of international adoption and to changing cultural attitudes within both sending and receiving countries, and also in the international community as a whole. The poor countries of the world have long had an excess of children for whom they cannot adequately care – children doomed to grow up in grossly inadequate orphanages or on the streets. The rich countries have long had an excess of infertile adults who want to parent and a relatively limited number of homeless children. Yet there was virtually no matching of these children with these adults until after the first World War. That war left the predictable deaths and devastation, and made the plight of parentless children in the vanquished countries visible to the world at a time when adoption was beginning to seem like a more viable option to childless adults in more privileged countries who were interested in parenting. Thus began the first wave of international adoptions.

In successive years different countries have decided whether or not to make their children available for adoption abroad based on some combination of (1) perceived needs of homeless children, often precipitated by war, poverty or other forms of political crisis, and (2) cultural attitudes, which can make international adoption unacceptable as a method of addressing children's needs regardless of the extent of those needs and the degree of political crisis. The Korean War led to the opening up of South Korea for adoption in part because of war-created needs: orphaned and abandoned children, and children fathered by American soldiers who would face discrimination in Korean society, represented a need for homes. The government took an adoption-friendly approach even after the crisis dissipated and the country became relatively well off economically, because it knew that it would be hard to place children in-country given the cultural bias for blood-related children. For years Korea was the source of most of the children coming into the U.S. for adoption, largely because it was one of relatively few countries that designed its international adoption system so as to facilitate the placement of children in need of homes with adults abroad who could provide them. But then South Korea began to limit the number of children released for adoption abroad not because the need for foreign homes for these children had lessened, but because political forces opposed to international adoption criticized the government for "selling" its children to foreigners, and shamed it in the press during the 1998 Seoul Olympics, and as a result changed the overall cultural dynamic surrounding international adoption. The number of adoptions to the U.S. dropped from 6188 in 1986 to 1534 in 1991. DAVID CHECK - THESE STATS FROM KLEEN AT NN 58-60 BUT INCONSISTENT WITH APP B YOUR STATS RE 1991. CAN YOU GET ME CORRECT STATS FROM 70'S THROUGH TODAY SHOWING WHEN DROPPED AND THEN WE

CAN FIX THIS SENTENCE.AND ADD CITE IN NO 17. ¹⁷ By 2006 Korea was only the fourth largest sending country to the U.S.¹⁸

The complicated interplay between children's needs and cultural attitudes is similarly illustrated by the history and trends involving other sending countries. The fall of the "Iron Curtain" and the dissolution of the former U.S.S.R. resulted in the opening up of China, Russia, and various new countries which were formerly part of the U.S.S.R. to international adoption. This was not because children's needs for adoptive homes suddenly and radically changed in these countries, but because it was suddenly acceptable to deal with the West. Over the years various of these countries have backed off from international adoption, restricting it significantly or altogether, sometimes in apparent reaction to particular adoption scandals, but generally for reasons that seem to have to do with significant changes in political and cultural attitudes toward international adoption, and in any event *not* because they have figured out how to solve the problems of their homeless children's needs adequately in the absence of international adoption.

So, for example, China just recently instituted very significant new restrictions on international adoption, disqualifying prospective adopters who are single, as well as those who are obese, older than 50, or who fail to meet a range of other new and more stringent criteria.¹⁹ Yet China continues to have a major crisis in terms of children's needs on its hands. China's overpopulation problems, its one-child policy, and societal attitudes regarding male and female roles, continue to produce the abandonment of many thousands of baby girls, filling the orphanages with girls in need of homes. Many suspect that baby girls are being not only aborted but also killed after birth in large numbers, finding no other logical explanation for the now huge discrepancy between the number of boys as compared to girls showing up in the official census count.²⁰ China claims in announcing its recent restrictions on international adoption that it is responding to an excess of prospective adoptive parents for the available children, but there is obviously no dearth of children in need of homes. The likely explanation in fact is some nationalistic concern at being seen as incapable of caring for its children.

Russia enacted new rules a few years ago prohibiting children from being considered for adoption abroad until they had been held six months for purposes of in-country placement. There had been no major developments in Russia at the time providing any reason for thinking that there were in-country homes for more than a small fraction of the large number of children being held in Russian orphanages.

Romania, after the fall of Ceausescu in December 1989 and the resulting exposure to the world of the horrible orphanage conditions in which thousands of its children were living and dying, opened its doors to international adoption and sent large numbers of children abroad.²¹ Romania closed those doors again at the end of 2000 and has allowed hardly any children out since.²² This change resulted not from any change in the needs of the country's children. An influx of Western attention and resources has brought some modest improvement in the orphanages, but there are still thousands on thousands of children living in desperately inadequate orphanage conditions. The closing down of international adoption was triggered by a baby-buying scandal in which some Romanian birth mothers received payments in connection

with surrendering their babies for adoption. Opponents of international adoption took advantage of this scandal to call for a moratorium on international adoption, pending “reform” of the adoption system. While efforts to enforce rules against baby buying are appropriate, these so-called reform moves in Romania resulted in denying adoptive homes on an on-going basis to thousands of children abandoned in institutions for reasons which had nothing to do with any illicit payments to their birth parents.²³ More recently, as noted above, the country has shut down international adoption entirely as a result of pressure imposed by the European Union in connection with Romania’s efforts to join the Union. Now many are calling for Romania to eliminate this 2004 law and open up international adoption again.²⁴ The U.S. Senate has passed a resolution calling for amendment of Romanian law to allow international adoption by people other than grandparents, and requesting that the E.U. not impede such adoption.²⁵ Baroness Emma Nicholson, who as the European Parliament Rapporteur to Romania had led the charge to force Romania to pass the law eliminating international adoption, has been succeeded by a new Rapporteur who rejects her philosophy and says that a majority of E.P. members do also, and who has called for reversing the E.P.’s position and urging Romania to open up international adoption again. A 2006 report by the Council of Europe Commissioner for Human Rights states that international adoption should not be precluded as an option if accompanied by guarantees that abuses will be prevented.²⁶ In the meantime homeless children in Romania continue to suffer. The 2004 law was supposed to usher in a new era in Romania in which institutionalization was abandoned, greater efforts were made to keep children with their biological parents, and those children who could not live in their original homes were placed in newly developed foster care. Some progress appears to have been made in this direction, but it is limited progress. Many thousands of infants and children continue to live in institutions in horrendous conditions, conditions documented in horrible detail in reports and videos.²⁷

While many poor countries in Latin America and Africa have had an extended family caretaking tradition which meant that orphaned children or others who could not be cared for by their parents were taken in by relatives, wars and other crises have created huge numbers of children for whom such family care is unavailable. Economic dislocation has resulted in many parents moving away from their extended families to cities in desperate attempts to find work, and then if the parents fall victim as they often do to the ravages of ongoing poverty the children are abandoned to the streets or to institutional care. The AIDS crisis has now so devastated the adult populations in many African countries that many millions of “AIDS orphans,” some themselves HIV positive and others not, have been left without any family care.²⁸ Impoverished Latin American countries have long been sending some of their children abroad for adoption, and while Africa has in the past sent very few children, the AIDS crisis there has created new pressures which have begun to increase the flow.²⁹ However in recent years many Latin American countries have significantly or totally shut down international adoption, not because the needs of their children have significantly changed, but largely because of the pressures from human rights and other critics from both inside the countries and from outside, that make these countries see international adoption in a different light.

At the same time that what are often termed “sending countries” have gone through the crises and cultural changes that have affected their international adoption policies, the more privileged

countries often termed “receiving countries” have gone through their own changes resulting generally in an increased willingness on the part of adults interested in parenting to look abroad for children to adopt. In the U.S. and elsewhere, such adults found fewer infants available domestically to adopt as the use of birth control and abortion expanded, and as the stigma against single parenthood lessened so that more birth mothers felt comfortable keeping their babies to raise themselves. As stigma against adoption and mixed race families lessened, adults became more comfortable doing international adoption, which so typically involves children who look physically different thus marking the families as adoptive families, and so typically involves the adoption by whites of black and brown children. Adults interested in parenting were thus conditioned to respond more positively to any signals sent from other countries that children were in need of homes and would be made available for adoption abroad.

At the present time it is clear that there is a significant and growing population of prospective international adoptive parents. Given the estimates that some 15% of couples who want to have children may not be able to produce their own biological children,³⁰ and the likelihood that a significant proportion of this group would be interested in international adoption, if encouraged rather than discouraged, the prospects for placing very large numbers of children in need are great. While international adoption will never provide homes for more than a small fraction of the millions on millions in need, it could provide many many times the roughly 20,000 homes now provided in the U.S. and 10,000 total now provided in other receiving countries DAVID CAN YOU GET SUPPORT CITE FOR OTHER COUNTRIES AND ALSO CHECK ME ON THE FIGURE, on an annual basis. However it is not clear that the children will be allowed out.

Recent Legal Developments

The law regarding international adoption is overwhelming negative in the sense that it focuses almost entirely on the bad things that can happen when a child is transferred from one country to another as opposed to the positive. It reflects the general negativity of all adoption law, which focused on the bad and not the good that can happen when a child moves from birth to adoptive parent, but adds a layer of additional negativity related to the particular issues involved in international adoption. Thus the law sometimes prohibits international adoption altogether. When international adoption is allowed, the law typically focuses on ensuring that children are not wrongfully removed from their birth parents, or wrongfully transferred to adoptive parents who are not fully fit. While these things are important, it is striking that the law almost never focuses on the bad things that happen when a child is denied international adoption, or on ensuring the positive things that happen when a child is provided such adoption. So the law consists largely of requirements to ensure that birth parents have properly and voluntarily relinquished their children, or have entirely and forever abandoned them, and that adoptive parents have been thoroughly screened for health and age and economic stability and a range of other factors thought to be important to parenting, and that they have been socialized to have the proper attitudes toward their future child’s heritage and culture. And often there are other requirements designed to ensure that if at all possible the child be adopted or provided some form of family support in the country of origin rather than abroad. These sometimes take the form of requirements that agencies search for in-country homes prior to considering placement

abroad, for periods like six months or one or two years, and sometimes they take the form of limiting foreign adopters to older children or children with disabilities. By contrast there are almost no laws or policies that focus on the devastating damage to children's life prospects that come from spending months and years on the streets or in the kinds of institutional conditions that typify the world's orphanages, despite the fact that there are millions on millions of homeless children worldwide living and dying in these situations, and limited prospects in the near term for doing better by them in their home countries. There are almost no laws or policies requiring that children whose birth parents will never be available to parent them be identified and freed up for adoption, or limiting the time they can be held before being placed in available adoptive homes or other nurturing situations, or otherwise facilitating the prompt placement of children in need of homes with those who can provide those homes so that children can have a decent chance to recover from early damaging experiences.

Accordingly, the general legal picture is one in which the law places multiple barriers between children who need homes and the parents who might provide them. Given this picture, recent developments indicate moves both in the direction of making international adoption yet more difficult to accomplish, and also in the direction of making it somewhat less difficult. The overall direction of change is not entirely clear. And there is *no move* to transform international adoption to focus more significantly on the positive, so that while ensuring against adoption abuses it simultaneously strives to place as many children as possible as promptly as possible in adoptive homes.

International adoption is governed by domestic law of both the sending and the receiving countries, law passed by a particular country to govern its own affairs, and international law, law agreed to by various countries to govern certain matters between those countries.

Domestic Law

Countries are understood to have jurisdiction to decide matters related to what are seen as "their children," and so can decide whether to allow adoption out of the country at all, and also the rules governing any such adoptions they choose to allow. Countries have on a regular basis changed the rules and policies governing the adoption abroad of their children. At times of crisis which create large numbers of children in need of homes, many countries create laws and policies permitting adoption of some of these children by foreigners. Other countries refuse to allow such adoption ever: Muslim countries, for example, believe it is wrong to assign children new legal parents as adoption typically involves, and so prohibits both domestic and international adoption. As noted above, there has been something of a pattern among countries that have allowed adoption abroad of their children during the past few decades to open up such adoption initially with relatively few restrictive rules, and then after a period of time to close down significantly, sometimes restricting the kind of children available to those who are older or have disabilities, sometimes restricting the kind of adults eligible to adopt to those who are married or who are below certain ages, sometimes placing adoption under the control of a central state authority, and sometimes closing down such adoption altogether, either temporarily or permanently. Sending countries's decisions regarding their domestic laws and policies are made

in response both to internal pressure, such as political leaders or non-governmental organizations, and also to external pressure, such as powerful international organizations like UNICEF, other international child and human rights non-governmental organizations (NGOs), and international law.

Countries also have jurisdiction to decide whether to allow their adults to adopt from abroad, bringing the children back home. Typically the “receiving countries” in international adoption are relatively well-off countries with many adults who have the luxury of being able to afford to take on children to raise. High infertility rates and a limited numbers of children available for adoption in these countries, creates a significant number of prospective international adoptive parents.

Receiving countries are in a position to have a major influence on many sending countries’ international adoption policies. The receiving country can if it chooses try to use whatever power it may have to influence sending countries’ policies either to ease the path of international adoption or to restrict such adoption. The United States has long been the major receiving country in the world, with some two-thirds of all internationally adopted children coming to the U.S. The U.S. is also politically the most powerful of all the receiving countries. Government policy in the U.S. has been somewhat ambivalent towards sending countries with respect to their international adoption policies. Government officials tend to be sympathetic to the desires of prospective adopters within the U.S., and so for example occasionally political actors within the U.S. will try to exert influence abroad to persuade foreign entities to allow certain children to be released for adoption. This has often happened when particular children assigned to U.S. parents for adoption get stuck in the pipeline when their home country declares a moratorium on adoption. At the same time the U.S. government is enormously reluctant to give the appearance of wanting to expropriate other countries’ children, and this concern appears to dominate its approach to dealing with sending countries. So, for example, when concerns are raised about “adoption scandals” in a particular sending country, cases involving alleged kidnapping or baby buying, the U.S. tends to take steps to try to ensure that no children are given visas permitting them to leave the sending country for purposes of adoption in the U.S. without new assurances that the children have been properly separated from their birth parents. It is for such reasons that the U.S. has introduced requirements in many sending countries for DNA testing to ensure that the adopted child is in fact the child of the alleged birth parent, along with other requirements designed to ensure that various laws of the sending country have been satisfied. This also explains the U.S. government’s current insistence that Guatemala change its laws and policies to deal with the allegations of baby selling that have long surrounded its international adoption practices.³¹ And on occasions the U.S. has found certain countries’ practices so problematic that it has declared a moratorium on allowing U.S. nationals to adopt in that country.³² Other receiving countries often take similar action, refusing to deal with countries they see as being too lenient toward various adoption abuses. For example, as of December, 2006, five countries had refused to accede to Guatemala’s accession to the Hague Convention because of concern about Guatemala’s adoption policies.³³

Receiving countries' laws and policies are also important because they determine whether the country's nationals will be allowed to adopt from abroad at all, and also if they can, how hard or easy this will be. Again the general picture here is one in which law plays a very negative, restrictive role. In order to accomplish an international adoption a U.S. national must satisfy the laws and related policies and practices of his or her own state within the U.S., of the immigration authorities, and of the sending country, all of which will be focused as discussed above on making sure that no adoption goes through that might be problematic, as opposed to focusing in addition on ensuring that adoptions likely to serve a child's interests go through as often and as efficiently as possible. Any given international adoption is likely to cost somewhere in the range of \$15,000 to \$40,000 and to involve a challenging emotional journey, inordinate paperwork, and years of commitment to accomplish. Given this background reality, U.S. law related to international adoption has moved significantly in recent years in directions more favorable to international adoption. A federal law entitled the Child Citizenship Act was passed in 2000, giving internationally adopted children automatic citizenship rights immediately upon adoption.³⁴ Upon return to the U.S. adoptive families can now expect to get proof of citizenship delivered to their home automatically within approximately a month of arrival.³⁵ On a practical level this law was a major step forward. Previously international adoptive parents had to apply for citizenship for their children, a requirement that constituted one more bureaucratic hurdle in a process already characterized by multiple hurdles, and one that if not fulfilled left the children dangerously unprotected in their new life, as non-citizens. This new citizenship legislation also constituted a major symbolic step forward, giving those *adopted* abroad similar citizenship status with children *born* abroad to U.S. citizens, an important move toward recognizing the legitimacy of international adoption as a way to form one's family. Federal income tax law was amended effective 1966 to give tax credits for the first time for expenses for any adoption, including international adoption, for those falling within the income eligibility limits, with the amount of the credit increased from \$5,000 to \$10,000 per adoption, in 2002, and designed to increase slightly every year so that for 2007 the amount is \$11,390.³⁶ Again, apart from the practical significance, this was a dramatic move in the direction of reducing disparities in the treatment of biologically related parenthood, always heavily subsidized by tax, employment benefit and health insurance policies, as compared to adoption, here including both domestic and international adoption.³⁷

Other legal developments in the U.S. with no specific impact on international adoption are nonetheless significant in changing the landscape in adoption-friendly directions that may well prove relevant to international adoption's long-term prospects. Congress passed in 1994 and strengthened in 1996 a law called the Multiethnic Placement Act (MEPA),³⁸ prohibiting foster and adoption agencies receiving federal funds from using race as a factor in child placement. This law was designed to radically change the laws and policies of the fifty states, all of which had traditionally engaged in "race matching," placing children if at all possible with same-race foster and adoptive parents. MEPA constitutes a powerful rejection of the philosophy at the heart of efforts to restrict international adoption – the idea that children are best off if kept within their community of origin, and the related idea that racial and ethnic communities are best off when they keep "their" children within the group. Congress also passed in 1997 a law called the Adoption and Safe Families Act (ASFA).³⁹ This law was designed to reduce the emphasis the

states had traditionally placed on keeping children with their family of origin, to place a greater emphasis on children's interests in growing up in nurturing, permanent homes, and to ensure that if the family of origin could not provide that kind of home within a reasonable period of time, then children be moved on to adoptive homes rather than held on an ongoing basis in foster or institutional settings. ASFA like MEPA rejects ideas at the core of opposition to international adoption about the central importance of heritage and about the last resort status of adoption. ASFA also rejects a related policy of holding children in limbo with technical ties to their birth parents, rather than moving them promptly on to available adoptive homes. This problem, while an issue within the U.S., exists in extreme form in most of the sending countries of the international adoption world, where children are held in orphanages for years at a time, technically tied to their birth parents and not free for adoption, even though they may see their parents rarely if ever and may have no hope of returning to live with them. ASFA is one of those very rare adoption laws that actually does focus not just on the bad things that happen with adoption but on the bad things that happen in the *absence* of adoption – namely the harm that comes to children when held in limbo, without permanent parents, and in less than good nurturing situations. If ASFA's spirit were to spread beyond our borders, it would help animate efforts to free increased numbers of children up for adoption, and to ease the barriers to international adoption so that more of them could be placed.

Finally, there are some very general developments in U.S. law in an adoption-friendly direction that bode well for international adoption also. Traditionally U.S. parentage law has accorded very significant weight to biology and been heavily biased against the kind of non-biologically linked parenting that is adoption.⁴⁰ But the recent trend has been in the direction of reducing the importance of biology as a factor in defining parentage. Increasing emphasis is being placed on established and/or intended *social* as opposed to biological parenting relationships, with these factors sometimes weighing equally with or even outweighing biology.⁴¹ And there are indications that despite our traditional emphasis on adult rights over children's, we are moving, however, slowly, in a child-friendly direction.⁴²

International Law

On the international front, law has moved generally in the direction of legitimating international adoption, and of providing general guidelines for its appropriate conduct, but does little to *facilitate* such adoption so as to help ensure that children in need of homes receive them. And of course, consistent with the generally negative legal picture, even the most favorable law of current times, the Hague Convention, in no way *requires* that countries recognize any rights in their children to receive a nurturing home abroad even if this is the only nurturing home available.

The first truly significant international documents recognizing international adoption were the 1986 U.N. "Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption, Nationally and Internationally,"⁴³ and the 1989 U.N. Convention on the Rights of the Child.⁴⁴ However they

stopped well short of fully legitimating such adoption. The Convention on the Rights of the Child is the most powerful document, ratified now by all countries in the world except the U.S. and Somalia.⁴⁵ It is seen as the ultimate expression to date of international support for children's human rights. It talks in powerful language in the *Preamble* of the child as one of the members of the human family entitled to fundamental human rights, and as entitled to special safeguards and care by virtue of immaturity, and in Article 3 proclaims that in all actions concerning children "the best interests of the child shall be a primary consideration." However in the key Articles dealing with children in need of care outside of their birth family, the Convention provides that countries are free to decide whether to provide adoption or not, and whether to include international adoption or limit adoption to domestic only. So Article 20 provides that with respect to children deprived of their family environment, nations "shall in accordance with their national laws" ensure alternative care, and that such care "could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background." Article 21 tells nations that might want to allow international adoption that they must treat it as lower on the hierarchy of choices than various in-country options *that include but are not limited to in-country adoption*. Many believe, rightly or wrongly, that in-country adoption should be preferred to out-of-country adoption, but the CRC goes far beyond this, stating that nations "that recognize and/or permit" adoption, "shall: ... (b) Recognize that inter-country adoption may be considered as an alternative means of child's care, *if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin*" (emphasis added). This places international adoption lower on the hierarchy than in-country foster care, and apparently even lower than institutional care that might be deemed "suitable." The Chair of the U.N. Committee on the Rights of the Child has on various occasions indicated publicly that this language should be interpreted to mean that the CRC requires that in-country foster care be preferred to out-of-country adoption only if it is ongoing, "permanent," foster care, as compared to temporary care, and that it should be interpreted to require a preference for adoption over institutional care since the latter cannot be considered appropriate for children.⁴⁶ But at the same time he appeared to assume that virtually all foster care would be "permanent," even though in those countries like the U.S. which have had significant experience with foster care, and far more resources to support positive forms of foster care, it has typically not been permanent, even when children are placed with kinship foster parents, and it has typically been far inferior to adoption for children, as indicated by various measure of child development and adjustment in the available social science.⁴⁷

A dramatic step forward in at least symbolic support for international adoption was taken in 1993, when 66 countries, including most of the sending and receiving countries in the international adoption world, approved a multilateral treaty called the Hague "Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption," generally referred to as the Hague Convention on Intercountry Adoption.⁴⁸ This constitutes the most significant legitimation of international adoption to date, apparently making such adoption a preferred option for children over institutional care in their home countries, although indicating that adoption in-country should be preferred over adoption abroad. The Convention's *Preamble*

recognizes that “the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,” and 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.” This of course again fails to in any way *require* that nations recognize international adoption as an option for children. And it accords with the popular sentiment that in-country adoption should be at the top of the hierarchy of options for homeless children. But it does at least seem to make international adoption next on line on the hierarchy. However the Chair of the U.N. Committee on the Rights of the Child has interpreted this language as consistent with his interpretation of the CRC, arguing that under the Hague a permanent foster family should count as a “permanent family” to be preferred over any international adoptive family.⁴⁹

The Convention also includes some basic substantive rules designed to ensure that birth parents and their children are protected against wrongful attempts to separate them through, for example, use of financial payments to induce the surrender of parental rights, or coercion as in kidnapping. And it includes some basic procedural rules designed to ensure obedience to the substantive rules, such as requirements that each country create a Central Authority to implement the Convention. The Convention governs only those adoptions that take place between countries which have ratified it.⁵⁰ As of December, 2006 CHECK DATE W DAVID, 69 countries had become parties to the Convention, with more having indicated that they will become parties in the coming years.http://www.travel.state.gov/family/adoption_hague.html⁵¹ The U.S. Senate has given its advice and consent authorizing U.S. ratification of the Convention, conditioned on laws and regulations being adopted to enable compliance with the Convention’s requirements.⁵² Basic enabling legislation entitled the Intercountry Adoption Act of 2000 has been enacted,⁵³ and the necessary regulations issued, with the final ratification step now anticipated in 2007 or 2008.⁵⁴

There is some reason to think that the net impact of the Hague Convention will be favorable to lawful international adoption. First, in legitimating such adoption as a good option for children, it not only reflects widely shared international opinion, but is likely to reenforce such opinion, giving those in a position to influence policy more reason to shape policy in an adoption-friendly way. Second, in reenforcing existing rules against baby-buying and other adoption abuses, it may help reduce the number of adoption scandals, which are not only problems in their own right but also so often trigger anti-adoption “reforms” closing down or drastically limiting international adoption. Third, in emphasizing that international adoption is supposed to serve children’s best interests and that it is to be guided by rules protecting birth parent rights and prohibiting abusive practices, the Hague may help promote a more positive image of such adoption in a world where many talk of it as equivalent to child trafficking. Finally, and for related reasons, the Convention will provide political cover for leaders in sending countries who think international adoption will serve their government’s and their country’s children’s interests, but might be afraid of anti-adoption forces’ charges that they are “selling” or otherwise exploiting these children, and wasting what are often termed these countries’ “most precious resources.” The Convention can be used to demonstrate that internationally adopted children

will be protected against sale and exploitation, and that the world community approves of such adoption as a good option for children.

The Hague Convention will also likely result in changes in various receiving countries' laws in a direction favorable to international adoption. This is notably true in the U.S. Most significant is the elimination for Convention adoptions of the so-called "orphan" requirement in U.S. Immigration law, which limits those children entitled to immediate entry upon adoption to those who have only a sole birth parent surrendering them for adoption.⁵⁵ Since virtually all countries allow couples who are not in a position to raise their children to surrender them for adoption, this restriction has limited the pool of children available for adoption who could find homes in the U.S. It has also caused crises in some number of individual adoption cases in which U.S. citizens unwittingly adopted abroad children who did not fit the orphan definition, only to find that although they were the legal parents of the adopted children, they could not bring them back into the U.S. The Intercountry Adoption Act of 2000 and the Hague implementing legislation referred to above, amends the Immigration and Nationality Act to eliminate the orphan restriction for those adoptions conducted under and in accord with the Convention.⁵⁶ This Act also should remove the need for parents who have adopted in courts abroad to re-adopt in their home state in the U.S. Parents have to date felt pressure to re-adopt because foreign decrees are not entitled to the "full faith and credit" from courts in the U.S. that an adoption decree issued by a court here would be, and because they typically have needed a U.S. court decree to get their local U.S. birth registry to issue a new U.S. birth certificate, so that their child has the very important practical advantage of an English-language birth certificate issued by a local registry capable of issuing additional "original" copies if the first is lost. The Act implements the Hague requirement that adoption decrees issued by courts in the sending country in compliance with Hague requirements be recognized and given effect in the receiving country. Such decrees will accordingly be entitled to full faith and credit within the U.S., and should entitle adoptive parents to get a birth certificate issued by their local U.S. birth registry based solely on the foreign decree, without the parents having to go through the second U.S. adoption.⁵⁷

However there is also reason to think that the Hague Convention will create additional barriers to international adoption, and some indication that it has already had this effect. Some countries may ratify the Convention based on good faith belief that it is a good idea, but have trouble taking the bureaucratic steps necessary to make it effective, thus locking themselves out of the international adoption business. Anti-adoption forces may see attempts to implement the Convention as an opportunity to mount a battle to limit or close down international adoption, as has apparently occurred recently in Guatemala. Even if the Convention is implemented, the new bureaucratic hurdles it creates will likely increase the expense of international adoption for all prospective parents. This is predicted to be the case in the U.S.,⁵⁸ and it of course creates the risk that reduced numbers of prospective parents will step forward, and reduced numbers of children will receive homes. And sadly there is always the risk that the new legal regimes put in place to accommodate the Convention requirements will result in some children in need of homes being held for even longer periods of time prior to placement, and others being denied placement altogether. This unfortunately is the general record of "law reform" in the area of international adoption, and no surprise given the focus of all adoption law on the negative rather

than the positive inherent in adoption arrangements. One obvious risk presented by the Hague is its requirement that each sending and receiving country create a Central Authority with overall responsibility for the regulation of international adoption. The Hague negotiations included many who foresaw the danger that if the state was given a monopoly over international adoption in any country there was a risk that such adoption would be unduly restricted, given the state's proclivity to regulate in a negative way, to assume that all restrictions will serve children's interests, and to ignore the importance for children of getting nurturing adoptive homes as soon as possible if they are not able to be cared for by their original parents. Many of us involved in those negotiations⁵⁹ fought to preserve the role of "private adoption" within the highly regulated world of international adoption. In this arena no adoption is truly private, but many non-governmental agencies and intermediaries have traditionally worked to facilitate adoption. Typically they work to maximize the opportunities for prospective adoptive parents and children in need of homes to find each other. Many put down such non-state actors as motivated by greed and serving the needs of adoptive parents, at the expense of the best interests of children. But many like myself believe that such actors are essential to keep international adoption alive, and accordingly to truly serve the best interests of children, at least in the many countries in which state governments typically operate to restrict and shut down adoption when given monopoly power. In the context of the Hague negotiations this debate was resolved somewhat ambivalently, but in a way which at least retains the possibility of private adoption. The Hague Convention does require each country to create a Central Authority, but then permits countries to authorize non-state actors to continue to play a major role in international adoption. This is the route that the U.S. has taken, and it seems likely that post-Hague, while international adoption will require a few more hoops and thus some greater expense, things will not change all that much within the U.S. as a result of the Hague. However many countries are likely to read the Hague's requirement for a Central Authority as equivalent to mandating state monopoly control over international adoption, and those hostile to international adoption are likely to promote this reading. This could effectively close down such adoption from those countries. Indeed there is already some evidence that this has been happening in various countries in Central and South America.⁶⁰

International law moved generally in the direction of increased recognition of children's rights and interests, as has the domestic law of many countries. The U.N. Convention on the Rights of the Child is one sign of this movement. The new Constitution adopted by the Republic of South Africa, which provides robust protection for children's rights, is arguably significant of things to come elsewhere, given that that Constitution embodies many of the progressive rights movements of recent years.⁶¹

Many of us might think that this move would encourage the future facilitation of international adoption as an option for children in need of homes. It seems to us clear that children's most fundamental interests are in being raised in a loving, nurturing manner, in the context of a permanent family, and that these interests can best be served by giving them the homes that often will only be available in international adoption. But many of the most powerful proponents of human rights believe very differently. And today it remains quite unclear what the future direction of law and policy governing international adoption will be.

The Politics and the Policy Pros and Cons⁶²

There are three issues at the heart of the debate over international adoption. One has to do with the interests of existing children who need alternative homes and could realistically be placed in international adoptive homes, but are unlikely to find in-country adoptive homes. Another has to do with the interests of the larger community, particularly in the sending country, and particularly including birth parents and homeless children with no prospects of international adoptive placement. The third has to do with adoption abuses such as baby buying and other violations of core adoption laws.

Opponents of international adoption range along a broad spectrum from those who believe that it is inherently a violation of human rights and should be entirely eliminated, the position taken by Baroness Emma Nicholson, the person who as former Rapporteur to Romania for the European Parliament, led the charge to force Romania to pass its current legislation eliminating international adoption as a condition of joining the European Union,⁶³ to those who focus on creating new restrictive adoption regulation designed to better ensure against adoption abuses. Supporters of international adoption range along a similarly broad spectrum, from those who see this as a particularly positive form of family, to those who think that such adoption should be treated as something of a last resort but at least allowed as an option for those children who are not likely to get adoptive homes in-country. Most of those who count themselves as supporters go along with the idea of a preference for in-country adoption over out-of-country adoption, and essentially all agree with the core adoption law principles ensuring that children made available for adoption have been properly separated from their birth parents, with those parents having consented to adoption without any coercion or payment, and ensuring that the children are placed with appropriately screened adoptive parents and protected against any exploitation.

I place myself at the most enthusiastic end of the spectrum of supporters. I find it overwhelmingly clear that international adoption serves the best interests of existing homeless children who can be placed. I take seriously the arguments based on larger community interests, but think in the end that allowing international adoption does more to serve those interests than does closing down such adoption. And finally, in addressing adoption law abuses, I think we need to work to eliminate the abuses but to keep the focus on the bigger picture – ensuring that as many children as possible receive permanent nurturing homes as early in life as possible. We have to avoid, as the saying goes, throwing the baby out with the bath water.

(1) Interests of Existing Homeless Children Who Could be Placed Internationally

Here the case for international adoption rests on the social science and the child development expertise that demonstrates how harmful it is to children to grow up on the streets or in institutional homes,⁶⁴ and how well children do when placed in international adoptive homes.⁶⁵ Children placed early in life in international adoptive homes are likely to do essentially as well in their families and in life as any children raised by their biological parents in those countries. Children subjected to terrible experiences prior to adoptive placement, as many international adoptees have been, often show remarkable success in overcoming the damage done by these

early experiences. By contrast, research on orphanages shows how devastatingly harmful institutional life is for children. Interestingly even the better institutions have proven incapable of providing the personal care that human children need to thrive physically and emotionally. Research on international adoptees who started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to escape the institutions at relatively early ages. Age at adoptive placement regularly shows up in adoption studies as the prime predictor of likelihood of successful life adjustment.

Opponents of international adoption argue that children are best served by remaining in their community of origin, where they can enjoy their racial, ethnic and national heritage, and that they are put at risk when placed with dissimilar adoptive parents in foreign countries, where they may be subject to ethnic and racial discrimination in addition to the basic loss of identity associated with their community of origin.

But the opponents' claims are based on extreme romanticism, without any grounding in the available evidence and without support in common sense. Children doomed to grow up in orphanages or on the streets cannot expect to enjoy their cultural heritage in any meaningful way. And the real choice today for most existing homeless children in the sending countries and in the poor countries of the world that might become sending countries, is between life – and often death – in orphanages or on the streets in their home country and, for a lucky few, life in an adoptive home abroad. Possibilities for adoption at home in the birth country are drastically limited by the poverty of the population and by attitudes toward adoption in most Asian and many other countries that are more blood-biased and otherwise discriminatory toward adoption than they are in the U.S.

Opponents argue that children might be placed in in-country foster care, and in that way benefit from remaining in their country and culture, as well as possibly still linked in some way with their birth family. But foster care does not exist to a significant degree in the sending countries and the poor countries of the world – overwhelmingly the homeless children of the world are living and dying in orphanages and on the streets. The U.S. is the country which has had the greatest experience with foster care – for many decades now the vast majority of our homeless children have been living in foster care because it has been seen as so superior to institutional care. The fact is that even with the resources that the U.S. has to support foster care, it does not work especially well for children, which is part of why on a regular basis child welfare specialists and policy makers focus on what to do about the problem represented by the large number of children living in foster care. Social science demonstrates clearly that while foster care works better for children than living in birth families characterized by child abuse and neglect, it does not work nearly as well as adoption.⁶⁶ It is extraordinarily unlikely that foster care will work better in other countries than it has here, and this is obviously particularly true when the other countries are desperately poor. And the bottom line for existing children who might find adoptive homes abroad now is that foster care, whether good or bad, for the most part simply doesn't exist as a current option.

(2) Larger Community Interests

Here the arguments are more amorphous, social science provides no clear answers, and in the end one must simply make a complicated judgement call. Opponents of international adoption argue that international adoption constitutes a particularly vicious form of exploitation of the impoverished sending countries of the world by the richer countries of the world, and the loss of the poor countries' "most precious resources." Supporters like me see international adoptive families, in which parents and children demonstrate the human capacity for love across lines of difference, as a positive force for good in a world torn apart by hatred based on racial, ethnic, and national differences. We also question how impoverished communities will in fact be in any way enriched by keeping these children in institutions or on the streets.

Opponents point out that at best international adoption is at best a band-aid operation providing homes to only a small fraction of the children in need in any sending country, and argue that the funds spent on giving homes to the handful would be much better spent improving conditions that would benefit the larger group of children in need. A related argument is that the governments of both sending and receiving countries should do more to change the conditions of poverty and the cultural attitudes that result in children being abandoned and surrendered for adoption, rather than making efforts to facilitate the transfer of such a limited number of children to adoptive parents.

These arguments raise hard issues. The history of the world has involved exploitation by the U.S. and some other receiving countries of the world, and it is understandable that many would see international adoption as a continuation of this pattern. And international adoption is unlikely ever to provide direct help for more than a limited number of children. Not only are limited numbers of children now being placed in international adoption, but even if laws were changed to facilitate such adoption, it is unimaginable that the numbers placed would ever begin to seriously address the needs for adequate nurturing of any significant percentage of the vast numbers of children in need. There are, after all, said to be some *100 million children with no available caregivers* – 65 million in Asia, 34 million in Africa, and 8 million in Latin America and the Caribbean.⁶⁷ And in any event, the better, more humane solution would obviously be the elimination of the kind of poverty and injustice that produce so many desperately poor people in so many nations who are unable to keep and raise the children that they bear.

The central question for me is whether international adoption impedes the goals of helping the larger group of children in need and of addressing global poverty and injustice. It is hard to know for sure. It *could* be that international adoption diverts energy and resources that would otherwise be devoted to these goals. But I see no evidence that this is the case, and I hear no claims by opponents that such evidence exists. Indeed I hear no developed arguments as to why this likely would be the case. Opponents instead tend simply to describe with outrage the picture of the rich American swooping in to carry the adoptive baby off to its new privileged life, paying the \$30,000 worth of adoption fees to various adoption agencies and other intermediaries, and they talk of all that that \$30,000 might mean if devoted to improve conditions in orphanages for the many children left behind. But the fact is that denying that prospective adoptive parent the opportunity to parent that child will not likely provide a substitute contribution of \$30,000 to the

sending country's poor children. It will much more likely push that person to pursue parenting through reproductive technology in the U.S. or deflect them from parenting altogether. It's hard to see how it will likely induce either that person or others to do more to work on improving conditions in poor countries for children and for others.

It seems to me more likely that allowing international adoption will push us slightly forward on the path to improving conditions for children and otherwise addressing poverty and social injustice in the poor and the sending countries of the world. And there seems at least some evidence indicating that this might be true. Anecdotal evidence indicates that many international adoptive parents emerge from their experience with a much greater sense of commitment to contribute to social services of various kinds in their children's sending countries. Many of them form new organizations dedicated to providing funds for children and child-oriented social services in their adopted child's home country.⁶⁸ They will also likely be more supportive of efforts by their government to contribute to foreign countries in need or to international organizations devoted to improving the lot of the world's children. Sending country officials that witness foreign adoptive parents gratefully taking into their homes children of different racial and ethnic backgrounds seem likely to realize new potential for placing these children in their own country. There is, for example, some indication that this has happened in South Korea.⁶⁹ The exposure that international adoption brings may provide helpful pressure on sending country officials and on people in the richer countries of the world to improve conditions for children. So, for example, International adoption has created a new consciousness throughout the world of China's one-child policy and of the related widespread killing and abandonment of baby girls. It has created awareness of the horrendous conditions in orphanages worldwide, as the press gets alerted to facts,⁷⁰ and as children come home to the U.S. from orphanages abroad and the parents begin to discover the ongoing problems these children suffer related to orphanage life, and the social scientists begin to document these problems.⁷¹ On a very concrete level, international adoption brings huge new amounts of money to a variety of players in the sending countries, including not just agencies and lawyers but also orphanages. For example, in many countries international adoptive parents are required to pay fees or make contributions that are designed to go directly to improving conditions in the orphanages from which the children are placed for adoption. In China there has for some time been a \$3,000 to \$5,000 fee⁷² which is supposed to be allocated to paying for the adoptive child's support there and to improving orphanage conditions. Given the 6500 children adopted into the U.S. from China in 2006 and the 7900 so adopted in 2005, and assuming a minimum \$3,000 contribution, this would have meant some \$19,500,000 total contributions to orphanages in 2006 and some \$23,700,000 in 2005. In addition international adoption saves sending countries significant costs by relieving them of the burden of support for the children adopted.

In the end it's hard to know for sure what impact international adoption has on the larger goal of helping address global issues of poverty and injustice, but in my view some reason to think that it does more good than harm. Given this, the fact that we *do know* that such adoption radically improves life prospects for virtually all those children who are in fact placed provides a powerful argument for moving in the direction of expanding rather than restricting such adoption.

(3) Adoption Abuses

Here there is dispute as to the *extent* of abuses and as to what to do about abuses, but not as to whether they are a bad thing and should be eliminated.⁷³ Opponents and supporters of international adoption agree that basic adoption law principles should apply: children should not be given to adoptive parents unless the birth parents have voluntarily relinquished or abandoned them; adoptive parents should raise children lovingly and not in any way exploit them. Universally applicable laws, within sending and receiving countries, and now incorporated as well in the Hague Convention as well as other international law like the CRC, prohibit payments to birth parents and other practices that can fairly be characterized as baby buying or selling, they prohibit any exploitation in connection with adoption, and they provide for the screening of international adoptive parents to ensure that they will be appropriately nurturing parents.⁷⁴

Opponents make some arguments that are simply absurd, but are nonetheless seriously problematic to international adoption because they are sometimes believed and thus give adoption an unjustified bad name. So, some have claimed over the years that such adoption involves the murder of children for their organs so that the alleged adoptive parents can use the organs for their “own” children. This rumor has been investigated on numerous occasions by responsible international and other bodies and always rejected as without any foundation.⁷⁵

More common are the claims that international adoption regularly involves the kidnapping of children from birth parents, and the purchase of children from birth parents. There is some proof that on some occasions kidnapping has occurred and the U.S., in order to prevent such abuses, now makes DNA testing to match alleged birth parents with the children surrendered for adoption a requirement in many countries in connection with decisions as to whether to allow the children to be adopted into the U.S. There is also good reason to believe that in some countries payments have on some occasions been made to birth mothers in connection with their decision to relinquish for adoption. Many claim that this is common in Guatemala today, and this is a major argument made in connection with calls to pass new restrictions on adoption there. It is impossible to say how extensive abuses such as kidnapping and the payments to birth parents are. However the opponents regularly make very misleading statements. For example, they tend to equate all adoption with baby buying, citing the large amounts paid by adoptive parents, without regard to the fact that such payments may be and almost certainly generally are entirely legal, as large amounts are involved in the fees charged by agencies and other intermediaries authorized to receive fees for their services in connection with facilitating adoptions. Also opponents ignore the distinction between payments made to birth parents which induce them to surrender children they would otherwise keep, and payments made to parents who would be surrendering in any event. The latter may be illegal, but the former is the problem at the core of the baby-buying prohibition. The idea is to prevent any form of coercion, including the proffer of money, having an influence on the decision whether to keep or surrender the child. It is an idea based on the felt value of enabling birth parents to keep their children, and children to grow up with those parents, if at all possible. It is extremely unlikely that much of this core form of baby buying is going on in the world. It is illegal everywhere, under a multitude of overlapping laws, laws of the sending country, laws of the receiving country, and

international law.⁷⁶ And the reasons that birth parents in the sending countries of the world surrender their children for adoption have to do with overwhelming poverty and social devastation – they simply have no choice. They often will have had no choice in getting pregnant – no access to contraception is typical. They may have a job, if they are lucky, that they would lose if they had a child. They may have one or two children they are struggling to keep alive, and know they are incapable of supporting a third. It is entirely understandable that many of these birth parents might accept money if offered, or seek money if they know other birth parents are getting it in connection with surrendering their children. They desperately need it after all, and everyone else involved in the adoption process, most of whom have no such dire need, seems to be getting paid handsome fees. It may be that we should still make such payments illegal – it would be hard to draw a clear legal line between such payments and the kind of payments that would induce surrender, and you need a clear legal line if you are going to hold people criminally responsible as we do for baby buying. But we should not see such payments as a terrible evil to be avoided at all costs.

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

Opponents of international adoption *never weigh the evils on each side*. Instead they focus solely on the evils represented by adoption abuses, and then argue for restrictive regulation that they claim will help address those evils. They don't consider the evils represented by failing to place children in international adoptive homes, and the good that comes from placing them. And policy-makers in charge of the rules are very responsive to this way of looking at things. As discussed above, the rules governing adoption typically focus on the negatives that come from transferring children from one set of parents to another and not on the positives.

So, adoption opponents and adoption policy-makers often respond to adoption abuses by calling for a moratorium on adoption, either temporary or permanent. An example is Romania, where as noted at ----- above, soon after international adoption opened up, it was closed down again in reaction to a baby buying scandal, and remained closed for years, essentially until it was permanently closed by the new law banning all international adoption except grandparent adoption. Yet the evil represented by the relative handful of cases in which impoverished Romanian birth parents might have accepted money in order to relinquish children they otherwise would have kept is minuscule, in my view, by comparison to the evil represented by

the thousands of Romanian children condemned to live and die in horrible institutions who could have had loving, nurturing adoptive homes.

Adoption opponents and policy-makers typically argue that if international adoption is to continue, the government in any given sending country should take over the adoption process, eliminating any private lawyers and other intermediaries. So do many others who see themselves as supportive of international adoption but focus on the importance of eliminating adoption abuses.⁷⁷ They see the state as more likely motivated to enforce the laws, and the private actors as more interested in facilitating adoption and thus more ready to do what it takes to make it happen including making payments to birth parents. The problem here is that in many countries, state monopoly power over international adoption means that it grinds to a near or total halt. This has been the case in several countries in South and Central America, where as the state has taken over, adoptions dwindle to a small trickle, and the children made available are no longer freed up as infants, but only after spending many months and typically at least two or three years in damaging institutions.⁷⁸ This is the battle that is now being fought out in Guatemala, a country with some of the most international adoption-friendly rules of any country today. Guatemala releases significant numbers of children for international adoption – despite its relatively small size it is one of the major sending countries of the world, second in line after China as of 2006.⁷⁹ It places many of these children in foster care immediately after birth, and then moves many of them on to their adoptive family within six to eight months. This is almost unheard of in today's international adoption world, and of course means for the children that they are spared the horrors of institutional life, and given a good chance once placed in adoption to develop normally both physically and emotionally, by contrast to most international adoptees who, by virtue of spending most of their early infancy in institutions are at high risk for developmental and ongoing problems. However adoption opponents and policy-makers have fixed on Guatemala as the problem country of the day, focused as they are solely on the adoption abuses they see there. They ignore the fact that in calling for restrictive regulations including a state monopoly over international adoption and the elimination of the private intermediaries who make foster care possible, they risk doing devastating harm to thousands of Guatemalan children every year, condemning them to spend unnecessary months and years in damaging institutions, and denying most of those who could under today's rules be placed in adoptive homes any opportunity for any normal family life.

We do need to pay attention to adoption abuses. We need to enforce the laws that already exist making them illegal. In some cases we may need to redesign some laws to make them more effective. But we need to keep in mind that the main thing children need is a permanent nurturing home, and that this is also the main thing most birth parents want for the children they can't raise themselves but must surrender. We should make sure that we don't take any action to cut down on abuses that causes children more harm than good by reducing their chances to obtain a nurturing family.

Reform Directions for the Future

Those committed to human rights and to children's rights need to keep the focus on the *genuine* and *most significant* needs of children, parents, and communities, rather than engaging in false romanticism, and they need to focus on the *genuine* and *most significant* evils that children face. Children need loving, nurturing parents to raise them. They need food and shelter and affection. They need protection from disease and disaster. Large numbers of children in the poorer countries of the world live in truly desperate circumstances. Those in orphanages spend their infancy having bottles jammed in their mouths as they are propped in the corners of their cribs in hopes that some nourishment will happen, left unattended for hours in between bottle-propping events, so that they learn early that screaming their hearts out or making other demands for human attention are meaningless. Those familiar with orphanages say that one of the most horrifying things is the silence that characterizes so many because the children have learned not to bother to ask for attention⁸⁰. Largely deprived of the human touch and human affection as they grow up, those who survive physically are unlikely to develop emotionally and mentally in ways that will make it possible for them to relate meaningfully and happily to other human beings, or to learn or work in meaningful ways. The longer they spend in such orphanages the less chance they will have at anything resembling normal development. By contrast, those placed in international adoption live comparatively blessed lives, and have an opportunity to overcome even very significant deficits caused by early deprivation, with the age of placement overwhelmingly predictive of the chance for normal life.⁸¹ Those who believe in children's rights and in human rights need to promote children's basic right to be liberated from the conditions under which they live in orphanages, and also the conditions under which street children live, and to grow up with parents who can provide the loving nurturing that is essential for human flourishing.

We should place as many of these children as we can in adoptive homes, since the evidence makes clear that adoption generally works better for children than other options such as foster care. There may be instances in which foster care will work better, and of course there should be room for exceptions to the general rule, but the hierarchy of alternative options established by the Hague Convention is the right one – international adoption should be preferred over in-country foster care as a general matter. See discussion *supra* pp_____.

Should in-country adoption be preferred over out-of-country adoption? Almost all who discuss this say yes.⁸² However there is no evidence that in-country adoption works better for children. While almost everyone tends to assume that children should be placed with birth parents of similar cultural and ethnic background, the issue has been examined fairly extensively in the area of domestic transracial adoption within the U.S., and there is not a shred of evidence in the entire body of social science studies following transracial adoptees from infancy into adulthood, and comparing them with control group samples of adoptees placed with same-race parents, that any harm comes to children from being raised by parents of a different ethnic background.⁸³ One might still find an in-country preference appropriate, for a range of reasons that could include a sense that despite the absence of evidence children will still do best when matched with similar parents, a sense that in-country parents deserve a preference because of the history of exploitation their group or country may have suffered, or simply a sense that it looks better to those suspicious of international adoption and will therefore help limit opposition. Many might

find an in-country preference important to counter the risk that the foreign parents' likely comparative wealth will somehow bias the process against the in-country parent.

But the risk of any in-country preference is that it will function as another barrier to placement, delaying and perhaps entirely denying the chance for children to find an adoptive home. This is in part because the overwhelming number of potential adoptive parents for children in poor countries will be in the rich countries of the world. If countries implement an in-country preference by a rule mandating an in-country search before the child can be placed internationally, there is a real danger that this translates for bureaucrats into a rule that they should simply hold the children and avoid placement altogether. This risk is made worse when the official rule prohibits international placement for a period of time, as some countries have provided. When Russia enacted its six-month waiting requirement there was no realistic possibility of any but a tiny fraction of Russia's homeless children finding an in-country home during that six months. So for almost all those homeless children the rule translates to a simple requirement that they spend an additional six months in damaging institutional care – and beyond that such a rule reduces the chances the child will ever be placed, both because older children are harder to place, and because risk-averse bureaucrats get the message from such rules that international adoption should be seen as a failure, a last resort that should be generally avoided. India adopted a rule recently requiring that 50% of adoptions be in-country,⁸⁴ very likely effectively precluding adoption altogether for almost all the affected children. The history of race-matching policies in the U.S., which gave a preference to placing children with black as opposed to white prospective parents, is that such policies resulted overwhelmingly in delaying and denying adoptive placement of black children.⁸⁵ It is in large part because of recognition of this fact that Congress in the 1996 amendments to MEPA, discussed above at -----, eliminated *any preference* for placing children within their racial group.⁸⁶

Ideally in my view there should be no in-country adoption preference. Countries should simply place children as soon as possible in available adoptive homes. But if countries want to institute such a preference, then they should do so in a way designed to cause *no delay whatsoever* in placement for children. Concurrent planning is the term for the adoption program inside the U.S. that should serve as the model. In concurrent planning, adoption professionals work simultaneously to reunite children in foster care with their birth parents, while they work to prepare a child to be adopted. At the point that a decision is reached not to reunite, then the child can immediately move forward to adoption. Adapted to international adoption this model would mean that adoption officials in the sending country would plan simultaneously for the international adoption while they checked to see if any domestic placement would be possible, rather than waiting to plan the international adoption until they had exhausted the domestic adoption possibility. All efforts should be made to avoid any unnecessary delays in placement for children. I share the views of Dr. Dana Johnson, a widely respected specialist in international adoption pediatrics and in the impact of orphanage conditions on children:

I think putting a child in a long-term institution is an act of abuse.... Children in institutional care have deteriorations in many things that we want to see children improve in during the earliest years of their life.... Their cognitive abilities are

lower, their growth is terrible and their brain development is abnormal as well....
*A few days in an institution should be as long as children are asked to endure.*⁸⁷

Assuming that adoption, including international adoption, is made the priority option, policy makers then need to focus on certain key reforms. First they need to ensure that children who cannot realistically be cared for by their parents are freed for adoption as promptly as possible. The ASFA legislation recently passed by the U.S. Congress (discussed *supra* TAN ____) can serve as something of a model for other countries as they look at their domestic laws. Most countries have no adequate system for identifying children in need of adoptive homes and freeing them up from their biological parents so that they can be placed. Orphanages world wide are filled with children who grow up with no meaningful tie to their parents except the technical tie that means they cannot be placed with adoptive parents. The same is true for street children. Law reform efforts need to focus on creating systems for identifying and freeing up such children, and they need to create realistic methods of expediting the entire process for children, from birth to placement, so that children are moved to nurturing adoptive homes as early in life as possible. Ironically and tragically, much of what now goes under the name of “adoption reform” pushes in the exact opposite direction, as discussed above, with countries which have opened up international adoption and begun sending their children abroad for placement, then shutting down again, increasing rather than decreasing the bureaucratic barriers between orphanage children and adoptive placement. The net effect is that infant adoptions are almost unknown today in the international adoption world, although they used to occur frequently. Insisting that children spend additional months and years in the inhumane and destructive conditions of the typical orphanage should be understood as criminal.

Second, policy makers in both sending and receiving countries need to facilitate the adoption process so that it better serves the needs of prospective adopters. The primary reason to do this is not because it will promote their interest in parenting, although that interest should be understood as perfectly legitimate, but because it will maximize the numbers of parents for the children in need. Bureaucratic barriers serve to drive prospective parents away, either away from parenting altogether, or into the world of reproductive technology, where they are seen as having rights to become parents by pretty much whatever means they choose, including the purchase of eggs, sperm, and pregnancy and childbirth services, and where they will be producing new children, rather than giving homes to existing children in need.

Policy makers do also need to address the baby-buying and kidnapping problems that exist in the international adoption world. International adoption’s opponents have grossly exaggerated the scope of these problems, using them deliberately to promote restrictive adoption rules to suit their larger anti-adoption agenda. But taking children from loving birth parents by applying improper financial or other pressures, is deeply wrong. And it victimizes not only the particular parents and children involved, but the larger group of children and parents whose opportunities for legitimate international adoption are thwarted by the negative regulation that is so often triggered by adoption abuses.

Finally, policy makers need to link their new adoption reform efforts with efforts to improve conditions for the children who will not be adopted and for their birth parents. International adoption's opponents are correct in arguing that it can never provide homes for all the children in need, and that we must address the problems of poverty and injustice that result in children being abandoned in large numbers in the poor countries of the world. International adoption provides a natural trigger for such reform efforts. Adoption agencies do a good deal now to socialize prospective international adoptive parents about the importance of raising their children with a sense of their cultural heritage. They could do more to socialize these parents about the importance of giving back to their children's birth country. Agencies and parents now do a good deal to provide support for orphanages and other institutions serving poor children and their parents in sending countries. They could do more. Adoptive parents, agencies, and others in receiving countries become more aware of the problems in the sending countries of the world by virtue of the adoption process. With this knowledge, and with the privilege of caring for these children, comes new responsibility for the children left behind.

1. Professor of Law, Harvard Law School. For other writings on international adoption by the author see: Bartholet, *Adoption Among Nations*, Chapter 7 of FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION (Beacon Press, 1999, originally published by Houghton Mifflin, 1993), pp. 118-63 [hereafter Bartholet, FAMILY BONDS] ; Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. Am. Acad. Matrim. Law 181, Number 2 (Winter 1996); Bartholet, *International Adoption: Current Status and Future Prospects*, in 3 *The Future of Children*, No. 1, 89-103 (Center for the Future of Children, Spring 1993). See also Bartholet, *International Adoption*, chapter 5 in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE, ed. By Lori Askeland (Greenwood Press, Westport, CT 2006); *What's Wrong with Adoption Law?*, 4 *The International Journal of Children's Rights* 263 (1996); Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 *Duke J. Gender Law and Policy* 5 (1995). The author has been deeply involved in issues related to international adoption since 1985, and draws on this experience as well as cited materials throughout this article.

2. See, e.g., Bartholet writings, *supra* n 1; 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. Intl L.J.* 251 (2003) (taking the position that international adoption should be understood as a fundamental human right for children).

3. See Sen, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (Norton 2006) (arguing that conflict and violence are fostered by an inappropriate emphasis on ethnic, religious and national identity).

4. See, e.g., Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 *Yale J.L. & Feminism* 101 (1998) (international adoption often results

in transfer of children from the least advantaged to the most advantaged while doing nothing to alleviate conditions in the children's birth countries); Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. Third World L.J. 25 (2006); Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev. 281 (2004) (international adoption systematically characterized by child selling and exploitation).

5. [Http://travel.state.gov/family/adoption/stats/stats_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html) DAVID are there supposed TO BE TWO "STATS" IN THIS WEBSITE CITE?? See Appendix (hereafter App.) A, *Total Immigrant Visas Issued to Orphans Coming to U.S. 1990-2006* DAVID INSERT WHAT'S MARKED WITH TOP POSTIT DAVID 1 ON YOUR RESEARCH BOOK FOR ME THIS INFO AS APP A, MARKED APP A, AND ALSO GIVE THE SOURCE THERE AS SHOULD APPEAR IN THE LAW REVIEW VERSION OF THIS APP. Pls UPDATE TO INCLUDE 2006

6. See, e.g., Dillon, *supra n. 2*, at 254 ("Despite protestations of neutrality, there is reason to suspect that UNICEF has bought into and perpetuates the idea that intercountry adoption is essentially a vestige of colonialism"); see generally *id* at 256 discussing UNICEF'S efforts more generally.

UNICEF's official position is only grudgingly approving of international adoption, describing it as at least one of "a range of options which *may* be open" for children who cannot be cared for by their birth families (emphasis added), and stating that for children who "cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution." This may be intended to place international adoption lower on the hierarchy than in-country foster care. See discussion of position of Chair of the U.N. Committee on the Rights of the Child, *infra* pp., arguing that similar language in the Hague Convention should be so interpreted, at least where permanent foster care is involved, which he seems to equate with most foster care, *infra* pp. -----. The U.N. position statement on international adoption goes on in the next paragraphs to discuss the alleged problems of inadequate regulation and oversight resulting in widespread adoption abuses including "the sale and abduction of children, coercion of parents, and bribery, as well as trafficking to individuals whose intentions are to exploit rather than care for children," and the related need recognized by many countries and here endorsed by UNICEF to ratify the Hague Convention. UNICEF, *Inter-country adoption*, UNICEF Press Centre, http://www.unicef.org/media/media_15011.html. UNICEF offices in different locations have taken stronger positions against international adoption. See, e.g., UNICEF Australia position in connection with tsunami victims, stating that international adoption should be seen as last resort, and considered only when no other option except growing up in institution. *UNICEF Says "No" to Intercountry Adoption*, <http://www.unicef.com.au/mediaCentre-Detail.asp?ReleaseID=587>. DAVID ADD FROM OTHERS IN MY IA RESEARCH COLLECTION??

7. DAVID FIND UNICEF STMTS IN MY RESEARCH PILE AND/OR IN SARA DILLON

8. See, e.g., *Adoption and the Rights of the Child in Guatemala*, by ILPEC Guatemala for UNICEF (2000), http://www.iss-ssi.org/Resource_Centre/Tronc_DI/ilpec-

unicef_english_report_2000.PDF (study commissioned by UNICEF, conducted by Latin American Institute for Education and Communication (ILPEC), claiming that international adoption in Guatemala characterized by rampant profiteering and baby buying); Marc Lacey, *Guatemala System Is Scrutinized as Americans Rush in to Adopt*, New York Times, 11/05/06 (illustrating popular press assumptions that Guatemala characterized by child trafficking).

9. See, e.g., *Families Without Borders*, UNICEF, *Guatemalan Adoption, and the Best Interests of the Child: An Informative Study* (2003), <http://www.geocities.com/familieswithoutborders/FWBstudyGuatemala.pdf>. FWB (report issued by coalition of prospective and already adoptive parents, refuting UNICEF claims as grossly misrepresentative of Guatemalan adoption situation).

10. See, e.g., on debate over what's happening in Guatemala, Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 Cap. U.L. Rev. 349, 366ff ((2005).

11. See App. B, *Immigrant Visas Issued to Orphans Coming to U.S. 1990-2006 by Country and Year, for Major Sending Countries* DAVID SEE DAVID 2 POSTIT AND UPDATE with 06 AND CREATE APP B AND PUT IN GOOD FORM FOR LAW REV AND GIVE SOURCE THERE. The author has had extensive experience with the Guatemalan situation, including a trip to Guatemala in 2005 to give a keynote speech at a conference addressing the controversy over international adoption (1/20/05).

12. *European parliamentarians break the Nicholson monopoly on international adoptions*, Bucharest Daily News, 3/8/06 (press release by Dr. Charles Tannock, Member of European Parliament for London), <http://www.charlestannock.com/pressarticle.asp.asp?ID=1190>: reporting on how the European Parliament's prior rapporteur on Romania, Baroness Emma Nicholson, had worked to make the EP's official position that Romania should ban international adoption, relying on unproven claims of adoption abuses; how the European commissioners had as a result pressured Romania into passing its new law banning such adoption; and how the current EP rapporteur on Romania, Pierre Moscovici, and many current members of the EP were now in favor of reversing the EP position, and urging Romania to open up international adoption again, based on disagreement with Nicholson's anti-international adoption philosophy, and on belief that such adoption was needed to serve children's needs.

13. The law went into effect on 1/1/05. See Testimony of Maura Harty, Asst. Secretary of State for Consular Affairs, before Commission on Security and Cooperation in Europe ("Helsinki Commission"), 9/14/05, available at http://travel.state.gov/law/legal/testimony/testimony_2635.html. DAVID - 2 "TESIMONY" S RIGHT? ANY OTHER CITE FOR LAW??

14. Ethica, *The Statistics Tell the Story*, <http://www.ethicanet.org/item/php?recordid=statistics> (Report issued by non-profit organization promoting ethical adoption practices, finds that over past 15 years, of 40 top 20 countries of origin for U.S., 13 currently closed or effectively closed,

an additional 4 closed, reportedly temporarily, to investigate concerns or establish new procedures, with the total of 17 countries accounting for 43% of the 40).

15. See generally ADOPTION LAW AND PRACTICE, Joan Hollinger, ed., chap. 10, *International Adoption: Overview*, by Elizabeth Bartholet, with an update in 2002 by Joan Hollinger, at sec. 10.02 (hereafter ADOPTION LAW AND PRACTICE: *International Adoption*).

16. Immigrant Visas Issued to Orphans Coming to the U.S.
http://www.travel.state.gov/family/adoption_resources_02.htmlhttp://www.travel.state.gov/family/adoption_resources_02.html

17.

18. See App. B.

19. *Requirements for intercountry Adoption from the Republic of China to take effect on May 1, 2007 (Preliminary version)*,
http://www.travel.state.gov/family/adoption/intercountry/intercountry_3110.html. See also Belluck and Yardley, *China Tightens Adoption Rules for Foreigners*, New York Times (12/20/06),
http://www.nytimes.com/2006/12/20/us/20adopt.html?_r=1&oref=slogin&pagewanted=p...

20. Russell, *The Mystery of the Chinese Baby Shortage*, New York Times, 1/23/07, Op-Ed, A19. See generally, Michelle Van Leeuwen, *The Politics of Adoptions Across Borders: Whose Interests Are Served? (A Look at the Emerging Market of Infants from China)*, 8 Pac. Rim L. & Pol'y J. 189 (1999).

21. Hoksbergen, Rene, *Experiences of Dutch Families Who Parent an Adopted Romanian Child*, 23, *Journal of Developmental & Behavioral Pediatrics*, pp. 403-409 (December 2002) (120,000-150,000 abandoned children living in 600-800 orphanages as of 1989, with approximately 10,000 institutionalized children placed in international adoption between 1990 and 2000).

22. See Harty Testimony *supra* n. 13. See U.S. Dept. of State Update on Romanian Moratorium on International Adoption (June 2003); see also March 2004 Update at http://www.travel.state.gov/family/adoption_romania.html. DAVID CHECK IF THESE STATE DEPT CITES STILL MAKE SENSE AS THEY ARE FROM 04 DRAFT. THE HARTY CITE IS GOOD.

23. See Elizabeth Bartholet, FAMILY BONDS, *supra* n.1 at 155-56.

24. See n. 12 *supra*.

25. See Congressional Coalition on Adoption Institute, *Senate Unanimously Passed Senate Resolution 359 Concerning the Government of Romania's Ban on Intercountry Adoptions* (2006). <http://www.ccainstitute.org/detail.php?id=116>.

26. Council of Europe Commissioner for Human Rights, *Follow Up Report on Romania*. <https://wcd.coe.int/ViewDoc.jsp?id=984009&BackColorInternet=99B5AD&BackColorIntranet+FABF45&BackColorLogged=FFC679>. DAVID CHECK CITE TO MAKE SURE I GOT RIGHT.

27. See, e.g., Mental Disability Rights International (MDRI), *Hidden Suffering*, Executive Summary at iii-viii, 1, 3, 4 (2006); presentations at Harvard Law School by Charles Nelson and Eric Rosenthal, CAROL INSERT DATE, course entitled "The Art of Social Change." The MDRI Report, while focusing on children with disabilities, documents the fact that even infants and children without disabilities continue to be sent to and kept in institutions, despite the new law forbidding placement of those 0-2 who are without disabilities in institutions. It also documents the horrific conditions characterizing many of these institutions, and the fact that even the new, smaller, and allegedly improved institutions function as devastatingly damaging places for children: "Romania's newer, cleaner, and smaller institutions continue to constitute a threat to children's right to life and protection from inhuman and degrading treatment...." at v.

28. As of 2003, there were an estimated 12,300,000 AIDS orphans in Africa out of 43,400,000 total orphans. By 2010 the number of AIDS orphans is expected to rise to about (OR BY ABOUT - DAVID WHICH DID YOU MEAN?) 18,000,000 out of a total 50,000,000 orphans. UNAIDS, UNICEF, and USAID, *Children on the Brink 2004: A Joint Report on New Orphans Estimates and a Framework for Action (2004)*, available at http://www.unicef.org/publications/files/cob_layout6-013.pdf.

29. In both 2005 and 2006, three African nations appeared in the list of top sending nations to the U.S. See App. B. DAVID DOUBLE CHECK ME ON THE 06 CLAIM PLS. See also Melissa Fay Greene, *What Will Become of Africa's AIDS Orphans?* N.Y. Times, 12/22/02, §6 (Magazine), at 50.

30. See FAMILY BONDS, *supra* n. 1 at 29 and n. 4. UPDATE WITH ANY MORE RECENT DATA ??

31. The U.S. is now demanding that Guatemala change its policies to accord with the Hague Convention in hopes presumably that this would eliminate the alleged problems. See Hearing Testimony Capitol Hill, House International Relations Committee [hereafter Congressional Testimony], Catherine M. Barry, Deputy Asst. Secretary, Overseas Citizens Services (11/14/06); Dept. Of State, *Frequently Asked Questions: Intercountry Adoptions and the Hague Convention: Guatemala*, http://travel.state.gov/family/adoption/notices/notices_2859.html.

32. See, e.g., description of U.S. suspension of adoptions from Cambodia in Dec. 2001, in Blair, *supra* n. –. See also as an example of the kinds of concerns expressed by U.S. officials, Congressional Testimony, *supra* n. 32, Christopher H. Smith, Chairman, Subcommittee on Africa, Global Human Rights and International Operations, Opening Statement, noting that in the top four sending countries, China, Guatemala, Russia, and South Korea, “the United States has “serious concerns about baby selling, trafficking, abandonment and fraud” (11/14/06).

33. See Hague Conference, http://hcch.e-vision.nl/index_en.php?act=status.comment&csid+767&disp=type. See also Blair, *supra* n. – on countries other than the U.S. suspending Cambodian adoptions. FIND PAGE NO IN Blair at TAN 68-69.

34. ADD CITE TO LAW. See Daniel Levy, *The Child Citizenship Act of 2000*, 6 *Bender’s Immigr. Bull.* 293 (2001).

35. See Congressional Testimony, *supra* n. 32, Lori Scialabba, Associate Director, U.S. Citizenship and Immigration Services, U.S. Dept. of Homeland Security (11/14/06).

36. See ADOPTION LAW AND PRACTICE, *supra* n. 2, *chap. 12, Economic Consequences*, sec. 12.05[1][c]; Internal Revenue Code sec. 23. IRS publication 968, Cat. No. 23402W. The eligibility limits are adjusted each year also; for 2007, the tax credit is reduced when adjusted gross income is \$170,820 and above, and is completely phased out when AGI is \$210,820. <Http://www.irs.gov/pub/irs-drop/rp-06-53.pdf>.

37. Adoptions of certain “special needs” children, identified as hard to place, have generally been subsidized by the state and federal governments since 1980.

38. ADD CITE TO LAW; CAN FIND IN MY RESPONSE TO GRIFFITH OR JUST LOOK UP.

39. ADD CITE TO LAW

40. See generally Barholet, *FAMILY BONDS*, *supra* n.1.

41. See Barholet, *Guiding Principles for Picking Parents*, 27 *Harv. Women’s L.J.* 323 (2004).

42. See Barholet, *The Challenge of Children’s Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3:2 *Whittier Journal of Child and Family Advocacy* 215-230 (2004).

43. U.N. General Assembly Resolution 41/85 (Dec. 3, 1986).

44. G.A. Res. 44/25, U.N. GAOR, 61st plen. mtg., Annex, *reprinted in* 28 *I.L.M.* 1448 (1989), *with corrections at* 29 *I.L.M.* 1340 (1990). Articles 20, 21, and 35 deal with the protection of

children without families, adoption nationally and internationally, and the sale, trafficking, and abduction of children.

45. Office of the High Commissioner for Human Rights (2003), <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-crc.htm>.

46. Jacob Doek Presentation at Harvard Law School, “Child Advocacy Policy Workshop” course, CAROL FILL IN DATE FOR THIS CAP spring 05 class session..

47. See Bartholet, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 81-97 (Beacon 1999).

48. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, reprinted in 32 *I.L.M.* 1134, 1139 (1993) [hereafter Hague Convention]. For the text of the 1993 Hague Convention, go to <http://www.hcch.net/e/conventions/text33e.html>.

49. See n. 47, *supra*.

50. See generally for descriptions of Convention Alexandra Maravel, *The U.S. Convention on the Rights of the Child and the Hague Conference on Private International Law: The Dynamics of Children’s Rights Through the Legal Strata*, 6 *Transnat’l L. & Contemp. Probs.* 309 (1996); Dillon, *supra* n. ----; Ryan, *For the Best Interests of the Children*, 29 *B.C. Int’l & Comp. L. Rev.* 353 (2006).

51. See Hague Convention on Intercountry Adoption http://www.travel.state.gov/family/adoption_hague.html. (Updated information as of 6/14/05)

52. See generally Kathleen Sullivan, *Intercountry Adoption Act Becomes Law*, 5 *Bender’s Immigr. Bull.* 977 (2000).

53. For the text of the Intercountry Adoption Act of 2000, Pub.L. No. 106-279, 114 Stat. 825, see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ279.106.pdf

54. See Hague Convention on Intercountry Adoption, *supra* n. 49.

55. See generally Kathleen Sullivan, *supra* n. 53. See INA § 101(b)(1) F(i); 8CFR §204.3._

56. See Scialabba testimony, *supra* n. — (once Hague effective for U.S., definition of child who may be adopted will be broadened to include child with two living biological parents incapable of providing care, and to include child with a sole parent regardless of whether that parent is father or mother). See generally Kathleen Sullivan, *supra* n. 53.

57. See Hollinger, *Resisting Challenges to the Rule of Full Faith and Credit for Adoption Judgements*, 8 *Adoption Quarterly* 3, at 84 n. 3.

58. See Congressional Testimony, *supra* n. 32, Richard Klarberg, President & CEO, Council on Accreditation, noting that U.S. adoption agency costs will go up as a result of Hague-related accreditation requirements (11/14/06).

59. The author served as a member of an advisory group to the U.S. State Dept. In connection with its role in representing the U.S. in the Hague Convention negotiations.

60. See App. A. See also Congressional Testimony, *supra* n. 32, Thomas DiFilipo, President & CEO, Joint Council on International Children's Services ("In at least four Central and South American countries, centralization has contributed to the elimination of intercountry adoption as a viable option," citing decrease in average annual adoption from 251 children to 0) (11/14/06).

61. See generally Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. Pa. J. Const. L. 1 (1999). See also, e.g., the 1991 Children Act in the United Kingdom, giving children the right to sue on their own behalf in family law matters. Fiona Millar, *Children: A Law that Cares at Last*, *Guardian*, Jan. 4, 1993, at E 10.

62. See generally Bartholet, *FAMILY BONDS*, *supra* n.1, at 150-63. See also other Bartholet writings cited *supra* n.1.

63. Nicholson, *Red Light on Human Traffic*, *Guardian Unlimited*, 7/1/04 (opposing international adoption, and relying on entirely unsubstantiated claims in promoting her position, e.g., that international adoptees are at high risk of "pedophilia, child prostitution or domestic servitude"). See *supra* nn----- for further discussion of her position and its current rejection by many members of European Parliament including the person who succeeded her as Rapporteur to Romania DAVID DOUBLE CHECK THIS IS HIS CURRENT POSITION. Others taking a similar hostile view to all international adoption include Bainham, *International Adoption from Romania – Why the Moratorium Should not Be Ended*, 15 *Child. & Fam. L.Q.* 223, 234-35 (2003).

64. See, e.g., Zeanah, Nelson, et al, *Designing research to study the effects of institutionalization on brain and behavioral development: The Bucharest Early Intervention Project*, 15 *Development and Psychopathology* 885, 886-88 (2003), summing up previous research on deleterious effects of institutional rearing, including recent research on many problems of children adopted out of institutions in Eastern Europe, Russia, and other countries, as well as ameliorating effects of early intervention. This article describes the Bucharest Early Intervention Project (BEIP), an ongoing randomized controlled trial of foster placement as an alternative to institutionalization designed to document scientifically both the effects of institutionalization and the degree of recovery that foster care can provide, and to assist the government of Romania in developing alternative forms of care beyond institutionalization. Research already produced by

BEIP “Core Group” documents some of the damage Romanian children have suffered by virtue of institutionalization. Marshall and Fox, *A Comparison of the Electroencephalogram between Institutionalized and Community Children in Romania*, 16 *Journal of Cognitive Neuroscience* 1327 (2004); Parker and Nelson, *The Impact of Early Institutional Rearing on the Ability to Discriminate Facial expressions of Emotion: An Event-Related Potential Study*, 76 *Child Development* No. 1, p. 54 (2005). For other recent research see the St. Petersburg-USA Orphanage Research Team, *Characteristics of children, caregivers, and orphanages for young children in St. Petersburg, Russian Federation*, 26 *J. Of Applied Developmental Psychology* 477 (2005) (giving comprehensive, empirical description of orphanage environments and describing most salient deficiencies as in social-emotional environment, and describing harmful impact on children, all consistent with reports on other countries’ orphanages); Yagmurlu et al, *The role of institutions and home contexts in theory of mind development*, 26 *J. Of Applied Developmental Psychology* 475 (2005) (documenting harmful impact of institutionalization on “theory of mind” development of children in Turkey, relevant to social, cognitive and language development, and psychological adjustment, all related to deprivation of normal adult-child interaction, and all consistent with other research findings. See also findings in MDRI Report, *supra* n —, and related research cited, at 5, 20-21, and nn 25-34. See also ADOPTION LAW AND PRACTICE: *International Adoption*, *supra* n. 2 at §10-17, §10.03[1][c], p. 10-20 and nn. 36-37; Bartholet, FAMILY BONDS, *supra* n. 1 at 150-51, 156-57.

65. See description of earlier research in Zeanah, Nelson, et al, *supra* n. 65. A meta-analysis of research on international adoptees recently published in the *Journal of the American Medical Association* showed the adoptees generally well-adjusted with those living with their adoptive families for more than 12 years the best adjusted, and with preadoption adversity increasing the risk of problems. Juffer and van Ijzendoorn, 293 *JAMA*, no. 20, p. 2501 (2005). See also ADOPTION LAW AND PRACTICE: *International Adoption*, *supra* n.2 at sec. 10.03[1][c], 10-15 - 10-21; Bartholet, FAMILY BONDS, *supra* n.1, at 150-60. Early results of the Bucharest Early Intervention Project, *supra* n. 70, show that placement of the institutionalized Romanian children in foster care had positive effects on their intellectual, emotional, psychiatric and brain development, with the length of time previously in the institution and the age at which removed to foster care factors in their functioning. Univ. of Maryland press release, Institutionalized Children Benefit from Early Intervention (12/14/06); see also Presentation by Dr. Charles Nelson of Bucharest research results at Harvard Law School, class session in The Art of Social Change, 10/19/06.

66. See Bartholet, NOBODY’S CHILDREN, *supra* n. .

67. USAID, UNICEF, and UNAIDS, *Children on the Brink 2002: A Joint Report on Orphan Estimates and Program Strategies* (Washington, DC: TvT Associates, http://www.dec.org/pdf_docs/PNACP860.pdf

68. See, e.g.: humanitarian aid projects created by New Hope adoption agency in countries where it has adoption programs, http://www.newhopewa.org/international/given_back.asp

(Website describing programs and encouraging contributions); Christianson, *International Adoption: Giving Back to Your Child's Country of Origin*, http://adoptionblogs.typepad.com/adoption/2004/11/international_a.html (blog by author specializing in adoption issues encouraging readers to give back to countries from which they adopt).

69. Liu, *International Adoptions: An Overview*, 8 Temp. Int'l & Comp. L.J. 187, -----(TAN 238).

70. DAVID CAN YOU FIND CITE TO 60 minutes SHOW on china ORPHANAGES CALLED SOMETHING LIKE THE KILLING ROOMS;

71. See, e.g., research reports *supra* n. 65.

72. State Department, http://travel.state.gov/family/adoption/country/country_365.htm (\$3,000-5,000 required donation to institution where child raised); Kleem, *Airplane Trips and Organ Banks: Random Events and the Hague Convention on Intercountry Adoptions*, 28 Ga. J. Int'l & Comp. L. 319 at —, (TAN39) (discussing international adoption from China and required donation); Van Leeuwen, *supra* n. 4 at 5 (same).

73. See generally Blair, *Wells Conference on Adoption Law: Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 Cap U.L. Rev. 349 (Winter 2005) (thoughtful discussion of the need to take international adoption abuses seriously both to address those abuses and to protect international adoption's ability to continue to serve the needs of homeless children).

74. So, for example, baby-buying not only violates the laws of all sending and receiving states, but also a variety of international laws. The Convention on the Rights of the Child (CRC), *supra* n—, prohibits “improper financial gain” and “the abduction of, the sale of or traffic in children....” Arts. 21(d), 35. CHECK LATTER. An Optional Protocol to the CRC, with 103 states parties, requires contracting nations to criminalize the improper inducement of consent and to enact laws and institute programs to deter the sale of children. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, annex II, arts. 3, 9-10, U.N. Doc. A/RES/54/263 (May 25, 2000). One of the major goals of the Hague Convention is to establish safeguards to prevent the abduction, sale, or trafficking of children, and many of its provisions are designed to further these goals, with other provisions designed to ensure against other abuses. See Blair, *supra* n. —.

75. DAVID FIND BARTHOLET DISCUSSIONS IN MY PRIOR INTERNATIONAL ADOP ARTICLES

76. See n. 75, *supra*.

77. See, e.g., Blair, *supra* n — .

78. See *supra pp.* — and *nn.*----- . See also App. B.

79. See App. B.

80. The MDRI Report at 4 describes an institution for newborns in Romania as follows:

Children who do not receive attention when they cry learn to stop crying. During MDRI's visit, there was an eerie silence about the facility. Only one baby on the ground floor was crying; staff informed investigators that this child had been placed in the institution the day before. While about one-third of the babies were sleeping, two-thirds were awake but there were no sounds of cooing or babbling, normal developmental sounds of babies that age.

81. See research cited *nn.* 65-66 *supra*.

82. See Blair, *supra n* —, for discussion of issues regarding in-country preference.

83. See Bartholet, *Where Do Black Children Belong? The Politics of race matching in adoption*, 139 U. Penn. L. Rev 1163, 1207-26 (1991); Bartholet, NOBODY'S CHILDREN, *supra n.* —, 126-28.

84. *Handling with Kid Gloves*, Fin. Express, 7/16/05, available at 2005 WLNR 11195769; Blair, *supra n.* ----, at ----- (TAN 130).

85. See Bartholet, *Where Do Black Children Belong?*, *supra n.* 84, at 1201-07; Bartholet, NOBODY'S CHILDREN, *supra n.* 84, at 126.

86. See Bartholet, NOBODY'S CHILDREN, *supra n.* 84, at 130-31; Bartholet, *Commentary: Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption*, 34 J. Am. Acad. Psychiatry Law 315 (2006) (describing decisions by the agency with enforcement responsibility for MEPA which make it crystal clear that race is to play no part in agency decision-making).

87. MDRI Report, *supra n.* —, at 21 (emphasis added). .