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Articles

INTERCOUNTRY ADOPTION AS CHILD TRAFFICKING

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When is intercountry adoption a form of child trafficking? The purpose of this Article is to attempt to answer this question, particularly from the perspective of international law. As it turns out, the answer is surprisingly obscure. Thus, a second purpose of this Article is to explain why a question so central to the ethical and legal legitimacy of intercountry adoption is so difficult to answer.

Part I of this Article explores some of the ideological and ethical dilemmas that initially make it difficult to distinguish intercountry adoption from child trafficking, and argues that an exploration of legal standards may represent a way out of the ideological impasse. Part II explores in some detail the question of when abusive adoption practices constitute illicit child trafficking under international law. Part II.A discusses the development of the international law of trafficking from its roots in anti-slavery conventions. It is particularly significant that the law has often refused to define the mere sale of a person as a form of trafficking; instead, the law has defined illicit trafficking to require some form of exploitation beyond sale, such as enslavement, sexual exploitation, or exploitative labor. Part II.B discusses contemporary international law documents which specifically address abusive

* Professor of Law, Cumberland Law School, Samford University. I would like to thank Miriam Cherry, Brannon Denning, and Desiree Smolin for their review of, and comments on, earlier versions of this Article. I also benefited from the comments of a number of Cumberland Law School colleagues at a faculty colloquium presentation of this paper. In addition, I wish to thank three Cumberland students, Vickie Willard, Ashley Mims, and Ken Scheinert, for their research assistance. Finally, it has become traditional for members of the adoption triad writing about adoption to note their personal experience with adoption; in this regard, it may be relevant that my wife and I are parents of older, internationally adopted children. Under these circumstances, I particularly wish to thank my wife, and adoptive and birth children, who have contributed so much to my developing understanding of these issues.

adoption practices as a form of trafficking. The recent movement of international law to address abusive adoption practices as a form of illicit traffic or child selling is cautious and incomplete. Initially, it appeared that at least some abusive adoption practices involving the transfer of children for financial consideration had been clearly condemned as a form of illicit child selling or child trafficking. However, a closer analysis of these provisions, in the context of both domestic and intercountry adoption, reveals that their prohibitions of abusive adoption practices as trafficking are largely illusory and ineffective. The law and practice regarding money and adoption turn out to be so mired in legal fictions and regulatory gaps as to make it extraordinarily difficult to distinguish between licit and illicit payments. The law of both domestic and intercountry adoption systems are compromised in their capacity to prohibit abusive adoption practices, because they have habitually permitted market behavior to predominate, while excusing such behavior through legal fictions.

The Conclusion compares Judge Richard Posner's use of verbal formulas in defending his famous market approach to adoption, with the use of similar verbal formulas in the law. These verbal formulas repeat the law's earlier reluctance to define the sale of a person as a form of illicit trafficking, absent some further enslavement or exploitation of the person. The Conclusion suggests that the law uses verbal formulas and legal fictions to implicitly permit what Judge Posner so controversially advocated, the creation of an adoption market in children. Under these circumstances, it turns out that the actual practices of intercountry adoption are, in systemic forms, a form of child selling or child trafficking. This is not to say that every individual adoption is illicit or unethical, but rather that the adoption system has become so intertwined with market behavior as to, in theory and practice, frequently permit child selling as a form of adoption. While some of the most important sending nations are generally free of child trafficking within their adoption systems, the adoption systems of a significant number of sending nations have been seriously impacted by abusive practices related to money and the transfer of children. This Article concludes that unless significant reforms are adopted, intercountry adoption will eventually be abolished with history judging it as another form of exploitation. Therefore, even assuming that intercountry adoption is not inherently exploitative or a form of child trafficking, it will be judged such, because the legal system and adoption practice have permitted intercountry adoption to operate as a market in human beings.

I. WHY IT IS DIFFICULT TO DISTINGUISH CHILD TRAFFICKING FROM INTERCOUNTRY ADOPTION: PROBLEMS OF IDEOLOGY AND ETHICS

The association of child trafficking with intercountry adoption will likely strike some readers as obvious, others as offensive. To some, intercountry adoption in itself is more or less a form of child trafficking, as it involves the transfer of children from poor nations to rich nations in order to meet the demand of those in rich nations for children. The fact that those seeking to adopt want daughters and sons, not sex or labor, seems to make little difference for those most ideologically opposed to intercountry adoption. In broad terms, it is still a matter of the citizens of rich countries using their wealth and power to "buy" the vulnerable children of the poor. From this perspective, those who really care about the suffering of children in developing nations should provide assistance and help to children within their own societies, rather than spending inordinate sums to strip children of their national identity, native culture, and language.

By contrast, those most supportive of intercountry adoption perceive literally millions of children in need of intercountry adoption in developing and transition economy nations. Children abandoned, killed, left in dismal orphanages, or living on the streets bear horrific testimony to the pressing need for adoption. From this perspective, ethical or political objections to intercountry adoption lack legitimacy, since they sacrifice the concrete good of children to ideological idols.[1]

These sharply conflicting views of intercountry adoption engender confusion. When one group views intercountry adoption as a form of child trafficking, while another views intercountry adoption as a beautiful act of compassion, the actual operation of our system of intercountry adoption becomes obscured. Continuing the ideological debate over whether intercountry adoption is inherently good or evil is a fool's errand, like so many other ideological debates leading further and further afield into conflicting worldviews. The resolution of such worldview conflicts cannot be found in the realm of brute facts—if there even is such a realm—because facts are viewed through the lens of

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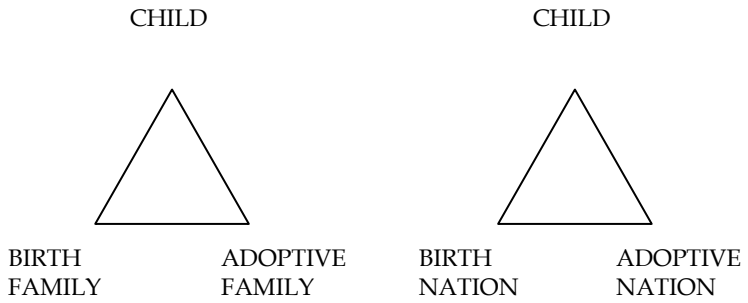
[1] For useful summaries and citations regarding the ideological conflicts over intercountry adoption, see ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION xxi-xxii, 141-63 (Beacon Press 1999) (1993); Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L. J. 179 (2003).

worldviews, and often seem powerless to conquer strong ideological commitment.

Fortunately, it is possible to bring some clarity to the debates concerning intercountry adoption, despite the inability to resolve the core ideological conflicts. We can seek broadly acceptable definitions for when adoption has clearly denigrated into child trafficking, even if we cannot agree on whether intercountry adoption is per se a form of trafficking. We can seek reform of intercountry adoption, even as some argue that intercountry adoption is an evil that should be abolished.

Initially, it is helpful to guide the ethical inquiry over intercountry adoption by reference to two adoption "triads."[2] The first triad, intrinsic to adoption itself, is the set of complex relationships between birth family, adoptive family, and child. The second triad, specific to intercountry adoption, is the complex set of relationships between the child and sending and receiving nations.



The ethical touchstone of intercountry adoption should be the imperative to respect the dignity and rights of all members of both triads. This imperative comes not merely from the broad ethical mandate to respect all human persons, and all nation-states, but it also follows from the unique nature of the adoption triads. In each adoption triad, the child is the central figure because the child is inherently and permanently connected in profound ways to all of the other triad members and links the triad members to one another. The child's inherent and permanent relationship to all triad members means that the

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[2] The language of an adoption "triad" or "triangle" is common in adoption literature. *See, e.g.*, E. WAYNE CARP, ADOPTION IN AMERICA, at 1, 19 (2002) [hereinafter CARP, ADOPTION]; ARTHUR D. SOROSKY ET. AL., THE ADOPTION TRIANGLE: SEALED OR OPEN RECORDS: HOW THEY AFFECTED ADOPTEES, BIRTHPARENTS, AND ADOPTIVE PARENTS (1978).

child's best interests cannot be considered in isolation from the rights of the other triad members. An adoption built upon a severe deprivation of the rights of the birth family, for example, intrinsically harms the child as well, because of the child's profound and permanent connection to her birth family. The same can be said about all of the other members of each triad. Thus, to the degree that adoption seriously harms a triad member, the child also is harmed. From this perspective, the only kind of adoption that can serve the "best interests of children" is adoption that honors all triad members. Of course this does not mean that all triad members receive everything they demand, but it does mean that attempts to save children at the expense of the dignity and well-being of birth or adoption families or nations are inherently flawed. Ethical adoption, therefore, is adoption that respects the dignity and rights of all triad members.

The adoption triad reminds us that the legal fiction of no continuing relationship between adopted child and birth family is just that—a fiction. Indeed, the contemporary experience of adoption indicates that even adopted individuals with excellent relationships with their adoptive families yearn to know, or at least know about, their birth families.[3] Reunions are attempted and arranged across the barriers of oceans, cultures, and language.[4] In intercountry adoption, moreover, the continuing psychological link to the birth family is closely related to the continuing link to the birth nation. Consider, for example, the common instance of a Korean girl adopted by a white American family. It would take a willful blindness to deny the Korean adoptee's family ties to Korean parents and the nation of Korea. Indeed, the Korean adoptee cannot escape the obvious—that her physical body did not descend in any way from her adoptive parents. Every part of her physical appearance points back to Korea. No matter how American she is, she is also inevitably, permanently, and inescapably Korean.[5] Thus, any system of adoption built upon denying her Korean identity—or demeaning, dishonoring, or victimizing the family and nation from which she came—in principle harms the adoptee herself.

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[3] *See* Barbara Melosh, *Adoption Stories*, *in* ADOPTION IN AMERICA 218-45 (E. Wayne Carp ed., 2002) (reviewing literature of adoption narratives).

[4] *See, e.g.*, JANE JEONG TRENKA, THE LANGUAGE OF BLOOD: A MEMOIR (2003); FIRST PERSON PLURAL (Dean Bortshay Liem 2000) (documentary film).

[5] *See* ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 52-53 (2000).

From this perspective, intercountry adoption is neither an inherent good nor an inherent evil but rather it is a potential or conditional good. To the degree that an adoption, or system of adoption, meets the criteria of treating all triad members fairly—giving them their "due"—then the system has positive merit. To the degree that an adoption, or system of adoption, victimizes or demeans one or more triad members, adoption is no longer a good, but becomes—at least in significant part—an evil, and one that is generally harmful to the child.

As a matter of abstract philosophy, it might be possible to become lost in interminable debates over what it means to respect members of the triad.[6] Fortunately, however, it is possible to rely on legal documents and principles defining proper treatment toward the various triad members. These legal documents provide, at a minimum, plausible starting points for defining the proper treatment of each triad member, and hence, the minimum requisites of a legitimate intercountry adoption. These legal documents also stand for the proposition that certain legal harms, such as trafficking or selling children, generally cannot be justified by claims of other "goods." Although it is certainly possible to argue that these legal standards are ethically flawed, this Article will presume that these legal standards, many of which are drawn from international legal materials, are plausible from a broad range of worldviews. After all, an attempt to "save a child" by reducing the child to an article of commerce, or by inducing her birth parents to sell her, would seek to validate victimization of the child and her loved ones in the name of the best interests of the child.

A purpose of this Article, therefore, will be to look beyond the fog of the ideological conflict, to the legal standards for a legitimate intercountry adoption. Put another way, this Article will seek the legal standard for discovering when intercountry adoption is really a form of child trafficking, and hence is legally and ethically illegitimate.

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[6] As Professor Carp has noted, the position that adoption, or at least traditional closed adoption, is inherently harmful to the child, leads to the argument that such adoption should be abolished. *E.g.*, E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURES IN THE HISTORY OF ADOPTION 222 (1998) [hereinafter CARP, FAMILY MATTERS] (noting the parallel argument in regard to intercountry adoption is that intercountry adoption is inherently exploitative and harms children by stripping them of their culture and language). I am seeking to avoid these ideological arguments, however valid or invalid, and instead attempt to apply broadly acceptable legal and ethical standards against selling and trafficking children.

II. DEFINING ADOPTION AS CHILD TRAFFICKING: THE LEGAL STANDARDS

A. Development of International Definitions on Trafficking

Despite the broad international condemnation of trafficking in children, it is not easy to find a complete and authoritative legal definition. Under these circumstances, it is helpful to begin with the dictionary definitions of the terms "traffick" or "trafficking." The most relevant meanings of these terms include the import and export trade, and the business of buying and selling.[7] The concept of trafficking in children generally refers, therefore, to the buying and selling of children. The term would be most applicable where a child was sold and then moved a significant distance, particularly across borders, but any sale of a child should suffice as a form of "trafficking." Thus, a sale of a child would be a form of "child trafficking."

It should also be helpful to trace the lineage of the legal condemnation of child trafficking. The legal conception of trafficking appears to be a derivative of long-standing legal condemnations of slavery and "slavery-like" practices. Logically, the link is obvious: normally the buying and selling of human beings implies a kind of ownership of a human being equivalent to, or at least analogous to, slavery. Both buying and selling human beings, and enslaving them, reduces human beings to articles of commerce. Moreover, slavery has generally been associated with the "slave trade," and hence efforts to abolish slavery have also focused on abolishing the "slave trade." Since the term "trade" and "trafficking" can be used as synonyms, the term "trafficking" in this context connotes a kind of slave trade.

It is therefore possible to follow the international concern with trafficking in children as a development of international documents intended to abolish slavery. In the 1926 Slavery Convention ("1926 Convention"), slavery is defined as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."[8] The "slave trade":

> [I]ncludes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view

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[7] WEBSTER'S NEW COLLEGIATE DICTIONARY 938 (7th ed. 1967).

[8] Slavery Convention, Sept. 25, 1926, art. 1(1), T.S. No. 778 [hereinafter 1926 Slavery Convention].

> to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.[9]

The ambiguity of this definition is made evident by its application to the kinds of abusive adoption practices at concern in this Article. For example, in the Andhra Pradesh, India adoption scandals it was revealed that scouts had been sent to purchase infants from impoverished birth parents; the scout in turn would be paid by the orphanage for the child, receiving a substantially higher sum than had been paid to the birth parents. In this instance, the child would have been sold twice: once by the birth parent to the scout, and then a second time, at a profit, by the scout to the orphanage. The orphanage would then place the child for adoption to a family in the United States, receiving adoption "fees" more than ten times higher than what it had paid for the child.[10] Similarly, some U.S. agents apparently hire "spotters" as their agents in Latin America, Asia, and Eastern Europe, paying these intermediaries "bounties" as high as ten-thousand dollars for each child they find, and apparently not looking too closely at how the children were obtained.[11] Do such practices constitute either the "slave trade" or "slavery" under the 1926 Convention?

A close examination of the definition of the "slave trade" reveals that the mere sale of a human being is not necessarily sufficient to meet the definition; instead, the sale must involve either the sale of a "slave" or the intent to reduce the individual to slavery. The question therefore becomes: Are children slaves or under slavery, merely because they have been sold? The legal definition of "slavery" is ambiguous on this point, for the definition of slavery leaves its key terms—"powers attaching to the right of ownership"—undefined. A slave is someone over whom any power "attaching to the right of ownership" is "exercised," but what are those powers? It could be argued that the power to sell or alienate is a traditional "right of ownership," and therefore that selling a human being makes her a slave, regardless of what is done with the person. According to this interpretation, a child purchased from her birth parents and resold to an orphanage would be a

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[9] *Id*. at art. 1(2).

[10] *See* David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, SETON HALL L. REV. (forthcoming Winter 2005).

[11] *See* PERTMAN, *supra* note 5, at 195-96.

slave, even though the ultimate intent and result of this process was to place her into an adoptive family.

Such an interpretation has both legal and intuitive flaws. Legally speaking, it renders certain terms in the definition of "slave trade" superfluous. The definition of "slave trade" has several definitions all involving two elements: One element pertains to sale or exchange. A second element requires the person exchanged to be a "slave" or the persons exchanging to possess the intent to "reduce . . . to slavery." If the element of sale or exchange of a person by definition meets the definition of slavery, then the second element is superfluous, for by definition every sale or exchange of a person would constitute the sale or exchange of a slave. A legal interpretation that renders a key element of a definition superfluous would generally be disfavored.

Second, it is counter-intuitive to view every "sale" of a person as rendering that person a slave. While the children purchased from birth parents and scouts were bought and sold like chattel, the ultimate intent was to place the children into families as sons or daughters, which seems contrary to the definition of a slave. Of course it is possible to take an ideological position that the custodial status of being a child is a kind of slavery, but that position certainly does not reflect the perspective of the law. The purpose of anti-slavery and anti-trafficking provisions, after all, is not to abolish childhood or the family. It is counter-intuitive to call an infant sold for purposes of adoption a "slave," despite the repugnant nature of the act.

The ambiguities and limitations in the definitions of slavery and the slave trade in the 1926 Convention are addressed in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery ("Supplementary Slavery Convention").[12] Interestingly, the Supplementary Slavery Convention retains the definition of "slavery" of the 1926 Convention[13] and almost the entire definition of "slave trade" from the 1926 Convention. Although easy to miss, however, the slight change in the "slave trade" definition may be significant. The 1926 Convention stated that the slave trade "includes . . . all acts of disposal by sale or exchange

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[12] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3 [hereinafter Supplementary Slavery Convention].

[13] *Compare* 1926 Slavery Convention, *supra* note 8, at art. 1(1), *with* Supplementary Slavery Convention, *supra* note 12, at art. 7(a).

of a *slave* acquired with a view to being sold or exchanged." [14] However, the Supplementary Slavery Convention defined slave trade to "include . . . all acts of disposal of a *person* acquired with a view to being sold or exchanged.[15]

This slight change of wording from "slave" to "person" would seem to mean that the mere "disposal"—including sale—of a human being who was "acquired with a view to being sold or exchanged" now would constitute the slave trade. Thus, when individuals in India bought infants from birth parents, with a plan to re-sell the children to an orphanage, this would apparently constitute the slave trade, even though the children were to be placed into adoption. A sale of a human being could constitute the "slave trade," even if the person sold was never made into a "slave."

This interpretation, however, founders on an examination of the rest of the Supplementary Slavery Convention, which in every other context—and every operative context pertaining to slavery—refers to the transfer, conveyance, branding, and marking, of slaves, rather than of persons.[16] Indeed, even if this new definition of the slave trade in the Supplementary Slavery Convention is taken literally, there is no generalized provision within the Supplementary Slavery Convention condemning the slave trade as such.[17] The assumption of the Supplementary Slavery Convention is that it is "supplementary" to the 1926 Convention, and therefore the Supplementary Slavery Convention does not repeat the core undertaking of the 1926 Convention to prohibit slavery or the slave trade.

The issues posed by the Supplementary Slavery Convention go beyond the significance of this re-worded definition of the slave trade, to encompass the Supplementary Slavery Convention's broadening concern with "Practices Similar to Slavery."[18] Thus, the Convention requires state parties to take necessary measures to abolish certain practices, "whether or not they are covered by the definition of slavery contained

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[14] 1926 Slavery Convention, *supra* note 8, at art. 1(2) (emphasis added).

[15] Supplementary Slavery Convention, *supra* note 12, at art. 7(c) (emphasis added).

[16] *See id*. at art. 3-7.

[17] Article 3 creates undertakings to prohibit various aspects of the slave trade, but the first three subsections refer to slaves; article 3(4) does refer to international cooperation in combating the "slave trade." *See id*. at art. 3.

[18] The term "Practices Similar to Slavery" comes from the title of the Convention. *See id*. at art. 1.

in Article 1 of the Slavery Convention."[19] These practices include debt bondage, serfdom, various practices transferring women involuntarily, and certain matters involving children.[20] The provisions involving women and children are most relevant to the issue of adoption.

In regard to women, the Convention requires state parties to bring about the abolition of "any institution or practice" whereby "[a] woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group."[21]

Thus, transferring a woman for financial consideration into a marital relationship, without her consent, is condemned as a practice similar to slavery. This provision is not based on the viewpoint that the status of a wife is a kind of slavery, either generally or within particular cultural contexts, however much some might argue for such a perspective. Thus, this practice is condemned even though the individual sold is not reduced to the status of a slave.

From one perspective, this provision on women is directly analogous to the sale of a child for adoption: In both instances an individual is involuntarily sold for financial consideration into a family relationship. The difficulty with the analogy, however, is the key difference between a woman and a child. It is permissible for an infant to be transferred into a family relationship without the infant's consent, particularly since infants lack the capacity to consent. The question of women, whether minors or adults, marrying without consent is, however, an entirely different matter. Even if women—or men—have in some cultures in the past married by the will of their parents or family, without their consent, this practice is condemned in modern international law. Thus, the 1948 Universal Declaration of Human Rights and the 1976 International Covenant on Economic, Social and Cultural Rights both declare that "[m]arriage shall be entered into only with the free and full consent of the intending spouses."[22]

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[19] *Id.*

[20] *Id.* at art. 1(a), (b), (c), (d).

[21] *Id.* at art. 1(c).

[22] 1948 Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (1948); International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966). There are some insignificant differences in wording between the Universal Declaration of Human Rights and the Covenant on Economic, Social, and Cultural Rights.

This difference between "transfers" of women and transfers of children may be highlighted by analyzing another of the subsections of the Supplementary Slavery Convention, which condemns the practice whereby a "woman, on the death of her husband, is liable to be inherited by another person."[23] Within the context of the Supplementary Slavery Convention, it appears that this section primarily refers to practices whereby a widow is involuntarily assigned a new husband—often a relative of her husband—upon her husband's death. In order to compare the situation of women to children, we should ask whether a similar practice concerning children would be so clearly condemned. What if a parent provided that upon her death, her child would become the child of a certain individual—perhaps an uncle or aunt of the child? Such a practice is in fact not substantially different from the contemporary U.S. practice of including a guardianship provision in a will, providing who shall be the guardian of the child upon the death of a parent. Such a provision is generally viewed positively, rather than negatively, even though one could rhetorically refer to it as "inheriting" a child.

The forbidden practice in which a widow is passed as a kind of inheritance does not involve any financial consideration. Similarly, another subsection of the Supplementary Slavery Convention condemns practices whereby "[t]he husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise."[24] This provision can involve transfers for financial consideration, but does not require such financial consideration: It is the "transfer" of the woman which is the essence of the wrong. The Convention's prohibition of a bride price, discussed above, does involve financial consideration, but only forbids the giving of such financial consideration when the woman has no right to refuse. Thus, a bride price is apparently permissible under the Supplementary Slavery Convention so long as the woman has the right to refuse the marriage.[25] Therefore, the essence of the forbidden slavery-like practices affecting women is not the financial consideration or sale, but rather the involuntary marriage of the woman. Thus, the provisions of the Supplementary Slavery Convention are treating as a "slavery-like" practice the involuntary transfer of women into the family relationship of marriage. Given the Convention's focus on lack of consent, the

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[23] Supplementary Slavery Convention, *supra* note 12, at art. 1(c)(iii).

[24] *Id.* at art. 1(c)(ii).

[25] *Id.* at art. 1(c)(i) ("A woman, *without the right to refuse,* is promised or given in marriage on payment of a consideration.") (emphasis added).

provisions on transfer of women for marriage cannot be analogized to the transfer of children for purposes of adoption, as infants necessarily are transferred for adoption without their consent. Indeed, the failure of the Supplementary Slavery Convention to include parallel provisions concerning children could be viewed as a deliberate decision not to condemn the sale of children for adoption as a practice "similar to slavery."

The Supplementary Slavery Convention does contain a specific provision on children, which condemns any "institution or practice whereby a child . . . is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child . . . or of his labour."[26]

In this provision, the question of financial consideration received for the transfer is secondary, as the wrong can occur without receipt of such consideration. The essence of the wrong is the transfer by the parent to another person with a "view" toward the "exploitation of the child."[27] There are two key ambiguities here. The first is the question of who must possess the evil intent, or "view," to exploit the child. Must the parent who delivers the child possess the culpable intent, or is it sufficient if the person receiving the child possesses this intent to exploit? This question is not an academic question, as contemporary child trafficking often involves individuals obtaining the child through misleading the parents. Parents may be told that their children will receive benefits, like education, apprenticeships, or good jobs, when the real intent is to exploit the children through prostitution or illicit and hazardous child labor.[28] Similarly, in intercountry adoption it sometimes happens that parents believe their children are only being taken away on a temporary basis, to receive benefits like housing, food, and an education, while the persons receiving the children actually intend the children to be adopted.[29] It is unfortunate that this provision is not

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[26] *Id.* art. (1)(d).

[27] *Id.*

[28] *See, e.g.*, Anti-Slavery Society, *Child Slaves of South Asia*, *at* http://www.anti-slaverysociety.addr.com/slaverysasia.htm (last visited Oct. 26, 2004).

[29] *See, e.g.*, Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 144 (1994) (stating that the U.S. embassy investigating Romanian adoptions discovered "incidents where Romanian mothers believed that they were merely 'loaning' their children to foreign parents and not relinquishing them permanently"). Because of difficulties with ascertaining the actual intent of parents who place children into orphanages, the Hague Convention on Intercountry Adoption specifically requires counseling regarding "whether or not an adoption will result in the termination of the legal relationship between the child and his or

clearer, therefore, because the question of whose intent counts is critical to the reach of the prohibition.

The second ambiguity in the Supplementary Slavery Convention's provision on children is the meaning of the term exploitation. Unfortunately, this key term is not defined in the Supplementary Slavery Convention. One can assume that child prostitution or child pornography would be forms of "exploitation," but the meaning beyond those obvious forms of exploitation is not so clear. Are all transfers in which an individual under eighteen works considered an exploitation of the child or his labor? And what about adoption: could adoption ever be a form of exploitation?

The exploitation of children through labor or commercial sex are elaborated in a number of legal instruments, such as the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.[30] Indeed, the development of the law of "trafficking" concerning both women and children is directed principally at trafficking for purposes of labor or sexual exploitation, due to the notorious nature of these problems in the contemporary world.[31] The problem of defining forms of "exploitation" beyond sex or labor is, however, much more difficult. The problem is illustrated by the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which is a supplement to the U.N. Convention Against Transnational Organized Crime ("2001 Protocol").[32] The definition of "trafficking" in the 2001 Protocol both returns us to the

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her family of origin." Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, May 29, 1993, art. 4(c)(1), 32 I.L.M. 1134 [hereinafter Hague Convention]. Absent such counseling, the consent of birth parents to an adoption would apparently be invalid. Due to similar concerns, U.S. regulations governing who is an orphan eligible for intercountry adoption note: "A child who is placed temporarily in an orphanage shall not be considered to be abandoned if the parents express an intention to retrieve the child, are contributing or attempting to contribute to the support of the child, or otherwise exhibit ongoing parental interest in the child." 8 C.F.R. § 204.3(b) (2004).

[30] Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 2133 U.N.T.S. 161.

[31] *See, e.g.*, Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7102(8) (2000) (defining "severe forms of trafficking in persons" as involving sex trafficking or trafficking for the purposes of involuntary servitude, peonage, debt bondage, or slavery); *id*. § 7101(b) (finding that trafficking in persons is a modern form of slavery often involving the "international sex trade" and also "forced labor" and "slavery-like labor").

[32] Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children; Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, at 60, U.N. Doc. A/45/49 (2001) [hereinafter 2001 Protocol].

original problem of trying to define trafficking in children, while also constituting an attempt to define the undefined term "exploitation" from the Supplementary Slavery Convention provision on children. The 2001 Protocol definition states that "Trafficking in persons":

> [S]hall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[33]

In broad terms, the 2001 Protocol definition of human trafficking contains three elements: (1) some transfer, harbouring or receipt of a person; (2) by wrongful means, broadly defined to include coercion, deception, abduction, abuse of power, or payment; and (3) for purposes of exploitation. However, the 2001 Protocol specifies that trafficking in persons exists when the first and third elements, transfer and exploitation, are present, even if there are no wrongful means.[34]

This definition is broader than some definitions of trafficking because it includes non-financial, but wrongful, transfers. In the end, however, the definition hinges on the question of the purpose of the transfer, which centers on the meaning of the term "exploitation." The definition of exploitation is helpful but deliberately open-ended; it gives a "minimum" set of purposes deemed exploitative, while permitting the list to be enlarged. The following list of minimum inclusions is primarily familiar: (1) sexual exploitation; (2) forced labor; (3) slavery or practices similar to slavery—presumably as defined in the 1926 Slavery Convention and the 1995 Supplementary Slavery Convention; 4) servitude; and 5) the removal of organs.[35]

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33 *Id.*

34 *Id.* at art. (3)(c).

35 *See id.* at art. 3(a).

Most of these named forms of "exploitation" would be typically inapplicable to a situation where a child was sold for adoption. Children placed in adoption are not being sold into sexual exploitation, forced labor, or servitude. There have been recurrent rumors in sending countries of children being "adopted" for their organs, but these sensational and inflammatory allegations are generally regarded as baseless.[36] Thus, we are left, in this section, with a problem of circular definitions. The Supplementary Slavery Convention defines the transfer of children for purposes of exploitation as a practice similar to slavery, and the 2001 Protocol defines exploitation to include practices similar to slavery. Hence, the children are subject to a practice similar to slavery if they are exploited, and they are exploited if they are subject to a practice similar to slavery. Moreover, as we have seen, the sale of children for adoption is apparently not a form of slavery itself because adopted children are not slaves.

Although the 2001 Protocol leaves open the possibility of additional unnamed forms of exploitation, it would be difficult to sustain the claim that adoption itself is a form of exploitation. One could argue that an adoptive parent "exploits" the child's need of love and care to obtain a child's love and loyalty, but this seems strained. Using this kind of reasoning, every possible kind of relationship could be deemed a form of exploitation, and every mutually beneficial relationship could be labeled a condemnable crime. More aptly, buying or stealing an infant or child could be viewed as a kind of exploitation, but since these acts already violate the elements of "trafficking" relating to the wrongful transfer, it is difficult to see how they could also constitute the separate element of exploitation. The definition of trafficking in the 2001 Protocol seems to view a wrongful transfer of a human being as insufficient in itself to constitute trafficking; rather, something more—an exploitative

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[36] *See, e.g.*, CARP, FAMILY MATTERS, *supra* note 6, at 228 (noting, but dismissing as false, "rumors" of intercountry adoption being used to run organ transplant rings); Carro, *supra* note 29, at 128-31 (documenting the history of the rumor that internationally adopted children were being used as organ banks, while noting that the U.S. government has extensively investigated such claims and found them "baseless"); *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, Ms. Ofelia Calcetas-Santos, Addendum: Report on the Mission to Guatemala*, Commission on Human Rights, 56th Sess., Agenda Item 13, at 10, U.N. Doc. E/CN.4/2000/73/Add.2 (2000) [hereinafter Report on the Mission to Guatemala] (noting that "sensational" reports of organ selling in Guatemala led to an arrest and riot, but that World Health Officials could not substantiate allegations, and that "[s]ome individuals believe that the rumors were part of an orchestrated campaign to foster resentment against foreigners, especially during the peace negotiations").

purpose—is also required. And adoption, in itself, would not appear to be an exploitative purpose.

This indeterminate tour of definitions of trafficking in persons, women, or children would not be complete without a brief review of the seminal Convention on the Rights of the Child ("CRC").[37] The CRC broadly condemns "the abduction of, the sale of or traffic in children for any purpose or in any form,"[38] but it does not contain any definition of trafficking. The provisions of the CRC on intercountry adoption are quite significant to defining standards for intercountry adoption, and certainly buying children or otherwise obtaining them without proper parental consent would violate those standards.[39] The CRC, in itself, however, does not answer the question of when these kinds of wrongs constitute a form of child trafficking.

This preliminary review of both the dictionary meaning of "child trafficking," and the historical development of international legal norms governing slavery and trafficking, reveals a paradox. On the one hand, buying children and sending them across national boundaries would seem to meet the dictionary definition of "trafficking in children," even if done as a part of an adoption. On a linguistic and intuitive level, buying and selling children would seem to be included in any plausible definition of "child trafficking." On the other hand, the various international legal definitions of slavery, practices similar to slavery, and trafficking, seem to generally require something more than the sale of a human being, and that "something more" is not met by sending the child across national boundaries. These legal definitions of slavery, slavery-like practices, and trafficking seem to require intent or an act harmful to the person enslaved or trafficked. The victim must be made a slave or servant, subject to forced or exploitative labor, sexually exploited, or involuntarily married. And generally speaking, the law would not characterize being adopted as a harm, let alone a harm equivalent to these serious forms of exploitation.

It is rational to construct a legal definition more narrowly than the dictionary meaning of that same term, particularly when defining serious penal wrongs or crimes. The law, in proscribing harms, generally will aim its prohibitions at the worst and most relevant harms, while

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[37] *Convention on the Rights of the Child*, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989) [hereinafter CRC].

[38] *Id.* at art. 35.

[39] For a discussion of the CRC and adoption, see Smolin, *supra* note 10.

avoiding peripheral definitional issues. In the experience of society, the central harms associated with slavery and trafficking have been chattel slavery, forced labor, and trafficking in human beings for purposes of exploitative sex or labor, and thus the legal definitions have required these sorts of harms.

Characterizing all exchanges of children for money as illicit trafficking would pose some surprisingly difficult issues for the law. The difficulty, as the Supreme Court has famously explained in other contexts, is that children "are always in some form of custody."[40] Thus, any child custody transfer that is associated in any way with some financial consideration can be characterized as the "sale of a child." Consider a typical divorce case in which one party drops a claim for child custody in exchange for the other party accepting a lower financial settlement. Though such divorce settlements are not explicitly presented in a strict quid pro quo form, the substance of giving up a custodial claim in exchange for a more favorable financial settlement may be all too common.[41] Even if one looks askance at this kind of situation, it would seem extreme to label this kind of negotiation as illicit "child trafficking."

As we will see, these difficulties in avoiding explicit or implicit sales of children haunt even domestic adoption. For all these reasons, it is not surprising that international law for many years defined "trafficking" narrowly, and avoided characterizing all quid pro quo transactions involving children as illicit child trafficking.

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[40] Schall v. Martin, 467 U.S. 253, 265 (1984) ("[J]uveniles, unlike adults, are always in some form of custody.").

[41] Justice Neely of the Supreme Court of Appeals of West Virginia cited the propensity of such bargaining as a reason for the court to employ the more certain "primary caretaker" presumption in child custody disputes, rather than the unpredictable multi-factor test. Garska v. McCory, 278 S.E.2d 357, 360 (W. Va. 1981). Justice Neely stated:

> The loss of children is a terrifying specter to concerned and loving parents; however, it is particularly terrifying to the primary caretaker parent who, by virtue of the caretaking function, was closest to the child before the divorce. . . . Since the parent who is not the primary caretaker is usually in the superior financial position, the subsequent welfare of the child depends to a substantial degree upon the level of support payments which are awarded in the course of a divorce. Our experience instructs us that uncertainty about the outcome of custody disputes *leads to the irresistible temptation to trade the custody of the child in return for lower alimony and child support payments.* Since trial court judges generally approve consensual agreements on child support, underlying economic data which bear upon the equity of settlements are seldom investigated at the time an order is entered.

Id. (emphasis added).

B. International Definitions of Trafficking Specifically Addressing Adoption

1. Adoption as the Prohibited Sale of a Child Under the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography ("OP-CRC").

In recent years, scandalous and illicit activities associated with intercountry adoption, along with the growing ideological controversy concerning intercountry adoption, have once again come to the attention of the international community. Given the growing international concern with child trafficking, the problem of abusive intercountry adoption practices has increasingly been defined in terms of the notorious problem of international child trafficking.[42] Under these circumstances, the gap between the common sense concept of child trafficking and the strict legal definitions has become significant. Thus, international legal materials have cautiously begun to specifically address the question of when intercountry adoption has descended into a form of illicit child trafficking. While these developments are likely incomplete, they are significant.

The primary international document directly addressing intercountry adoption as a form of child trafficking is the OP-CRC.[43] Significantly, the United States has ratified the OP-CRC, even though it has not ratified the CRC. Therefore, the OP-CRC is not merely international law, but it constitutes international law that is binding within the United States.[44]

The OP-CRC defines the "sale of children" as "any act or transaction whereby a child is transferred by any person or group of persons to

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[42] The problem of abusive intercountry adoption practices, and in particular baby-selling, has plagued the international community for decades. For a 1994 account of what was, even by then, an old problem, see Carro, *supra* note 29, at 131-43 (documenting "baby trafficking" problems in Peru, Brazil, Paraguay, Columbia, Honduras, Sri Lanka, and Romania). Recent reports on the problem of trafficking sometimes include, to a modest degree, adoption-related trafficking. *See, e.g.*, THE PROTECTION PROJECT AT JOHNS HOPKINS UNIVERSITY SCHOOL OF ADVANCED INTERNATIONAL STUDIES, TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN IN THE COUNTRIES OF THE AMERICAS 41-43 (2000).

[43] *Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography*, G.A. Res. 263, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/263 (2000) (entered into force Jan. 18, 2002) [hereinafter OP-CRC].

[44] *See* Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AM. J. INT'L L. 789 (2000); Office of the High Commissioner for Human Rights, *Status of Ratifications of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, *available at* http://www.unhchr.ch/html/menu2/6/crc/treaties/status-opsc.htm (last modified Nov. 14, 2003).

another for remuneration or any other consideration."[45] In defining the situations where the "sale of children" must be legally prohibited, the OP-CRC includes"[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption."[46] The term "applicable international legal instruments on adoption" is understood to refer to the Hague Convention on Intercountry Adoption ("Hague Convention").[47] The Hague Convention explicitly includes as one of its "objects" the prevention of "the abduction, the sale of, or traffic in children."[48] Although the Hague Convention contains no definition of the sale of, or trafficking in, children, the OP-CRC has effectively made the Hague Convention's sections on consent to adoption into a critical part of the definition of illicit child selling. Thus, where an intermediary induces consent to adoption in a manner that violates the Hague standards, and a child is transferred "for remuneration or any other consideration," then the illicit sale of a child has occurred. Moreover, although there is no separate definition of "child trafficking," the term presumably would include any illicit sale of a child, particularly where the child is moved geographically.

Thus, as a matter of international law, intercountry adoption constitutes illicit child selling and child trafficking where an intermediary induces consent to adoption in violation of the standards of the Hague Convention and when the child is transferred for remuneration or any consideration. As a technical matter, both elements—inducement of consent by an intermediary in a manner violating Hague standards and the transfer of children for remuneration or consideration—must be established to constitute the kind of "sale of children" that literally violates the standards of the OP-CRC.

The OP-CRC prohibition of adoption as illicit child selling contains several apparent gaps. First, the prohibition, as literally written, does

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45 OP-CRC, *supra* note 43, at art. 2(a).

46 *Id.* at art. 3(a)(ii).

47 *See e.g.*, United Nations Treaty Collection, *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, United States of America: Ratification, available at* http://untreaty.un.org/English/CNs/2002/1301_1400/1360E.doc (Jan. 2, 2003) [hereinafter Ratification OP-CRC] (stating that the United States understands the term "applicable international legal instruments" to refer to Hague Convention); Hague Convention, *supra* note 29; Dennis, *supra* note 44, at 793-94 (stating that the United States and Japan understood "applicable international legal instruments on adoption" to refer to Hague Convention).

48 Hague Convention, *supra* note 29, at pmbl., art. 1.

not address situations where a child is taken from the birth family without any consent whatsoever, as in instances of abduction or kidnapping. In such instances, there has not been an improper "inducing" of consent, and hence the OP-CRC is literally inapplicable, even if the child is later sold. This situation would meet the OP-CRC definition of the "sale of children" but would not meet the OP-CRC definition of the *prohibited* sale of children. Second, the literal terms of the OP-CRC require that an "intermediary" improperly induce consent and therefore do not address situations where adoptive families directly purchase children from birth parents without use of an intermediary. Of course such wrongful acts violate the Hague Convention, and nations should prohibit them. But the failure of the OP-CRC to include such abusive adoption practices within its definition of illicit sale of children, and thereby require penal sanctions for such practices, illustrates the cautious, partial manner in which international law is beginning to address abusive adoption practices.

2. Hague Standards for Valid Consent to Adoption as Applicable to the OP-CRC

The Hague Convention standards for a valid consent to adoption are extensive and yet are ultimately a matter of broadly-held ethical adoption standards. The standards have three requirements for consent by those, like birth parents, with custodial responsibilities and rights in relation to the child. First, those parents giving consent to adoption must have received the equivalent of informed consent, including counseling "as necessary," and being informed as to the legal effect of the consent, "in particular whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin."[49] Second, the consent must not have "been induced by payment or compensation of any kind and have not been withdrawn."[50] Third, consent must be given "freely, in the required legal form, and expressed or evidenced in writing."[51]

It is clear, therefore, that "inducing" birth family members to relinquish children for adoption through the payment of money would violate the terms of the Hague Convention. Moreover, such "inducing" monetary payments would also appear to constitute the separate definition of "sale of children," under the OP-CRC, because they

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[49] *Id.* at art. 4, 5(b).
[50] *Id.*
[51] *Id.*

constitute the transfer of the child for "remuneration or any other consideration."[52] Hence, where an intermediary induces consent to adoption through monetary payments or financial benefit, such acts would clearly constitute the prohibited sale of children under the OP-CRC.

In addition, where an intermediary obtains consent to adoption from a birth family through fraud, misrepresentation, coercion, failure to provide necessary counseling, or failure to disclose the legal effect of the consent, such adoption would also constitute a prohibited "sale of a child" under the OP-CRC where the child was transferred for "remuneration or any other consideration." Such remuneration or consideration could occur, moreover, in a subsequent transfer of the child not involving the original birth parents. Children are often transferred multiple times, passing from an individual who obtains the child from the birth parent to an orphanage, perhaps passing from one orphanage to another, and then passing from the orphanage to the adoptive parents overseas. If any of these transfers involve consideration paid for the transfer, and the original consent was illicit, then under the OP-CRC the sale of a child (and child trafficking) has occurred.

3. Money as the Root of All Evil (or Much Uncertainty) Under the OP-CRC and the Hague Convention

We have seen that the developing international law definitions of illicit child trafficking, or the sale of children, do not yet address all situations within the common sense or dictionary definition of those terms. The law has been reluctant to label all sales of children as prohibited forms of child trafficking and has failed to demand penal sanctions for all abusive adoption practices. Yet, it is encouraging that the law has been moving in the direction of clearly labeling certain abusive adoption practices as prohibited forms of child trafficking or sale of children. Certainly, it seems to be the intent of the OP-CRC to clearly and definitively label some abusive adoption practices as the illicit sale of children subject to penal sanction.

Unfortunately, further analysis will demonstrate that the kinds of wrongs addressed by the OP-CRC, which involve an illicit transfer of a child for "remuneration or other consideration," are not effectively prohibited by law. The difficulty, as we shall see, is that the law is not in

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[52] *See* OP-CRC, *supra* note 43, at art. 2(a).

a position to clearly differentiate, in the context of adoption, between licit and illicit payments of money. Once the law loses its capacity to distinguish clearly between prohibited and permitted provisions of financial benefit, the effectiveness of legal prohibitions against the "sale of children" virtually collapses.

Under the OP-CRC, there are essentially two points at which illicit consideration may be involved: (1) in inducing consent to adoption; or (2) in a subsequent transfer of the child. In both instances, difficulties arise from the fact that payment of money in itself may be viewed as customary and licit. Upon closer examination, distinguishing between licit and illicit payment of money in each instance may be difficult, not only theoretically but also in practice.

C. Inducing Consent from Birth Parents

1. The Domestic Adoption System Creates an Unstable Baseline for Distinguishing Between Licit and Illicit Payments of Money

The letter and spirit of international law, and domestic law within the United States, forbids the payment of money or other consideration to birth parents to induce relinquishment of the child or consent to adoption. Such payments are tantamount to buying a child. However, state laws governing domestic adoption within the United States generally permit the provision of very significant "birth parent expenses," including temporary living expenses, medical expenses, and counseling fees. These payments are viewed as a gift, rather than legal consideration for consent to adoption. Indeed, payment of such expenses in most states cannot be conditioned, or made reimbursable, based upon the birth mother actually consenting to the adoption. Moreover, birth parents cannot be bound to any pre-birth agreement to relinquish or place their child.[53]

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[53] The state of law and practice regarding money and domestic adoption is far messier than can be summarized in this section. However, for useful material see National Adoption Information Clearinghouse, *2003 Adoption State Statute Series Statute-at-a-Glance, State Regulation of Adoption Expenses, available at* http://naic.acf.hhs.gov/general/legal/statutes/expenses.cfm (last updated July 23, 2004) [hereinafter NAIC Adoption Expenses]; *see also* ADOPTION LAW AND PRACTICE (Joan H. Hollinger ed., 1988 & Supp. 2004); CYNTHIA D. MARTIN & DRU MARTIN GROVES, BEATING THE ADOPTION ODDS 156-61 (1998); PERTMAN, *supra* note 5, at 38-43, 185-208; Avi Katz, *Surrogate Motherhood and the Baby-Selling Laws*, 20 COLUM. J.L. & SOC. PROBS. 1 (1986); Sara L. Johnson, Annotation, *Validity of Agreements to Pay Expenses Attendant on Birth of Child on Condition That Natural Parents Consent to Adoption of Child*, 43 A.L.R. 4TH 935 (1986 & Supp. 2004).

The net effect of these rules in practice is unclear and casts a certain ethical cloud over domestic adoption. The intent of the law is to prohibit, and generally even criminalize, the sale of children. In practice, however, prospective adoptive parents provide financial assistance to birth parents, directly or through intermediaries, precisely based on the hope and expectation of obtaining the child. Certainly most prospective adoptive parents lack the funds or motivation to lavish financial assistance on birth mothers for the mere sake of compassion or kindness. Everyone understands that prospective adoptive parents are, in crude terms, "in it for the baby." The fact that the birth parents are free to accept the aid, and then ultimately keep the baby, does not ultimately change the truth that the assistance is provided at least in the hope that the birth parents will relinquish the child. Indeed, such assistance could be compared to a "right of first refusal" real property contract in which the owners become contractually obligated, if they sell property, to offer it first to a particular individual. Prospective adoptive parents who provide aid to birth parents are assuming that if the child is relinquished, they will be offered the child. Since a "right of first refusal" provision for property is commonly made binding by financial consideration, it would appear that the aid provided to birth mothers really is a form of legal consideration.[54]

The self-contradictory nature of the law is illustrated by California law, which simultaneously criminalizes both paying a birth parent to consent to adoption and a birth parent accepting benefits from prospective adoptive parents with the intent to not complete the adoption.[55] Logically, the net effect of California law is to turn every provision of financial assistance by adoptive parents to birth parents into the sale of a child. The adoptive parents' "consideration" is the financial payment; the birth parents' corollary consideration is the representation, under California law, that upon receipt of such benefits they sincerely intend to place their child with the adoptive family. The birth parents' legal rights to genuinely "change their minds" about adoption does not alter the fact that the present intent to place the child serves as a kind of consideration for the receipt of financial benefit. The birth mother, in

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[54] Regarding the law of "right of first refusal" contracts, see 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS §§ 11.3-.4 (1996 & Supp. 2004). Another way of addressing the obligations created by financial payments to birth parents would be through the doctrine of a "contract to bargain." *See, e.g.*, Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969).

[55] *See* CAL. PENAL CODE § 273 (West 2004).

essence, is paid for a truthful representation of intent to place her child with a particular family.

An additional benefit to birth mothers, that of education expenses, has been specifically prohibited in some states and would appear to fall outside the range of permissible adoption expenses in most states.[56] However, adoption intermediaries nonetheless find a way of offering "scholarships" as a kind of implicit inducement, by creating and publicizing "scholarship" programs for birth mothers who place their children for adoption.[57] Since the award of such "scholarships" generally would occur after the adoption, and are not necessarily guaranteed, the award would presumably escape the oversight of the courts that issue adoption decrees and review permissible forms of adoption expenses. Thus, although more than a decade ago the provision of a college scholarship to a birth mother was seen as a sign of an illegal black market adoption,[58] today adoption intermediaries openly tout their scholarship programs in their internet appeals to birth mothers.[59] Presumably these intermediaries have been advised that so long as the scholarship is not formally guaranteed, no illegal inducement is present.

The perception that children are being implicitly bought and sold within the domestic adoption system is furthered by the common practice of private agencies charging vastly different sums based on the race of the child. Thus, it might cost thirty-thousand dollars to adopt a white infant but only ten-thousand dollars to adopt an African-American infant.[60] Further, agencies charge extra for finding an infant quickly.[61] It

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[56] *See* NAIC Adoption Expenses, *supra* note 53.

[57] *See* American Adoptions, *at* http://www.americanadoptions.com/pregnant/scholarship (last visited Oct. 29, 2004) (describing "Birth Mother Scholarship Program"); Lifetime Adoption Facilitation Center, *at* http://www.lifetimeadoption.com/for_birthmothers/bmresources.html (last visited Oct. 29, 2004); Lifetime Adoption Foundation, *at* http://www.lifetimefoundation.org (last visited Oct. 29, 2004) (advertising educational scholarships under their "Lifetime Adoption Foundation," a nonprofit 501(c)(3) charity).

[58] *See* William Pierce & Robert J. Vitillo, *Independent Adoptions and the 'Baby Market,' in* ADOPTION: INTERNATIONAL PERSPECTIVES 131, 140 (Euthymia D. Hibbs ed., 1991).

[59] *See supra* note 57.

[60] *See* Dean Schabner, *'Buying and Selling,' Preacher Calls Adoption Fees Discriminatory*, (Mar. 12, 2004) *at* http://abcnews.go.com/US/story?id=91834&page=1. This problem of differential fees based on race is not a new problem. *See, e.g.*, Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913, 918 (1994) (describing her own son's adoption, with offer of a differential fee scale for "older, black, and other handicapped children"). Of course Judge Posner had discussed these issues much earlier. *See infra* note 78 and accompanying text.

can be hard to see why the legitimate birth parent expenses and professional services would vary so substantially based on the race of the child or the speed of the adoption. Whatever the explanations offered for such charges, the effect is to create a market in babies, with high-demand characteristics of the infant (race, youth, and health) or the adoption speed of the adoption being allocated to the highest bidder. This contradicts the legal conception that adoption is guided principally by the best interests of the child, with money limited to the subsidiary role of providing reasonable fees for services.

Occasionally, a decision from the courts makes the existence of an exchange of money for child patently clear. Thus, in *Gorden v. Cutler*[62] a Pennsylvania court concluded that a contract between the birth and prospective adoptive parents had existed:

> As the negotiations for the proposed adoption progressed, counsel recalled how he told the natural father 'that [his] clients were willing to pay the medical expenses on condition that he [the natural father] sign a consent to adoption.' This same condition was communicated on several occasions to the natural mother. . . . Finally, as it appears on the record, counsel characterized the moment at which the custodial exchange occurred in the hospital dispassionately, as would occur in the culmination of any business transaction. He stated it as: 'They signed. I paid the bills, and they then turned the baby over to me.' We find the aforesaid to be, in its simple form, descriptive of a contract, i.e., an offer, acceptance and consideration.[63]

In this case, the birth parents subsequently changed their minds, and successfully obtained the return of their child prior to the filing of the adoption papers.[64] The disappointed prospective adoption parents thereupon sued for reimbursement of the childbirth expenses they had provided to the birth parents, including hospital and physician costs associated with the birth mother's pregnancy, delivery, and care of the

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[61] Schabner, *supra* note 60 (noting that a "non-black baby" in nine to eighteen months costs nineteen thousand dollars to twenty-four thousand dollars, but twenty-seven thousand dollars to thirty-six thousand dollars in three to nine months).

[62] 471 A.2d 449, 455 (Pa. Super. Ct. 1983).

[63] *Id.*

[64] *Id.* at 450.

child.[65] The lower court found the contract unenforceable as a matter of public policy, but the Superior Court of Pennsylvania reversed, finding the contract enforceable and the birth parents responsible to reimburse the prospective adoptive parents.[66] The court agreed that a "contract wherein a mother of a child agrees to adoption of her child by another in consideration of a monetary consideration to herself is void against public policy."[67] However, the court held that such contracts were proper where "the monetary consideration is to flow to the child."[68] Somehow, the hospital expenses associated with childbirth were then characterized by the court as not only benefiting the child but also as "in no way inured to the benefit of the natural mother."[69] Thus, the Court was able to conclude that the contract in question was valid, despite the ban on exchanging monetary consideration for consent to adoption, because none of the monetary consideration benefited the mother.[70]

Gorden is apparently unusual in its willingness to require birth parents to reimburse medical expenses to disappointed prospective adoptive parents. *Gorden* is also somewhat unusual in its straightforward acknowledgement and acceptance of a contract in which financial benefit is exchanged for consent to adoption. *Gorden*'s conclusion that the mother does not financially benefit when childbirth expenses are paid is so incredible that it must be accounted as a mere legal fiction. First, no one could miss the fact that hospital and medical charges for childbirth include fees for medical care of the mother, as well as the child. Second, it obviously benefits parents when someone pays the medical expenses of their children, since parents are legally responsible to pay their children's medical expenses. Thus, the court employed a legal fiction to validate a contract involving the exchange of financial benefit to the mother, in exchange for the mother's consent to the adoption. The court in *Gorden* refused to indulge in the more common legal fiction that medical expenses provided to birth mothers by prospective adoptive parents are mere "gifts"; instead, it employed the even more ludicrous fiction that the payment of pregnancy and childbirth expenses is not a financial benefit to the birth mother. The court's choice of a more unusual legal fiction was apparently motivated by a desire to see the prospective adoptive parents reimbursed, a result

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65 *Id.*
66 *Id.* at 452-59.
67 *Id.* at 458.
68 *Id.*
69 *Id.*
70 *Id.*

that could not be obtained by calling their provision of medical expenses a "gift."

The confusion of the courts is illustrated by subsequent cases in Pennsylvania that cite *Gorden* for the proposition that the state has a strong public policy against selling children. Thus, in justifying the judicial reduction of intermediary adoption fees, the Pennsylvania Supreme Court invoked the memory of slavery and the civil war, and then lamented:

> By now the practice should be so abhorrent to every American that no one would traffic in human life for profit. Unfortunately, the lessons of the past are already forgotten; and due to the current small supply of babies available for adoption relative to the demand for those infants by prospective parents who are ready to pay, if they must, to get an infant, our society has experienced a degree of principle-shifting.[71]

In support of these brave words, the Pennsylvania Supreme Court then cited *Gorden* for the proposition that contracts contrary to public policy would not be enforced,[72] apparently oblivious to that decision's use of a legal fiction to enforce a contract exchanging money for the birth parents' consent to adoption.

The difficulties of the legal system in defining and enforcing the principle against selling children has been accentuated by the emergence of various alternative reproductive technologies, including, particularly, various forms of surrogacy. The question of whether surrogacy contracts should be evaluated under the principles of adoption statutes prohibiting baby-selling has received a variety of answers. Although the better and more common answer would appear to be that surrogacy for a fee is illegal, the answer is not universal, as it varies according to whether the "surrogate" mother is the genetic mother and still leaves room for providing generous "expenses."[73] The net result is a booming

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[71] *In re* Adoption of B.A.B., 534 A.2d 1050, 1052 (Pa. 1987).

[72] *See id*.

[73] *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding that a gestational surrogate mother is not a mother under California law, and therefore gestational surrogacy contracts are not subject to adoption statutes and do not violate public policy); MARTHA A. FIELD, SURROGATE MOTHERHOOD (1990); Ann M. Haralambie, *Handling Child Custody*, *in* 1 ABUSE AND ADOPTION CASES §§ 9.13–.18 (1993 & Supp. 2003); Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407 (2002).

business in surrogacy, which as advertised on the internet involves very substantive payments to "surrogate" mothers and can prove more expensive than even a high-end conventional adoption.[74]

Given all of the confusion regarding the current role of money in domestic infant adoption, it should not be surprising that one author, a psychologist and adoptive parent specializing in adoption and family issues, finally concluded that "black market adoptions are not much different from our current adoption practices."[75] Based on this conclusion, this popular guide to adoption proposed that the black market be legalized, to "allow the mother and those involved with arranging adoptions to make a profit."[76] Similarly, although Judge Posner's proposal for creating an infant adoption[77] has become notorious, he plausibly defended his proposal by arguing that he was merely proposing to make the existing legal "market in babies" more efficient and equitable. Thus, Judge Posner argued that the "element of a sale" exists in private agency adoptions due to the provision of expenses to the birth mother, and is "even more transparent" in independent adoptions.[78] Although it would be possible to allow for the provision of birth parent expenses in a way that was clearly different from Judge Posner's proposal that birth mothers sell their parental rights to the highest bidder, within our current law and practice it is not always easy to discern the difference.

2. Money and Birth Parents in the Intercountry Adoption System

The ethical and legal paradoxes of the domestic adoption system within the United States create an unstable baseline for evaluating when intercountry adoption has descended into trafficking or the sale of children. This uncertain baseline causes many to come to intercountry adoption, believing that it is normal to pay birth mothers large amounts of money, and with a hazy sense as to when such financial provision becomes illicit. Thus, one reporter investigating a major baby-buying

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[74] *See, e.g.*, Surrogate Alternatives, Inc., *at* http://www.surrogatealternatives.com/fees.htm (last visited Oct 29, 2004); Center for Surrogate Parenting, Inc., *at* http://www.creatingfamilies.com/Costai.HTML (last visited October 29, 2004).

[75] MARTIN & GROVES, *supra* note 53, at 162. The statement was apparently not meant as a condemnation of the current system, but rather as a part of an argument for legalizing the black market. *Id*. at 162-70.

[76] *Id*. at 167.

[77] The original proposal is found in Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUDIES 323, 347 (1978).

[78] *See* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60 (1987).

scandal in Cambodia found that some minimized the concern over payments made to Cambodian birthmothers, by pointing out that "privately arranged adoptions in the United States often require adoptive parents to pay a birth mother's medical and living expenses, up to tens of thousands of dollars, during and after pregnancy." Under this line of reasoning, some maintained that it should be legitimate to give a poor birth parent in Cambodia "some money so that she can properly look after the rest of her family."[79]

This lack of a clear domestic adoption baseline is unfortunate, because the financial aspects of intercountry adoption involve distinctive and troubling ethical dilemmas. Indeed, in nations where poverty is often an inducing factor in relinquishments, the entire question of money is a quagmire.

The first issue is whether financial assistance toward keeping the family together must be offered prior to accepting a relinquishment. Given that many birth mothers will be among the segment of humanity living on less than two dollars per day—and some among those living on less than one dollar per day—it could be argued that relatively small amounts of money might help keep the child with the birth family.[80] Indeed, it may be that the travel expenses involved in an intercountry adoption would be more than sufficient to avoid relinquishment, if such a sum were available to assist the birth family rather than to remove the child. Thus, it could be argued that consent to intercountry adoption should only be considered valid where financial assistance to keep the child with the birth family was offered and available. As an ethical matter, it is perverse to spend thousands of dollars taking a child from the birth family, when a much smaller sum would have kept the family intact.

Neither the OP-CRC nor the Hague Convention, however, require the offer or availability of such financial assistance to birth families to validate consent to adoption. It is legal to accept the relinquishment of a child for purposes of intercountry adoption even where the provision of

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[79] *See* Sara Corbett, *Where Do Babies Come FROM?*, N.Y TIMES, June 16, 2002, at 42.

[80] For commentary on the role of poverty in contributing to relinquishments in various nations, see generally Smolin, *supra* note 10 (India); *see also* Corbett, *supra* note 79 (Cambodia); Robin McDowell, *Cambodian Babies Still Sold for Adoption*, BIRMINGHAM NEWS, March 7, 2004, at 6A (Cambodia); Robin McDowell, *Poor Cambodians Selling Babies*, THE TIMES UNION (Albany, NY), March 7, 2004, at A10 [hereinafter McDowell, *Poor Cambodians*] (Cambodia); Report on the Mission to Guatemala, *supra* note 36 (Guatemala).

a very modest sum of assistance would have kept the child with the birth family.

From a legal perspective, therefore, the financial issues related to relinquishment only arise when birth parents receive some kind of money or assistance. Under the combined standards of the OP-CRC and the Hague Convention, any amount of remuneration or consideration that "induces" consent to adoption is sufficient to constitute child selling. This rule is important, particularly given reports of birth families being induced to relinquish children for as little as twenty dollars.[81] When such small sums actually are "inducements," however, proof and enforcement issues become difficult. Even if it is possible to document the receipt of money and corollary relinquishment by a birth parent—a difficult matter, when such small sums are involved, and intermediaries to send and receive are available—the distinction between assistance and inducement can be difficult to define. Given a poverty-stricken birth parent, the failure to provide some small amount of assistance would seem itself a cruelty, and yet once such assistance is given it can be difficult to tell whether it served as an inducement.[82]

Unfortunately, the international rules governing consent to adoption are not prophylactic, in that they permit situations where inducement is likely. For example, the international rules apparently allow aid to be offered only to those birth parents who relinquish their children, rather than requiring aid to birth parents to be unconditional. Thus, the international rules permit patterns of aid that create incentives to relinquish. It is only an actual inducement that is apparently illegal. The difficulty with this rule is that proof of an inducement, or a quid pro quo, ultimately turns on the inner motivations and understanding of the parties. Because birth parents frequently will not be cooperative with investigative authorities, given their own legal, social, and financial vulnerabilities, proof of inducement will often be difficult even where

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[81] *See* McDowell, *Poor Cambodians*, *supra* note 80 (noting that Cambodian birth mothers received as little as twenty dollars from intermediaries); Smolin, *supra* note 10 (citing T. Sunil Reddy, *Rescued Children Fight Diseases, Face a Future of Uncertainty*, INDIA EXPRESS, April 4, 1999, at 1) (noting birth parents in India are paid as little as fifteen dollars by intermediaries).

[82] *See* Ethica, *Child Trafficking: Why Can't the Immigration Service Prove It?*, (June 6, 2003), *available at* http://www.ethicanet.org/INEvidence.PDF [hereinafter Ethica] (reviewing specific U.S. government investigations of alleged child trafficking in intercountry adoption). Ethica is an organization that advocates for ethical adoption. This author has been on advisory boards of this organization but had no role in creating the article cited herein.

children were in fact sold. If the "buyer and seller" (agency and birth parent) maintain their story that no sale occurred but that the consent to adoption and provision of assistance were each independent acts, proof of inducement becomes extraordinarily difficult even where receipt of money is proven.[83]

Indeed, under the official U.S. interpretation of the OP-CRC, proof of a willful and knowing intent to induce consent through compensation is required to constitute a violation of the OP-CRC's ban on the illicit sale of children.[84] Under this interpretation, an adoption may be lawful under the OP-CRC even if the provision of money to a birth parent actually induced relinquishment. It is not enough to prove that the birth parents thought they were selling their baby; one must also prove that those receiving the child willfully and knowingly purchased the child. Thus, a well-intentioned system of assistance to relinquishing birth parents that inadvertently induces consent does not constitute the illicit sale of children.

Intercountry adoption largely mirrors the ethical dilemmas of domestic adoption in which financial consideration inducing consent to adoption is condemned, but non-inducing "gifts" of assistance, even directed only to relinquishing birth parents, are apparently permissible.[85] The issue is aggravated in intercountry adoption by the extreme poverty of many birth parents in developing nations that face a severe struggle to obtain the very barest necessities of food, water, clothing, and shelter for themselves and their children. Under these circumstances, it becomes much more likely that the possibility of a small "gift" could in fact induce relinquishment.[86] Indeed, in some developing nation contexts a "gift" of one hundred dollars might be more likely to "induce" consent to adoption than would a "gift" of fifty-thousand dollars within the United States. Thus, a systematic program of assistance for birth parents, where aid was conditioned on relinquishment, would be likely to have the effect of inducing relinquishments in a significant percentage of cases. The conclusion that inadvertent child buying does not constitute

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[83] *See id.*

[84] *See* Ratification OP-CRC, *supra* note 47, at art. 3 (noting that the United States understands that the term "improperly inducing consent" in Article 3(1)(a)(ii) of the Protocol means knowingly and willfully inducing consent by offering or giving compensation for the relinquishment of parental rights).

[85] Ethica, *supra* note 82 (noting that the Foreign Affairs Manual, 9 FOREIGN AFFAIRS MANUAL 42.21 N13.7, states that investigating officers "must take into account the fact that some payment of expenses is allowed under the law").

[86] *See supra* note 80.

an illicit "sale of children" would leave the door wide open to abusive adoption practices, making enforcement of the norm against child selling all but illusory.

Despite these difficulties, some violators of the ban on buying infants act so flagrantly and notoriously that enforcement should be possible. Thus, as adoption intermediaries systematically make it known among birth parents that they are in the market for buying children, and themselves employ or rely on further intermediaries, the quid pro quo aspects of intentionally paying money for children becomes unmistakable. Even then, however, it may be difficult to prove the sale of a child in each individual case, at least so long as the birth parents fail to admit that they "sold" their baby.[87]

The intercountry adoption system should create a rule forbidding all assistance to birth parents that is conditioned on relinquishment or placement of the child. This kind of prophylactic rule would clarify, to some degree, the critical distinction between assistance and buying children. There is precedent for such a rule within the domestic adoption system, although the international ban would have to be broader and clearer than the domestic ban to be effective. Until the international adoption system adopts such a rule, it will be difficult to prevent both notorious and inadvertent inducement to relinquish.

In the longer term, the intercountry adoption system should require that birth parents be offered some degree of financial help to keep the child with the family. Under this rule, a relinquishment or consent to adoption by a birth parent to a licensed agency would only be valid within the intercountry adoption system if the birth parents had been offered a certain measure of financial assistance to keep the family intact. The amount offered could be relatively modest—for example, approximately one hundred U.S. dollars for adoptions in nations like India, Cambodia, and Guatemala, where relinquishing parents often earn less than two dollars per day. The funds would come from intercountry adoption fees.

Such a rule could help rebut the charge that intercountry adoption between rich and poor countries exploits the economic vulnerability of

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[87] Thus, in the Andhra Pradesh, India, Guatemala, and Cambodian adoption scandals, many concluded that baby-selling was occurring, and shutdowns or moratoriums sometimes have occurred, but it was still rare to find any individual cases in which a court found that a particular infant had been illicitly purchased.

the poor in order to meet the desire of the rich for children. While a rule requiring modest assistance toward keeping the family intact would not entirely rebut this charge, it would reduce the instances where the children were relinquished solely for financial reasons. Without such a rule, the intercountry adoption system would continue to permit the cruel practice of spending tens of thousands of dollars to take a child from his birth parents, while being unwilling to provide any assistance, not a single dollar, to help the child remain with his parents.

D. Money and Intermediaries

Where the birth parents' consent to adoption is illicit in a non-financial way, for example through coercion, fraud, or misrepresentation, the adoption violates the standards of the Hague Convention.[88] Such a violation of the Hague Convention, however, is insufficient in itself to render the adoption an illicit "sale of children" under the OP-CRC standards because it does not constitute the sale of a child.[89] However, if such a wrongful taking of a child through non-financial means is followed by the subsequent transfer of the child for "remuneration or any other consideration," then under the OP-CRC the adoption would constitute an illicit "sale of a child."[90] We might call such a subsequent transfer of the child a "downstream sale," because the sale occurs after the child has already been (wrongfully) taken from the birth parents.

This question of a "downstream sale" of a child requires inquiry into the quagmire of money and adoption intermediaries. Commonly, adoption intermediaries are both paid and they transfer the child. The difficulty therefore becomes determining when these two related events constitute the "transfer" of a child for "remuneration or any other consideration," as described in the OP-CRC.

Once again, the domestic adoption system creates a problematic point of comparison. Despite the concern within the domestic adoption system of profiteering by adoption intermediaries, it has been permissible for such intermediaries to receive substantial payments. The theory of such payments appears to vary with the kind of intermediary, but the common theme is that intermediaries may be paid reasonable and customary fees for services provided. Permissible services include

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88 *See* Hague Convention, *supra* note 29 .

89 *See supra* note 47 and accompanying text.

90 *See supra* notes 43-47 and accompanying text.

counseling, home studies, social and medical histories, and attorney fees. Payment for obtaining a consent to adoption or placement of a child is generally forbidden.[91] These rules are designed to ensure that placements are made in the best interests of children, rather than made through a market process in which children are allocated to the highest bidder regardless of the appropriateness of the adoption.

The context for these payments for "services" is a domestic system for infant adoption dominated by private agencies and intermediaries. Public agencies primarily place older children who have come into state custody through allegations of abuse or neglect. These private agencies and intermediaries have created a diverse and somewhat entrepreneurial environment, which includes religious and social service agencies broadly involved in human services, as well as entities and persons specialized in adoption. The competitive environment for these entities can be difficult, since entry into the field appears wide-open. While the persons working in the field include social workers and lawyers, professional credentials are not required, and the most critical attribute may be the capacity to find or attract birth parents.[92]

Domestic adoption within the United States has been radically altered by the relative empowerment of birth parents of healthy infants. Since more than ninety-five percent of single birth parents either abort or keep the child, and only a small percentage offer the child for adoption, birth parents find themselves courted by agencies, intermediaries, and prospective adoptive parents. Large numbers of prospective adoptive parents seek a much smaller number of available infants through advertisements to birth parents. These advertisements offer birth parents free counseling, financial assistance, college scholarships, detailed information on prospective adoptive families, and open adoption. In addition, the reduction of social stigma for single parenthood has further empowered birth parents, making the option of keeping their baby or openly interviewing prospective adoptive parents generally available. Under these circumstances, birth parents are no longer limited to a shame-faced relinquishment of their child to an all-powerful intermediary. While this empowerment of the birth family opens the door to certain kinds of abuse—principally related to a bidding war for scarce babies—it reduces to some degree the capacity of

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[91] *See* NAIC Adoption Expenses, *supra* note 53.

[92] *See* Pierce & Vitillo, *supra* note 58, at 131; Evan B. Donaldson Institute, *Private Domestic Adoption Facts*, *available at* https://www.adoptioninstitute.org/FactOverview/domestic_print.html (last visited Oct. 29, 2004) [hereinafter Evan B. Donaldson Institute].

intermediaries to use the cloaks of privacy and power to profiteer for themselves. On the other hand, the empowerment of birth parents means that intermediaries who can attract birth parents will tend to dominate, regardless of professional competencies or official credentials.[93]

The intercountry adoption system is similarly dominated by private intermediaries, but here the picture becomes even more complex. Unlike domestic adoption, where the capacity to find birth parents as clients is critical, the most significant client for intercountry adoption is the adoptive family. Thus, whereas domestic infant adoption advertisements are aimed at birth parents, in intercountry adoption the ads are aimed at adoptive families. Agencies tout their capacity to reliably and quickly deliver healthy infants to adoptive parents: "Want a baby?—we'll get you a healthy Guatemalan infant in less than a year!" Clients weary of chasing picky birth parents within the domestic system, put off by the specter of birth parents changing their minds before or after birth, and ambivalent about open adoption, are lured into the international system by the comparative powerlessness and distance of foreign birth parents. Well-meaning families who already have children are drawn into intercountry adoption by the plea to provide homes for the destitute orphans of the world that are presented as being virtually limitless in number. The regulatory environment for intermediaries working in intercountry adoption varies significantly from state to state, but can be summarized, overall, as quite lax, making professional credentials optional.

In intercountry adoption, as in domestic adoption, the theory is that adoptive parents are paying for "services," and perhaps "gifts" to others, but they are not buying a child. The nature of those "services" and "gifts" within intercountry adoption remains quite obscure, however, due to the vague breakdown of intercountry adoption fees. Intercountry adoption can be quite expensive, but it is not always clear exactly where the money is going. Fees are often broadly designated as "agency fees," "international fees," or fees going to those within the foreign nation (i.e., "India Fee"). In many intercountry adoptions, all of the fees are paid by the adoptive parents to the U.S. placement entity, which then channels portions to various entities and persons within the sending nation. In some countries, the adoptive parents are required to bring significant

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[93] *See generally* CARP, FAMILY MATTERS, *supra* note 6, at 196-222 (discussing the development of open adoption); PERTMAN, *supra* note 5 (discussing general changes in adoption); Evan B. Donaldson Institute, *supra* note 92 (discussing attracting birth parents).

amounts of cash with them into the foreign nation, and pay various entities directly. In either event, it is common for five thousand dollars to ten-thousand dollars per child to be paid to various individuals, agencies, and entities within the foreign nation. When this kind of money goes to nations with per capita incomes of less than one thousand dollars, often less than five hundred dollars, it becomes extraordinarily difficult to prevent adoption from descending into a form of child trafficking. I have elsewhere described at great length how the Indian adoption system has been corrupted by large amounts of American dollars, but doubtless the story could be repeated in the various nations plagued by adoption scandals.[94]

The various entities and individuals involved in intercountry adoption, who may receive fees, include (1) U.S. placement agencies; (2) U.S. agencies providing home study of adoptive family; (3) orphanages or agencies in the foreign country with custody of child; (4) various "facilitators," employees of United States or foreign agencies, who move adoptions through the foreign system; (5) attorneys in foreign nations; (6) possible "foster parents" in foreign countries; (7) medical professionals providing medical evaluations of children; and (8) social workers providing social histories or child study forms. Of course there are also various official immigration and court fees, in addition to travel costs, which add to the cost of intercountry adoption, but generally provide far less room for mischief.

As a practical matter, the U.S. practice of spending five thousand dollars to ten-thousand dollars per child in the foreign countries generally creates a large "profit" or excess beyond any actual, legitimate costs related to adoption services. Indeed, in nations where social workers traditionally earn a few thousand dollars per year, and orphanage workers can be paid a few dollars a day or less, it seems probable that the vast bulk of the fees are sheer profits. The ultimate destinations of these profits seem to vary from nation to nation. Some argue that the Chinese, with their centralized systems of control, have successfully used most of their adoption fees to significantly improve their orphanages and services for abandoned children, most of whom will remain in China.[95] By contrast, in Guatemala, India, and Cambodia,

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[94] *See* Smolin, *supra* note 10.

[95] *See* KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA 183-211 (Amy Klatzkin ed., 2004).

it appears that the exorbitant fees have enriched individual intermediaries.[96]

The Hague Convention specifically requires contracting States to take "all appropriate measures to prevent improper financial or other gain in connection with an adoption . . . ."[97] But what is "improper" gain? The best definition would include compensation disproportionate to services rendered, based on the Hague Convention's prohibition of remuneration that "is unreasonably high in relation to services rendered."[98] For example, if an individual in a developing nation spends ten hours working on an adoption, and a person in his field (social work, child welfare, law, etc.) would normally receive two hundred dollars for such work, then receipt of three thousand dollars beyond expenses should count as "improper" gain.

One difficulty with enforcing such a norm is that the foreign agencies and individuals receiving "adoption fees" often claim that those sums are funding an orphanage, including the costs of caring for children who will never be adopted. In many instances there does not seem to be a clear system of accountability to determine the degree to which such fees are truly spent on child welfare or are simply to enrich individuals. In those circumstances, it becomes very difficult to document whether the "profit" is used to fund the operation of the orphanage or is pocketed by the individual.[99]

Even if the amounts paid to particular individuals are disproportionately high, and within the Hague Convention's prohibition of "improper financial gain," they are not necessarily within the OP-CRC definition of a sale of a child. In order to come within the definition of a "sale" of a child, there must be the following two elements beyond the receipt of some consideration: (1) transferring the child; and (2) in exchange for, or in consideration for, the receipt of consideration. The first element is met only when the individual at some point had physical or legal custody of the child. Even where that element is met, however, the element of exchange of the child for money is problematic.

Consider a typical situation where a corrupt individual ("Mr. K.") in a sending nation obtains physical custody of a child in some non-

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[96] *See* note 79.

[97] Hague Convention, *supra* note 29, at art. 8.

[98] *See id*. at art. 32(3).

[99] *See* Smolin, *supra* note 10 (discussing issue of orphanage donations and fees in context of India).

financial illicit manner, such as tricking or coercing the birth parents. The child is living in an orphanage controlled by Mr. K. Assume that legitimate adoption agencies in the United States regularly obtain children from Mr. K's orphanage, paying him a four thousand dollar per child "foreign fee." This money comes from the adoptive families, who pay the money to the U.S. agency. The U.S. agency pays Mr. K. half of the money upon some initial stage of the adoption, and the other half when the child arrives in the United States. Although the complete and specific purposes of the fees are not delineated, the fees do cover the care of the child while in the orphanage, necessary medical and social examinations and reports, attorney and court fees, general assistance to the orphanage, and the shepherding of the adoption through an intricate, and somewhat corrupt, adoption process. While unstated, it is understood that some portion of the fees may be used, as needed, for the payment of bribes, which are often necessary even to complete a legitimate adoption of a true orphan. Moreover, assume that the U.S. agency has no knowledge of the illicit relinquishment and that the fees are handled in exactly the same way when children were properly relinquished by their parents. Finally, Mr. K. in practice generally pockets, personally, approximately sixty percent or twenty-four hundred dollars of the four thousand dollar fee, even though he actually spends no more than ten hours time working on the adoption, and his normal salary for a year's work outside the adoption field would be eight thousand dollars.

In this hypothetical,[100] it is arguable whether the element of quid pro quo, involving the exchange of financial gain for transfer of the child, is present. On the one hand, this situation could be seen as a matter of payment for services—or more precisely, gross overpayment for services. While overpayment for services can be seen as violating norms against profiteering or improper financial gain, such a violation does not necessarily turn an adoption into a sale of a child. Indeed, Mr. K. can plausibly argue that since he was paid for services rendered he is not liable for selling children.

On the other hand, it would be possible to argue that the combination of illicit taking of the child from his parents and

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[100] I would stress that Mr. K. does not refer to any particular person, but rather is meant to describe an unfortunately typical example of a somewhat corrupt adoption orphanage director in a sending country. The choice of the letter "K" is meant as an allusion to Kafka's work. Of course I do not think that such persons are innocent victims of an absurdist bureaucracy; here, the sources of absurdity have to be found elsewhere.

profiteering or improper financial gain make this into an implicit sale of a child. Such an argument depends on a kind of non-technical, yet realistic conclusion that Mr. K. is in the business of obtaining children and then selling them for a handsome profit. But how can Mr. K be a seller of children, without labeling the U.S. adoption agency and adoptive parents as buyers, even if unwitting buyers?

The difficulty of drawing the line between a service contract and the sale of a child should not obscure the clear cases. It is reported that in India, orphanages were paying "scouts" or intermediaries for children. The intermediaries that bought a newborn for twenty dollars from an impoverished birth family and then transferred the child to the orphanage for two hundred dollars certainly seem to have been involved in child selling, child trafficking, and the downstream "sale of a child." Ironically, however, even such scouts could claim that they were being paid for the "service" of finding needy children in danger of infanticide and in need of adoption and hence were not really "selling" or transferring the child.[101] Hopefully no one would "buy" this argument, but in a strictly logical sense, the line between being paid for the "service" of finding children, and being paid for the child, is more or less arbitrary.

Another clear instance of intermediaries selling children in intercountry adoption occurs when orphanages, which have either legitimately or illegitimately obtained custody of children, choose the adoptive parent and U.S. placement agency based on a "highest bidder" methodology. For example, an orphanage director may let it be known that he will place infants through the U.S. agency that provides the highest adoption fee. Such a situation is compounded by the custom of some U.S. intercountry adoption agencies of compensating "country coordinators" by paying a sum per completed adoption. This arrangement, of course, looks suspiciously like a sales commission. If the U.S. intermediary is paid, for example, three thousand dollars per completed adoption—perhaps half of the agency fee—it may be tempting for that individual to "kick back" a certain percentage of his fee to the foreign country director in exchange for quick access to the most adoptable children. As the foreign orphanage and various U.S. orphanages negotiate these kinds of arrangements, they are in fact exchanging money in consideration of the transfer of the child, a classic form of downstream child-selling. Yet, it is possible to theoretically and

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[101] *See* Smolin, *supra* note 10 (describing adoption scandal in Andhra Pradesh, India).

practically disguise these kinds of transactions as merely standard "fees" for services exchanged, with even "highest bidder" tactics justified as attempts to fund the orphanage or demand higher quality service.

III. CONCLUSION: INTERCOUNTRY ADOPTION AS CHILD TRAFFICKING

As the above analysis demonstrates, the fundamental legal distinction between a legitimate adoption and the illicit sale of a child is unclear in both theory and practice. The distinction is maintained by a logically arbitrary system of labeling under which exchanges involving money are classified as legitimate or illegitimate. This labeling system unfortunately appears quite illusory because the distinction between legitimate and illegitimate is maintained by applying conclusory legal labels without a clear relationship to the actual nature of the underlying transaction. Thus, the domestic system of adoption generally labels financial benefits provided to the birth parent, and the birth parent's consent to adoption, as unrelated "gift" and "consent." This labeling is applied even where it is clear that the financial assistance is induced by the representation that the birth parent currently intends to place the child with those providing the "gift." The law deliberately obscures the true nature of the transaction through labels like "gift" to theoretically maintain the rule against selling children. Similarly, the system maintains the illusion that intermediaries are being paid for "services," rather than for the child, even when the payments are contingent on successful delivery of the child or differ according to the characteristics of the child, rather than according to the services rendered.

This terminological sleight of hand can be played to the point where child selling can be explicitly defended. The best illustration of this is the famous (or infamous) defense of child selling by Judge Richard Posner, who argued that the law should permit birth parents to sell their infants to adoptive families. Judge Posner defended his proposal by claiming that it did not really amount to "baby selling" since it was merely custodial rights, rather than children, that would be sold. From Judge Posner's perspective, so long as children are not reduced to the status of slaves, they are not being sold. Hence, Judge Posner responded to the criticism that his proposal commodified human beings, or undermined the ban against slavery, by stating that his critics were really confused by the "mis-use" of the term "baby selling." Once one used the proper term

of "sale of parental rights," all such moral objections should disappear, according to Judge Posner.[102]

One could summarize the word games and arbitrary distinctions of both Judge Posner, and our legal system, as follows:

	Prohibited	**Permitted**
Judge Posner	Sale of children (as slaves)	Sale of parental or custodial rights
Current law	Sale of children, parental, or custodial rights	"Gifts" to birth parents Birth parent "expenses" Payment for "services"

My argument is that the law's distinction between illicit sale of children (or parental rights) and licit "gifts," "expenses," and "services" is just as illusory as Judge Posner's distinction between illicit sale of children and licit sale of parental rights. Just as Judge Posner's proposal to permit the sale of parental rights would render a prohibition of baby-selling illusory, the law's current permission of "gifts," "expenses," and "services" makes the law's prohibition of selling parental rights and children largely illusory.

I am not arguing that gifts to birth parents, birth parent expenses, or adoption service fees, are in themselves necessarily unethical or tantamount to baby selling. However, the context in which the law permits these activities renders them questionable and allows children to be commercialized and commodified. Thus, in the context of intercountry adoption, it is illusory to distinguish between buying children, and paying for adoption services, when the law has no effective system of preventing adoption intermediaries from profiteering from adoption.

Where the law permits orphanages to become profit centers generating wealth far beyond normal compensation for services, the concept of "payment for services" is a legal fiction ineffectively hiding a commercial trade in children. Where the law permits adoptive parents to be charged for "orphanage donations," but has no effective means of ensuring that these funds are spent on children, rather than being pocketed by intermediaries, "donations" become a legal fiction facilitating a trade in children. Similarly, the distinction between gifts to birth parents and illicitly inducing consent through financial

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[102] *See* RICHARD POSNER, SEX AND REASON 409-17 (1992).

consideration has little meaning in an intercountry adoption system in which aid to assist birth families to stay together is not required and in which it is permissible to offer aid only to birth parents who consent to adoption.

Thus, where parents give up their children for the lack of a few hundred dollars, or less, but the intercountry adoption system spends tens of thousands of dollars completing the adoption of the child, the concept of compassionate adoption becomes a cruel hoax. Moreover, where impoverished parents in developing nations are offered financial assistance only when they relinquish their children, and the law considers this a licit "gift" unless agency and parent virtually confess to intending a sale, as a result a ban on child selling becomes illusory. Similarly, within the domestic system the concept of paying for services, but not for children, becomes illusory when agencies charge far more for high-demand white infants, evidencing the development of a market in children. The willingness of the law to label such an obvious sign of a market as a mere "payment of permissible services" indicates that the adoption system is mired in legal fictions with little relationship to the underlying commodification of children.

Thus, adoption can only maintain a principled and enforceable line against child selling and child trafficking when effective systems of enforceable regulation are in place that effectively prevent adoption systems from becoming markets in children. The refusal or failure of the domestic and intercountry adoption systems to put those needed regulations into place speaks volumes regarding the ethics of the domestic and intercountry adoption systems.[103] Unfortunately, upon closer examination it appears that the ethics of the adoption systems, both domestic and intercountry, are just as illusory and fictional as the legal prohibitions on child-selling.

If my argument is correct, then those who label intercountry adoption as a form of child trafficking are largely correct, at least under current circumstances and contexts. Intercountry adoption is a form of child trafficking not because adoptive families in rich countries obtain poor children from developing and transition economy nations. Rather,

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[103] My comments on the system of domestic adoption pertain only to the placement of healthy infants. The domestic system for placing abused and neglected children from the foster care system, or special needs children generally, is quite different and is not addressed in this article.

intercountry adoption is a form of child trafficking because the law and current systems of intercountry adoption permit it to operate as such.

I am not arguing that every individual adoption in the current intercountry adoption system constitutes the illicit sale of a child or illicit child trafficking. I am confident that there are many intercountry adoptions that are ethical, where money has not played any improper or illicit role. Moreover, some of the most important sending nations are free of significant child trafficking within their adoption systems. However, the system as a whole is corrupt because it has no effective means of preventing intercountry adoption from degenerating into illicit child trafficking. This legal failure, moreover, is not merely a theoretical difficulty. According to one estimate, over forty percent of significant sending nations over the last fifteen years have been shut down due primarily to adoption scandals concerning corruption and child trafficking.[104] This estimate, moreover, does not include nations, such as India, that have been plagued by significant adoption scandals but have not experienced a nation-wide shutdown or moratorium. The gaps in the law, therefore, are accompanied by recurrent and systematic baby-selling scandals. Moreover, these abusive adoption practices are not new but have been going on for decades.[105] The problems with intercountry adoption and child trafficking are systematic and recurrent, not exceptional or occasional.

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[104] *See* Ethica, *Intercountry Adoption Reform Act (ICARE); Suggested Amendments and Comments on Suggested Language*, (July 13, 2004), *available at* https://www.ethicanet.org/ICAREcomments.pdf. The report notes:

> Over the last 15 years, 40 different countries were in the Top 20 Countries of Origin for U.S. Families. Of these, 13 are currently closed or effectively closed. (By effectively closed, we mean that the number of children being adopted has fallen to 26 or less each year *including* orphan petitions filed by immediate relatives or those living in the foreign country. Former numbers ranged from 79 to 1,122 per country, with an average of 306).
>
> An additional four countries are closed, reportedly temporarily, to investigate concerns or establish new procedures. Together, these 17 countries account for 43 percent of the 40 most common countries for U.S. citizens to adopt from. Virtually all of these countries closed due to concerns about corruption, child trafficking or abduction.

Id.

[105] *See, e.g.*, Pierce & Vitillo, *supra* note 58, at 138-42 (documenting abusive adoption practices, some documented from a 1980 book); Carro, *supra* note 29 (documenting already long-standing abusive intercountry adoption practices).

Of course, it could be argued that the very nature of intercountry adoption, involving a transaction between rich and poor nations, lends itself to abuse, and therefore the choice is ultimately between shutting down intercountry adoption, or allowing it to continue, in the interests of saving children, despite these abuses. This kind of argument implicitly justifies child trafficking in the name of the best interest of the child. Such justifications are not of the explicit sort provided by Judge Posner but rather of the apologetic, "we just can't stop it," variety. From this perspective, child selling in the guise of adoption becomes a kind of vice crime, like gambling or prostitution, that the law is helpless to stop and that may cause more harm than good to prevent. It is against this kind of argument that the introduction of this Article, as well as my prior article on the Indian adoption scandals, are directed. Child trafficking is not a mere "vice" crime that the law may legalize, regulate, or allow to operate in the shadows. Child trafficking is a profound violation of human rights that law and society must energetically seek to abolish, wherever it may be found and whatever disguises it may adopt. Further, as this Article makes clear, the law has in no way exhausted the regulatory possibilities for preventing intercountry adoption from degenerating into a form of trafficking. Only when the law has energetically implemented the obvious and rational regulatory steps to prevent adoption as trafficking can the argument be made that the only choices are banning intercountry adoption or permitting trafficking. Indeed, it is those supposed advocates of intercountry adoptions who resist such regulations and excuse the presence of trafficking in the adoption system, who are digging the grave of intercountry adoption.

Intercountry adoption is a conditional good; intercountry adoption as child trafficking is an evil. Only when the law, society, and intercountry adoption system are reformed will the conditions under which intercountry adoption can flourish as a good be established. Unfortunately, the prospects for such reform are poor because there are few within the current intercountry adoption system with the motivation to demand it. Hence, the recurrent cycle of scandal, excuse, and ineffective "reform" will probably continue until intercountry adoption is finally abolished, with history labeling the entire enterprise as a neo-colonialist mistake. It does not have to be this way, but it will take more than legal fictions and illusory restrictions on child trafficking to prevent the ultimate demise of the intercountry adoption system.