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INTERCOUNTRY ADOPTION AND POVERTY: A HUMAN RIGHTS ANALYSIS

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Adoption proponents commonly view intercountry adoption as an appropriate response to the extensive poverty that exists in many developing nations.[1] Intercountry adoption is perceived as a humanitarian act that transfers a child from extreme poverty and its vulnerabilities and limitations, to the wealth, comfort, and opportunities of developed nations.[2]

The extreme nature of poverty in developing countries underscores the impetus to rescue children from its harsh effects. An estimated 800 million to one billion people live below the international poverty line of $1 per day, with perhaps another 1.5 to 2 billion living on less than $2 per day.[3]

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* Professor of Law, Cumberland Law School, Samford University. The author appreciates the research assistance of Anna Schmidt. I owe a broad intellectual debt to Desiree Smolin, who has been my partner in working through a number of issues related to intercountry adoption.

[1] *See, e.g.*, Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 183 (2007) ("allowing international adoptions will push us slightly forward on the path to improving conditions for parents and children and otherwise addressing poverty and social injustice in the poor and the sending countries of the world.").

[2] *See id.* at 152–53; Ramya Parthasarathy, *Harvard Hosts Debate on Transnational Adoption*, THE HARVARD CRIMSON ONLINE EDITION, Nov. 2, 2005, http://www.thecrimson.com/article.aspx?ref=509558 (quoting adoption advocate Professor Bartholet, who "agreed that poverty is a driving factor behind women's choices to put their children up for adoption," but that nonetheless "[w]e should promote international adoption . . . ."); Jane Gross & Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES, June 4, 2007, at A1, A16 (Ethiopian government opens intercountry adoption to those who "come from families too destitute to feed and clothe them"); *International Adoption Stories: Guatemalan Adoption Laws*, 2007, http://www.internationaladoptionstories.com/guatemalan-adoption-laws.htm (adoption story by adoptive parent illustrates viewpoint that intercountry adoption is an appropriate response to the poverty of Guatemala) (last visited June. 15, 2008); Hands to Hearts International: A Deeper Look at International Adoption, http://handstohearts.blogspot.com/2006/11/deeper-look-at-international-adoption.html (Nov. 18, 2006, 12:39) (illustrating common pro-international adoption rhetoric).

[3] See JEFFREY D. SACHS, THE END OF POVERTY 2–3 (2005), for a discussion on extreme poverty and efforts to alleviate it. See Shaohua Chen & Martin Ravallion, *How Have the*

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Parents living under or near the international poverty line struggle to provide bare subsistence for themselves and their children, and many children and adults suffer from malnutrition and the lack of clean water, sanitation, electricity, medical care, housing, and education.[4] The children of the poor in developing nations are also vulnerable to other harms, such as child labor, debt bondage, child prostitution, and child trafficking.[5] The

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World's Poorest Fared since the Early 1980s?, 19 WORLD BANK RES. OBSERVER 141, 141 (2004), for a discussion on the measurement of extreme poverty. One view of poverty estimates and trends in global income distribution examines the magnitude of inequality in income distribution. At the most extreme, the world's wealthiest 500 persons have a combined income greater than that earned by the 416 million persons falling into the poorest income bracket. *See* U.N. Dev. Program [UNDP], Human Development Report Office, *Human Development Report 2005: International cooperation at a crossroads: Aid, trade and security in an unequal world*, at 4 (*lead author* Kevin Watkins, 2005), *available at* http://hdr.undp.org/en/media/hdr05_complete.pdf. The 2.5 billion people living on less than $2 per day, which is 40% of the world's population, account for 5% of global income, whereas the richest 10%, almost all of whom live in high-income countries, account for 54%. *Id.*; *see also generally* Shaohua Chen & Martin Ravallion, *Absolute Poverty Measures for the Developing World, 1981–2004* (World Bank, Working Paper No. WPS4211, 2007), *available at* http://go.worldbank.org/JKM6JMVZ10; World Bank, *2007 World Development Indicators*, http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:21298138~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html [hereinafter *World Development Indicators*] (providing the latest world income distribution estimates, along with explanations of how the data are gathered and the rationale for calculating the distribution of poverty in terms of people worldwide living under $1 and $2 per day); U.N. Econ. & Soc. Aff., *The Millennium Development Goals Report 2007*, http://www.un.org/millenniumgoals/docs/UNSD_MDG_Report_2007e.pdf (showing United Nations goals for the eradication of poverty and progress to date).

[4] *See, e.g.*, World Summit for Soc. Dev., March 6–12, *Report of the World Summit for Social Development*, at 13, U.N. Doc A/CONF.166/9 (Apr. 19, 1995) (note with particularity Part C, Commitment 2) [hereinafter *Social Development Summit*]; SACHS, *supra* note 3, at 20; BARRY S. LEVY &VICTOR W. SIDEL, SOC. INJUSTICE AND PUB. HEALTH 379–402 (Barry S. Levy & Victor W. Sidel eds., 2006); World Bank, *World Development Report 2004, Making Services Work for Poor People* (2003) (discussing education, health care, water, sanitation, electricity), *available at* http://go.worldbank.org/YLHM12T4M0.

[5] *See generally* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REP. 18–22 (2007), *available at* http://www.state.gov/g/tip/rls/tiprpt/2007/; Niels-Hugo Blunch & Dorte Verner, Revisiting the Link between Poverty and Child Labor, The Ghanaian Experience, (World Bank, Policy Research Working Paper No. WPS2488), *available at* http://go.worldbank.org/5PHI7SR030; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, Nov. 19, 2000,

(*continued*)

impetus to rescue children from this kind of poverty, and its attendant miseries, is certainly understandable.

This Article explores the question of whether intercountry adoption is an effective, appropriate, or ethical response to poverty in developing nations. As a matter of methodology, this fundamental question of adoption ethics is explored through the lens of international human rights law. This Article specifically argues that, where the birth parents live under or near the international poverty standard of $1 per day, family preservation assistance must be provided or offered as a condition precedent for accepting a relinquishment that would make the child eligible for intercountry adoption.

The question posed by this Article is fundamental to intercountry adoption practice in many developing countries, such as Cambodia, Ethiopia, Guatemala, India, Nepal, and Vietnam. The question is also fundamental to the issue of whether intercountry adoption should be expanded in many other developing nations where it is rare.[6] The issues were well posed by a recent New York Times article on the expansion of intercountry adoption in Ethiopia.[7] The article noted that while many African countries have "outlawed or impeded" intercountry adoption, Ethiopia has opened itself to intercountry adoption for children whose families are "too destitute to feed and clothe them."[8] The emerging Ethiopian intercountry adoption system is unusual in encouraging adoptive families to "meet birth families and visit the villages where the children were raised."[9] This practice has the effect of unveiling to adoptive parents

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ILO Convention No. 182, pmbl., *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C182 [hereinafter Worst Forms of Child Labour] ("Recognizing that child labour is to a great extent caused by poverty and that the long-term solution lies in sustained economic growth leading to social progress, in particular poverty alleviation and universal education."); THE END OF CHILD LABOUR: WITHIN REACH, ILO, at 10 (2006), http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-i-b.pdf (discussing poverty, among other factors).

[6] See U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *Immigrant Visas Issued to Orphans Coming to U.S.*, http://travel.state.gov/family/adoption/stats/stats_451.html (last visited June 15, 2008), for intercountry adoption statistics from the United States government.

[7] Gross & Connors, *supra* note 2, at A1, A16; see also *Immigrant Visas Issued to Orphans Coming to U.S.*, *supra* note 6, for statistics documenting the increase in adoptions from Ethiopia.

[8] Gross & Connors, *supra* note 2, at A16.

[9] *Id.*

and others the stark choices involved in adopting children internationally based on the poverty of their families. Thus, one adoptive mother of a twenty-one month old and a five year old "anguished," asking, "Should we just give all the money we're spending on this to the children's mother?" The adoptive father stated that "[i]t was obvious the birth mother loved her children."[10] The dilemma was perhaps sharpened when the five year old refused to leave the orphanage with the adoptive parents, grabbing the bars at the gate and refusing to let go.[11]

These issues do not disappear when the child arrives in the United States. This was clear in the situation of a six year old adoptee who would "work herself up until she was inconsolable" while looking at the photos of the "aunt and grandmother who had raised her."[12] This prompted the adoptive mother to put the photographs away.[13]

The hard choices involved at the intersection of poverty and adoption are often hidden from view by an intercountry adoption system that usually keeps adoptive parents and birth families separated from one another.[14] The complex relationships between adoption triad members is structured and facilitated by a complex mix of governmental and private intermediaries and regulators that can hide from view the simple human choices involved.[15] The purpose of this Article is to look behind the veil the intercountry adoption system creates and ask the simple questions which any adoptee, adoptive parent, or birth parent might ask about his or her own adoption experience: Was the adoption really necessary? What could have been done to keep the original family together, and was it done? Why was so much money spent to move a child from one family to another, and so little money (if any) was available to help the original family keep the child? Did the adoption respect the humanity and rights of the original parents and family, or did it take advantage of their poverty and misfortune in order to meet the desire of others for children or profits? An adoption system that cannot provide the adoption triad members with

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[10] *Id.* The adoptive father also noted that the birth mother thanked her for "sharing my burden." *Id. See infra note* 122 and accompanying text, discussing grateful birth parents.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Cf. id.* at A1 (noting that the practice of meeting birth families is "cutting-edge" in international adoptions).

[15] *Cf.* Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 345–51 (1996) (discussing complex issues implicated by drafting of the Uniform Adoption Act).

accurate, clear, and satisfactory answers to these questions ultimately lacks legitimacy, no matter how many complex systems, regulations and rationales it uses to justify itself. My argument, therefore, is that an intercountry adoption system without the aid rule I propose is, to that degree, illegitimate, for a system without such a rule cannot provide satisfactory answers to these questions.

I. INTERCOUNTRY ADOPTION, POVERTY AND HUMAN RIGHTS

Under international human rights norms, birth parents are possessed of equal and inalienable rights based on their inherent dignity as human persons.[16] From this perspective, extreme poverty is not simply a background condition or circumstance, but in itself represents a severe deprivation of human rights. The lack of food, water, sanitation, clothing, housing, health care, and education, along with a lack of employment and economic opportunities, constitute severe deprivations of rights.[17] The international community is responding to these deprivations in significant part through the Millennium Development Goals, which seek to mobilize efforts to, among other things, "eradicate extreme poverty and hunger."[18] Thus, the statistic of approximately 800 million to one billion people living in extreme poverty[19] is not accepted as a given, or inevitable, but as something that can and will be overcome.[20]

Poverty clearly extends beyond those living under the international standard of $1 per day, to encompass many of the two billion people living under $2 per day.[21] Many people living above the $1 per day standard for extreme poverty still lack, at least intermittently, significant economic or

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[16] *See, e.g.*, U.N. Charter pmbl. ("We the peoples of the United Nations . . . reaffirm faith in fundamental human rights, in the dignity and worth of the human person. . . ."); G.A. Res. 217A (III) of 10, at 71, U.N. Doc. A/810, (Dec. 10, 1948) pmbl. ("Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."); *id.* art. 1 ("All human beings are born free and equal in dignity and rights."); International Covenant on Civil and Political Rights, 6 INT'L LEGAL MATERIALS 368, 368, 371, 373, U.N. Doc. A/6313 (Dec. 19, 1966).

[17] *See generally* International Covenant on Economic, Social and Cultural Rights, 6 INT'L LEGAL MATERIALS 360, 360–68, U.N. Doc. A/6313 (Dec. 19, 1966).

[18] *See* United Nations Millennium Development Goals, http://www.un.org/millenniumgoals (last visited June 15, 2008) [hereinafter Millennium Goals].

[19] *See* sources cited *supra* note 3.

[20] *See supra* note 18.

[21] *See* sources cited *supra* note 3.

subsistence rights.[22] Living in such poverty, and close to extreme poverty, produces little or no margin of economic security, such that illness, crop failure, rising food prices, or job loss can have devastating consequences.[23]

Individuals and families suffering under the deprivation of their rights to an adequate standard of living are particularly vulnerable to the deprivation of additional rights. The poor often are subjected to debt bondage, human trafficking, illicit child labor, and a variety of slavery-like practices. Those with little seem to end up with less, and have nothing left to sell or offer but themselves and their loved ones.[24]

It is one of the cruel ironies of poverty that some grow rich by exploiting the poor. Although the poor have little or nothing in legal possession, their labor, bodies, and children remain valuable. Markets develop in human organs, slave labor, child labor, sexual services, and adoptable children.[25] Markets develop in human beings, both adults and

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[22] *Id.*

[23] *Id.*; *see also* United Nations Development Programme, *Human Development Report 2003, Millennium Development Goals: A Compact Among Nations to End Human Poverty*, (Sakiko Fukuda-Parr ed., 2003), *available at* http://hdr.undp.org/reports/global/2003 [*hereinafter* 2003 Millennium Development Goals]. *See generally* Chen, *supra* note 3 (explaining that the numbers of persons living under the "$1 a day" and "$2 a day" standards are population estimates derived from data originally gathered using systematic household surveys, where quantitative and some qualitative data are gathered and enable researchers to correlate income with the social and health consequences of relative deprivation). The use of those measures stems from the 1990 World Development Report, where the World Bank's "global" poverty measures have mainly been based on an international poverty line of about $1 a day; more precisely,

> the line is $32.74 per month, at 1993 international purchasing power parity . . . a deliberately conservative definition, being anchored to the poverty lines typical of low-income countries. To gauge sensitivity, [the reports] also use a line set at twice this value, $65.48 per person per month. Following common practice we refer to these as the "$1 a day" and "$2 a day" lines. The higher line is more representative of what "poverty" means in middle-income developing countries.

Id. at 6.

[24] *See* sources cited *supra* note 5.

[25] On human organs, see D. Parturkar, *Legal and Ethical Issues in Human Organ Transplantation*, 25 MED. & L. 389, 397 (2006) (noting the tendency for organ markets to arise in countries where poverty is endemic because the supply is "consequently highly elastic and plentiful"), on other markets, see TRAFFICKING IN PERSONS REP., *supra* note 5, and Worst Form of Child Labour Convention, *supra* note 5, and MIKE DOTTRIDGE, 'KIDS AS

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children, who once sold are often controlled in slavery-like conditions so they can make money for their "owners."[26] The poor, wittingly or unwittingly, become the primary human commodities of these markets. The problem for the poor is that they often seem to lack a better alternative. Their desperation and frequent lack of access to legal protection render them ripe for exchanges that exploit them because their bargaining position (if any bargaining is involved) is generally "poor." The rich, middle-class, and even organized criminal elements have superior capacities to influence the police and courts, allowing them to cheat and defraud the poor with relative impunity. Adding to their vulnerabilities are the illiteracy and lack of education of many of the poor.[27] Hence, poverty is frequently characterized as an extreme powerlessness.[28]

Under these circumstances, the ultimate solution to poverty involves a kind of empowerment, sometimes aptly called development. It is not

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COMMODITIES?' CHILD TRAFFICKING AND WHAT TO DO ABOUT IT 23–27 (2004), *available at* http://www.terredeshommes.org/pdf/commodities.pdf. On adoption specifically, see David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2006) [hereinafter *Child Laundering*].

[26] *See* TRAFFICKING IN PERSONS REP., *supra* note 5; *see also* U.N. Comm'n on H.R., Sub-Comm'n on the Promotion and Prot. H.R., Working Group on Contemporary Forms of Slavery, *Contemporary Forms of Slavery Related to and Generated by Discrimination: Forced and Bonded Labour in India, Nepal and Pakistan* (28th Sess. 2003), *available at* http://www.antislavery.org/archive/submission/submission2003-discrimBL.htm (last visited June 15, 2008).

[27] *See, e.g.*, Blaise Benedict *The Word Becoming Flesh Among Us: An Ongoing Reality in our Life*, PROMOTIO IUSTITIAE, 2007, at 65, *available at* http://www.sjweb.info/documents/sjs/pj/docs_pdf/PJ094ENG.pdf.

[28] The entitlement theory of the economist Amartya Sen captures some of the broader implications of the powerlessness of the poor. AMARTYA SEN, POVERTY AND FAMINES (1981); *see also* AMARTYA SEN, DEVELOPMENT AS FREEDOM 4–11 (1999); David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 980–87 (2000) (applying Sen's theories to child labor issues). For a concrete description of power relationships and poverty in a particular context, see ANDRIES DU TOIT, HUNGER IN THE VALLEY OF FRUITFULNESS: GLOBALIZATION, "SOCIAL EXCLUSION," AND CHRONIC POVERTY IN CERES, SOUTH AFRICA, Mar. 5, 2003, http://www.chronicpoverty.org/pdfs/2003conferencepapers/DuToit.PDF [hereinafter *Chronic Poverty*]. *See also* Madeleine Albright, *It's Time for Empowerment*, ECONOMIST, WORLD IN 2007, at 7, *available at* http://www.undp.org/legalempowerment/pdf/ALBRIGHT.pdf. *See generally* Commission on Legal Empowerment of the Poor, http://www.undp.org/legalempowerment/ (last visited June 15, 2008).

enough to provide the poor with food, shelter, and clothing—although on an emergency basis that may, of course be necessary and appropriate. Ultimately, the solution to poverty is human development, which comprehensively involves the economic, educational, vocational, social, cultural, and political development of the individual, family, and community.[29]

Existing relationships of exploitation can serve as a barrier to efforts to promote development that empowers the poor. Many of the poor are embedded within a web of hierarchical relationships with wealthier classes that often exploit them, but sometimes assist and defend them.[30] Assistance that seeks to empower the poor necessarily disrupts those existing relationships.[31] Those with an interest in maintaining current relationships with the poor, therefore, may resist empowering assistance.[32]

Unfortunately, some programs to "aid the poor" primarily benefit those who run and regulate them, including a host of intermediaries and government officials. It is easy to see how programs assisting the poor can be co-opted by more powerful interests who subvert such programs for their own interests and purposes. Creating an efficient and corruption-free network linking donor nations, non-governmental organizations (NGOs) and individuals in wealthy countries with the poor of Africa, Asia, and Latin America, is difficult at best.[33] Both government-to-government aid,

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[29] *See also generally Social Development Summit*, *supra* note 4.

[30] *See, e.g.*, E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN-DAY SLAVERY 203–51 (2008).

[31] *See id.*

[32] *See, e.g.*, *id.*; *see also* BENEDICT, *supra* note 27, for a narrative illustrating the problem of more powerful classes resisting empowerment of the poor (in this instance through education).

[33] Questions about the effectiveness of foreign aid and the extent of corruption are highly controversial. *Compare* WILLIAM EASTERLY, THE WHITE MAN'S BURDEN: WHY THE WEST'S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD 30 (2006) *and* John Stossel & Patrick McMenamin, *Myth: More Foreign Aid Will End Global Poverty, Food and Financial Aid Often Reaches Only Corrupt Officials, Not the Poor*, ABC NEWS 20/20, May 12, 2006, *available at* http://i.abcnews.com/2020/Story?id=1955664&page=1, *with* SACHS, *supra* note 3, at 310–15. Even Sachs, however, estimates that a significant percentage of foreign aid goes for consultants in donor countries and administrative costs. *Id.* at 310.

Even apart from corruption issues, the question of whether and when aid works requires an analysis of the causes of poverty. *See, e.g.*, Shaohua Chen, Ren Mu & Martin Ravallion, *Are There Lasting Impacts of Aid to Poor Areas?: Evidence from Rural China* 31 (World Bank, Working Paper No. 4084, December 2006), *available at*

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and private aid, is subject to being diverted, skimmed, and stolen, such that only a small fraction of the value invested reaches the poor.[34] Even non-corrupted systems of aid may create an infrastructure of people who come to depend, for their middle-class support, on their roles in administering assistance to the poor, which will lead to the problem of maintaining efficiency in the governmental and nonprofit sectors.[35]

Moreover, even the best-intentioned interventions face the dilemma of creating a new paternalism that assists, while ultimately inhibiting full human development. The question of how to promote development and provide assistance in a way that fully respects human dignity is sensitive and controversial. The relationship of donor/donee is not necessarily exploitative, but is open to exploitation. Yet, abandoning the poor to their fate is not an acceptable solution. Ultimately, the question of how to appropriately intervene, despite the dilemmas and risks, must be faced.[36]

II. INTERCOUNTRY ADOPTION, POVERTY, AND THE CHOICE OF INTERVENTIONS

Intercountry adoption is one of many possible interventions for vulnerable families and children. Other possible interventions include assistance to the birth family, extended family care, foster care, institutional care, or domestic adoption. A critical question is determining the appropriate intervention in any given circumstance, such as the extreme poverty of the birth family.

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http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2006/12/06/000016406_20061206153200/Rendered/PDF/wps4084.pdf (noting that longer-term impacts of aid to poor areas depend crucially on why the areas are poor). "If persistently poor areas arise from generalized capital-market failures then external aid can more effectively relieve financing constraints and subsequently enhance long-run growth." *Id.* It follows that whenever "credit market failures are specific to certain (liquidity-constrained) subgroups of the population then the aid will need to be targeted to those groups," yet, the "persistently poor and disenfranchised often arise from other causes, such as governance failures or (possibly policy-induced) distortions in other markets (including labor, such as due to restrictions on migration.)" *Id.* The benefits from extra aid to poor areas of the latter type may be "modest or even zero." *Id.*

[34] *See* sources cited *supra* note 33.

[35] *See* sources cited *supra* note 33.

[36] *See, e.g.*, Amartya Sen, *The Man Without a Plan: Can Foreign Aid Work?*, 85 FOREIGN AFF. 171, 177 (March/April 2006) (reviewing EASTERLY, *supra* note 33).

A. Prioritizing Interventions for Children who cannot Remain with their Parents

For the most part, international law has concentrated on prioritizing interventions where children cannot be cared for by their parents. This question has largely been posed in terms of the choice between in-country and out-of-country remedies.[37] Under international law, adoption within the child's birth country is clearly preferred over intercountry adoption.[38] The basis of this preference is apparently related to the child's identity rights. While adoption involves the loss of the child's original family, intercountry adoption often involves an additional loss of the child's birth culture and language.[39] For example, a Korean child raised by a white family in the United States can be effectively cut off from her culture and language of origin.[40] Thus, children are only supposed to be placed in intercountry adoption if no domestic adoptive placements are available for that child.[41]

In practice, the implementation of this preference for domestic adoption has been ineffective. Systematic pressures have often produced a practical preference for intercountry adoption over domestic adoption. In many sending countries, intercountry adoption often provides "fees" and "donations" that are not available for domestic adoption,[42] which creates an incentive to place children internationally. Under these circumstances, orphanages find ways to subvert rules favoring domestic adoption when a

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[37] *See* David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 407–19 (2005) [hereinafter *Indian Adoption Scandals*] (reviewing relevant international law materials concerning relative priorization of intercountry adoption, domestic adoption, in-county foster care and in-country institutional care); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; *see generally* Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 1870 U.N.T.S. 167 [hereinafter Hague Convention].

[38] *See Indian Adoption Scandals*, *supra* note 37, at 407–08; CRC, *supra* note 37, arts. 20, 21; Hague Convention, *supra* note 37, pmbl.

[39] *See Indian Adoption Scandals*, *supra* note 37, at 411 (discussing how adoption affects children's identity rights); CRC, *supra* note 37, arts. 7, 8, 20, 21.

[40] For exploration of such issues by a Korean adoptee, see generally JANE JEONG TRENKA, THE LANGUAGE OF BLOOD (2003). *See also* Deann Borshay Liem & NAATA, *First Person Plural*, http://www.pbs.org/pov/pov2000/firstpersonplural (last visited June 15, 2008) (documenting the experience of a Korean adoptee who explored similar issues).

[41] *See* CRC, *supra* note 37, art. 21.

[42] *See Indian Adoption Scandals*, *supra* note 37, at 447–50.

lucrative intercountry adoption is possible.[43] This has produced the anomaly of intercountry placements being made in locales where long waiting lists remain for domestic adoption.[44]

Other difficulties involve the presence of laws that make domestic adoption an unattractive option, or otherwise limit its practicality or usefulness. For example, China for many years counted an adopted child against a couple's allotment of children under their population control policies, creating a definite disincentive to domestic adoption.[45] India traditionally limited full adoption to "Hindu" couples, but forbade it when the couple already had a child of that gender.[46] In these instances, it is hard to see how a country is abiding by the international law preference for domestic adoption over intercountry adoption when its laws systemically suppress domestic adoption. Thus, even where international law clearly states that domestic adoption is the preferred choice, in practice, financial incentives and competing policies cause intercountry adoption to be prioritized over domestic adoption.

A related question of international law is whether institutional or foster care within the child's country should be preferred to intercountry adoption. The international law materials are contradictory and read in different ways. Specifically, the Convention on the Rights of the Child (CRC) could be read to favor institutional or foster care over intercountry adoption, while the Hague Convention and recent UNICEF policy could be

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[43] *See id.* at 478–79.

[44] *See id.* at 474.

[45] Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 610–11 (2005). However, the legal disincentives and barriers to domestic adoption in China were partially removed by a 1999 law. *Id.* at 611–12.

[46] *Indian Adoption Scandals*, *supra* note 37, at 426–27 (citing Hindu Adoptions and Maintenance Act, No. 78 of 1956 and Guardians and Wards Act, No. 8 of 1890.). Some attempts are being made to use the Juvenile Justice (Care and Protection of Children) Act, No. 56 of 2000, and the Juvenile Justice (Care and Protection of Children) Amendment Act, 2006, No. 33 of 2006, as a legal basis for offering full adoption to all regardless of religion, but it is unclear yet whether that approach will be effectively implemented. *See, e.g.*, Parvathi Menon, *A New Act and Some Concerns*, FRONTLINE (2001) *available at* http://www.frontlineonnet.com/fl1811/18110630.htm. *See also* ASHA BAJPAI, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE 33–60, 308 (2003) (overview of adoption history, law, and practice in India).

read to favor intercountry adoption, particularly in relationship to institutional care.[47]

Conflicting arguments can be made based on child welfare alone. Thus, the often devastating impact of institutional care on child development, and the lack of permanence and stability of foster care arrangements can present strong child welfare rationales in favor of intercountry adoption.[48] On the other hand, in some instances, high quality foster care or institutional care might be superior to the extreme language, cultural, and educational transitions that intercountry adoption would require of school age children.[49] (To illustrate this phenomenon, imagine taking a twelve-year-old child from a successful relative foster care placement in the United States and placing them for adoption in China with a Chinese family that spoke no English.)

Logically, choosing between intercountry adoption and either institutional or foster care would require individualized examination of the child and the available placement options. The age of the child, the nature and quality of the institutional or foster care placement, the wishes of an older child and the nature of the adoptive placement, could all be significant considerations.[50] Whatever logic and international law might dictate, in practice, the availability of institutional or foster care options for a child generally are no obstacle to intercountry adoptions. Where an intercountry adoptive placement for a child is available, it is usually prioritized over institutional or foster care arrangements, even where the child is doing well in those settings.[51] Once again, in practice, the

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[47] *See* sources cited *supra* note 37.

[48] *See* Bartholet, *supra* note 1, at 179–81; *see also* 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 Adoptio*n, 21 B.U. INT'L. L.J. 179, 253–54 (2003).

[49] For example, SOS Children's Villages could be characterized as providing family-like care that is short of formal or full adoption, and yet of much higher quality than typical institutional care. *See* SOS-Kinderdorf International, http://www.sos-childrensvillages.org/pages/default.aspx (last visited June 15, 2008).

[50] *See* CRC, *supra* note 37, art. 3(1) ("In all actions concerning children . . . the best interests of the child shall be a primary consideration."). The "best interests of the child" standard suggests an individualized determination based on all of the relevant factors.

[51] While the policy and legal controversy over whether intercountry adoption should be prioritized over in-country foster care or high quality institutional care may be significant, it rarely seems to enter into individual adoption decisions in active sending nations; children deemed eligible for adoption through abandonment or relinquishment are considered

(*continued*)

pressures that favor intercountry adoption operate to prioritize it over other possibilities.

B. Parental Rights, Family Preservation, and the Choice of Interventions

Intercountry adoption discourse usually begins with the child, rather than with the child's family.[52] One result is that the focus on prioritizing among out-of-family interventions has not been matched by an equal focus on issues related to family preservation. In order to appreciate the oddness of intercountry adoption discourse and practice, it may be helpful to examine the central role that parental rights and family preservation play in domestic adoption.

1. A Comparative Lens: Domestic Adoption, the Parental Rights Doctrine, and the State Obligation of Reasonable Efforts

Under constitutional,[53] federal,[54] and state law,[55] placement options for children within the United States are dependent in large part on the question of parental rights. The fundamental rule is that a child is not eligible for adoption until and unless he or she is an orphan, meaning that

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eligible for adoption without any consideration of the quality of their foster or institutional care.

[52] *See, e.g.*, Elizabeth Bartholet, *Intercountry Adoption: The Child's Story*, 24 GA. ST. L. REV. 333, 333–34 (2008); Margaret Liu, *International Adoption: An Overview*, 8 TEMPLE. INT'L & COMP. L. J. 187, 187–89 (1994).

[53] The constitutional doctrine of parental rights is developed in Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Wisconsin v. Yoder, 406 U.S. 205, 232–34 (1972); Santosky v. Kramer, 455 U.S. 745, 753–54 (1982); and Troxel v. Granville, 530 U.S. 57, 65–66 (2000).

[54] *See generally* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No., 96-272, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter AACWA]; Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified at 42 U.S.C. §§ 620–632, 670–679 (2000)) [hereinafter ASFA]. The ASFA brings the balance of federal child welfare policy more strongly toward child protection and permanency, but without eliminating the fundamental premise of parental rights. Whether these federal statutes represent the correct balance between parental rights and other concerns (such as child protection) remains, of course, a matter of much debate. *See, e.g.*, *Foreword to the State Construction of Families: Foster Care, Termination of Parental Rights, and Adoption*, 12 VA. J. SOC. POL'Y & L. 363 (2005) [hereinafter *Construction of Families*] (introducing symposium issue).

[55] *See* Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 644–45, nn.30–35 (2006) (describing state law applications of the parental rights doctrine).

there is no legally recognized and living mother or father.[56] The legal institution of adoption within the United States was not developed primarily for literal orphans—those whose parents are dead.[57] Rather, adoption law and practice were largely shaped as nineteenth and twentieth century responses to child neglect and abuse, urban poverty, street children, institutionalized children, and the unwed mother.[58] The law was designed to enable the state and private sectors to rescue children from situations viewed as inadequate or substandard, and in those situations to allow either the state to terminate parental rights, or the parents to "voluntarily" relinquish them. Until the United States Supreme Court started protecting the rights of unmarried fathers in the 1970s, a birth father never married to the mother was not a legally recognized parent for custodial purposes and, hence, the law dissolved his rights *ab initio*.[59]

Today, however, less than two percent of single pregnant woman choose to give birth and relinquish their children for adoption.[60] The original purpose of adoption as a response to the situation of the single mother is, for the most part, an unpopular or ineffectual remedy. Put another way, it appears that the relative empowerment of single pregnant women has resulted in a situation where only a small proportion voluntarily relinquish their parental rights.[61] The result is that, at least for healthy white infants, the number of prospective adoptive parents far outstrips the available "supply" of adoptable babies.[62] The unwillingness of birth parents to offer their children for adoption has been one of the determining factors limiting the availability of babies for adoption.[63]

The question of parental rights also dominates the child welfare response to the problems of child neglect and abuse. Parents possess a

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[56] *See, e.g.*, *infra* note 69; E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998); *see also infra* note 77.

[57] CARP, *supra* note 56, at 1–137.

[58] *Id.*

[59] *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972).

[60] CHILD WELFARE INFORMATION GATEWAY, VOLUNTARY RELINQUISHMENT FOR ADOPTION 1 (2005), http://www.childwelfare.gov/pubs/s_place.pdf (stating, "less than 1% of children born to never-married women placed for adoption from 1989 to 1995"); MADELYN FREUNDLICH, THE IMPACT OF ADOPTION ON MEMBERS OF THE TRIAD 73–74 (2001) [hereinafter IMPACT OF ADOPTION].

[61] *See* CHILD WELFARE INFORMATION GATEWAY, *supra* note 60.

[62] *See id.*

[63] *See id.*

constitutional right to the care and custody of their children.[64] Even where the state finds that the parents are guilty of child abuse or neglect, the state is generally required to make reasonable efforts to retain the child within their original home, if such can be done safely for the child.[65] When the state removes children from their homes based on neglect or abuse, federal law requires that "reasonable efforts" be made to reunite the children with their parents.[66] Therefore, where the state intervenes in the lives of families, it must justify the necessity of each level of interference, and must provide appropriate services to enable the family to retain or regain custody.[67] In addition, even where the children have been removed from the family and reside in foster care, the parental status and relationship remains.[68] The children are not considered orphans, and may not be placed for adoption at that point.[69] Rather, adoption requires either parental consent, or an additional judicial decree terminating parental rights.[70] Hence, most of the more than 500,000 children in foster care in the United States[71] are not legally eligible for adoption.

The child welfare systems within the United States are often overwhelmed, under funded, and mistake prone, providing neither

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[64] *See* cases cited *supra* note 53.

[65] *See* AACWA, *supra* note 54, *and* ASFA, *supra* note 54; ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 343–44 (5th ed. 2005).

[66] *See* sources cited *supra* 65; 42 U.S.C. § 671(a)(15). Under ASFA, *supra* note 54, reasonable efforts to reunite children with their parents after the state removes the child from the home are not required in situations where the parents subjected the child to aggravated circumstances. 42 U.S.C. § 671(a)(15)(D).

[67] *See* sources cited *supra* note 65.

[68] *See, e.g.*, Smith v. Org. of Foster Families, 431 U.S. 816, 846–47 (1977) (discussing constitutional and statutory position of "natural parent of a foster child").

[69] *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 748–49, 769–70 (1982) (holding that children in foster care due to neglect are not eligible for adoption unless state initiates additional step of terminating parental rights; due process requires minimum of clear and convincing evidence standard for termination of parental rights).

[70] *See id.*

[71] *See, e.g.*, U.S. DEP'T OF HEALTH & HUMAN SERV., ADMINISTRATION FOR CHILDREN AND FAMILIES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT (2006), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report13.pdf (providing extensive statistical information on children in foster care).

appropriate respect for parental rights nor adequate child protection.[72] From that perspective, it could be asked whether the child welfare system in the United States offers a useful comparative lens. However, the shortcomings of the system do not necessarily arise from too much emphasis on parental rights, but rather from failures of funding, administration and implementation.[73] For present purposes, the germane comparative lesson is that the domestic system is legally oriented around the intertwined but sometimes conflicted poles of parental rights and child protection.[74] These primary legal orientations create duties for the state to act affirmatively to maintain children with their birth families.[75] Continued and appropriate controversy over whether the United States child welfare system has found the appropriate balance between family preservation and child protection cannot obscure the deep influence of parental rights in the system.[76] Despite the practical failures of the domestic system and its many unresolved issues, the primary legal emphases of domestic law remain worthy of consideration.

Indeed, if one extends the comparative lens across infant relinquishment adoption, adoption from the foster care system, and the

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[72] *See, e.g.*, DEALVAH HILL SIMMS, OFFICE OF THE CHILD ADVOCATE FOR THE PROTECTION OF CHILDREN, ANNUAL REPORT FY 2006 AND 2007, http://gachildadvocate.org/vgn/images/portal/cit_1210/55/9/9038669706_07_annualreport.pdf (documenting extensive problems and improvements with Georgia's child protective services). Additional reports from the Office of the Child Advocate for Georgia can be found at http://gachildadvocate.org/00/channel_title/0,2094,84387339_84394649,00.html. Similar shortcomings can be documented in many states and, despite jurisdictional/cause of action limitations, "courts have ordered 27 states to improve their child welfare systems." MNOOKIN & WEISBERG, *supra* note 65, at 346.

[73] *See, e.g.*, GENERAL ACCOUNTING OFFICE, CHILD PROTECTIVE SERVICES, COMPLEX CHALLENGES REQUIRE NEW STRATEGIES (July 1997), *available at* http://www.gao.gov/archive/1997/he97115.pdf; U.S. DEP'T OF HEALTH & HUMAN SERV., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (August 2005), *available at* http://aspe.hhs.gov/hsp/05/fc-financing-ib/ib.pdf.

[74] *See supra* notes 53–71 and accompanying text.

[75] *See supra* notes 64–71 and accompanying text.

[76] For some of those debates, compare ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999), with Martin Guggenheim's review in, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000). *See generally* Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999); *Construction of Families*, *supra* note 54.

additional category of stepparent adoption, a single salient thread emerges. Due to the parental rights doctrine, the determination of whether someone may adopt a child is not made based on whether that person is a better parent, or can offer a better home life than the birth parents.[77] Birth parents that might be considered marginal by some, including single parents, gay parents, poor parents, uneducated parents, unemployed parents, disabled parents, racist parents, parents under child protective services supervision, and non-custodial parents, all have the capacity to block adoptions of "their children," even where the prospective adoptive parents would be considered ideal.[78] Thus, so long as such "marginal" birth parents can meet the usually modest standards of adequate parental care, they can defeat competitive claims by prospective adoptive couples who can evidence a far superior set of parenting skills, personal characteristics, home environment, and educational opportunities for the children.[79] Further, where the state itself is initiating efforts to separate the child from the birth parent(s), the state acquires affirmative duties to offer assistance and services that would help the birth parent(s) rise to the standard of parental care necessary to justify reunion.[80]

Regarding intercountry adoption, the parallel question is whether reasonable efforts must be made to keep the birth family intact, or reunite the birth family, before intercountry adoption is an acceptable option. Further, what would such reasonable efforts entail? If poverty is the primary reason that the birth family is considering relinquishing or abandoning the child, must financial assistance be offered? The question,

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[77] *See* Deboer v. Deboer, 509 U.S. 1301, 1302 (1993).

> Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply be deciding another home offers more advantages."

Id. (citation omitted).

[78] *Id.*

[79] *Id.*

[80] For the appropriate debates over whether the system properly or effectively implements these norms, see sources cited *supra* note 76. Nevertheless, these debates, however important, should not distract from the deep legal roots and attempted implementation of the norms.

therefore, is whether intercountry adoption is an appropriate intervention where poverty of the birth family is the primary problem.

This question raises the matter, which is also controversial in the United States, as to the relationship between the child welfare system and the broader social safety net or welfare system. Within the United States, issues of welfare reform have focused to a considerable degree on poor single mothers and their children, a population that disproportionately finds itself under child welfare supervision or concern.[81] Thus, the links between child welfare policies, general welfare policies, and broader family structure issues, remain highly controversial.

This question of financial assistance changes contexts in relationship to intercountry adoption. First, many developing nations lack the resources to lift the poor out of even extreme poverty.[82] Under those circumstances, a comprehensive welfare scheme may simply not be an option. By contrast, rich countries like the United States have the resources to provide comprehensive welfare programs to the poor, but structure or limit the programs based on a variety of political, policy, funding, and ideological considerations.[83] Second, the nature of poverty as defined internationally makes it different, in important ways, from much of the poverty found within rich countries. Poverty within the United States is real and can be grim, but often does not amount to the literal deprivations of clean water, food, modern sanitation, electricity, and housing suffered by the one billion people who live under the international standard of $1 per day.[84] Third, in circumstances where those living in or near extreme poverty are relinquishing or abandoning children primarily due to that poverty, there is a particular irony to the use of intercountry adoption. Does it make sense

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[81] *See* Smith v. Org. of Foster Families, 431 U.S. 816, 833–34 (1977); Martha F. Davis, *War on Poverty, War on Women*, N.Y. TIMES, Aug. 3, 1991, § 1, at 119 ("Federal and state aid on the marital and childbearing choices made by poor single mothers are being touted as important components of welfare reform."); Erik Eckholm, *For the Neediest of the Needy, Welfare Reforms Still Fall Short, Study Says*, N.Y. TIMES, May 17, 2006, at A18; Kay P. Kindred, *Of Child Welfare and Welfare Reform: The Implications for Children When Contradictory Policies Collide*, 9 WM. & MARY J. WOMEN & L. 413, 414 (2003); Allison B. Smith, *The Breakdown of the American Family: Why Welfare Reform Is Not the Answer*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 761, 763 (1997).

[82] *See* SACHS, *supra* note 3.

[83] *See, e.g.*, Lee Anne Fennell, *Interdependence and Choice in Distributive Justice: The Welfare Conundrum*, 1994 WIS. L. REV. 235, 290–92 (1994) (using game theory to analyze welfare policy choices).

[84] *See* sources cited *supra* note 3.

to spend $30,000 on adopting a child from Guatemala, including $15,000 or more going to the Guatemalan attorney and his intermediaries, when several hundred dollars would have permitted the child to remain with her original family?

2. Intercountry Adoption, Parental Rights, and Family Preservation

International law lacks authoritative and specific answers on the question of whether intercountry adoption is permissible where relinquishment or abandonment of the child is occurring primarily because of poverty. Similarly, international law lacks specific standards for the efforts that are required to keep the child in the family, prior to accepting relinquishment of a child for intercountry adoption. This lack of authoritative and specific answers stems from a failure to discern the symbiotic link of birth parent rights and child rights in relationship to intercountry adoption.[85] However, an analysis of applicable international human rights principles suggests that such answers and standards could be deduced from existing international law materials.

While it is unfortunate that international law has not already addressed these issues with specificity, it is not difficult to infer what the answers are, based on existing international law materials. Specifically, international law requires that the human welfare and intercountry adoption systems should be structured to require the offer or provision of aid to keep families intact, prior to accepting children for intercountry adoptive placements.[86]

The most relevant source of international law on intercountry adoption is the Hague Convention on Intercountry Adoption.[87] The preamble recalls the principle that "each State should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin."[88] While the Hague Convention contains no direct citation for this principle, the preamble generally cites both to a 1986 United Nations Declaration on Child Welfare, foster care, and adoption, and to the 1989 Convention on the Rights of the Child.[89] The first three articles of the 1986 UN Declaration state:

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[85] *See* David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 4–18, 29–45 (2007) [hereinafter *Child Exploitation*] (claiming that acts which harm or exploit the birth parents or birth family thereby also harm or exploit the child).

[86] *See* Hague Convention, *supra* note 37; CRC, *supra* note 37.

[87] *See* Hague Convention, *supra* note 37.

[88] *Id.* pmbl.

[89] *Id.*

Article 1: "Every State should give a high priority to family and child welfare";

Article 2: "Child welfare depends upon good family welfare"; and

Article 3: "The first priority for a child is to be cared for by his or her own parents."[90]

The 1986 Declaration, therefore, appropriately grounds child welfare in family welfare. However, like the Hague Convention, it fails to define the "appropriate measures" that should be taken to "enable the child to remain in the care of his or her family of origin."[91]

Similarly, the CRC requires state parties to "respect the responsibilities, rights and duties of parents,"[92] and to "ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child"[93] because "[p]arents . . . have the primary responsibility for the upbringing and development of the child."[94] In these provisions, the CRC recognizes parents as the first-line providers of the rights and best interests of the child.

In addition, the CRC states that the child has, "as far as possible, the right to know and be cared for by his or her parents."[95] The CRC, however, like the Hague Convention and the 1986 UN Declaration, fails to define the specific steps state parties are obligated take to enable parents and children to remain together. While parents and children clearly possess reciprocal rights to remain and live together, the extent and definition of the state obligation to take "appropriate measures" to "enable the child to remain in the care of his or her family of origin,"[96] remains unclear.

Nonetheless, UNICEF's position paper on intercountry adoption takes the same inference from the CRC, as does this paper, stating:

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[90] Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally, U.N. Doc. A/RES/41/85 (Dec. 3, 1986).

[91] *See* Hague Convention, *supra* note 37, pmbl.

[92] CRC, *supra* note 37, art. 5.

[93] *Id.* art. 18.

[94] *Id.*

[95] *Id.* art. 7.

[96] *See* Hague Convention, *supra* note 37, pmbl.

> The Convention on the Rights of the Child, which guides UNICEF's work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children's lives, UNICEF believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her.[97]

From this perspective, the duty to assist birth families with keeping their children flows directly from the CRC as a necessary and logical inference, even if the requirement is not specifically stated therein. UNICEF's position applies the aid requirement as a condition precedent to any out-of-family care for the child, not just for intercountry adoption.[98] Nonetheless, the aid requirement is stated specifically in their position paper on intercountry adoption,[99] suggesting that the requirement has special force or application in relationship to intercountry adoption.

To fully appreciate the force of the aid rule in the context of intercountry adoption, it is necessary to place it within the context of rules forbidding financial inducements to procure parental relinquishments. Thus, the Hague Convention specifies that parental consents to adoption cannot have been "induced by payment or compensation of any kind."[100] The Hague Convention clearly forbids any kind of *quid pro quo*, where something of value is received in exchange for consenting to an adoption (or relinquishing a child).[101] The Hague Convention's anti-inducement principle arguably addresses situations where aid is offered to a family, conditioned upon their relinquishment or consent. The absence of aid offered to the intact family, coupled with aid offered to those who give up

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[97] UNICEF, UNICEF's Position on Inter-Country Adoption, http://www.unicef.org/media/media_41118.html (last visited June 15, 2008).

[98] *Id.*

[99] *Id.*

[100] Hague Convention, *supra* note 37, art. 4(c)(3).

[101] *Id.* *See also* pmbl. ("Convinced of the necessity to take measures to . . . prevent the abduction, the sale of, or traffic in children.").

their children, could create an inducement to relinquish.[102] However, where no aid at all is provided or offered, this provision alone appears inapplicable, as it does not directly require that aid be given or offered in an attempt to keep the family together.

A narrow focus on the Hague Convention's prohibition of induced consents, coupled with a background practice of not offering aid to maintain or restore the birth family, therefore, can produce an unattractive rule concentrated on ensuring that *no aid* reaches the birth family. The difficulty is that even small amounts of aid offered only to those who relinquish their children can be seen as inducements, given the desperate poverty of some birth parents.[103] Even aid given only *after consents* have been procured could be seen as the fulfillment of an expectation that itself induced relinquishment. Yet, a rule mandating no aid to those who relinquish their children can appear harsh or even absurd. Should hungry or malnourished birth parents, and their remaining children, be turned away with nothing, solely to protect the purity of their consents? Should nothing be offered to maintain the health and life of the mother during pregnancy? Can international law rationally demand that impoverished people be completely barred from even subsistence levels of assistance by the organizations that assist them in arranging the adoption of their children?[104]

The rational alternative to this difficulty would be to offer unconditional aid, applicable regardless of whether or not the parents relinquish or consent to adoption, prior to accepting a child for intercountry adoptive placement. If aid is offered and provided to those who keep their children, then similar levels of aid given to those who relinquish can no longer constitute an illicit inducement. Such an approach would clearly avoid the current uncertainties of the Hague Convention's "inducement" standard in the context of extreme poverty.

Current law, therefore, logically provides a safe harbor to adoption agencies wishing to provide or offer aid to birth families: provide it unconditionally. Unfortunately, however, many intermediaries and

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[102] *See, e.g.*, ETHICA, COMMENTS ON THE FINAL REGULATIONS IMPLEMENTING THE HAGUE ADOPTION CONVENTION 12–13 (2006), http://www.ethicanet.org/HagueRegComments.pdf [hereinafter ETHICA].

[103] *See id.* at 3, 11–12.

[104] Perhaps for these reasons, United States Hague regulations permit such aid. *See* Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons and Intercountry Adoption—Preservation of Convention Records; Final Rules, 22 C.F.R. § 96 (2006).

orphanages involved in intercountry adoption do not provide or offer aid unconditionally, nor provide or offer aid to assist impoverished birth parent(s) in keeping their children.[105] The first question, therefore, is the legal status of aid conditioned on relinquishment in the context of poor birth families and intercountry adoption.

It is rational to fear that such practices of offering aid and assistance only to those who relinquish, even when well-intentioned, at best, blur the line between legitimate adoption and child trafficking and, at worst, actually provide an inducement to relinquishment and hence constitute a form of child trafficking.[106] For this reason alone, it would be prudent to require aid to be offered unconditionally. That is, the current common practice of systematically offering and providing aid only to those who relinquish their children should be considered illicit in the context of intercountry adoption, at least in situations where the birth parent(s) are poor.

The response to those who complain about the apparent harshness of a rule limiting aid to birth parents, therefore, would be to point out that no such limitations would exist if aid were offered unconditionally. The problem is not that adoption agencies are too generous with birth families, but rather that they are only conditionally generous, creating an appearance of a *quid pro quo*.

The next question concerns the practice of providing no aid at all to birth families/parents that relinquish. Where no aid is offered or provided, there is no violation of the Hague Convention's "inducement" standard.[107] Yet, other standards of international law may be violated by such parsimony. This question returns us to the issue, as articulated in domestic adoption, of "reasonable efforts" to assist the birth family in remaining together. Does such an obligation also exist in relationship to intercountry adoption and, if so, does it extend to some degree of financial assistance?

There are multiple international law foundations upon which to build such a duty. First, there is the preamble to the Hague Convention which requires state parties, "as a matter of priority," to take "appropriate

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[105] I am not aware of any systematic study of how often unconditional family preservation assistance is provided or offered in intercountry adoption. My statement that such aid is frequently not given is based on my personal investigation of intercountry adoption from India, including interviews of orphanage directors, as well as a review of numerous intercountry adoption agency web sites, and of numerous United States and foreign press reports.

[106] *See* ETHICA, *supra* note 102, at 9, 11–12.

[107] *See* Hague Convention, *supra* note 37, art. 4(c)(3).

measures to enable the child to remain in the care of his or her family of origin."[108] That is, under international human rights norms, state parties are under obligations to act affirmatively to safeguard parent-child relationships. Such actions protect the reciprocal rights of parents and children to form and maintain their family associations and ties.

A further foundation for such a rule would be found in international human rights norms relating to poverty. Apart from intercountry adoption, state parties are under affirmative obligations, domestically (and for richer countries internationally), to respond to extreme poverty.[109] Poverty threatens the core value of human rights, human dignity. A situation where parents and families are so impoverished as to consider relinquishing their children already reflects a severe deprivation of human rights.

International human rights law recognizes that the implementation of economic rights is progressive and, therefore, extreme poverty cannot be eliminated overnight, particularly in developing countries.[110] Hence, the failure of a state party to alleviate extreme poverty immediately does not necessarily represent a breach of their international responsibilities. Given scarce resources and large numbers of people living in extreme poverty, the state and NGO sectors within some developing nations may be incapable of intervening in every situation where parents lack sufficient resources to provide for their children.

However, intercountry adoption involves a linkage between developing nations and rich nations. Where such linkage exists and interventions are already intended, the resources are most likely present that would make it possible to offer some degree of financial assistance to enable birth families to retain custody of their children. To put the matter another way: spending $30,000 on an intercountry adoption makes it incongruous to state that $300 in assistance to keep the child with their birth family was not available.

Intercountry adoption typically is not a sporadic, occasional event, but rather represents a system with repetitive linkages between governments and institutions in the developing and developed world.[111] Relinquishments induced primarily by poverty are repetitive and predictable situations in many sending nations and, intercountry adoption,

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[108] *Id.* pmbl.

[109] *See, e.g.*, Covenant on Economic, Social, and Cultural Rights, *supra* note 17; *Social Development Summit*, *supra* note 4.

[110] Covenant on Economic, Social, and Cultural Rights, *supra* note 17.

[111] *See* Hague Convention, *supra* note 37, art. 1.

as an internationally recognized system regulated by international law, is responsible for providing an appropriate response.[112] The appropriate response is that institutions and persons in sending countries, who necessarily are linked to orphanages, hostels, and other child and family welfare institutions, must ensure that aid was offered or provided to attempt to maintain the child with the family before accepting relinquishments. This is the appropriate response because it respects the clear choice of international law, which normally favors a child remaining with their original family over other options.[113]

The intercountry adoption system does not have the option of inaction in relationship to keeping families intact, while being highly active in placing children internationally. Such selective activism turns the clear priorities of international law on their head, and cannot be justified on humanitarian grounds.

Indeed, there is a palpable cruelty to taking away the children of the poor. Such an act exploits the vulnerability of those deprived of their basic human right to an adequate standard of living, and uses this deprivation of rights as justification for a further deprivation of rights: the rights of parents to retain the care and custody of their children.

Choosing intercountry adoption as the primary response to the extreme poverty of the birth family, therefore, is a violation of international law because it represents an invalid prioritization of interventions contrary to international law. International law clearly states that the first priority should be to keep families together.[114] If limited resources within a developing nation allow a situation where a family is unable to provide for their children, an immense tragedy has occurred. Where, under such circumstances, intercountry adoption is selected over the option of assisting the birth family to retain the child, it represents not merely a tragedy, but a legal wrong. Indeed, where intercountry adoption is chosen over the option of family preservation efforts, the intercountry adoption system has itself become an exploitative system built upon the vulnerability of the poor.

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[112] *See, e.g.*, *id.* (intercountry adoption as an internationally recognized system regulated by international law); Bartholet, *supra* note 1, at 187 ("extreme poverty and social devastation" are "overwhelmingly" the reasons children are surrendered in sending countries).

[113] *See supra* notes 86–99 and accompanying text.

[114] *See id.*

III. OVERCOMING FUNDAMENTAL OBJECTIONS TO THE AID RULE

My claim is that international law requires that poor birth families be offered or provided financial assistance to avoid the necessity of relinquishment, prior to placing the child internationally. Although few would object to the practice of offering such assistance, there are possible objections to such being viewed as a legal predicate for intercountry adoption.

The most fundamental objection comes from the viewpoint that international adoption of children from poor families is a profound good that can occur independently of the good of assisting poor birth parents. Thus, just as one does not need to provide clean water in order to justify a provision of food to the hungry, one does not have to provide family assistance in order to justify intercountry adoption. Further, those who would spend their money to adopt a child internationally are not thereby condemned because they are not willing to invest much lesser amounts in support of poor adults. Those who do good acts for some are not thereby condemned because they do not perform good acts for others.[115] Otherwise, virtually any acts of assistance to those in need would be condemned, since the failure to reach everyone in need, or to meet all possible needs, occurs in virtually all interventions.[116]

From this perspective, there is a match between the large numbers of adults in rich countries who wish to adopt, and the large number of needy children in poor countries. The intercountry adoption system should be simplified in order to maximize the good that can come from matching these children to such prospective adoptive parents. Thus, any further regulation of the intercountry adoption system that might slow down adoptions, or make adoption more onerous or expensive, should be eliminated. From this perspective, the requirement of first providing aid is another hurdle that must be crossed, in a system with far too many regulatory rules and hurdles. Further, this hurdle would require the costs of intercountry adoption to increase in order to fund the required aid. Intercountry adoption fees most likely would have to provide an aid program both for those who place their children and those who accept the aid and then keep their children.[117] Thus, such a rule would raise the cost

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[115] *Cf.* Bartholet, *supra* note 1, at 183 (arguing that international adoption does not impede goal of "addressing global poverty and injustice").

[116] *Cf. id.*

[117] *Cf. generally* Bartholet, *supra* note 1, *and* Bartholet, *supra* note 52 (arguing in similar ways for increasing intercountry adoption and reducing regulatory obstacles).

of intercountry adoption at a time when the existing costs already serve as a barrier to adoptions.

In order to answer this fundamental objection, it is necessary to understand that adoption is not an inherent good, but rather is a conditional good that inevitably involves loss and tragedy. A surgeon who amputated a leg when administration of antibiotics would have been adequate would hardly be praised, even if the amputation did save the patient's life. Instead of being considered a lifesaver, the surgeon would be regarded as one who unnecessarily maims another. In the same way, subjecting the birth family to the loss of their child, and the child to the loss of their original family, is a kind of radical surgery that should only be used where less radical and less costly remedies are unavailable.[118]

Indeed, the fundamental objection to the aid rule, based on the view of adoption as an inherent good, illustrates the extent to which the parental rights and human dignity of poor birth parents are discounted. If the discussion concerned the parental rights of the kinds of people generally adopting—middle-class and rich, white Americans—then it is doubtful that anyone would question the need to take reasonable efforts to retain the child with the birth family before using adoption as a remedy. However, because intercountry adoption concerns the wish of mostly middle-class and rich, white American adults to parent the children of the poor, then assisting the poor to keep their children becomes merely optional, and implicitly is regarded as an obstacle to the supposed absolute good of adoption. It is almost as though poor birth parents in other countries are not viewed fully as human beings who experience, like other human beings, the loss of their children as a tragedy.[119]

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[118] I develop this key concept of adoption as a conditional, rather than an absolute, good, in David M. Smolin, *Child Laundering As Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, *supra* note 85.

[119] This concern with the racial and class aspects of intercountry adoption has been evident in the work of Professor Twila L. Perry. *See* Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 102 (1998). Professor Elizabeth Bartholet acknowledged this argument, but then sought to rebut it. *See* Bartholet, *supra* note 1. However, Bartholet's recent treatment of the "Human Rights Issues" involved in intercountry adoption seems to have virtually no treatment of the rights of the birth parents, either as parents or as human beings, beyond noting in general the need, separately from adoption, to address poverty and injustice. The human rights specifically at stake for these birth parents in the regard to adoption itself, however, seem to receive little treatment by Professor Bartholet. Thus, it seems that Professor Bartholet's rebuttal in some ways actually confirms the critique. *Id.*

I would further contend that there is a permanent link between birth families and children that makes it impossible to ethically separate treatment of one from the other. One cannot harm or abandon the birth family without also harming their birth child. Thus, saving the child and abandoning the family is unethical, particularly when it leads to the harm of unnecessarily separating the two.[120]

One way to test this thesis is to imagine, as an adoptive parent, explaining to one's adult adopted child why it was ethical to spend $30,000 on their adoption, while being unwilling to provide $300 to enable the child to remain with their original parents and family. Would there be some discomfort in the discussion? What would it feel like to say, "I wanted you as my child, so I was willing to pay a lot for that, but I wasn't going to adopt your parents, and so I wouldn't do anything to help them keep you."?[121]

Some might object to this line of argument by pointing to poor birth parents who expressed gratitude to adoptive parents for taking their children, even where no aid to help them keep their children was offered.[122] The obvious answer to this phenomenon is that desperation can create gratitude for even exploitative forms of "assistance." Further, poor birth parents do want the best for their children, and can appreciate the opportunities that life in a rich country can give their children. Nonetheless, offering impoverished birth parents the Faustian bargain of giving away their children to comparatively rich Europeans or North Americans is exploitative, where the alternative possibility of modest aid to enable them to keep their child was not offered. Indeed, relying on the consent of those who live in extreme poverty to legitimate questionable acts reflects a kind of ethical desperation. For example, the fact that some impoverished persons "consent" to the use of their bodies (or their children's bodies) for paid sexual services in order to feed themselves and their children does not justify the rich foreign tourists who choose to buy those services rather than simply offer some gratuitous assistance. Relying on what those living in extreme poverty are willing to do with themselves or their children cannot justify the choices of the comparative rich who

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[120] *See Child Exploitation*, *supra* note 85, at 4–18, 33–45.

[121] This hypothetical dialogue between adoptive parent and adoptee is already implicit in the question an adoptive parent of an Ethiopian child asked herself. *See* Gross & Connors, *supra* note 2, at A16.

[122] *See id.*

exploit the vulnerabilities of the poor. The ethics of economic desperation cannot establish the legal rules for the comparatively wealthy.

Some might consider my implicit comparison of adoption and prostitution overly harsh. In some ways, the analogy is completely wrong: the overwhelming majority of adoptive parents have no intent or desire to sexually exploit their children. The comparison is meant to underscore that the separation of parents and children inherent in adoption sometimes can exploit both birth parents and children, and that "consents" to adoptions occasioned by economic desperation cannot shield adoptions from ethical evaluation. The choice to adopt necessarily includes an at least implicit relationship between adoptive and birth parent which is properly subject to ethical evaluation.

Closed, exclusivist forms of infant adoption, upon examination appear to involve a kind of reproductive service. Birth parents provide to adoptive parent(s) the conception, gestation, and birth of a child whom the adoptive parent(s) can subsequently claim as though they themselves had engaged in these reproductive acts. This becomes most obvious in instances of surrogacy,[123] or in claims that some poor birth parents in developing nations are getting pregnant in order to sell their children for adoption.[124] But even in more conventional infant adoptions, adoptive parents are implicitly being treated as though they were the procreative parents.

This question of adoption as a form of reproductive services underscores the relationship between the birth and adoptive parents. Where adoption is envisioned as an exclusivist parenting relationship that excludes and terminates the birth parent relationship, the possibility of exploitation is increased, for the birth parent loses everything.[125] It is as though they had never conceived or birthed a child. This exclusivist model hides the relationship between the child and their birth parents, and between the adoptive and birth parents, behind the legally constructed fiction that the adoptive parents are the birth parents. Under such

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[123] Surrogacy at *best* is the sale of some kind of reproductive service, and at worst is an implicit sale of a child. *See* David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 308–09 (2004) [hereinafter *Child Trafficking*] (discussing surrogacy in the context of drawing the line between illicit baby-selling and permissible contractual arrangements).

[124] *Cf.* Mica Rosenberg, *Cleaning Up International Adoptions*, TIME, Aug. 29, 2007, *available at* http://www.time.com/time/printout/0,8816,1657355,00.html (describing how adoptive parents discovered birth parent of their adopted child "was essentially a baby factory who had sold many of her eight children to a dealer").

[125] *See, e.g.*, *Child Exploitation*, *supra* note 85, at 4–18.

exclusivist models, it is almost as though the reproductive acts of the birth parents are credited to the adoptive parents. Hence, the officially falsified birth certificates that state or imply that the child was born to the adoptive parents.[126] Such legal arrangements and documents imply a kind of transfer of reproductive services, along with the custodial transfer of the child.

By contrast, an inclusivist form of adoption in which the birth parent is acknowledged as having a permanent place in the child's life, and in which adoptive parents understand that "their" children are also the children of the birth parents, acknowledges and potentially normalizes a set of relationships between the birth and adoptive parents.[127] The adoptive parents may parent the child without being credited with, or pretending to be, the reproductive source or birth parent of the child. The child is understood to have multiple sets of parents performing different roles in the child's life. Under this circumstance, there is not necessarily a transfer of reproductive services, even if there is a transfer of immediate and daily custody of the child.

The dominant legal model of adoption under United States law is the exclusivist model, in which the birth parent ceases to be a parent, and the adoptive parents are in law deemed "as though" they had conceived, carried and given birth to the child.[128] Under these circumstances, the implicit relationship between birth and adoptive parents are obscured and the possibilities of exploitation of the birth parents are accentuated. To the extent that a tendency toward open adoption has empowered birth parents to a limited degree, this trend has very little impact on intercountry adoption. Indeed, some choose to adopt internationally to avoid any contact with birth parents. Thus, the current model and practice of international adoption is structured in a way more likely to exploit the birth family.

A related difficulty with relinquishments by birth parents in developing nations is that the inclusivist, extended family structures in those countries make it easy to imagine adding parents to a child's life, but may make it difficult to imagine that birth parents can truly be extinguished or removed.[129] Birth parents may not easily or fully understand the concept

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[126] *See* IMPACT OF ADOPTION, *supra* note 60, at 12; *see also Child Exploitation*, *supra* note 85, at 6–7.

[127] *See* IMPACT OF ADOPTION, *supra* note 60, at 118–19, 161–66.

[128] *Id.* at 156–57; *see Child Exploitation*, *supra* note 85, at 5–8.

[129] *See* IMPACT OF ADOPTION, *supra* note 60, at 66, 110.

of "relinquishment" because it is based on a culturally foreign, exclusivist, nuclear (rather than extended family) model. Hence, they may assume that "their child" will retain sufficient family loyalty, identity, and connection to stay in touch as they grow up, and later offer the entire family the advantage of having family members in a wealthy nation like the United States.[130] It is easy to exploit the mismatch between an inclusivist model of adoption present in the minds of many birth parents, and the exclusivist model applied by United States law and sought by many prospective adoptive parents in the United States.[131]

The point of this extensive analysis of the relationship between birth and adoptive parents is to underscore the potential for exploitation involved in intercountry adoption. A rule requiring that aid be offered or provided to birth parents to assist them in keeping their children is designed to lessen this danger of exploitation, by reducing somewhat the extreme vulnerability and poor bargaining posture of poor birth families in developing nations. Poor birth parents in developing nations are easily overwhelmed by the imbalance in financial resources, education, social position, political connections, and legal services between themselves and the intercountry adoption system.[132] The concept that adoption is an inherent good that may be facilitated without such assistance to the birth parent in effect builds adoption on the backs of the powerlessness of the poor. Adoption can only be a good when it is just and, hence, adoption needs to be built upon an empowerment of the birth family.

IV. OVERCOMING PRACTICAL OBJECTIONS TO THE AID RULE

There are a number of less fundamental objections to making aid to the birth family a legal predicate to intercountry adoption. These objections concern the practicality of such a rule. Such practical objections are significant because they provide an opportunity to refine the rule and determine its limits, dangers and workability.

A. The Aid Rule in the Context of Abandonment

Children are sometimes found alone, rather than being relinquished by family members. This happens in a variety of circumstances, including

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[130] *Child Laundering*, *supra* note 25, at 118–24.

[131] *See, e.g.*, E. WAYNE CARP, FAMILY MATTERS, SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 3–4 (1998) (contrasting, from an anthropological perspective, cultural views of adoption where birth families retain family ties with Western views of adoption "where parental ties are always broken").

[132] *See Child Laundering*, *supra* note 25, at 119–20.

intentional parental abandonment, lost children, and circumstances where family members seize and then abandon the child against the wishes of one or both parents.[133] Due to the uncertainties involved, the law should require reasonable efforts to find the immediate and extended family, and if they are found, to investigate the situation.

Unfortunately, in some countries these reasonable efforts sometimes are not made.[134] Even where the legal obligation exists, there is often little implementation.[135] At worst, some corrupt agencies use the occasion of lost children to fraudulently alter identities and process such children for adoption.[136] The tragedies of lost children never being returned to their families, languishing in institutional care, or being unnecessarily adopted occur all too frequently.[137]

Where such reasonable efforts are made and, nonetheless, no family identity or relative connection for the child can be established, it obviously becomes impossible to offer or provide aid to the birth family. Thus, where no family can be identified or located, the reasonable efforts to locate the family substitute for the reasonable effort to provide aid. The point of the aid rule is to empower birth families, not to arbitrarily create impossible hurdles for intercountry adoption.

Once this abandonment exception is created, however, it would be possible to avoid the aid rule by fraudulently re-classifying relinquished children as abandoned children. It might be argued, therefore, that the abandonment exception to the aid rule would render the rule ineffective and meaningless. Some might posit an unattractive choice between a meaningless and ineffective aid requirement that includes the abandonment exception, or a harsh aid rule with no abandonment exception that arbitrarily makes truly abandoned children ineligible for intercountry adoption.

My response to this argument would be to note that there are innumerable ways in intercountry adoption to bypass rules and create fraudulent paperwork.[138] Using this argument selectively against any particular rule, therefore, makes no sense. Should the intercountry

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[133] *See id.* at 121–23.

[134] *See id.*

[135] *See id.*

[136] *Id.*

[137] *See, e.g.*, Sanjay Dubey, *Missing Children, The Business of Adoption*, TEHELKA, July 7, 2007, *available at* http://www.tehelka.com/story_main31.asp?filename=Ne070707the_business.asp; *see also Indian Adoption Scandals*, *supra* note 37, at 460–61.

[138] *See Child Laundering*, *supra* note 25, at 115–22.

adoption system permit children to be bought and sold for adoption merely because the ban on such is often bypassed through fraud? The intercountry adoption system has indeed proven particularly vulnerable to systemic fraud and abuse. The proper remedies for such fraud include limiting and making fully transparent the financial aspects of intercountry adoption, requirements that should be applied by the United States government to United States placement agencies under the Hague Convention implementation process. The aid rule would make the intercountry adoption system less vulnerable to fraud, because its enforcement would send a signal that the system is no longer to be built upon the vulnerability of poor birth parents in developing countries.

B. Funding the Aid Rule

A further practical objection to the aid requirement is that it would be too expensive to implement. Where would the money come from to provide aid to both birth parents who keep their children, and those who relinquish their children? One response is to point to the numbers involved. For those families living at or near the international poverty standard of $1 per day, it would usually be the case that an extra $200 to $300 would be enough to get the family over a crisis, or supplement their meager income, such that they could keep their child. Even if those who were offered or provided aid kept their children at a ratio of ten to one, this would mean, at a cost of $300 per case, some $3300 extra cost per adoption. Intercountry adoptions typically cost between $15,000 and $35,000 once all of the agency fees, required donations, program fees, immigration fees, travel costs, etc., are included.[139] Under these circumstances, raising the cost of intercountry adoption by $3,300 would not be too high a price to pay for protecting and assisting birth families—not to mention the fundamental justice and legitimacy of adoption. Indeed, if this increased cost were paired with reasonable caps on fees, it could be completely offset in at least those countries, like Guatemala, where facilitators and intermediaries currently receive unreasonably high fees. Why should the intercountry adoption system be unwilling to spend an extra $3,300 on poor birth parents, when it is currently willing to spend $15,000 on attorneys and their various finders and facilitators? Who is more deserving: poor birth parents, or comparatively wealthy Guatemalan attorneys or other facilitators?

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[139] *See* DEBORAH L. SPAR, THE BABY BUSINESS, HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION 182, 184 (2006) [hereinafter THE BABY BUSINESS].

Another vantage point from which to view this possible cost of $3,300 per adoption is that of required orphanage "donations." The intercountry adoption system has often employed the oxymoron of a mandated or required donation. The concept has been that the donation will assist orphanages and the children "left behind" who will never be adopted.[140] Required donations often have been around $3,500. For example, China typically requires an orphanage donation/fee between $3,000 and $5,000.[141] The Cambodian adoption scandal involved required orphanage donations of $3,500, which the government claimed were diverted to personal profit, leaving the orphanage children in appalling conditions.[142] Whether used to upgrade orphanages, or exploited for personal profit, the concept of requiring those who adopt to fund forms of required aid is well established in adoption practice.[143] The amounts typically required are compatible with those that would be involved in my proposal to mandate birth parent assistance.[144] From this standpoint, the requirement to offer or provide aid to poor birth parents could be seen simply as refocusing aid toward families.

Given the amounts involved, a new requirement to aid families would not necessarily reduce aid to orphanages. First, assisting families to keep their children aids orphanages by reducing their "orphan" population. Orphanages or child welfare systems that invest in services to keep families together will need to spend less on taking care of children who are

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[140] *See id.* at 182 (explaining that intercountry adoption fees include overseas charges that "generally include a set 'donation' to the child's orphanage or baby home . . . ."); *see also* A Child's Desire, Bringing Home the Orphans, http://www.achildsdesire.org/donate.htm (last visited June 15, 2008) ("Most international adoptions include an orphanage donation as part of the mandatory adoption fees."); Children's Hope International, India Adoption, http://www.childrenshopeint.org/India.htm (last visited June 15, 2008) [hereinafter *India Adoption Costs*] (intercountry adoption agency web site listing orphanage donation as element of required fees). For a discussion of the troubled history of orphanage donations in the context of Indian adoptions, including attempts of the Indian government to regulate them, see *Indian Adoption Scandals*, *supra* note 37, at 435–37, 450–74, and *Child Laundering*, *supra* note 25, at 146–57.

[141] U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS, *Intercountry Adoption, China*, Feb. 2006, http://travel.state.gov/family/adoption/country/country_365.html [hereinafter *China Adoption Costs*].

[142] *See Child Laundering*, *supra* note 25, at 140.

[143] *Id.* at 175.

[144] *See, e.g.*, *India Adoption Costs*, *supra* note 140; *China Adoption Costs*, *supra* note 141.

separated from their families. In addition, it is presumably more efficient to assist parents in keeping their children than paying the costs of care within an orphanage, because parents and extended family do not need to be paid for every task they perform on behalf of their children. Further, the family environment is normally viewed as superior for children.

Second, given the amounts involved, it would be possible to maintain current aid to orphanages, while adding another $3,000 to $4,000 per adoption aid per birth family. The variable and high costs of intercountry adoption[145] make it clear that the system could absorb this level of increased costs. In addition, if the intercountry adoption system ever implements appropriate limitations on "foreign" fees spent in sending countries, the reduced costs there would largely or entirely offset the increased costs of aid to families.[146]

C. The Aid Rule in the Context of Wealthier Sending Countries and Relative Poverty

The aid requirement proposal defended in this Article is aimed at those living under or near the international poverty standard of $1 per day, who comprise a significant part of the population of sending countries like Ethiopia, Guatemala, India, and Nepal.[147] Some significant sending countries like South Korea, however, have become relatively prosperous.[148] Other significant sending nations, like Russia and the Ukraine, represent former Communist economies experiencing difficult transitions.[149] Poverty exists within South Korea, Russia, and the Ukraine, but it is usually a relative poverty, not of the absolute or extreme kind

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[145] *See* THE BABY BUSINESS, *supra* note 139, at 184.

[146] *Cf. id.* at 184 (reviewing disparate costs of intercountry adoption from various countries).

[147] *See* World Bank, *World Development Report 2000/2001, Attacking Poverty*, 280–81 (2001) [hereinafter *Attacking Poverty*]; SACHS, *supra* note 3, at Map 1, 9. For tabulated and graphical representations of relative progress in relationship to poverty in Ethiopia, Guatemala, India, and Nepal, see *2003 Millennium Development Goals*, *supra* note 23, at 53.

[148] *See Attacking Poverty*, *supra* note 147, at 280–81; *see also* SACHS, *supra* note 3, at Map 1, 9. For tabulated and graphical representations of relative progress in relationship to poverty in Ethiopia, Guatemala, India, and Nepal, see *2003 Millennium Development Goals*, *supra* note 23, at 53.

[149] *See 2003 Millennium Development Goals*, *supra* note 23, at 53. See SACHS, *supra* note 3, at 131–47, for a description of Russia's economic transition, including a defense of his own controversial role.

defined by the international standard of $1 per day.[150] Would the aid requirement apply to those living in relative poverty within these wealthier sending countries? Indeed, could the requirement that children not be taken away from parents due to poverty be applied everywhere, even in the United States?[151]

There are several reasons for distinguishing between the issues of extreme poverty and relative poverty in relationship to adoption. First, the amounts of money required to assist birth families in keeping their children would be, in absolute terms, much larger. Three hundred dollars in the context of South Korea generally would not be a significant enough amount of aid to influence the relinquishment decision; indeed, even $3,000 could be wholly inadequate. Thus, the amounts of aid required to assist poor families in transition or developed economies could be beyond the capacity of the intercountry adoption system.

Second, the much larger amounts of aid that would be required in relationship to relative poverty in rich or transition nations implicates governmental policy toward welfare and family structure issues. Given the amounts involved, governments are the only actors likely to possess the means to systematically lift families out of relative poverty. The controversy over welfare reform in the United States illustrates the issues that arise in relationship to such efforts. Some in the United States claimed that certain kinds of welfare benefits contributed to an increase in unwed births, undermined the two-parent family, and created a self-perpetuating culture of poverty.[152] While some would dispute the validity of these concerns, they implicate policy issues beyond the scope of this Article.

In distinguishing situations of extreme and relative poverty, I do not intend to dismiss the important relationship between the issues. The question of whether parents should lose their children due to poverty has resonance and application everywhere, including the United States.[153] However, addressing relative poverty and child welfare issues poses issues beyond the scope of this Article. Therefore, this Article's proposal will not

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[150] *Attacking Poverty*, *supra* note 147, at 280–81.

[151] *Cf.* Huntington, *supra* note 55, at 667 nn.155–57 ("[i]nadequacy of income, more than any other factor, constitutes the reason that children are removed." (citing and quoting DUNCAN LINDSEY, THE WELFARE OF CHILDREN 175 (2d ed. 2004))).

[152] *See, e.g.*, CHARLES MURRAY, LOSING GROUND, AMERICAN SOCIAL POLICY, 1950–1980 (1984), *reprinted in* WELFARE, A DOCUMENTARY HISTORY OF U.S. POLICY AND POLITICS 466 (Gwendolyn Mink & Rickie Solinger eds., 2003).

[153] *See* Huntington, *supra* note 55, at 666–68 & nn.155–57.

address how such concerns would or should be addressed outside the context of families living under or near the international poverty standard.

D. Institutional Concerns, Corruption, and the Aid Rule: What is the Relationship between the Family Welfare and Intercountry Adoption Systems?

Some who sympathize with the purpose of the proposed aid rule might object because the rule may result in larger amounts of money being processed through the intercountry adoption system. Since a primary part of the effort to reform intercountry adoption concerns limiting the funds involved, any reform project that could increase funds available to the intercountry adoption system is problematic. Given a history in which intercountry adoption "donations" sometimes have been misappropriated, and become a part of the "price" or motivation to obtain children illicitly, creating yet another kind of donation seems risky.[154] If donations have been diverted from assisting orphanages to enriching individuals such as orphanage or agency directors, who is to stop donations intended for poor birth parents from being similarly diverted?

A related issue has to do with the appropriateness of entities devoted to intercountry adoption, or financially dependent on intercountry adoption, being responsible for administering aid designed to avoid relinquishment. Intercountry adoption agencies within the United States are often financially dependent on processing a sufficient quantity of intercountry adoptions. Orphanages in sending countries that become involved in intercountry adoption also can become dependent on intercountry adoption to fund their programs, even where the monies received are properly spent on humanitarian acts.[155] It may be naïve to expect a system comprised of such orphanages and intercountry adoption agencies to effectively administer programs designed to prevent children from becoming available for adoption.[156]

This objection raises broader issues concerning the place of intercountry adoption within child welfare and social welfare systems. The

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[154] *Cf. Child Laundering*, *supra* note 25, at 135–46.

[155] *See infra* note 157 (dependency of agencies on intercountry adoptions); *cf. infra* note 156 (dependency of orphanages on intercountry adoption).

[156] *Cf.* Bartholet, *supra* note 1, at 185 (estimating that Chinese orphanages received 19.5 and 23.7 million dollars in 2006 and 2005, respectively, from intercountry adoption, and noting that "opponents" see this as "creating problematic pressure to continue with international adoption"). Professor Bartholet, of course, sees the orphanage donations positively rather than negatively. *Id.*

large sums of money involved in intercountry adoption, and the large demand in the United States, Europe, and other rich nations for children, has produced an elaborate and highly entrepreneurial set of organizations and persons devoted to intercountry adoption.[157] Although these actors often refer to themselves as child welfare organizations, they usually are primarily intercountry adoption agencies. Such entities may advertise or emphasize the money they raise for orphanages or other child welfare work, but the bottom line is that they would not exist, but for intercountry adoption. Intercountry adoption specifically, rather than family or child welfare in general, is ultimately their *raison d'être*.

Intercountry adoption agencies inevitably form relationships with individuals and organizations in sending nations. Although the purported purpose of such linkages may be child welfare, the essential purpose of such linkages is to source adoptable children. The networks intercountry adoption agencies form in sending countries, therefore, are highly selective. Intercountry adoption agencies typically have no formal working relationship with large international development organizations because such organizations do not provide children for intercountry adoption and prefer to emphasize local solutions that assist entire communities, rather than moving children across international boundaries. Intercountry adoption agencies as a group often have no formal working relationship with much of the private and governmental child and family welfare structure within a particular sending country.[158] Instead,

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[157] Most intercountry adoptions to the United States are conducted by the membership of the Joint Council for International Children's Services. A membership list can be found at http://www.jcics.org/Membership_Directory.htm (last visited June 15, 2008), although it also includes a few organizations that do not place children. My claim, based on research but without systematic proof, is that most of those entities serving as placement agencies could not exist in anything close to their present size, but for their income from intercountry adoption. A recent article indicating that a slowdown in intercountry adoptions is causing agencies to shut down supports this thesis. *See* Dan Frosch, *New Rules and Economy Strain Adoption Agencies*, N.Y. TIMES, May 11, 2008, *available at* http://www.nytimes.com/2008/05/11/us/11adopt.html.

[158] *See, e.g.*, World Vision UK Press Release, *Tackle poverty through local solutions not inter-country adoption, says World Vision*, Oct. 16, 2006, *available at* http://www.worldvision.org.uk/server.php?show=nav.860; Maria Mackay, *World Vision's Child Rights Advisor on Madonna and Intercountry Adoption*, CHRISTIAN TODAY, Oct. 18, 2006, *available at* http://www.christiantoday.com/articledir/print.htm?id=8034. An examination of the membership of the Joint Council for International Children's Services, *supra* note 157, would indicate this intercountry adoption orientated organization fails to

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intercountry adoption agencies selectively connect to those organizations and individuals willing to focus on placing a significant number of children for intercountry adoption.[159]

The kinds of deals struck among intercountry adoption agencies, facilitators, intermediaries, and orphanages often look remarkably like child trafficking. Facilitators, scouts, touts, and others, many of whom have absolutely no training or background in child or family welfare, may be paid for each child they bring into a facility.[160] Orphanages may promise to place a certain number of children per year with a particular foreign agency in exchange for receiving a minimum amount of fees and/or donations.[161] Under those circumstances, a kind of bidding war can develop over children with certain characteristics: healthy babies, attractive children, and girls.[162]

It is very difficult to connect the concept of an integrated family and child welfare system with these kinds of arrangements. A money and demand driven system fueled by an unremitting search for adoptable children does not seem to integrate easily into the concept of a family welfare system that invests in families. Rather than contributing positively to an effective family or child welfare system, intercountry adoption has the potential to distort whatever system is already in place. The monetary incentives to place children internationally can, in practice, totally

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include most child sponsorship, relief and development, and child welfare organizations working internationally—despite the name, the organization consists largely of intercountry adoption agencies.

[159] *See id.*

[160] *See* Sara Corbett, *Where Do Babies Come From?*, N.Y. TIMES MAG., June 16, 2002, at 42, 46; *Indian Adoption Scandals*, *supra* note 37, at 457–58.

[161] *See, e.g.*, EMBASSY OF THE UNITED STATES, *Summary of Irregularities in Adoptions in Vietnam*, *available at* http://vietnam.usembassy.gov/irreg_adoptions042508.html (last visited June 15, 2008); Ravi Sharma, *A Business in Babies*, FRONTLINE, Apr. 28–May 11, 2001 (reporting that Indian agencies admit to receiving at least $3000 per baby plus "liberal donations," and claiming that Indian agencies earn $7000 per baby from monies received abroad), *available at*, http://www.frontlineonnet.com/fl1809/18090460.htm.

[162] *See generally Child Laundering*, *supra* note 25; *Indian Adoption Scandals*, *supra* note 37, at 457–58; *Child Trafficking*, *supra* note 123, at 316; Corbett, *supra* note 160, at 44; Rosenberg, *supra* note 125. The web blog Fleas Biting, *available at* http://fleasbiting.blogspot.com (last visited June 15, 2008), comprehensively documents reports of corruption and international adoption.

overwhelm the appropriate priorities of a social welfare and services system.[163]

It can be difficult to see, therefore, how to appropriately integrate the option of intercountry adoption into social services for families and children without undercutting the fundamental purposes of the overall social welfare system. Because of this difficulty, some argue for the abolition of intercountry adoption, perceiving it as inherently disruptive, corrupting, and distortive. For those (like myself) who do not take the abolition position, the dilemma is how to provide the benefit of intercountry adoption, where it is appropriate, without having this option distort and disrupt the social services system of sending nations. For present purposes, the problem is how to implement the aid requirement in light of this broader dilemma.

The solution to this dilemma necessarily would have to vary with the particular circumstances of each significant sending nation. Thus, the manner of implementing a requirement of offering aid or assistance to poor families, prior to intercountry placement, would necessarily vary. In some circumstances, it might be best to require that family welfare systems maintain a clear separation from the intercountry adoption system. Only after the independent family welfare systems certify that reasonable family preservation efforts failed, despite the requisite offers or provision of aid, will the child be eligible for intercountry adoption.

It could also be necessary to ensure that the independent family welfare institutions have no economic incentive to make children eligible for intercountry adoption. Thus, the funding of family welfare systems, including its provision for assistance to poor birth families, should be independent of how many children it certifies as eligible for adoptive placements. At a minimum, the persons making the determination of whether a child is eligible for adoption should have no economic incentive to place children for adoption.

This kind of intentional separation of the intercountry adoption and child welfare systems is necessary where the existing child and family welfare systems are vulnerable to corruption or distortion. In other circumstances, a sending nation may have sufficiently robust social

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[163] *See Indian Adoption Scandals*, *supra* note 37, at 447–50; Judith Masson, *Intercountry Adoption: A Global Problem or a Global Solution?*, 55 J. INT'L AFF. 141 (2001) (describing argument that intercountry adoption can undermine and distort child welfare systems); ROELIE POST, ROMANIA, FOR EXPORT ONLY, THE UNTOLD STORY OF THE ROMANIAN "ORPHANS" (2007) (embodying argument that intercountry adoption undermines and distorts child welfare systems).

services and sufficient regulatory control over intercountry adoption to make this kind of separation between family welfare services and adoption services unnecessary.

The aid rule, thus, provides an occasion for clarifying the relationship between family welfare and intercountry adoption systems: a clarification that even without the aid rule is much needed.

CONCLUSION
INTERCOUNTRY ADOPTION AND HUMAN DIGNITY

The foundation of international human rights law is the equal and fundamental dignity and worth of the human person. A demand-driven intercountry adoption system built upon the vulnerability of parents living in extreme poverty therefore undercuts, rather than facilitates, human rights. It is one thing to intervene to mitigate the negative impacts of poverty, but something else entirely to take advantage of the vulnerability of the poor to obtain their children. The aid rule proposed in this Article is a partial, but necessary, reform of the current intercountry adoption system, designed to require that the system respect the basic human rights of the poor. The failure of the current intercountry adoption to explicit state and require such a rule suggests that intercountry adoption, as currently practiced, is based on the desire of the rich for children, rather than upon the equal human dignity of all adoption triad members. Only when the adoption system equally values the human dignity of birth families, children, and adoptive parents, will the system be compatible with the basic principles of human rights.