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The Corrupting Influence of the United States on a Vulnerable Intercountry Adoption System: A Guide for Stakeholders, Hague and Non-Hague Nations, NGOs, and Concerned Parties

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THE CORRUPTING INFLUENCE OF THE UNITED STATES ON A
VULNERABLE INTERCOUNTRY ADOPTION SYSTEM: A GUIDE FOR
STAKEHOLDERS, HAGUE AND NON-HAGUE NATIONS, NGOS, AND
CONCERNED PARTIES

David M. Smolin*

The United States has been the most significant nation in the history and development of the modern intercountry adoption system.¹ The United States was the receiving nation that initiated adoptions of South Korean children after the Korean War.² Statistically speaking, approximately half of all children adopted internationally have come to the United States, with the percentage falling to around 40% since 2009.³ Practically speaking, this statistical dominance means

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¹ See, e.g., Tobias Hubinette, *Korean Adoption History*, in COMMUNITY 2004, GUIDE TO KOREA FOR OVERSEAS ADOPTED KOREANS (Eleana Kim ed., 2004), *available at* http://www.tobiashubinette.se/adoption_history.pdf (“The most important host country during the post-war era was . . . the United States.”); ARISSA HYUN JUNG OH, INTO THE ARMS OF AMERICA: THE KOREAN ROOTS OF INTERNATIONAL ADOPTION 92–151 (2008); Peter Selman, *Intercountry Adoption in the New Millennium: The “Quiet Migration” Revisited*, 21 POPULATION RES. & POL’Y REV. 205, 211 (2002) (“[T]he United States has been the largest recipient of children for adoption.”); David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 462–63 (2010) [hereinafter Smolin, *Future*] (“[T]he United States . . . constitut[es] more than half of all intercountry adoptions . . .”).

² See, e.g., OH, *supra* note 1, at 104, 107–10, 127–35, 138–49; Hubinette, *supra* note 1 (stating that between 1953 and 1959, “[t]he main country of destination [of adopted Korean children] was the United States”).

³ See Peter Selman, *Key Tables for Intercountry Adoption: Receiving States and States of Origin 2003–2011*, NEWCASTLE UNIV., <https://blogs.ncl.ac.uk/peterselman/files/2>

that the characteristic ways in which the United States structures and practices intercountry adoption have a predominate influence on the entire system. Not surprisingly, the United States played a significant role in the development of international law governing intercountry adoption, including both the Convention on the Rights of the Child (CRC)⁴ and the Hague Adoption Convention.⁵ The conceptions of adoption in the United States legal system have come to have a favored place in the intercountry adoption system, despite being minority or foreign concepts in much of the world.⁶

While there have been very significant nations of origin, none has dominated the field of such nations for a comparable period of time. Instead, particular nations of origin tend to rise and fall in relative prominence. Although South Korea has uniquely survived as a significant sending nation for the entire period, its dominance was eclipsed by other nations, such as China, Russia, Guatemala, and Ethiopia.⁷ Thus, no one nation of origin can approach the United States in overall significance and influence for the intercountry adoption system.

The United States has used its large-scale role in the intercountry adoption system to shape the system according to its own needs and ideals.⁸ In addition, the United States employs its strategic position as a world power, which is a product of its military, economic, and strategic power, to influence legal regimes and shape contexts in which children will move to and from the United States for intercountry adoption. Thus, the influence of the United States over intercountry

012/11/intercountry-Adoption-2003-2011.pdf (last visited May 5, 2013); Smolin, *Future*, *supra* note 1, at 462–63; *see also* Selman, *supra* note 1, at 211.

⁴ *See* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456 [hereinafter CRC]; Cynthia Price Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, 20 EMORY INT'L L. REV. 185, 188–89 (2006); Cynthia Price Cohen, *Role of the United States in Drafting the Convention on the Rights of the Child: Creating a New World for Children*, 4 LOY. POVERTY L.J. 9, 18–22, 25–26 (1998) [hereinafter Cohen, *Creating a New World for Children*].

⁵ *See* Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, *convention concluded* May 29, 1993, 32 I.L.M. 1134 (entered into force May 1, 1995) [hereinafter Hague Adoption Convention]; Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purposes, Implementation, and Promise*, 28 FAM. L.Q. 53, 60 (1994).

⁶ *See generally* Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413 (2009) (stating that the Western ideas of self and adoption have dominated the international adoption conversation); Riitta Högbäck, *Transnational adoption and the exclusiveness and inclusiveness of families* (2008), *available at* http://www.kumsn.org/main/index.php?mid=kumsn_resources_unwed&page=4&document_srl=904 (last visited Nov. 12, 2013.)

⁷ *See* Kelley McCreery Bunkers et al., *Ethiopia at a Critical Juncture in Intercountry Adoption and Traditional Care Practices*, in INTERCOUNTRY ADOPTION 133, 136 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012); Smolin, *Future*, *supra* note 1, at 463–84.

⁸ *See, e.g.*, Pfund, *supra* note 5; Cohen, *Creating a New World for Children*, *supra* note 4, at 26–39.

adoption has doubtless been augmented by its status as a world power in the post-World War II, Cold War, and contemporary eras.⁹

In recent years, the United States has also become a significant country of origin for intercountry adoption. While the numbers of children leaving the United States for intercountry adoption are quite small as compared to the much larger number coming to the United States, this role of the United States as a sending nation is also significant.¹⁰

The thesis of this Article is that the predominate influence of the United States on the intercountry adoption system has had primarily negative effects, and is largely responsible for many negative characteristics of the intercountry adoption system. While the United States has unique strengths as a participant in the intercountry adoption system, the United States has also employed an ethos and approach to intercountry adoption that has consistently corrupted the intercountry adoption system. The many scandals, moratoria, closures, abusive practices, and the declining numbers of intercountry adoptions are due in significant part to the practices of the United States. A further thesis of this Article is that the negative impacts of the United States on the intercountry adoption system are not the inevitable feature of United States law and culture. While these negative impacts do follow naturally from specified characteristics of the law and culture of the United States, the United States is capable of being a positive influence on intercountry adoption. Indeed, the United States has unique strengths in relationship to adoption. However, for the United States to be a positive influence on the intercountry adoption system, the United States would have to deliberately curb certain practices and tendencies that continue to corrupt the intercountry adoption system.

The influence of the United States on the intercountry adoption system does not occur in a vacuum. Upon examination, the very concept of a legitimate, sustainable, regulated, and legally normalized intercountry adoption *system* is riddled with tensions, paradoxes, and practical difficulties that threaten to undo it. In order to evaluate the influence of the United States on the system, this Article also seeks to explain the vulnerability of the system to exploitative and illicit practices.

Of course, many other nations contribute, both positively and negatively, to the intercountry adoption system in complex ways. Certainly, this Article does not purport to claim that the intercountry adoption system would be perfect or untroubled but for the involvement of the United States. However, an assessment of the impact of other particular nations is beyond the scope of this Article.

⁹ See, e.g., OH, *supra* note 1. Professor King and Professor Hubinette both describe the power imbalance between the United States and South Korea and its impact on international adoptions. Hubinette, *supra* note 1; King, *supra* note 6, at 422–23.

¹⁰ See Dana Naughton, *Exiting or Going Forth? An Overview of USA Outgoing Adoptions*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 161, 162–63. The numbers reported by the United States government for outgoing cases are currently inaccurate. See discussion *infra* Part III.G.

The theses of this Article have practical implications. For those within the United States, the question is whether stakeholders will use their influence to put in place the reforms that could make the United States a positive force in the intercountry adoption system. Until now, most of the influential stakeholders have nurtured and protected precisely those attitudes, policies, and practices that make the United States a destructive force in the intercountry adoption system. Perhaps if such stakeholders ever perceive their negative impacts on intercountry adoption, and the opportunities that could exist for positively impacting the future of intercountry adoption, effective reform would be possible.

For those outside the United States, there are also choices to be made. Perhaps the United States can be influenced from the outside. Regardless, nations also have to look out for their own interests and, indeed, for their own people. Each nation, whether or not it has ratified the Hague Adoption Convention, has the choice of whether to engage in intercountry adoption, and, if it does so, has the choice of which nations with which to partner. Nations should evaluate carefully the impact that partnering with the United States on adoption would have on their own nation, including their governmental, legal, human welfare, child welfare, and adoption systems. Nations should evaluate whether they have the necessary capacities to avoid the negative impacts often—but not always—associated with partnering with the United States, and therefore are in a position to benefit from the unique strengths of the United States regarding adoption. Nations should ascertain the practices of the United States that present a danger and consider if they can seek a change in those practices by negotiation with the United States.

The intercountry adoption system has significance far beyond the relatively small number of children who are adopted internationally. Intercountry adoption is practiced at the intersection of poverty, child welfare, human rights, family structure, and discrimination. Intercountry adoption systems have the potential to exacerbate societal tendencies and systems that impact vast numbers of people, or to positively address issues far beyond intercountry adoption itself. Thus, corrupting intercountry adoption systems can have very significant national and international repercussions, making a proper response to such even more imperative.

I. CENTRAL PARADOXES AND PRACTICAL DIFFICULTIES OF CREATING A LEGITIMATE, SUSTAINABLE, REGULATED, AND LEGALLY NORMALIZED INTERCOUNTRY ADOPTION “SYSTEM”

Upon examination, the very concept of a legitimate, sustainable, regulated, and legally normalized intercountry adoption system is riddled with tensions, paradoxes, and practical difficulties that threaten to undo it. In this Article’s context of evaluating the influence of the United States on the system, this section exposes the vulnerability of the intercountry system to exploitative and illicit practices that would destroy the system’s legitimacy.

A. *Normalizing Human Rights Violations in the Construction of Intercountry Adoption Systems*

The conceptualization of a legally normalized intercountry adoption system found in the CRC and Hague Adoption Convention contains inherent tensions and paradoxes. On the one hand, the normalization of intercountry adoption is built upon a hierarchy of outcomes/interventions which theoretically legitimizes intercountry adoption only conditionally, in circumstances where other, preferred outcomes are not practically possible. This hierarchy of outcomes/interventions is known as the subsidiarity principle. At a minimum, this subsidiarity principle prefers family preservation to adoption, and prefers domestic adoption to intercountry adoption. Controversy remains over the role of other in-country care options short of either family preservation or full adoption, such as foster care.¹¹

The subsidiarity hierarchy is built upon a child-rights conceptualization in which children have identity and family relationship rights as to their original family, community, and nation.¹² Thus, the child has a right to a name, a nationality, and “to know and be cared for by his or her parents,”¹³ and governments undertake to “respect the right of the child to preserve his or her identity, including nationality, name and family relations”¹⁴ This child-rights concept is itself built upon a broader human rights conception wherein all human beings are guaranteed rights to an adequate standard of living, including rights to food, housing, clothing, education, employment, social security, and health care.¹⁵

The import of these legal regimes is to simultaneously normalize and de-normalize intercountry adoption. It is clear that under this conception, intercountry adoption intrinsically involves multiple deprivations of child and human rights. These include deprivations of the child’s identity and relational rights with their original family, community, and nation, including the child’s culture, language, and opportunity to “know and be cared for by his or her parents.”¹⁶ In addition, the contexts in which parents and extended family members relinquish, abandon, or lose their children frequently involve some basic deprivation of their rights. In

¹¹ See CRC, *supra* note 4, at art. 20–21; Hague Adoption Convention, *supra* note 5, at pmb.; Guidelines for the Alternative Care of Children, G.A. Res. 6 4/142, ¶ 166, U.N. GAOR, 64th Sess., Supp. No. 49, U.N. Doc. A/RES/64/142, at 4–5 (Feb. 24, 2010); David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 406–417 (2005).

¹² See Smolin, *supra* note 11, at 409–12.

¹³ CRC, *supra* note 4, at art. 7(1).

¹⁴ *Id.* art. 8(1).

¹⁵ See *id.* arts. 24, 26–29, 31; International Covenant on Economic, Social, and Cultural Rights, art. 2–3, 6, 9–13, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR]; Universal Declaration of Human Rights, arts. 2, 7, 22–23, 25–26, G.A. Res. 217(III), U.N. Doc A/RES/217(III) (Dec. 10, 1948) [hereinafter Universal Declaration].

¹⁶ See CRC, *supra* note 4, at art. 7(1); Smolin, *supra* note 11, at 408–11.

many nations, poverty, including deprivations of adequate food, housing, clothing, education, health care, employment, and social security, is a basic precipitating factor.¹⁷ Many instances of intercountry adoption involve some kind of discrimination against the child and/or the child's parents based on categories such as gender, race, disability, religion, or caste.¹⁸ In China, the coercive population-control policies of the government are often a major instigating factor affecting abandonment decisions by parents.¹⁹ Although the intercountry adoption system employs a legal conceptualization of parents making voluntary relinquishment or abandonment decisions, often the background deprivations, discriminations, and coercive governmental or societal practices are so severe as to have drastically constricted the practical options of the original parents. Therefore, in practical terms we may view the parents as losing their parental rights in a largely involuntary way, or at least in a context of sharply circumscribed choices.

Thus, typically intercountry adoption involves such an intense set of deprivations of rights and equalities as to constitute, from a human-rights and child-rights perspective, a highly abnormal situation. Yet, the Hague Adoption Convention appears to largely normalize these deprivations as baseline conditions upon which it is permissible to construct an intercountry adoption system.²⁰ In practice, trying to construct a normal, ethical, and controlled intercountry adoption system upon the foundation of the chaos, trauma, and deprivations engendered by such profound wrongs creates tensions that threaten to de-legitimize, destroy, and overturn intercountry adoption systems. It is like trying to build a house upon the sand, or fly a plane through a tornado. It seems odd to expect that a legally normal, predictable, ethical, well-run, rule-of-law intercountry adoption system can be built upon what, in human rights terms, would be viewed as a series of unlawful deprivations—particularly where these unlawful deprivations have often been caused in significant part by inefficient, unethical, and corrupted legal, economic, governmental, and societal practices and conditions.

Of course, the normalization of such deprivations of rights and equality can be seen positively as an acknowledgement of the real world situations of children, and a determination to assist children, to the degree possible, under the guidance of the

¹⁷ See generally Richard Carlson, *Seeking the Better Interests of Children with a New International Law of Adoption*, 55 N.Y.L. SCH. L. REV. 733, 757 (2010) (“It is indisputable that many birth parents who voluntarily place their children for adoption do so because of poverty.”); David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 CAP. U. L. REV. 413, 417–18 (2007).

¹⁸ See, e.g., David M. Smolin, *The Missing Girls of China: Population, Policy, Culture, Gender, Abortion, Abandonment, and Adoption in East-Asian Perspective*, 41 CUMB. L. REV. 1, 2 (2011).

¹⁹ See *id.*; see also KAY ANN JOHNSON, WANTING A DAUGHTER, NEEDING A SON: ABANDONMENT, ADOPTION, AND ORPHANAGE CARE IN CHINA 1 (Amy Klatzkin ed., 2004).

²⁰ See, e.g., Hague Adoption Convention, *supra* note 5, at arts. 4–5 (listing very limited “Requirements for Intercountry Adoptions” implicitly permitting such even when severe deprivations of rights and equality have occurred).

overriding best interests of the child standard. Children cannot wait for the achievement of a better world, but must be provided for within the limits of what is practically possible. Thus, the CRC places adoption within the context of a child “temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment”²¹ Within this vulnerable circumstance, the child is “entitled to special protection and assistance provided by the State,” and the State shall “ensure alternative care for such a child.”²² Intercountry adoption is thus envisioned as one form of alternative care, although not a preferred one, because of the subsidiarity principle. The subsidiarity principle itself is apparently protective of the child’s rights and best interests, because intercountry adoption involves greater deprivations of the child’s identity and relationship rights, as compared to other forms of alternative care.²³ On the positive side, intercountry adoption is seen as providing permanency for children, which is one of the fundamental goals for children in terms of their best interests.²⁴

Although normalizing interventions for abnormal situations is superficially supportable by reference to the immediate needs of children, it creates deep tensions and anomalies. In many instances, for example, the State and broader society are complicit in creating the contexts, including the deprivations of rights and equality that precipitate the child’s loss of their original family. The most obvious example is that of China’s population control policies, which according to most accounts played a major, although unintended, role in producing large-scale child abandonment.²⁵ Of course, in many nations a major factor precipitating abandonment and relinquishment is extreme poverty.²⁶ The degree of governmental fault involved in large-scale poverty in some nations is a difficult question beyond the scope of this Article, but in at least some instances it would seem that governments could have been more focused and effective in fostering economic development and alleviating the deprivations of poverty. Similarly, the failures of governments and society to alleviate discrimination based on gender, race, disability, and other categories become instigating factors in separating children from their families and communities and making them eligible for intercountry adoption. Under these circumstances, when governments create intercountry adoption systems built upon the wrongs and injustices created by governments and society, it can appear to be a normalization of those underlying wrongs.

²¹ CRC, *supra* note 4, at art. 20(1).

²² *Id.* art. 20(1)–(2).

²³ *See id.* arts. 20(3)–21.

²⁴ Hague Adoption Convention, *supra* note 5, at pmb1. (“Recognising that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin”).

²⁵ *See* JOHNSON, *supra* note 19, at 1; Smolin, *supra* note 18.

²⁶ *See* Smolin, *supra* note 17, at 418.

*B. The Subsidiarity Principle in Theory and Practice**1. Family Preservation*

Because adoption systems are often built upon normalizing deprivations of rights and extreme inequality, it is not surprising that the subsidiarity principle is very difficult to sustain in practice. For example, under the CRC and the preamble to the Hague Adoption Convention, it appears that family preservation efforts, including economic assistance if poverty is the precipitating problem threatening parent-child separation, would be required prior to placing a child for intercountry adoption.²⁷ Yet the Hague Adoption Convention never concretely operationalizes this aspect of the subsidiarity principle through any kind of specific rule. Nothing in the Hague Adoption Convention specifically requires economic assistance or family preservation efforts of any kind.²⁸ Hence, placing children for intercountry adoption merely because of the extreme poverty of the family appears technically legal under the letter, if not the spirit, of the Hague Adoption Convention.²⁹ Similarly, adoption systems involving no family preservation efforts at all do not violate any specific rules of the Hague Adoption Convention, other than the stated subsidiarity principle. In practice, this means that entire intercountry adoption systems are built primarily upon accepting relinquishments and abandonments based on poverty, without the necessity of any economic assistance or family preservation efforts. Some prominent supporters of intercountry adoption explicitly support such practices.³⁰ In a context where poverty is pervasive and aid only sporadic, an intervention that takes the children of the poor can appear reasonable to some, because there are large numbers of families suffering from the effects of poverty without any probability of receiving support.³¹ Of course, others, including this author, decry intercountry adoptions based on poverty as cruel and unethical, compounding the vulnerability and suffering of the poor with the loss of their children, and absurdly spending tens of thousands of dollars for an intercountry adoption when perhaps one hundred dollars or less would have been sufficient to maintain the child with her family.³² Regardless of the position one takes, it is clear that intercountry adoption systems commonly operate in violation of the subsidiarity principle,³³ purportedly one of the central principles of the system.

²⁷ See *id.* at 431–33.

²⁸ See generally Hague Adoption Convention, *supra* note 5.

²⁹ See Smolin, *supra* note 17, at 431–33.

³⁰ See *id.* at 413–16.

³¹ See generally Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 163, 180–81 (2007); Carlson, *supra* note 17 at 33–38.

³² Smolin, *supra* note 17, at 430–31.

³³ See Carlson, *supra* note 17, at 757 (“It is indisputable that many birth parents who voluntarily place their children for adoption do so because of poverty.”).

2. *Preference for Domestic Adoption over Intercountry Adoption*

The subsidiarity principle clearly prefers domestic adoption to intercountry adoption.³⁴ Yet, in practice, some adoption systems effectively prefer international adoption over domestic adoption. For example, when China authorized intercountry adoption in its 1992 Adoption Law, the same law simultaneously suppressed domestic adoption within China. China's 1992 Adoption Law required, as to domestic adoption, that adoptive parents be at least thirty-five years old, and counted adopted children against the parents' allotment of permissible children under the population control policy.³⁵ These limits apparently were based on concerns that domestic adoption was used to circumvent the population control policies, by circulating above-quota children among family and friends as adoptive placements. The law thus sacrificed domestic adoption in the interests of enforcement of population control policies.³⁶ Thus, the purportedly model Chinese intercountry adoption system was built not only upon an unintended consequence of the population control policy and cultural gender bias, but also upon a deliberate government decision to favor intercountry adoption over domestic adoption: a direct violation of the core subsidiarity principle. The large number of nations accepting placements from China normalized these violations of the subsidiarity principle by accepting China as a proper partner, apparently without even attempting to persuade China to alter its limitations on domestic adoption. China's relaxation of some of the limitations on domestic adoption in the 1999 amendments to the Adoption Law improved the situation significantly, but the 1999 Amendments still placed limitations on domestic adoption that do not exist for international placements,³⁷ thus still violating the subsidiarity principle in some instances.

Practically speaking, in some adoption systems the subsidiarity principle of favoring domestic adoption over intercountry adoption is frequently violated as a consequence of financial incentives favoring international placement. Whatever the law may say, when orphanage directors and others know that there are significant financial benefits to their institutions and/or themselves in making international placements, it becomes very difficult to enforce the subsidiarity principle. Thus, some intercountry adoption systems in practice tolerate strong financial incentives favoring international placement, despite the obvious risk that this will lead to wide-scale violation of the subsidiarity principle.³⁸

³⁴ See Hague Adoption Convention, *supra* note 5, at pmb.; CRC, *supra* note 4, at art. 21; Smolin, *supra* note 11, at 408.

³⁵ See Adoption Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1991, effective Apr. 1, 1992), art. 6, 8 (China); JOHNSON, *supra* note 19, at 118–19, 162–67.

³⁶ See JOHNSON, *supra* note 19, at 118–19, 162–67.

³⁷ See Smolin, *supra* note 18, at 57–58 & n.295.

³⁸ See Smolin, *supra* note 11, at 446–48.

C. *“The Abduction, the Sale of, or Traffic in Children”³⁹ in Theory and Practice: Illicit, Abusive, and Abnormal Practices Harbored by Intercountry Adoption Systems*

The Hague Adoption Convention attempts to delineate several situations where intercountry adoption cannot be legally normalized, which are summarized as involving “the abduction, the sale of, or traffic in children.”⁴⁰ The preparatory materials focused on child trafficking as the primary form of abusive adoption practice.⁴¹ One of the stated purposes of the Convention is to create safeguards that would prevent these abusive practices.⁴² Thus, theoretically, an adoption involving such wrongs cannot be legally normalized into a legitimate adoption, from the vantage point of the Convention.

The Hague Adoption Convention seeks to safeguard the requisites of a valid consent for adoption by requiring consents to be fully informed, voluntary, not withdrawn, and not “induced by payment or compensation of any kind.”⁴³ Additionally, under the Hague Adoption Convention, a mother’s consent can only be given after the child has been born.⁴⁴ Abductions do not involve any kind of valid consent, and monetary incentives are viewed as illegitimate inducements that taint consents and constitute the sale of or traffic in children. Hence, the requisites of a valid consent partially implement the objective of preventing the “abduction, the sale of, or traffic in children.”⁴⁵

Unfortunately, neither the Hague Adoption Convention, nor the practice of intercountry adoption that occurs both under and outside its provisions, have provided any concrete remedies for cases in which abducted, purchased, and trafficked children have been transnationally adopted.⁴⁶ This author and others have extensively documented a pattern, sometimes called child laundering, in which children are illicitly obtained by some combination of abduction, fraud, or funds, provided false paperwork labeling them as relinquished or abandoned “orphans,” and processed through the normal channels of the intercountry adoption

³⁹ Hague Adoption Convention, *supra* note 5, at pmb1., art. 1(b) (capitalization added).

⁴⁰ *Id.*

⁴¹ See Smolin, *Future*, *supra* note 1, at 452–61.

⁴² Hague Adoption Convention, *supra* note 5, at art. 1.

⁴³ *Id.* art. 4(c).

⁴⁴ *Id.*

⁴⁵ *Id.* art. 1(b).

⁴⁶ See generally *id.* One of the only attempts to delineate a protocol was recently put forward by the Australian government, but it stops far short of a remedy. See Att’y Gen. Dep’t, Australian Gov’t, *Protocol for Responding to Allegations of Child Trafficking in Intercountry Adoption*, [http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Documents/Protocol%20for%20responding%20to%20allegations%20of%20child%20trafficking%20in%20intercountry%20adoption%20\[PDF%20123KB\].pdf](http://www.ag.gov.au/FamiliesAndMarriage/IntercountryAdoption/Documents/Protocol%20for%20responding%20to%20allegations%20of%20child%20trafficking%20in%20intercountry%20adoption%20[PDF%20123KB].pdf). (last visited Oct. 20, 2013).

system.⁴⁷ Indeed, this pattern of abusive practice was specifically documented in the foundational Report on Intercountry Adoption of Children created by Hans van Loon (the “van Loon Report”), which constitutes an important part of the preparatory materials for the Hague Adoption Convention.⁴⁸ The van Loon Report proposed that a mechanism be created for dealing with such cases as a part of the Hague Adoption Convention,⁴⁹ but such was not done, and little has been done since to address this problem.⁵⁰ Unfortunately, these abusive practices have continued to be widespread since the creation of the Hague Adoption Convention in 1993.⁵¹ Thus, in practice, even adoptions which are completely improper under the terms of both the CRC and the Hague Adoption Convention nonetheless end up being legally-recognized adoptions, and in most instances the victims lack an effective remedy.⁵² Thus, one of the tensions of the so-called intercountry adoption system is the lack of a mechanism for remedying even the most egregious violations of its core principles.

D. The Contestable Ethical Hierarchies of the Intercountry Adoption System

The CRC and the Hague Adoption Convention embody implicit criteria for evaluating the legitimacy of adoptions; upon examination, these criteria are ethically contestable. In combination, these legal documents create a hierarchy, as follows: (1) Intercountry adoptions built upon extreme deprivations of rights and equality, and on the lack of child and human welfare systems providing alternatives, interventions, and remedies short of intercountry adoption, are legally normal and acceptable; (2) theoretically, the subsidiarity principle should be followed, but in the absence of any rules operationalizing those principles, adoption systems based on frequent or even generalized violations of subsidiarity

⁴⁷ See David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV 113, 115–16 (2006); Smolin, *Future*, *supra* note 1, at 443–44 & n.19; Smolin, *supra* note 11, at 412.

⁴⁸ See generally J.H.A. van Loon, *Report on Intercountry Adoption of Children, Preliminary Document No. 1 of April 1990*, in PRELIMINARY WORK, PROCEEDINGS OF THE SEVENTEENTH SESSION 101 (May 10–29, 1993); Smolin, *Future*, *supra* note 1, at 452–57.

⁴⁹ See van Loon, *supra* note 48.

⁵⁰ See Smolin, *Future*, *supra* note 1, at 455–57; see also *supra* note 46 and accompanying text.

⁵¹ See, e.g., Smolin, *Future*, *supra* note 1, at 444 n.19.

⁵² See, e.g., *id.*; see also Maria Renee Barillas & Rafael Romo, *Guatemalan Mother Seeks ‘Stolen’ Daughter’s Return From U.S.*, CNN (May 21, 2012, 10:44 AM), <http://www.cnn.com/2012/05/17/world/americas/guatemala-us-adoption> (discussing the United States’ State Department’s refusal to assist the Guatemalan mother of an abducted child adopted into the U.S, while suggesting the woman seek redress in state court); see also *Operation Mercy Mercy (Masho)*, AGAINSTCHILDTRAFFICKING.ORG, <http://www.againstchildtrafficking.org/category/operation-masho-ethiopia/> (last visited Nov. 23, 2013) (NGO attempting to provide remedies in such cases in context of governmental inaction).

remain legally supportable and legitimate; (3) intercountry adoptions without the requisites of a valid consent, and those involving “the abduction, the sale of, or traffic in children”⁵³ violate the CRC and the specified rules of the Hague Adoption Convention, and hence are viewed as legally abnormal, illicit, and the worst kind of violations of governing norms (despite the lack in most intercountry adoption systems of any concrete mechanisms for remedying such cases when they occur).⁵⁴

Some may rationally view some adoptions in category one, normalizing intercountry adoptions consequent to extreme deprivations of rights or equality, as worse than some forms of sale or trafficking of children in category three. For example, some may view the coercive power of population control policies, unremedied extreme poverty or gender discrimination, or the lack of functioning human welfare systems as ethically worse and more problematic than the payment of small amounts of money to family members to induce consent.⁵⁵ Some may view the payments of small amounts of money to induce consents, or illicit payments or bribes, as justifiable evils in view of the desperate situation of children and families. These and related ethical dilemmas can create a lack of ethical clarity in the actual practice of intercountry adoption. These disagreements tend to destabilize the intercountry adoption system because they undercut the ethical agreement necessary for such a transnational, cross-cultural system.

E. Building “Well-Functioning” Intercountry Adoption Systems upon a Foundation of Non-Functional Child Welfare and Human Welfare Systems

In practice, intercountry adoption systems often are built upon the absence of other effective systems, such as child-welfare systems, poverty-alleviation systems, etc. The less that child welfare and poverty alleviation are effective and available in a particular society, the more children are potentially eligible for intercountry adoption. In most societies with well-functioning child and human welfare systems, only a small number of children (if any) are properly and practically available for intercountry adoption. This, of course, creates another practical and theoretical paradox.

Beyond the paradox, some argue that intercountry adoption systems become a serious disincentive to the development of properly functioning child welfare and human welfare systems. Persons who financially benefit from the intercountry adoption system become invested in the lack of alternative systems. Therefore, the

⁵³ Hague Adoption Convention, *supra* note 5, at pmb., art. 1(b).

⁵⁴ See *supra* notes 16–52 and accompanying text.

⁵⁵ Cf. Kay Johnson, *Challenging the Discourse of Intercountry Adoption: Perspectives from Rural China*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 116–17 (challenging discourse where adoptions built upon coercive population policies and suppression of domestic adoption are viewed as acceptable or ethical). In this chapter, Professor Johnson misunderstands this author’s position on such adoptions. See *id.* at 112–13; Smolin, *supra* note 18, at 64–65.

functionality of intercountry adoption systems is built upon the dysfunctionality of child welfare and human welfare systems.⁵⁶ While these negative incentives may not be inevitable, they can be very destructive and significant.

II. INTERNATIONAL LAW, HUMAN RIGHTS, INTERCOUNTRY ADOPTION, AND THE UNITED STATES

A. *The United States and International Law*

One of the primary issues for nations considering partnering with the United States for intercountry adoption is whether there is a sufficient set of shared principles to form the basis of a positive relationship. The relationship of the United States to the governing principles of international law is one way to assess this question.

The relationship of the United States to international law is a difficult topic with permutations far beyond that of intercountry adoption. Some critics view the United States as habitually and purposely acting lawlessly, unbounded by international law. Some within the United States express attitudes that fuel this perception. Disputes over matters relating to the conduct of the so-called war on terror highlight these concerns.⁵⁷ On the other hand, in some ways, the United States acts in a more lawful manner than many other nations. The rule of law is a very important ideal within American legal and governmental culture. The United States has a fairly positive ranking regarding issues such as transparency and corruption, ranking within the best twenty nations: not ideal, but hardly exemplifying a particularly lawless society.⁵⁸ The difficulty with the United States and international law may be intrinsic to any nation whose power and strategic position frequently allow it to choose between employing international law or employing its own military, economic, and strategic assets. Smaller nations

⁵⁶ See, e.g., Roelie Post, *International Adoption: Child Protection or a Breach of Rights?*, CONDUCTIVE MAGAZINE (Oct. 7, 2009), available at <http://www.conducivemag.com/2009/10/international-adoption-child-protection-or-a-breach-of-rights/>.

⁵⁷ See, e.g., David M. Crane, *An Age of Extremes: International Law in Crisis, Eight Challenges*, 44 CASE W. RES. J. INT'L L. 47, 51 n.21 (2011) (quoting Richard Falk, Presentation to the Congressional Black Caucus Annual Legislative Conference (Sept. 2005) ("The US Government has long adopted double standards when it comes to respecting international law . . . [it] is outraged by violations of international law by its enemies, and chooses selectively when to comply and when to violate." (alterations in original))); Dawn E. Johnsen, *The Story of Hamdan v. Rumsfeld: Trying Enemy Combatants by Military Commission*, in PRESIDENTIAL POWER STORIES 447, 448–49, 456–63 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009); Margaret L. Satterthwaite, *The Story of El-Masri v. Tenet: Human Rights and Humanitarian Law in the "War on Terror,"* in HUMAN RIGHTS ADVOCACY STORIES 535, 550–62 (Deena R. Hurwitz et al. eds., 2009) (describing post 9-11 indefinite detention, rendition, and torture by U.S.).

⁵⁸ See *Corruptions Perception Index 2012*, TRANSPARENCY INT'L, <http://www.transparency.org/cpi2012/results> (last visited May 18, 2013).

without such significant military, economic, or other power-based assets are intrinsically more dependent on international law and international relations and thus may tend to rely more on international law.⁵⁹

B. The United States and International Human Rights Law

In addition to the complex relationship of the United States to international law generally, there are additional factors that have created a complex and ambivalent relationship between the United States and international human rights law. On the one hand, the United States played a prominent role in the birth of the modern human rights movement. The United States was active in the creation of the United Nations, with its fundamental statements on human rights in the U.N. Charter.⁶⁰ The United States was also very active in the creation of the 1948 Universal Declaration of Human Rights, which is a foundational statement of the modern human rights movement.⁶¹ On the other hand, the United States has failed to ratify a number of significant international human rights conventions.⁶² Even when the United States does ratify human rights conventions, it generally does so subject to significant reservations, understandings, and declarations (RUDs), including a declaration that the Convention is not self-executing and hence is not justiciable in the courts of the United States.⁶³ Similarly, the United States is not a member of the International Criminal Court, and has had at times a hostile or defensive posture toward the Court, although that has lessened in recent years.⁶⁴

In defense of the United States' position toward human rights law, it could be said that its selective ratification of a limited number of human rights treaties, and its elaboration of significant RUDs to the treaties it ratifies, reflect the emphasis on lawfulness within the legal and governmental culture of the United States. Many nations ratify human rights conventions seemingly without any serious intent to implement the norms involved, as largely symbolic acts. Indeed, one legal scholar has claimed that for some nations, adherence to human rights norms decreases with ratification; there is certainly reason to doubt whether ratification of human rights

⁵⁹ Cf. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 147–48 (Michael Ignatieff ed., 2005).

⁶⁰ See, e.g., ROGER NORMAND & SARAH ZAIDA, HUMAN RIGHTS AT THE UN: THE POLITICAL HISTORY OF UNIVERSAL JUSTICE 3–10, 143–96 (2008).

⁶¹ See *id.* at 143–96; Universal Declaration, *supra* note 15; See generally MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 53–72, 235–41 (2001).

⁶² See, e.g., THOMAS BUERGENTHAL ET AL., INTERNATIONAL HUMAN RIGHTS IN A NUT SHELL 412–18 (4th ed. 2009).

⁶³ See *id.* at 432–44.

⁶⁴ See, e.g., *International Criminal Court*, U.S. DEP'T OF STATE, <http://www.state.gov/j/gcj/icc/index.htm> (last visited May 19, 2013); AM. SOC'Y OF INT'L LAW, U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT: REPORT OF AN INDEPENDENT TASK FORCE, at iv–vii (Mar. 2009), available at <http://www.asil.org/files/asil-08-discpaper2.pdf>.

treaties generally represents a strong commitment to the human rights norms within those treaties.⁶⁵ Thus, it may be that the United States takes human rights much more seriously than many nations that have ratified more human rights conventions than the United States.

Within this context of selective adherence to human rights norms, the stance of the United States toward economic, social, and cultural rights is of particular significance to intercountry adoption. Within the modern human rights system, such rights include education, health care, employment, social security, food, housing, recreation, and an adequate standard of living. These rights are enumerated both in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”).⁶⁶ The United States has never ratified the ICESCR, in large part due to a conflict between the concept of rights as articulated in the United States constitutional system, and the concept of rights as embodied in the modern human rights system. In the United States constitutional system, individual rights are essentially negative rights, in that they protect individuals against government. Thus, in the constitutional law of the United States, individual rights address the question of what government may not do to the individual, but do not address what government must do for the individual. Indeed, there are no national constitutional rights to demand that government do anything for the individual. In that sense, what are termed “positive rights”⁶⁷—rights to assistance or economic or social goods—are essentially lacking in the United States national constitution. There are no national constitutional rights to education, health care, food, housing, employment, social security, or an adequate standard of living.⁶⁸

The lack of such positive national constitutional rights in the United States does not mean that government never provides such goods or services. Rather, it means that such matters are in the area of federal legislative discretion, or are determined by states rather than the federal government. For example, although

⁶⁵ See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2020–23 (2002); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOLUTION 588, 592–94 (2007); JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 107–34 (2005) (describing tenuous relationship between a state’s signing human rights treaties and the amount of human rights abuse it tolerates); Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT’L L. 171 (2003) (critiquing Hathaway’s 2002 article).

⁶⁶ See Universal Declaration, *supra* note 15, at arts. 22–26; ICESCR, *supra* note 15, at arts. 6–7, 9–12.

⁶⁷ *Deshaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 204 (1989) (Brennan, J., dissenting).

⁶⁸ See, e.g., *id.* at 189; *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 2 (1973); see Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 366–69 (1990); Ann M. Piccard, *The United States’ Failure to Ratify the International Covenant on Economic, Social, and Cultural Rights: Must the Poor Be Always with Us?*, 13 ST. MARY’S L. REV. ON MINORITY ISSUES 231, 262–63 (2010).

states commonly consider education to be a state constitutional right, and although every state in the United States provides a free and compulsory system of public education, this does not alter the holding that education is not a federal constitutional right.⁶⁹ Thus, even when government has a long-standing system of providing certain goods and services, and even where there is, in some sense, a state constitutional or legislatively-derived “right” to receive such goods or services, nonetheless such provision is not conceptualized primarily as a right under the federal Constitution. Fundamentally, this means that most questions as to the extent of government assistance in alleviation of poverty are legislative rather than judicial matters, with the primary exceptions being matters of state constitutional law determined by state court judges.

It should be added that where government does provide a good or service, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution does address discrimination.⁷⁰ However, this is not the equivalent to a positive right, for the Equal Protection Clause as interpreted by the courts generally does not address discrimination based on poverty, and does not create any substantive right to basic subsistence rights.⁷¹

It would be conceptually possible for the United States to ratify the International Covenant on Economic, Social, and Cultural Rights (ICESCR). From the standpoint of the ICESCR, it does not matter whether or not the rights named are secured constitutionally or legislatively. In addition, the ICESCR does not necessarily imply a communist or socialist system, as a capitalist economic system may be the most likely one to produce the wealth necessary to secure the named rights. However, ratification of the ICESCR does imply, particularly for a wealthy nation like the United States, some kind of governmental guarantee of all of the named rights, thus mandating some kind of social safety net in regard to the various named rights. This is a commitment the United States has not been willing to make. Indeed, from a political perspective, the long-term opposition to United States ratification of the ICESCR appears to have changed little over several decades, and hence it appears there are no short-term prospects that the United States will ratify the ICESCR.⁷²

The United States’ rejection of the ICESCR is significant to intercountry adoption in two related ways. First, the rejection of the ICESCR undergirds the rejection of the CRC, which is of significant importance for intercountry adoption.

⁶⁹ See *Rodriguez*, 411 U.S. at 2; *Plyler v. Doe*, 457 U.S. 202, 202–03 (1982); William E. Thro & R. Craig Wood, *The Constitutional Text Matters: Reflections on Recent School Finance Cases*, 251 EDUC. L. REP. 510, 514 (2010).

⁷⁰ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Plyler*, 457 U.S. at 211–12.

⁷¹ See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 805–07 (4th ed. 2011).

⁷² See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT’L L. 365, 366–69 (1990); Piccard, *supra* note 68 at 262–63.

Second, and related to the first point, is that the rejection of both the ICESCR and the CRC reinforces and reflects the tendency of United States actors to accept poverty as a legitimate basis for making a child eligible for intercountry adoption. Both points will be discussed in the next section.

C. The United States and the Convention on the Rights of the Child (CRC)

The United States is virtually the only nation in the world that has not ratified the CRC.⁷³ What makes the stance of the United States so unusual is the combination of the popularity of the CRC outside of the United States, and its relative unpopularity within the United States.

1. Why Is the CRC So Broadly Ratified?

Millions of children around the world suffer from profound deprivations of rights and equality. They suffer from inadequate food, water, housing, sanitation, clothing, education, health care, and overall standard of living.⁷⁴ They are subject to serious exploitation through sex and labor trafficking and harmful forms of child labor.⁷⁵ Children are forcibly recruited as child soldiers.⁷⁶ Many children are tragically separated from their families;⁷⁷ some are subjected to forms of “care” that are traumatizing and abusive and which can be so deficient as to cause permanent disability or deficits in adult functioning.⁷⁸ Children are physically and

⁷³ See *United Nations Treaty Collection, Databases, Status of Treaties*, UNITED NATIONS, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited May 19, 2013).

⁷⁴ See, e.g., THIRD ANNUAL REPORT TO CONGRESS ON PUBLIC LAW 109-95, THE ASSISTANCE FOR ORPHANS AND OTHER VULNERABLE CHILDREN IN DEVELOPING COUNTRIES ACT OF 2005, at 9–10 (2009) [hereinafter THIRD ANNUAL REPORT].

⁷⁵ *Id.*; see E. BENJAMIN SKINNER, A CRIME SO MONSTROUS: FACE-TO-FACE WITH MODERN DAY SLAVERY 283 (2008).

⁷⁶ See THIRD ANNUAL REPORT, *supra* note 74, at 10 tbl. 1 (providing statistics concerning children associated with armed forces or groups); Susan W. Tiefenbrun, *Child Soldiers, Slavery, and the Trafficking of Children*, 11–12 (TJSL Legal Studies Research Paper No. 1020341, 2007), available at <http://ssrn.com/abstract=1020341>; *Fact Sheet: Child Soldiers*, UNICEF <http://www.unicef.org/emerg/files/childsoldiers.pdf> (last visited Oct. 20, 2013).

⁷⁷ THIRD ANNUAL REPORT, *supra* note 74, at 9–10 (providing statistics of indicators of child vulnerability); Guidelines for the Alternative Care of Children, G.A. Res. 64/142, ¶¶ 3–8, U.N. Doc. A/Res/64/142 (Feb. 24, 2010) (recognizing the need to allow children to stay with or near their families when possible).

⁷⁸ Laurie C. Miller, *Medical Status of Internationally Adopted Children*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 187. See generally, KATHLEEN HUNT, ABANDONED TO THE STATE: CRUELTY AND NEGLECT IN RUSSIAN ORPHANAGES 33–41 (Human Rights Watch 1998) (discussing the problems facing children raised and abused in Russian Orphanages); ALAN PHILIPS & JOHN LAHUTSKY, THE BOY FROM BABY HOUSE 10:

sexually abused by parents, relatives, teachers, religious leaders, and others.⁷⁹ While children suffer in common with adults from the ills of poverty, violence, warfare, natural disaster, and discrimination, their suffering from traumas like child abuse and separation from parents that relate specifically to childhood, and the sensitive nature of their development and their innate dependence, create special vulnerabilities to negative developmental impacts with destructive lifelong effects.⁸⁰

Positively viewed, the almost universal ratification of the CRC represents a global commitment to address these ongoing harms to the children of the world. National governments are committing themselves to create a world in which these harms to children are progressively reduced.⁸¹ Moreover, the impact of the CRC goes far beyond governments. Like the broader human rights movement, the CRC and corollary children's rights movement engage not only governments, but also all segments of society.⁸² The rights and well-being of children, after all, are not effectuated primarily by governments, but rather are implemented practically by parents, families, schools, clubs, religious organizations, neighborhoods, and businesses: the entire network of organizations, functions, and persons with whom children interact.⁸³ The CRC provides a transnational and transcultural language, a kind of lingua franca or common language with which to address the rights and welfare of children. The CRC has empowered various organs and segments of society and the non-governmental organization (NGO) sector to advocate for children, creating a tool by which sometimes recalcitrant governments can be made more accountable.⁸⁴

Practically speaking, however, the limited legal enforceability of the CRC can lead to a more negative assessment of the virtually unanimous ratification of the CRC. In a world in which there are few costs to either ratification or

FROM THE NIGHTMARE OF A RUSSIAN ORPHANAGE TO A NEW LIFE IN AMERICA (2009) (detailing the life of a child in a Russian orphanage).

⁷⁹ See THIRD ANNUAL REPORT, *supra* note 74, at 9, 43 (detailing the number of children abused and stating that family members are often responsible for the abuse).

⁸⁰ See, e.g., John A. Fairbank et al., *The Prevalence and Impact of Child Traumatic Stress*, in HANDBOOK OF PTSD 229 (Matthew J. Friedman et al. eds., 2007).

⁸¹ Jaap E. Doek, *What Does the Children's Convention Require?*, 20 EMORY INT'L L. REV. 199, 199–200 (2006).

⁸² Universal Declaration, *supra* note 15, at pmb1. (stating that the declaration is addressed to "every individual and organ of society").

⁸³ See CRC, *supra* note 4, at art. 3 (addressing "public or private social welfare institutions" and "institutions, services and facilities responsible for the care or protection of children"); *id.* arts. 5, 18, 27 (addressing parents, extended family, and community); *id.* art. 17 (addressing mass media); *id.* art 24(2)(e) (addressing "all segments of society"); *id.* arts. 28–29 (addressing schools); *id.* art. 32 (implicitly addressing employers regarding child labor).

⁸⁴ See, e.g., ASHA BAJPAI, CHILD RIGHTS IN INDIA: LAW, POLICY, AND PRACTICE 17–21, 28–29 (2003).

nonratification of human rights treaties,⁸⁵ the desire to rhetorically embrace the interests of children apparently has made this human rights treaty particularly popular. Children's rights may be viewed as a symbolic or soft issue that can be embraced with even fewer costs than are generally involved in human rights treaties. There seem few other ways to explain the propensity of some governments to ratify the CRC and theoretically embrace rights of freedom of speech, media, association, and religion for children, when those same governments commonly deny such rights even to adults. Although technically a legally binding convention, it seems that the CRC is viewed more as a general statement of principles and ideals. From a cynical perspective, it seems that ratifying nations often do not take the principles and ideals of the CRC seriously.⁸⁶

Despite ample reasons for viewing the actual results produced by the CRC with caution or even cynicism, the actions of governments in ratifying the CRC have proven useful, for it has provided a common language and legal support for those throughout the world who act and advocate on behalf of the interests and rights of children. The CRC, in short, functions more as a form of social mobilization than as an enforceable legal standard. Even though the norms the CRC establishes are not legally enforceable in a direct way, those norms can be of great significance in guiding the overall culture of legal, child welfare, governmental, and societal systems. The presuppositions and norms of the CRC can be significant even when, in certain ways, they are systematically violated. Understanding the significance of the CRC thus requires finding a proper understanding somewhere between the poles of naïve idealism and nihilistic cynicism.⁸⁷

2. *The Refusal of the United States to Ratify the CRC*

The refusal of the United States to ratify the CRC has multiple sources. First, there is the general ambivalence and careful consideration of human rights treaties in the United States, as noted above.⁸⁸ Second, there is the general rejection of positive rights as embodied in the International Covenant on Economic, Social, and Cultural Rights (ICESCR), as also noted above.⁸⁹ The CRC draws heavily from the ICESCR and thus includes positive rights to education, food, health care, social security, and an adequate standard of living.⁹⁰ Third, ironically there are difficulties created by the inclusion, urged by the United States, of civil and

⁸⁵ See GOLDSMITH & POSNER, *supra* note 65, at 119–34.

⁸⁶ *Cf. id.* at 131 (“Why is the United States one of two states (the other is Somalia) that did not ratify the Rights of the Child Convention, a treaty that has no enforcement mechanism and that is ignored by the states that did ratify it?”).

⁸⁷ See David M. Smolin, *A Tale of Two Treaties: Furthering Social Justice Through the Redemptive Myths of Childhood*, 17 EMORY INT’L L. REV. 967, 990–1000 (2003).

⁸⁸ See *supra* notes 60–65 and accompanying text.

⁸⁹ See *supra* text accompanying notes 66–72.

⁹⁰ See Doek, *supra* note 81, at 199–200.

political rights, which has led to the objection that under the CRC the child has rights to privacy, association, and access to media that undercut both parental authority and the best interests of children.⁹¹ Fourth, there is a general concern that the treaty's broad conception of children's rights, coupled with the provision of civil and political rights to children, radically alters the proper relationships between child, parents, and government, allowing government too free a hand in intruding into the family.⁹² Fifth, the CRC appears to limit private and public education to that which supports the United Nations and certain fixed and vaguely defined values: limitations which are contrary to current United States constitutional law giving parents broad authority over the education of their children.⁹³ Sixth, there is the concern that although in many nations the treaty may have little impact, within the legalistic culture of the United States, where the judiciary is particularly empowered through a combination of a precedent-based common law system, judicial review, and broad interpretative methodologies,⁹⁴ the treaty could have significant, and sometimes detrimental, legal impacts.⁹⁵

There is strong support for the CRC within some segments of society in the United States.⁹⁶ This author has argued that the United States should ratify the CRC subject to certain reservations, understandings, and declarations.⁹⁷ Nonetheless, the failure of the CRC to be seriously considered for ratification in the United States persists throughout various political administrations, and there is little likelihood that it will be ratified in the near future.⁹⁸

The refusal of the United States to ratify the CRC is directly relevant to adoption, given the multiple provisions pertaining to either adoption or related

⁹¹ *Id.* at 200 (“Some opponents of the CRC expressed concerns that civil and political rights promote an independency or autonomy that is not in the interest of the child.”); see Cohen, *Creating a New World for Children*, *supra* note 4, at 17–18; Cohen, *The Role of the United States in the Drafting of the Convention on the Rights of the Child*, *supra* note 4, at 186–92; David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 81, 90–92 (2006).

⁹² See Smolin, *supra* note 91, at 91–92; Doek, *supra* note 81, at 207–08.

⁹³ See CRC, *supra* note 4, at arts. 28, 29; Smolin, *supra* note 91, at 104–05.

⁹⁴ See David M. Smolin, Precedent, Judicial Review, and Constitutional Interpretation in the United States: Doctrine, History, and Culture, presented at the International Symposium on Constitutional Law, Sao Paulo, Brazil (Sept. 20, 2011) (on file with author).

⁹⁵ *But see* Smolin, *supra* note 91, at 105–06 (arguing that such concerns could be mitigated through a declaration that the CRC was non-self-executing).

⁹⁶ In 2006, the Emory International Law Review held a symposium where several scholars presented academic papers overwhelmingly supportive of the United States’ ratification of the CRC. See Symposium, *What’s Right for Children*, 20 EMORY INT’L L. REV. 1, 105–06, 158 (2006).

⁹⁷ Smolin, *supra* note 91, at 105–06.

⁹⁸ David Weissbrodt, *Prospects for Ratification of the Convention on the Rights of the Child*, 20 EMORY INT’L L. REV. 209, 210, 216 (2006) (urging human rights groups not to focus on ratification of CRC due to “a vehement and politically powerful opposition” and possible detrimental impacts on prospects for ratifying other human rights treaties).

topics. As discussed above, the CRC provides children with identity and family relationship rights, including birth registration, “a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents.”⁹⁹ Similarly, the child has the right to “preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.”¹⁰⁰ In addition, “State Parties shall ensure that a child shall not be separated from his or her parents against their will,” subject to certain limited exceptions.¹⁰¹

Given this premise, Article 20 of the CRC expresses particular concern for a child deprived of these identity and family relationship rights, stating that “[a] child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.”¹⁰² This is the context in which the CRC introduces various possible interventions, including “foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”¹⁰³ In addition, the CRC embraces a subsidiarity principle under which “inter-country adoption may be considered as an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”¹⁰⁴ The subsidiarity principle thus generally favors local and in-country forms of care. In addition, the CRC also states that “due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”¹⁰⁵ Presumably, the subsidiarity principle is subject to the CRC’s overarching principle that “[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration.”¹⁰⁶

Does the United States accept this rights-based foundation for evaluating intercountry adoption, despite its failure to adhere to the CRC? Arguments could be made in both directions. On the one hand, the United States has ratified the Hague Adoption Convention, which expressly states in its preamble that it is “taking into account the principles” of the CRC.¹⁰⁷ The preamble further states, “. . . 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.”¹⁰⁸ On the other hand, as noted above, the Hague Adoption Convention also fails to provide any concrete

⁹⁹ CRC, *supra* note 4, at art. 7(1).

¹⁰⁰ *Id.* art. 8(1).

¹⁰¹ *Id.* art. 9(1).

¹⁰² *Id.* art. 20(1).

¹⁰³ *Id.* arts. 20, 21.

¹⁰⁴ *Id.* art. 21(b).

¹⁰⁵ *Id.* art. 20(3).

¹⁰⁶ *Id.* art. 3(1).

¹⁰⁷ Hague Adoption Convention, *supra* note 5, at pmbl.

¹⁰⁸ *See id.*

rules or procedures that would require affirmative family preservation efforts as a condition precedent to a valid intercountry adoption.¹⁰⁹ Further, the United States, when acting as a receiving nation, could perceive any obligation for such family preservation efforts to be the duty of the country of origin, and not of the receiving nation, given the language in the Hague Adoption Convention which charges the State of origin with determining the adoptability of the child and giving “due consideration” to domestic placements.¹¹⁰ In the broader sense, nations are each responsible for ensuring that the intercountry adoption systems and partnerships which they form operate legally and ethically. Unfortunately, the structure of the Hague Adoption Convention can be used to obscure this broader responsibility and create a false justification for a total abdication of responsibility for functions which the Hague Adoption Convention gives, in the first instance, to the other nation.¹¹¹

Looking to the domestic law of the United States, there is a longstanding parental rights doctrine, as a matter of both common law and constitutional law, giving parents the right to care for and have custody of their biological children.¹¹² However, this approach differs from that of the CRC in two significant ways. First, like other rights in the United States, this is a negative right protecting against governmental action, rather than a positive right by which governmental assistance would become mandatory.¹¹³ In practice, this means that the government does not have any obligation to assist parents with the financial means necessary to be able to care for their children. Indeed, where the parents are unable to provide for the child due to poverty, in some instances child protective services will remove the child from the home rather than provide the financial assistance necessary to preserve the family. While persons working in the system may make theoretical statements that poverty is not a grounds for removal, in practice the deficiencies of environment and provision associated with poverty are commonly used by child protective services as grounds for removal, and the State often does not offer to remediate the poverty that contributes to those deficiencies. Not surprisingly, in this context voluntary temporary placement of a child into foster care, or permanent relinquishment of a child for adoption, due to poverty or financial

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 4, 16.

¹¹¹ Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 115, 121–25 (2003) (noting vulnerabilities created by the division of responsibilities between countries of origin and receiving countries in the Hague Adoption Convention).

¹¹² *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944) (discussing a parent’s right to give their children religious training); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (discussing parents’ right to direct the education of their child); *Meyer v. Nebraska*, 262 U.S. 390, 398–400 (1923) (discussing foreign parents’ rights to educate their child in their native languages).

¹¹³ *See supra* notes 66–72 and accompanying text.

difficulty, is seen as a lawful and legitimate act within the United States, even if no effort is made to offer financial assistance.¹¹⁴

Second, unlike the CRC, there is no corollary right of children, under statutory or constitutional law, to be raised by their parents. This is true in large part because children in many situations lack rights in the United States as a theoretical, legal matter, and also because the existence of the parental rights doctrine has largely obviated and eclipsed the development of any corollary rights of children within the legal system. Thus, within the legal culture of the United States, a child lacks the rights, stated in the CRC, to “know and be cared for by his or her parents.”¹¹⁵ Although this right may sometimes be indirectly protected, the failure to identify it as a right can have important consequences.

Thus, the United States, due to its specific legal culture and almost unique failure to ratify the CRC, may fail to focus on children’s identity and relationship rights as stated in the CRC. Therefore, building adoption systems upon the destruction of those rights may seem legally normal in the context of the legal culture of the United States. In the context of intercountry adoption, viewing relational rights as purely belonging to the parent has the consequence of normalizing parental relinquishment and abandonment, as rights normally can be waived by those who hold them. Hence, within the culture of the United States, when a parent voluntarily relinquishes or abandons a child, no destruction of rights is involved, for the parent is viewed as either exercising or waiving his or her rights, and the child has no relational rights to lose.

The domestic legal system of the United States leads to the following views and practices: (1) parental rights do not include a right of positive economic assistance; (2) relinquishing a child for adoption due to poverty and without any government assistance is legally normal; (3) children can be involuntarily removed from their family due to deficiencies in provision and environment related to poverty; and (4) children lack relational rights with their parents. These views and practices are likely to flow into the realm of intercountry adoption.¹¹⁶ Of course,

¹¹⁴ See *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 833–35 (1977) (noting controversy over “voluntary” placements into foster care and stating “foster care has been condemned as a class-based intrusion into the life of the poor”); Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 J. OF GENDER, SOC. POL’Y & L. 1023, 1048–50 (2003); Joy Duva & Sania Metzger, *Addressing Poverty as a Major Risk Factor in Child Neglect: Promising Policy and Practice*, 25 PROTECTING CHILD. 63, 64–66 (2010), available at http://www.judiciary.state.nj.us/conferences/2A-4/Protecting_Children_Article_on_Poverty_and_Neglect.pdf; Lisa R. Pruitt & Janet L. Wallace, *Judging Parents, Judging Place: Poverty, Rurality and Termination of Parental Rights*, 77 MO. L. REV. 95, 96–100 (2012); Elizabeth Stuart, *Poor-But-Happy Family Says Government Took Six Kids Because of Poverty*, DESERET NEWS, July 11, 2011, available at <http://www.deseretnews.com/article/700150927/Poor-but-happy-family-says-government-took-six-kids-because-of-poverty.html?pg=all>; NAT’L COAL. FOR CHILD PROT. REFORM, CHILD ABUSE AND POVERTY (2011), <http://www.nccpr.org/reports/6Poverty.pdf>.

¹¹⁵ CRC, *supra* note 4, at art. 7(1).

¹¹⁶ See *supra* notes 8–9, 66–72, 114 and accompanying text.

these perspectives are undergirded by the general denial, by the United States, of positive economic and subsistence rights. Thus, poverty, including extreme poverty with inadequate food, housing, or clothing, from the vantage point of the United States does not involve the denial of any fundamental constitutional rights.¹¹⁷ From the standpoint of the United States, a parent placing a child for intercountry adoption due to poverty could be seen as making a rational and positive voluntary decision, rather than as being coerced in the context of a severe deprivation of fundamental rights. Consequently, the United States does not appear to view intercountry adoption induced by poverty to be an inherent wrong built upon the deprivation of a fundamental right. Instead, any concerns of the United States with limiting poverty-based relinquishment or abandonment seem to be purely pragmatic, in terms of limiting intercountry adoption as a form of economic migration. Those latter concerns have had some largely technical impact on the law, but as a practical matter have not really limited intercountry adoption due to poverty.¹¹⁸

The denial of positive economic rights also has serious implications for the relationship between governmental and private actors offering assistance and poor and vulnerable persons who are offered such assistance. Because there is no right to positive economic assistance, even in the context of extreme poverty, the alleviation of poverty becomes an act of charity rather than a duty. The lack of a duty to alleviate poverty creates a kind of uneven contractual relationship between those providing assistance and those who may receive it. In effect, those offering the assistance may offer it on virtually any set of limitations or conditions they may choose. So long as the recipient has the option to refuse the aid, the existence of conditions or limitations is usually not problematic. Or, to put it more precisely, the existence of conditions or limitations is only a problem if such is viewed as a violation of the person's rights—and the failure to offer or provide financial aid is not a violation within this context. Within the legal culture of the United States, intercountry adoption itself is viewed as an act of charity, and therefore it can be offered à la carte, separate from any system of aid (which would also be viewed as forms of charity).¹¹⁹

Consider what happens if an individual acting on behalf of an adoption agency encounters a parent or parents who literally cannot afford to feed their children, and whose children are literally starving to death. Under the predominate approach in the United States, the agency may refuse to offer even a single dollar in aid to help the parent(s) feed their child, but can instead offer to take the child for intercountry adoption. This choice of "charity" can be made even though the intercountry adoption will end up costing tens of thousands of dollars, and family preservation aid would have only cost one hundred dollars (or less). Thus, the

¹¹⁷ See *supra* notes 66-72 and accompanying text.

¹¹⁸ See Smolin, *supra* note 11, at 419-26 (discussing complex orphan visa definitions designed to prevent intercountry adoption as a form of voluntary economic migration).

¹¹⁹ See Smolin, *supra* note 17, at 421-31; Bartholet, *supra* note 31, at 187-88; Carlson, *supra* note 17, at 752-59.

agency can literally say to the parent(s): you must choose between giving up your child to us so that she may live, or else watching your child starve to death. If the parent(s) under these circumstances hand over the child for intercountry adoption, from the vantage point of the United States, this is seen as a completely legal, normal, and ethical form of both intercountry adoption and even humanitarian assistance.¹²⁰ As will be seen, this is true even if a for-profit organization will ultimately receive thousands of dollars of profit from placing the child internationally.¹²¹

Ironically, from this viewpoint such an adoption only becomes legally questionable if the parent(s) are provided financial assistance, as it raises the possibility that there is an illicit financial inducement to consent. So it may be a “cleaner” adoption if the children are taken and the parents are left to starve because it would avoid the inference of illicit financial inducement to consent. Of course, it would be completely legal and ethical to offer the parents and family unconditional aid regardless of their decision regarding adoption. Since, however, many United States agencies create, and operate within, adoption systems which lack the capacity or willingness to offer unconditional family preservation economic assistance, such unconditional aid is often not available. In this common circumstance, the choices become starker: either offer aid only to parents who do relinquish—which could be perceived as improperly inducing relinquishments through a quid pro quo—or else make sure that not even a small amount of aid is given to relinquishing parents (the safer course).¹²²

III. THE DOMINANT ROLE OF PRIVATE ORGANIZATIONS, AGENCIES, AND INDIVIDUALS IN THE UNITED STATES’ APPROACH TO INTERCOUNTRY ADOPTION

A. *Comparative Models of Social and Child Welfare Systems*

Comparative social work analysis has characterized the United States’ approach to child and social welfare as based on a laissez faire philosophy. Under this approach, individual liberty and family autonomy, as well as the free market and contractual relationships, are fundamental values. From this perspective, adoption—international and domestic—is largely delegated to private agencies and lawyers, who, acting as intermediaries, interact directly with the participants. Adoption is based on a series of contractual arrangements between and among the intermediaries and the original and adoptive parent(s). The child can be viewed positively as a kind of a third party beneficiary of these contractual arrangements, although many fear that the child instead becomes commodified into a product in a market for children. There is an ideal of minimal and efficient regulation which will facilitate rather than impede the contractual and private bases for these

¹²⁰ See Smolin, *supra* note 17, at 421–31.

¹²¹ See *infra* notes 240–260 and accompanying text.

¹²² See *supra* note 119.

activities.¹²³ A social entrepreneurial model allows for a vibrant, private humanitarian sector that combines segments that are officially non-profit with those that are officially for-profit.¹²⁴ As will be seen in the later analysis, the lines between the officially non-profit and the for-profit segments allow for substantial interaction and even a certain degree of conceptual blurring.¹²⁵

In the United States, the imperative to “rescue” children is seen as providing an overriding value allowing for the displacement of other concerns, for both state and private actors. State statutes in the area of child abuse and neglect traditionally reflect an empowerment model designed to empower, rather than limit, the authority of child protective services, based on an assumption that the state will only act in cases of necessity and serious abuse.¹²⁶ Thus, the need to rescue children from extreme abuse is the primary instance where the values of individual liberty and family autonomy give way to state power. Similarly, private individuals and organizations involved in intercountry adoption often consider that their activities, which they view as forms of life-saving rescue of children, should not be slowed by burdensome state regulations, or concerns with equality, legality, or bureaucratic due process.¹²⁷ Thus, one of the paradoxes with child welfare in the United States is the uneasy tension between other values and the disruptive and overriding need to “rescue” children from various kinds of harms. This concern to rescue could eventually produce a stronger rhetoric of children’s positive economic rights, but so far the tendency to normalize poverty has limited the development of a rhetoric of positive economic rights. Instead, the need to rescue serves to legitimize and even prioritize interventions that take children from their families, as well as serving to legitimate the operation of adoption systems with minimal financial regulation and little accountability.

¹²³ See Jonathan Dickens, *Social Policy Approaches and Social Work Dilemmas in Intercountry Adoption*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 28, 28–34; Mary Katherine O’Connor & Karen Smith Rotabi, *Perspectives on Child Welfare: Ways of Understanding Roles and Actions of Current USA Adoption Agencies Involved in Intercountry Adoption*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 77, 78–79.

¹²⁴ See O’Connor & Rotabi, *supra* note 123, at 77.

¹²⁵ See *infra* notes 240–260 and accompanying text.

¹²⁶ See, e.g., Michael S. Wald, *State Intervention on Behalf of Endangered Children: A Proposed Legal Response*, 6 INT’L J. CHILD ABUSE & NEGLECT 3, 7–10, 17–25 (1982) (questioning the expansion of state intervention and arguing for a clearer set of legislative standards to justify coercive state intervention).

¹²⁷ See, e.g., CHERIE CLARK, *AFTER SORROW COMES JOY: ONE WOMAN’S STRUGGLE TO BRING HOPE TO THOUSANDS OF CHILDREN IN VIETNAM AND INDIA* 3–8 (2000) (describing the charitable organizations and private individuals that rescued a young girl from the harsh realities of a village in Vietnam through international adoption); Bartholet, *supra* note 31, at 164–177 (asserting that legal developments improperly focus on negative aspects of adoption and not on the life-saving benefits of international adoption); Elizabeth Bartholet & David Smolin, *The Debate*, in INTERCOUNTRY ADOPTION, *supra* note 7, at 233–38, 245–47 (Prof. Bartholet arguing that international adoption should be utilized more because it saves children and brings new resources into poor countries).

The legal scholarship buttresses this comparative social work approach, observing within the United States a long-term privatization of family law, and parenthood by contract, in which, through surrogacy, assisted procreation, and adoption, the law increasingly focuses on providing children for adults who want to parent, rather than focusing on meeting the needs of children. In this contractual, free-market context, lawyers often play a key role, serving as well-paid legal counselors and intermediaries between relinquishing and adopting parents, or between intended parents and surrogates and others who provide for the biological creation of children. Private agencies in this context also operate in a market context where they are under pressures to similarly fulfill the desires of the adults who pay them for their services.¹²⁸

The approach of the United States contrasts with social welfare and child welfare regimes in nations emphasizing a stronger state role in pursuit of values such as equality, social stability, and bureaucratic due process. Thus, in some systems, the state is dominant in the provision of social and child welfare services, while in others the state plays more of a cooperative and a licensing role. In either case, in many nations the emphases on equality and social stability provide for a much stronger role for the state than found in the laissez-faire emphasis of the United States.¹²⁹

Of course, this comparative social work perspective largely repeats, from a different vantage point, what was evident from the prior analysis of human rights and child rights discourse. Nations that have ratified the Convention on the Rights of the Child (CRC) as well as the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and thereby embrace positive economic rights, would be expected to bring a different set of values to child and social welfare than the United States. These different values do not necessitate either a communist economic system or a state monopoly on social services, but they can imply a stronger state role in ensuring provision of positive rights. When children and adults are perceived as having positive economic rights for which the government has some responsibility, providing for such rights becomes a matter of duty rather than one of charity. Whether the task of implementing those rights is conducted by the state, private actors, or the two working cooperatively, the viewpoint that provision of such social goods is a matter of duty and rights brings the issues of equality and the dignity of the poor to the forefront and can change the way in which a topic like adoption is addressed.

Many developing nations appear to be in a paradoxical position regarding these different approaches to child and social welfare. Developing nations which have ratified the CRC and the ICESCR theoretically embrace positive economic rights. The call in human rights documents for progressive implementation of

¹²⁸ See Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1478–97 (1992) (explaining the shift from adoptions that promote the welfare of children to the fulfillment of the desires and needs of couples who want children).

¹²⁹ See Dickens, *supra* note 123, at 32–34 (describing the welfare regimes for children); O'Connor & Rotabi, *supra* note 123, at 78–80.

positive economic rights, with “international assistance and co-operation,”¹³⁰ is likely attractive to many developing nations. Of course, the concept of “international assistance” largely means that developed and wealthy nations, and international organizations funded primarily by such nations, should be actively assisting developing nations. In addition, the concepts of equality and social stability prized in some developed European nations may appeal ideologically to some developing nations more than the laissez-faire economic stance of the United States. So, theoretically and rhetorically speaking, many in developing nations may express more kinship with approaches to child and social welfare common in continental Europe, with their embrace of activist governmental action on behalf of positive economic rights, equality, and social stability. Yet, practically speaking, many developing nations lack the capacity for either a social or child welfare system that could come anywhere close to meeting the overwhelming needs of their populations. A theory of state activism is therefore met by the reality that state limits on private humanitarian efforts would in effect cut off many vulnerable people from the only sources of assistance likely to reach them. Thus, developing nations may have an impetus to grant a large role to both domestic and international private humanitarian actors, and to allow essentially anyone willing to “help” to be active in the fields of social and child welfare.¹³¹ In addition, the large-scale role of NGOs in the human rights, children’s rights, and humanitarian fields has largely normalized, even from an activist state perspective, the concept that the state should *not* have a monopoly in such fields.¹³² Finally, the sad reality is that corruption is so endemic within many developing nations that the state can often be an unreliable and wasteful institution for the assistance of the vulnerable and poor, or indeed for reliable services of any kind—although, of course, corruption can also easily invade and pervade the non-profit, humanitarian, and NGO sectors as well.¹³³

Developing nations are thus left in the paradoxical position of giving over many child and social welfare functions to private actors whose concepts and values are sharply different from their own. Of course, as we shall see, this can be particularly evident in intercountry adoption, where the United States plays such a predominant role, because the United States operates its adoption systems according to legal and social work conceptions at sharp variance from many of the countries which partner with the United States.

¹³⁰ ICESCR, *supra* note 15, at art. 2.

¹³¹ See Katharina Hofer, *The Role of Evangelical NGOs in International Development: A Comparative Case Study of Kenya and Uganda*, 38 AFR. SPECTRUM 375, 376–95 (2003).

¹³² See BUERGENTHAL ET. AL., *supra* note 62, at 481–99.

¹³³ See Richard Holloway, *NGOs: Loosing the Moral High-Ground—Corruption and Misrepresentation*, 8TH ANN. INT’L ANTI-CORRUPTION CONF. 9, (2010), available at http://iacconference.org/documents/8th_iacc_workshop_NGOs_Loosing_the_Moral_High_Ground-Corruption_and_Misrepresentation.pdf (describing the corruption that often erodes the ethics of NGOs in developing countries).

B. The United States Successfully Negotiated a Role for For-Profit Organizations and Individuals in the Hague Adoption Convention, in the Context of a Convention Designed to Create Safeguards Against Market Forces and the Commodification of Children

The United States is a long-time member of the Hague Conference on Private International Law (“HCCH”), having joined in October of 1964.¹³⁴ The United States was an active participant in the five-year effort, from 1988 to 1993, that created the Hague Adoption Convention. The United States’ delegation for three preparatory sessions, and to the Seventeenth Session of the Hague Conference which ultimately adopted the text, was led by Peter H. Pfund, Assistant Legal Advisor for Private International Law, U.S. Department of State.¹³⁵ Pfund’s 1994 article on the Hague Adoption Convention made clear the central role of the United States on the issue of independent, private, and for-profit providers of adoption services. Pfund noted that this question was “[p]erhaps the most difficult issue considered. . . .”¹³⁶ Pfund stated,

The United States’ experts at the Hague Conference were very active in proposing that [independent] adoptions be permitted and covered by the Convention. These experts were concerned that failure to deal with independent adoptions in the Convention might cause some to infer that independent adoptions are not permitted between States becoming parties. This possible inference concerned the U.S. experts because many experts from other countries, and several of the international organizations participating at the Hague Conference, believe that independent adoptions are particularly prone to abuses and bad practices.¹³⁷

Thus, Pfund made it clear that the United States played a major role in keeping independent adoptions as an option for nations adhering to the Hague Adoption Convention. It seems likely that independent adoptions—and especially adoptions arranged by for-profit organizations or individuals—would not have been a part of the Convention if the United States had not actively negotiated for it. The provisions which the United States successfully negotiated for in this regard are primarily reflected in Art. 22(2) of the Convention. Article 22(2) allows Central Authority functions to be performed by bodies or persons not subject to the requirements of Chapter III of the Convention, and thereby permits waiver of the requirement of non-profit objectives stated in Article 11(a).¹³⁸

¹³⁴ See *HCCH Members*, HAGUE CONFERENCE ON PRIVATE INT’L LAW, http://www.hcch.net/index_en.php?act=states.details&sid=76 (last visited May 26, 2013).

¹³⁵ See Pfund, *supra* note 5, at 53–54.

¹³⁶ *Id.* at 60.

¹³⁷ *Id.*

¹³⁸ See Hague Adoption Convention, *supra* note 5, at art. 11(a); *id.* art. 22(2).

The definition of “independent” adoptions has long been ambiguous within the United States, and originates in the domestic adoption systems developed in the United States in the twentieth century. Typically, “agency” adoptions are differentiated from “independent” or “private” adoptions, which were sometimes called “gray market” adoptions. The implication of the term “gray market” adoptions was that such practices were closely related to illicit “black market” baby-selling. Yet, over time, independent adoptions were seen as having certain advantages over agency adoptions, and were viewed by many as legitimate and even superior, despite the gray market language.¹³⁹

To understand these distinctions, it is necessary to briefly explain the legal and cultural context of adoption within the United States in the post-World War II era. In the period from 1945 to about 1980, the United States developed a legal theory of “as if” adoption, under which the law created a legal fiction under which it was “as if” the child had been born to the adoptive parents and family. The original birth certificate was sealed, and a new birth certificate was issued, listing the adoptive parents as the “birth” parents of the child. Most states prevented all parties, including adult adoptees, from accessing their original birth certificates and records, with the intention that the adoptee was never to know his or her birth identity and the original family was never to know the adoptive identity of the child they had relinquished. The all-powerful intermediaries were the private and public (governmental) agencies which received and matched each child with an applicant adoptive family. The agencies conducted home studies of prospective adoptive families to see if they were suitable, and often sought a match that would hide the adoption, making it possible for everyone to literally pretend that the child had been born to the adoptive parents. At the same time, intense social and legal pressures were brought to bear on unwed mothers to relinquish their children, with social workers, psychiatrists, and others using derogatory terms like “sex delinquent,” “imbecile,” or “neurotic,” to express the viewpoint that unwed mothers were inherently unfit to raise their children. Legally, unwed fathers were not fathers for most purposes, and their consent was not needed prior to the child being adopted. Critics call this the “baby-scoop era,” while others more positively view the high adoption rates of this time as a positive time for domestic adoption.¹⁴⁰

¹³⁹ See Singer, *supra* note 128, at 1478–88 n.180 (explaining the popularity of independent or private adoptions); see also David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 471–72 (1999) (describing private adoptions as fast growing because they are more “consumer-driven” and “can abide by what the client wants”).

¹⁴⁰ See E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 1–35 (1998) (providing the history of the rise in domestic adoption); Elizabeth J. Samuels, *Adoption*, in ENCYCLOPEDIA OF PRIVACY 7, 7–12 (2007) [hereinafter, Samuels, *Adoption*]; Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 387, 396 (2001) [hereinafter Samuels, *The Idea of Adoption*]; Singer, *supra* note 128, at 1513.

The positive theory of this kind of agency adoption was that it operated for the best interests of the child, matching each child with a suitable permanent home. Agency adoptions were intended to be distinguished from already-existing black markets in which babies were sold illicitly for large amounts of money. Thus, agency adoptions were designed to create a bulwark against a black market in adoption that would commodify children for profit.¹⁴¹ Unfortunately for this effort, however, some of the worst baby-selling and related practices were indulged in by agencies, such as the notorious baby-selling activities conducted by Georgia Tann under the auspices of the Tennessee Children's Home Society from the 1920s until 1950.¹⁴² Even when agency adoptions were not corrupted in this way, they have been criticized for giving social workers and agencies unbridled powers to select who is fit to adopt which child according to criteria many have viewed as arbitrary or discriminatory. In addition, agencies have been criticized from open-adoption and adoptee-rights perspectives as enforcers of the as if, closed records system; in practice, such agencies commonly deny adult adoptees and original parents access to records and information about their adoptions.¹⁴³

Public (governmental) agencies have been dominant in modern adoption processes where children were taken into custody by governmental child protective services because their parents were deemed abusive, neglectful, or unsuitable. Even here, private, charitable, and religious organizations have played a prominent role historically, sometimes being empowered by the state to play child-protection or child-rescue roles.¹⁴⁴ Thus, the concept of an "agency" does not necessarily denote a governmental actor in the history of child welfare in the United States, but can equally refer to a governmental or private entity. The usual assumption, however, is that where the "agency" is private it has received some kind of permission, license, empowerment, or approval from the government to operate in the field, and is involved in some kind of private-governmental partnership.

Within this context, the term independent (or private) adoption is quite ambiguous. Generally, it refers to an attempt to avoid the traditional power of the agencies, whether private or public. It typically does not involve acting without

See generally ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* (2006) (telling the history of millions of women who felt pressured into giving children up for adoption).

¹⁴¹ *See, e.g.*, Singer, *supra* note 128, at 1478–81.

¹⁴² *See generally* BARBARA BISANTZ RAYMOND, *THE BABY THIEF: THE UNTOLD STORY OF GEORGIA TANN, THE BABY SELLER WHO CORRUPTED ADOPTION* (2007) (describing the story of more than 5,000 adoptions arranged by Georgia Tann between 1924 and 1950, many involving children she had kidnapped).

¹⁴³ Samuels, *Adoption*, *supra* note 140, at 7; Samuels, *The Idea of Adoption*, *supra* note 140, at 402–04; *See, e.g.*, Singer, *supra* note 128, at 1478–88; CARP, *supra* note 140, at 139–234.

¹⁴⁴ *See generally* LEROY ASHBY, *ENDANGERED CHILDREN, DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* (1997) (detailing the history of dependent, neglected, and abused children in the United States) David Ray Papke, *supra* note 139, at 470–72.

intermediaries at all. The goal usually is to find intermediaries who can give the principals more control and choice, and quicker access to what they seek. For prospective adoptive parents, this has meant access to the kinds of adoptable children they wish to adopt (usually healthy, young, and of a selected race and gender) within a reasonable waiting period, perhaps with more information and choice about the children, and without being subject to the seemingly harsh and arbitrary agency viewpoints about who is best suited to adopt which kind of child. For relinquishing parents, this has meant varying degrees of “openness” in adoption, beginning with the capacity to choose the adoptive family themselves out of a larger group of prospective adoptive parents, with the selection process sometimes including interviews with prospective adoptive parents. Subsequent to the adoption, openness often includes receiving continuing information and photographs about the children, and sometimes includes continuing contact with the child and adoptive family.¹⁴⁵ Practically speaking, a prime difficulty is that promises of post-adoption openness are often legally unenforceable, and thus can constitute a bait and switch.¹⁴⁶ The kinds of intermediaries involved in these new kinds of independent or private adoptions are a mix of private attorneys, physicians, social workers, for-profit agencies, and non-profit agencies that operate under the more relaxed methods of so-called independent adoption.¹⁴⁷

Demographic realities have resulted in a division in which traditional agency powers over adoption have largely receded in infant relinquishment adoption, while remaining for adoption from the government’s foster care and child protection systems. In a context where only a tiny percentage of single pregnant women, or indeed anyone else, voluntarily relinquish for adoption, there are perhaps hundreds of prospective adoptive parents for every available infant.¹⁴⁸ Under those circumstances, the tiny percentage who voluntarily relinquish have enlarged bargaining power, and can bargain for the degree of openness they seek—and, often, for a significant degree of financial benefit. The relatively large amounts of money involved in such adoptions can push or exceed the line between

¹⁴⁵ See CARP, *supra* note 140, at 196–232 (discussing the development of open adoption); Singer, *supra* note 128, at 1481–85; SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 17–19 (2007), available at http://www.adoptioinstitute.org/research/2006_11_birthparent_wellbeing.php (discussing the “continuum of openness in adoptions today”).

¹⁴⁶ See ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE & ADOPTION CASES 98–100 (2d ed. 1993); SMITH, *supra* note 145, at 5; Leenilee, *Open Adoption is a Bait and Switch Technique*, OUT OF THE FIRST MOM CLOSET (Nov. 20, 2012), <http://firstmomout.wordpress.com/2012/11/20/open-adoption-as-a-marketing-tool>.

¹⁴⁷ See SMITH, note 145, at 18; Singer, *supra* note 128, at 1481–86.

¹⁴⁸ See 3 MADELYN FREUNDLICH, ADOPTION AND ETHICS: THE IMPACT OF ADOPTION ON MEMBERS OF THE TRIAD 7–17 (3d ed. 2001) (describing the evolution of adoption in the twentieth century and the different circumstances in which children are adopted); CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS, VOLUNTARY RELINQUISHMENT FOR ADOPTION 2–4 (2005).

lawful support and unlawful baby buying. In this largely private world of gray market adoption, adoption intermediaries, including private attorneys and private adoption agencies, dominate.¹⁴⁹

By contrast, there are more than 100,000 usually traumatized, and generally much older children who are eligible and waiting for adoption in the United States, and their adoptions are handled primarily by governmental organizations or agencies.¹⁵⁰ These adoptions remain subject to substantial bureaucratic and governmental processes operated theoretically in the best interests of the child, although the systems are chronically underfunded and overwhelmed, and often are criticized as being incompetent and ineffective. Indeed, the majority of child protective systems in the United States on a state-by-state basis have been subject to a federal court decree due to substandard practices.¹⁵¹

It is these categories, and this history, that the United States delegation brought to the negotiations and discussions regarding the Hague Adoption Convention. The United States' delegation actively, persistently, and successfully defended the right of the intermediaries who dominated infant relinquishment adoption in the United States to also be active in regard to "Hague" intercountry adoptions. This was not principally a defense of private, non-profit agencies, for such were already considered acceptable to many nations. Indeed, from the perspective of the United States, private, non-private agencies were often viewed as providing traditional agency adoption services, and in Hague treaty terms are accredited entities. The distinguishing feature of "independent" adoptions as conceptualized by Peter Pfund and incorporated into the treaty is their for-profit status. These "approved for-profit organizations" constitute agencies, law firms, lawyers, and individuals who operate on a for-profit basis. The United States successfully lobbied for the capacity of for-profit organizations and individuals as intermediaries.¹⁵²

Some find the acceptance of for-profit entities in a purportedly humanitarian field like intercountry adoption to be shocking.¹⁵³ Below, this Article will examine in more detail the extent, rules, and significance of the for-profit sector in

¹⁴⁹ See 2 MADELYN FREUNDLICH, *ADOPTION ETHICS: THE MARKET FORCES IN ADOPTION* 9–11 (2000); David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 303–09 (2004) (addressing the unstable baseline for distinguishing between licit and illicit payments of money to induce consents from birth parents).

¹⁵⁰ See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT 1 (2012), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf> (listing 104,236 children in foster care system awaiting adoption as of September 30, 2011); Papke, *supra* note 139, at 470–71.

¹⁵¹ See CHILD WELFARE LEAGUE OF AM., CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005, at 2 (2005), available at <http://www.cwla.org/advocacy/consentdecrees.pdf> (stating that settlement agreements or consent decrees were issued in thirty states).

¹⁵² See Pfund, *supra* note 5, at 62 ("Pursuit only of nonprofit objectives is not required of the bodies and persons covered by Article 22(2).").

¹⁵³ *Id.* at 19.

intercountry adoption in the United States. At this stage, however, it is important to make a broader point, which is that in the United States, non-profit adoption agencies often function more like for-profit businesses than like the old-style “agencies” of the past. Market forces related to adoption have pushed many non-profit private adoption agencies into the role of finding children for their paying clients. Because so many such agencies are financially dependent on completing adoptions to pay their executives and staff, they must find ways of both attracting prospective adoptive parents as clients and obtaining access to children. Thus, what is significant about the United States’ adoption culture is not just the existence of for-profit entities, but also the extent to which purportedly non-profit entities operate in a market environment and under market pressures and in fact have adopted market behaviors.¹⁵⁴

C. The United States Took Nearly Fifteen Years to Effectively Ratify the Hague Adoption Convention, Substantially Undermining the Effectiveness of the Convention While Establishing Adoption Practices Rife with Dangerous Monetary Incentives and Abusive Adoption Practices

The United States got what it wanted from the negotiations that created the Hague Adoption Convention: compatibility between its own distinctive, privatized adoption systems and the treaty’s terms.¹⁵⁵ Paradoxically, however, the United States nonetheless took almost fifteen years to effectively ratify the Hague Adoption Convention, finally ratifying the 1993 Convention effective April of 2008.¹⁵⁶ Since approximately one-half of all intercountry adoptions between 1993 to 2008 were to the United States,¹⁵⁷ the consequences of this delay for the global intercountry adoption system were profound, as most intercountry adoptions were conducted outside of the Hague Adoption System. Thus, although the Hague Adoption Treaty could be invoked to support the claim that the world had created a well-regulated intercountry adoption system, in practice the United States was entrenching a parallel, non-Hague based system that was statistically even more significant.

¹⁵⁴ See, e.g., O’Connor & Rotabi, *supra* note 123, at 77; JOINT COUNCIL ON INT’L CHILDREN’S SERVS., MOVING PAST THE PRESENT: THE FUTURE OF INTERCOUNTRY ADOPTION (2009) (projecting and documenting sharp decreases in the number of adoption service providers involved in intercountry adoption due to a sharp drop in numbers of intercountry adoptions).

¹⁵⁵ See *supra* notes 134–152 and accompanying text.

¹⁵⁶ Hague Conference on International Law, *Status Table: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*, HCCH.NET http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last updated March 21, 2013).

¹⁵⁷ See Smolin, *Future*, *supra* note 1, at 462–63; Selman, *supra* note 3; Selman, *supra* note 1.

Significantly, these years from finalization of the Convention in 1993, to United States ratification in 2008, include both the greatest numeric rise in the history of intercountry adoption, as well as the beginning of the subsequent decline. Intercountry adoptions to the United States nearly tripled from 1993 (7,377) to the peak year of 2004 (22,990). Driven in large part by this increase in adoptions to the United States, global intercountry adoptions increased from approximately 20,000 in 1993 to approximately 45,000 in 2004.¹⁵⁸

The subsequent decline in adoptions to the United States was evident by 2008 (17,475), with the decline accelerating since then to 8,668 adoptions in 2012.¹⁵⁹ Intercountry adoptions are declining to levels not seen since the creation of the Hague Adoption Convention. The declines in adoptions to the United States have themselves impacted global declines in intercountry adoptions, but have also been paralleled by declines in many other receiving nations, leading to a significant overall decline of intercountry adoptions.¹⁶⁰

A number of deeply troubling adoption scandals involving the United States occurred during the period from 1993 to 2008, including the Cambodian adoption scandal of 1997 to 2001,¹⁶¹ the Andhra Pradesh, India scandals of 1999 and 2001,¹⁶² adoption scandals from Chenna/Madras, India,¹⁶³ recurrent difficulties in Vietnam¹⁶⁴ and Nepal,¹⁶⁵ and most prominently, the controversies over the large-

¹⁵⁸ See Smolin, *Future*, *supra* note 1, at 462–63 nn. 120–23; Selman, *supra* note 3; Selman, *supra* note 1; PETER SELMAN, THE MOVEMENT OF CHILDREN FOR INTERCOUNTRY ADOPTION: A DEMOGRAPHIC PERSPECTIVE 5 (2001), available at http://www.archive-iussp.org/Brazil2001/s20/S27_P05_Selman.pdf.

¹⁵⁹ See Smolin, *Future*, *supra* note 1, at 441–42; U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, FY 2012 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2013), available at http://adoption.state.gov/content/pdf/fy2012_annual_report.pdf [hereinafter FY 2012 ANNUAL REPORT]; see also U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, FY 2011 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2011), http://adoption.state.gov/content/pdf/fy2011_annual_report.pdf [hereinafter FY 2011 ANNUAL REPORT]; U.S. Dep't of State, Bureau of Consular Affairs, *Intercountry Adoption Statistics*, http://adoption.state.gov/about_us/statistics.php (last visited May 27, 2013).

¹⁶⁰ See Smolin, *Future*, *supra* note 1, at 441–42, 462–63; Selman, *supra* note 1; Selman, *supra* note 3.

¹⁶¹ See Smolin, *supra* note 47, at 135–46; see generally Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005) (describing the Cambodian adoption scandal).

¹⁶² See Smolin, *supra* note 11, at 450–74.

¹⁶³ See, e.g., Smolin, *supra* note 47, at 157–58; Scott Carney, *Meet the Parents: The Dark Side of Overseas Adoption*, MOTHER JONES (Mar. 9, 2009), <http://www.motherjones.com/politics/2009/03/meet-parents-dark-side-overseas-adoption>; *Mother Declah*, AGAINST CHILDTRAFFICKING.ORG, <http://www.againstchildtrafficking.org/category/pap/declah/> (collecting sources on the cases from Chennai/Madras) (last visited May 27, 2013).

¹⁶⁴ See, e.g., INT'L SOC. SERV., ADOPTION FROM VIETNAM: FINDINGS AND RECOMMENDATIONS OF AN ASSESSMENT 43 (2009), http://www.iss-ssi.org/2009/assets/files/news/vietnam%20report_ENG.pdf; Embassy of the U.S., Hanoi, Vietnam, *Summary of Irregularities in Adoptions in Vietnam* (Apr. 25, 2008), <http://vietnam.usembassy.gov/irreg>

scale Guatemalan program.¹⁶⁶ Some commentators, including this author, perceived troubling and cyclic patterns of abusive adoption practices driven by monetary and ideological incentives, leading to the rise and fall (or marked slowdown) of adoption programs in particular sending nations.¹⁶⁷

Most emblematic of the United States' approach to intercountry adoption in those years were Guatemalan adoptions. Nearly 30,000 Guatemalan children, generally healthy babies and toddlers, were sent to the United States for adoption from 1998 to 2008, with Guatemalan attorneys typically paid, in the last years, \$15,000 to \$20,000 USD per baby in unregulated funds.¹⁶⁸ Reduced to its essence, adoptive parents from the United States, acting through their agencies, sent Guatemalan attorneys approximately \$400,000,000, and in response the Guatemalan attorneys sent close to 30,000 children to the United States for adoption. In a country with chronic corruption, poor governmental capacity, endemic violence against women, the scars of a 36-year civil war, and a significant percentage of the population living in extreme poverty, it should hardly be surprising that these unaccounted funds incentivized systematic child laundering. Yet, in the last two years before intercountry adoption was shut down, with increasing publicity around misconduct and the United States government issuing increasingly severe public warnings about abusive practices, nearly 9,000 children were rushed out of the country by the agencies, who often continued to insist on the integrity of their programs. By this point in time, other receiving nations had closed their Guatemalan programs, but the United States instead made it one of their most popular and significant adoption programs.¹⁶⁹ The Guatemalan system was in many ways quite compatible with the privatized ethos of adoption in the United States, as the Guatemalan notarial system centered on private attorneys who operated with little supervision or regulation.¹⁷⁰

[_adoptions042508.html](http://www.brandeis.edu/investigate/adoption/vietnam.html); Schuster Inst. for Investigative Journalism, *Adoption: Vietnam*, <http://www.brandeis.edu/investigate/adoption/vietnam.html> (last updated Feb. 24, 2011).

¹⁶⁵ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, INTERCOUNTRY ADOPTION TECHNICAL ASSISTANCE PROGRAMME: REPORT OF MISSION TO NEPAL 23–27 NOVEMBER 2009 (Feb. 4, 2010), available at http://www.hcch.net/upload/wop/nepal_rpt09.pdf; PARENTS FOR ETHICAL ADOPTION REFORM, (Dec. 31, 2012) <http://pearadoptinfo-nepal.blogspot.com/>; Schuster Institute for Investigative Journalism, *Adoption: Nepal*, <http://www.brandeis.edu/investigate/adoption/nepal.html> (last updated Feb. 21, 2011).

¹⁶⁶ See, e.g., Smolin, *Future*, *supra* note 1, at 467–69, 476–80; Smolin, *supra* note 47, at 163–70; Schuster Inst. for Investigative Journalism, *Adoption: Guatemala*, <http://www.brandeis.edu/investigate/adoption/guatemala.html> (last visited May 27, 2013); Erin Siegal, Finding Fernanda (2012); *The Story*, FINDINGFERNANDA.COM, <http://findingfernanda.com/the-story/> (last visited May 27, 2013).

¹⁶⁷ See, e.g., FLAVIE FUENTES ET AL., INVESTIGATING THE GREY ZONES OF INTERCOUNTRY ADOPTION 3 (2012); Smolin, *supra* note 47, at 115–17, 137, 146–47.

¹⁶⁸ See Smolin, *Future*, *supra* note 1, at 467–69, 476–77; see *supra* note 166.

¹⁶⁹ See *id.* at 467–69, 476–78; Smolin, *supra* note 47, at 163–70; see *supra* note 166.

¹⁷⁰ See Smolin, *supra* note 47, at 165.

The reactions of the adoption community in the United States to the recurrent adoption scandals followed a clear pattern. Each time, the dominant voices of agencies, adoptive parents and prospective adoptive parents would deny wrongdoing and minimize the extent of abusive practices, emphasize the need of children to be rescued for adoption, and plead for the continuance of the program more or less on a status quo basis. Little or no concrete steps were proposed or taken for any specific reforms or adjustments that might reduce corruption or abusive practices. These predominant voices of the adoption community in the United States thus effectively resisted significant change and reform, while sometimes successfully delaying closures, moratoria, and slowdowns.¹⁷¹ In the end, however, those closures, moratoria, and slowdowns have occurred.¹⁷²

D. The United States' Ratification and Implementation of the Hague Adoption Convention has Codified a Privatized, Financially-Incentivized Method of Adoption under the Guise of a Hague Adoption System

Within the United States, the sharp rise in intercountry adoption was accompanied, for many stakeholders, with a certain degree of ambivalence toward the Hague Adoption Convention. Intercountry adoption was perceived as thriving. A large number of adoption agencies were opening and expanding as the numbers sharply increased.¹⁷³ Within the United States, there was concern that ratification of the Hague Adoption Convention could destroy, slow, or reverse the increases in intercountry adoption. The common perceptions in the United States—that there are virtually unlimited numbers of orphans in need of intercountry adoption, that corruption did not necessarily undercut the ethical imperative for adoption, and that truly abusive practices are rare—led some to question the usefulness of the Convention. A strongly pro-intercountry adoption set of voices associated with adoption agencies, adoptive parents, and prospective adoptive parents dominated adoption discourse. Adoption agencies commonly claimed to speak and act for the needs of “orphans,” and adoptive parents and prospective adoptive parents generally perceived their ideals and interests as aligned with those of the agencies. These dominant voices represented the predominate mindset favoring a privatized, contractual, laissez-faire approach to adoption. Under these circumstances, a dominant set of actors worked to ensure that ratification of the Hague Adoption Convention, when it came, did not fundamentally alter the privatized approach of the United States to adoption.¹⁷⁴

¹⁷¹ See, e.g., Elizabeth Bartholet, *Slamming the Door on Adoption: Depriving Children Abroad of Loving Homes*, WASH. POST, Nov. 4, 2007, at B7.

¹⁷² See sources cited *supra* notes, 160–170 (describing scandals in Cambodia, India, Nepal, Vietnam, and Guatemala).

¹⁷³ See Smolin, *Future*, *supra* note 1, at 441, 462–63.

¹⁷⁴ See, e.g., JOINT COUNCIL ON INT’L CHILDS. SERVS., COMMENTS ON 22 CFR PARTS 96, HAGUE CONVENTION ON INTERCOUNTRY ADOPTION; INTERCOUNTRY ADOPTION ACT OF 2000; ACCREDITATION OF AGENCIES; APPROVAL OF PERSONS; PROPOSED RULES (Nov. 21,

The Intercountry Adoption Act of 2000 (IAA),¹⁷⁵ an important, but incomplete step toward ratification of the Hague Adoption Treaty, demonstrates the dominance of these agency-aligned voices. The statute expanded the privatization of adoption services by providing for the outsourcing of the government's core accreditation and oversight roles. Thus, although the IAA named the United States Department of State as the Central Authority for purposes of the Hague Adoption Convention,¹⁷⁶ the statute also provides that the Secretary of State "shall enter into agreements" by which "qualified entities"¹⁷⁷ performed the Central Authority duties of "[a]ccreditation of agencies, and approval of persons, to provide adoption services in the United States in cases subject to the Convention,"¹⁷⁸ as well as "[o]versight" in terms of "monitoring of the compliance of accredited agencies and approved persons with applicable requirements, including review of complaints against such agencies and persons."¹⁷⁹ "Qualified entities" include "a nonprofit private entity that has expertise in developing and administering standards for entities providing child welfare services and that meets such other criteria as the Secretary may by regulation establish."¹⁸⁰ In addition, "[q]ualified entities" can include State or local, but not federal, entities with "responsibility for licensing adoption agencies," but these can potentially accredit only agencies located in their state.¹⁸¹ Thus, the United States incorporated into the IAA a core vision of one or more non-profit agencies accrediting, approving, and having oversight of the private non-profit and for-profit entities and individuals that would provide adoption services.

The IAA was thus written to ensure the dominance of those active in the current intercountry adoption system. Beyond outsourcing of accreditation and oversight functions, the IAA also required the personnel within the State Department who perform "core central authority functions" to "have . . . personal experience in international adoptions, or professional experience in international adoptions or child services."¹⁸² While there is nothing inherently wrong with the State Department employing those with a personal stake and relevant professional experience in intercountry adoption, in the context of the United States this further ensures continuation of a privatized, agency-dominated system.

2003), available at <http://d1021342.hostaccount.com/JCICS%20Hague%20Comments%20-Part%2096.pdf>; Barholet, *supra* note 31, at 152; Elizabeth Barholet, *International Adoption: The Child's Story*, 24 GA. ST. U. L. REV. 333, 370 (2007).

¹⁷⁵ Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (codified at 42 U.S.C. §§ 14901–14954 (2006) [hereinafter IAA].

¹⁷⁶ *See id.* § 101(a).

¹⁷⁷ *See id.* § 202(a)(1); *see also id.* § 102(f) (Secretary may "authorize public or private entities to perform appropriate central authority functions for which the Secretary is responsible").

¹⁷⁸ *See id.* § 202(b)(1).

¹⁷⁹ *See id.* § 202(b)(2).

¹⁸⁰ *See id.* § 202(a)(2)(A).

¹⁸¹ *See id.* § 202(a)(2)(B).

¹⁸² *See id.* § 101(b)(2).

When it came time to write the implementing regulations, the United States Department of State, as the Central Authority, hired a private consulting company, Acton Burnell, to facilitate public hearings, collect comments, and write draft regulations.¹⁸³ Outsourcing the initial writing of administrative regulations again illustrates the remarkable degree to which the United States government took a hands-off approach and allowed a privatized system to largely write its own rules. Acton Burnell's open process of seeking comments did allow a variety of voices to provide input, including, but not limited to, the adoption agencies and organizations in sync with the privatized American system.¹⁸⁴

As the process began in 2001, the adoption community within the United States was still largely naïve and unconcerned about the risks of corruption and abusive adoption practices. This naïve view existed despite the prominent role of concerns with child trafficking in the development and language of the Hague Adoption Convention,¹⁸⁵ and despite prominent scandals in Latin American adoptions in the 1980s and 1990s.¹⁸⁶ To a significant degree, this naïve and unconcerned perspective represents a long-standing tendency in the adoption community in the United States to deny and minimize the prevalence and significance of abusive practices in intercountry adoption. This minimization includes a denial by the United States government that the term "trafficking" applies to the kidnapping or sale of children for adoption, despite the clear use of the term trafficking for this conduct in the Hague Adoption Convention and preparatory materials for the Convention.¹⁸⁷ In the late 1990s and early 2000s, this tendency to deny and minimize abusive practices was reflected by the responses of the adoption community to the Andhra Pradesh adoption scandals of 1995–96, 1999, and 2001, where the predominant voices of adoptive parents and agencies seemed focused on minimizing the extent and significance of wrongdoing in the interests of keeping intercountry adoption systems open.¹⁸⁸ When the United States government responded to extensive wrongdoing by closing Cambodian adoptions in December 2001, many in the adoption community in the United States were sharply critical rather than appreciative of the government's vigilance, even after a

¹⁸³ See Trish Maskew, *The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention*, 60 ADMIN. L. REV. 487, 493–94 (2008); CACI AB Int'l, Inc., *History of the Hague Adoption Standards Project*, <http://web.archive.org/web/20050404093301/www.hagueregs.org/History.htm> (last modified Jan. 26, 2004).

¹⁸⁴ See Maskew, *supra* note 183, at 493–94.

¹⁸⁵ See Smolin, *Future*, *supra* note 1, at 447, 450–61.

¹⁸⁶ See *id.* at 459–60; Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End?*, 18 HASTINGS INT'L & COMP. L. REV. 121, 131–36 (1994).

¹⁸⁷ 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, 2 & nn.4–6 (2007); Smolin, *Future*, *supra* note 1, at 447, 450–60.

¹⁸⁸ See Smolin, *supra* note 11, at 450–93.

guilty plea some years later relating to the adoption agency that had been most involved in Cambodian adoptions.¹⁸⁹

Acton Burnell produced two sets of draft regulations, after which in September 2003, the State Department issued proposed regulations and opened a comment period.¹⁹⁰ After receiving approximately 1,500 comments, the State Department issued the final rule in February 2006 (“Final Rule”).¹⁹¹

Ironically, it was ultimately the State Department that most acceded to agency wishes when it issued the revised Final Rule. Thus, on a number of key points the Final Rule created loopholes that largely gutted the effectiveness of the regulations, making them significantly weaker than even the prior draft regulations.¹⁹² The advocacy group Ethica astutely observed that “the Department often sought to make the regulations match current practices rather than to change practices to meet the purposes of the Convention.”¹⁹³ Indeed, as Ethica noted, the Department itself stated that they had “sought to reflect current norms in adoption practices, as made known to us during the development of the rule.”¹⁹⁴ Given this rationale, it can hardly be surprising that the Final Rule frequently ratified agency viewpoints and practices.

The major points of weakness of the Final Rule are discussed in the following sections.

1. A Lack of Properly Defined and Enforceable Financial Limits on Intercountry Adoption

Article 32 of the Hague Adoption Convention forbids unreasonable professional fees as well as “remuneration which is unreasonably high in relation

¹⁸⁹ See Thomas Fields-Meyer et al., *Whose Kids are They?*, PEOPLE (Jan. 19, 2004), <http://www.people.com/people/archive/article/0,,20149115,00.html>; see Sara Corbett, *Where do Babies Come From?*, N.Y. TIMES (June 16, 2002), <http://www.nytimes.com/2002/06/16/magazine/where-do-babies-come-from.html?pagewanted=all&src=pm>.

¹⁹⁰ See Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96); Maskew, *supra* note 183, at 494.

¹⁹¹ Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000 (IAA), 22 C.F.R. pt. 96 (2012); Issuance of Adoption Certificates and Custody Declarations in Hague Convention Adoption Cases, 22 C.F.R. pt. 97 (2012); Intercountry Adoption—Convention Record Preservation, 22 C.F.R. pt. 98 (2012); Maskew, *supra* note 183, at 49.

¹⁹² See Maskew, *supra* note 183, at 496–507; Smolin, *supra* note 47, at 173–200; ETHICA, COMMENTS ON THE FINAL REGULATIONS IMPLEMENTING THE HAGUE ADOPTION CONVENTION (2006), available at <http://web.archive.org/web/20110626125640/http://www.ethicanet.org/HagueRegComments.pdf> [hereinafter ETHICA].

¹⁹³ See ETHICA, *supra* note 192, at 1.

¹⁹⁴ See *id.*

to services rendered.”¹⁹⁵ In addition, Article 32 prohibits “improper financial or other gain.”¹⁹⁶ Article 8 of the Hague Adoption Convention states, “Central Authorities shall take . . . all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.”¹⁹⁷

In response, the Final Rule defined fees, wages, and salaries as reasonable so long as they are within the “norms for compensation within the intercountry adoption community in that country.”¹⁹⁸ The United States’ interpretation entirely fails to fulfill the purposes of Article 32 of the Convention, which are to create safeguards to “prevent the abduction, the sale of, or traffic in children,”¹⁹⁹ as well as to safeguard the subsidiarity principle.²⁰⁰ So long as fees, remuneration, and gain for intercountry adoption are substantially higher than for other child welfare interventions, those higher fees will provide incentives both for obtaining children illicitly for intercountry adoption, as well as providing incentives for improperly favoring intercountry adoption over domestic adoption. Therefore, the correct interpretation of Article 32 is to norm remuneration, fees, and gain for intercountry adoption to the standard of remuneration, fees, and gain for child welfare work in the relevant country, in order to bring intercountry adoption remuneration, fees, and gain to the same level as other forms of child welfare work.²⁰¹

In practice, the United States’ definition of “reasonable” permits entire adoption systems to be built on profiteering and allows fees, remuneration, and gain that by almost all accounts would be unreasonable. For example, as noted above in the notorious example of Guatemala, Guatemalan attorneys typically received \$15,000 to \$20,000 USD per child of unregulated money; by most accounts these large fees, which provided hundreds of millions of unregulated dollars into the hands of Guatemalan attorneys, made it practically impossible to enforce norms against “the abduction, the sale of, or traffic in children.”²⁰² In a nation with extensive corruption and violence and limited governmental capacity, introducing literally hundreds of millions of unregulated dollars into the intercountry adoption system almost inevitably destroyed any hope of creating and

¹⁹⁵ Hague Adoption Convention, *supra* note 5, at art. 32(2)–(3).

¹⁹⁶ *Id.* art. 32(1).

¹⁹⁷ *Id.* art. 8.

¹⁹⁸ See 22 C.F.R. § 96.34(d) (2012).

¹⁹⁹ Hague Adoption Convention, *supra* note 5, at art. 1(b).

²⁰⁰ See *supra* notes 11–15 and accompanying text (describing subsidiarity principle); Hague Adoption Convention, *supra* note 5, at art. 1(a); CRC, *supra* note 4, at art. 20–21.

²⁰¹ See DEBORAH L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 184 (2006); Maskew, *supra* note 183, at 506–07; Smolin, *supra* note 47, at 178–79.

²⁰² See Hague Adoption Convention, *supra* note 5, at art. 1(b); *supra* notes 166–171 and accompanying text (detailing issues in Guatemalan adoptions).

sustaining an ethical, transparent, and lawful system.²⁰³ Yet, there is nothing in the current definition of “reasonable” compensation that would forbid these extremely large, destabilizing and corrupting fees to become normative for Hague adoptions in any number of nations, as they are considered reasonable so long as they are common. There are arguably similar issues regarding the compensation levels for intercountry adoption work within the United States. This is even more significant given that the United States is now also a significant country of origin, which is discussed to a limited degree below.²⁰⁴ Thus, in the context of the United States as a country of origin, monetary incentives can distort the choice between domestic and intercountry adoption, just as it does in other countries of origin such as India.²⁰⁵

2. The Refusal to Make United States Agencies Responsible for the Actions of their Foreign Partners and Facilitators who Perform Critical Functions in Countries of Origin

The Final Rule failed to make United States adoption agencies responsible for their foreign partners, including facilitators, lawyers, and others who perform critically important functions within sending nations. While purporting to create such responsibility through the concept of a supervised provider, the Final Rule created a category of unsupervised providers who perform the critically important functions of obtaining consents for relinquishment of a child, and creating child study forms.²⁰⁶ Consents and child study forms are, of course, central to the ethical and legal integrity of adoption, and go to the heart of efforts to safeguard adoption against abusive adoption practices. The Final Rule frees United States agencies of responsibility for these critically important functions performed by unsupervised foreign partners, facilitators, lawyers, and others, so long as the United States agency does some kind of verification. Without exhaustively defining verification, the Final Rule states that such verification can be accomplished “through review of the relevant documentation and other appropriate steps”²⁰⁷ Since the “other appropriate steps” have not been defined and abusive adoption practices typically also involve falsification of documents, this in practice allows United States adoption agencies to place children illicitly obtained through force, fraud, or funds, and to provide falsified child study forms to the prospective adoptive parents, without violating any of their duties under the Final Rule, so long as they had

²⁰³ See *supra* notes 166–171 and accompanying text (discussing Guatemalan adoptions).

²⁰⁴ See *infra* notes 261–271 and accompanying text.

²⁰⁵ See *supra* notes 162–163 and accompanying text (discussing adoptions from India).

²⁰⁶ See 22 C.F.R. §§ 96.14(c)(2)–(3), 96.46(c) (2012); Maskew, *supra* note 183, at 496–502; Smolin, *supra* note 47, at 197–200.

²⁰⁷ See 22 C.F.R. § 96.46(c) (2012); Maskew, *supra* note 183, at 496–502; Smolin, *supra* note 47, at 197–200.

reviewed the documentation. There does not appear to be any enforceable duty to correctly distinguish between legitimate and falsified documents or information through the required verification process or review of documents.²⁰⁸ In addition, the Final Rule stripped out from the draft regulations the provisions regarding the tort and civil liability of United States agencies for their foreign partners, regardless of whether they used supervised or unsupervised providers. Hence, even for supervised providers, the overall issue of substantial compliance to accreditation standards became the only enforcement method. The Final Rule leaves questions of civil liability to state law.²⁰⁹ However, as discussed immediately below, the allowance of waivers of liability in the Final Rule allows agencies to contractually waive their legal responsibility under state law for the acts of their foreign partners in creating child study forms and obtaining consents and children.²¹⁰ Hence, in total, the Final Rule effectively allows United States adoption agencies to structure their relationships with their foreign partners and clients in a way that allows the agencies to avoid becoming responsible for the critically important functions of (1) ensuring the validity of the consents to adoption and that the children they place for adoption have not been obtained through “the abduction, the sale of, or traffic in children”²¹¹ or other illicit means; and (2) ensuring that the child study forms accurately portray the characteristics, background, and needs of the child.²¹²

3. Allowing United States Agencies to Create Enforceable Waivers of Liability Freeing Agencies from Responsibility and Accountability for Critically Important Functions

The proposed regulations disallowed agencies from requiring “a blanket waiver of liability” in Hague adoptions.²¹³ Agencies had objected to this proposed regulation. For example, Holt International Children’s Services, which called itself the “oldest and largest international adoption agency in the country,” objected, stating that it is “Holt’s current practice to advise its clients of the many risks inherent in international adoption and require clients to partner with Holt by accepting the known and identified risks.”²¹⁴ Holt went so far as to argue that

²⁰⁸ See Maskew, *supra* note 183, at 496–502; Smolin, *supra* note 47, at 197–200.

²⁰⁹ See Maskew, *supra* note 183, at 497–98; Smolin, *supra* note 47, at 198–99.

²¹⁰ See *infra* notes 213–217 and accompanying text; Smolin, *supra* note 47, at 195–97.

²¹¹ Hague Adoption Convention, *supra* note 5, at art. 1(b).

²¹² See *supra* notes 206–210 and accompanying text.

²¹³ Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 Fed. Reg. 54,064, 54,103 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96); Smolin, *supra* note 47, at 195.

²¹⁴ See HOLT INT’L CHILDS. SERVS., COMMENTS ON STATE DEPARTMENT REGULATIONS ON INTERCOUNTRY ADOPTION STATE/AR-01/96, at 1, 4–5 (2003).

“absent an ability to require prospective adoptive parents to . . . voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.”²¹⁵ In response to adoption agency objections, the Final Rule permits waivers of liability that comply with “applicable State law” and are “limited and specific, based on risks that have been discussed and explained to the client in the adoption services contract.”²¹⁶ The State Department noted that the Final Rule “defers to the adoption service provider’s own assessment of risks and benefits in asking a client to sign a waiver.”²¹⁷ Thus, so long as the contract between the prospective adoptive parents and agencies names all of the possible sources of liability, such contractual waivers of liability will effectively be nearly as broad as a blanket waiver of liability. In practice, it is commonplace for agencies to waive liability in particular for all aspects of the child study form, and thus for all issues related to the characteristics and conditions of the child. Therefore, contractual waivers of liability place virtually all of the risks of inaccurate child study forms—and implicitly of children being illicitly obtained—on adoption triad members.

4. *A Two-Track System for Hague and Non-Hague Adoptions*

The Final Rule is applicable only to Hague adoptions, meaning adoptions where the partner nation has ratified the Hague Adoption Convention. In practice, this means that federal accreditation or approval is not required for agencies to be involved in non-Hague adoptions.²¹⁸ While this is legally permissible under the Convention,²¹⁹ and reflects the language of the Intercountry Adoption Act (IAA),²²⁰ it largely undercuts the efficacy of the regulations. For this reason, the HCCH Guide to Good Practice, Guide No. 1, states, “It is generally accepted that State Parties to the Convention should extend the application of its principles to non-Convention adoptions.”²²¹ Unfortunately, during the first years of implementation the United States has not followed this critically important recommendation that Hague principles be applied to all adoptions.

Thus, from the period between implementation of the Convention in April 2008, to the present time, a large majority of adoptions to the United States have

²¹⁵ *Id.* at 5.

²¹⁶ See 22 C.F.R. § 96.39(d) (2012); Smolin, *supra* note 47, at 195–97.

²¹⁷ Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 71 Fed. Reg. 8064, 8068 (Feb. 15, 2006) (codified at 22 C.F.R. pt. 96).

²¹⁸ See Smolin, *supra* note 47, at 173–74.

²¹⁹ See Hague Adoption Convention, *supra* note 5, at art. 2.

²²⁰ See IAA, *supra* note 175, at § 2.

²²¹ HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE, GUIDE NO. 1, at 134 (2008), http://www.hcch.net/upload/adoguide_e.pdf.

been non-Hague adoptions, and hence not subject to the Hague regulations.²²² In effect, “this loophole . . . endorses unaccredited adoption service providers involvement with States [i.e., nations] that have been documented as having unethical and irregular adoption practices.”²²³ This loophole is made worse because some states in the United States, such as Florida, have “adoption laws and child placement agency practices that do not fully address ICA practices.”²²⁴ In effect, agencies lacking or having been denied federal accreditation, against which there are serious and recurrent complaints regarding deficient intercountry adoption practices, nonetheless are allowed to be licensed under state law.²²⁵

Given the language of the IAA, this dual approach would likely require legislation to correct. It is a positive, albeit belated, step that Congress finally enacted such legislation, as the Intercountry Adoption Universal Accreditation Act of 2012 passed the Senate on December 5, 2012, and the House on January 1, 2013, with implementation to take place in 18 months.²²⁶

E. The Destructive Results of a Large-Scale, Privatized Intercountry Adoption System with Insufficient Financial and Accountability Controls: Cycles of Abuse and Slash and Burn Adoption

A premise of the Hague Adoption Convention is that intercountry adoption systems without adequate safeguards, including enforceable limits on remuneration, fees, and compensation, are corrupted by abusive practices, including especially the “abduction, the sale of, or traffic in children.”²²⁷ Another way of describing the results of intercountry adoption systems without adequate safeguards is to speak of the practice of slash and burn adoption: an analogy to slash and burn agriculture. Slash and burn agriculture can involve unsustainable practices that maximize a temporary harvest while despoiling the land, necessitating a move to new fields. By analogy, slash and burn adoption refers to practices that create a temporary rise or increase in intercountry adoptions (the desired “harvest”), but ultimately destroy intercountry adoption systems through corruption and abusive practices, resulting in moratoria or slowdowns. The concept of slash and burn adoption involves cycles of abuse in intercountry adoption, as after such moratoria and slowdowns the cycle continues through new sending

²²² See *Intercountry Adoption*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT. OF STATE, http://adoption.state.gov/about_us/statistics.php (last visited June 10, 2013) (analyzing intercountry adoption statistics by visa type).

²²³ Bunkers et al., *supra* note 7, at 135.

²²⁴ *Id.* at 137.

²²⁵ *Id.* at 136–38.

²²⁶ See S. 3331 (112th): *Intercountry Adoption Universal Accreditation Act of 2012*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s3331> (last visited Mar. 31, 2012).

²²⁷ See Hague Adoption Convention, *supra* note 5, at pmb., arts. 1(b), 8, 32; Smolin, *Future*, *supra* note 1, at 447–61.

nations being opened up for “harvest” through irresponsible slash and burn intercountry adoption practices.²²⁸

Unfortunately, the approach of the United States to intercountry adoption has frequently created these cycles of abuse. Substantial numbers of United States adoption agencies seek to develop large-scale programs in vulnerable nations with substantial extreme poverty, corruption, human trafficking, and poor governmental capacity. The capacity of large numbers of United States adoption agencies to charge prospective adoptive parents very high fees, as well as to solicit substantial “donations,” creates a bidding war for children who are particularly attractive candidates for adoption, due to their age, health, and gender. The lack of any limits on the number of agencies operating in such vulnerable countries or the amounts of money spent on each adoption, creates a specialized market for children in the context of intercountry adoption.²²⁹ Contributing to the lack of safeguards is a legal environment in which United States agencies are, as described above, not responsible for the abusive practices wrought by their activities. This is due to the enforcement of legal waivers of liability in agency contracts with prospective adoptive parents; the rule freeing United States agencies of legal responsibility for the acts of their unsupervised providers who obtain consents and create child study forms; the lack of enforceable financial limits and a definition of “reasonable” remuneration, fees, and compensation that norms with intercountry adoption rather than with child welfare work; and a decision not to apply Hague regulations to the majority of adoptions from non-Hague nations.²³⁰ United States adoption agencies thus choose to operate in vulnerable nations in ways that invite corruption and abusive adoption practices, being enabled by a legal system that frees them from accountability or responsibility for the predictable negative results.

As documented in many places elsewhere, these approaches have led to disastrous results in a variety of sending nations, including Cambodia,²³¹ Guatemala,²³² Ethiopia,²³³ India,²³⁴ Nepal,²³⁵ and Vietnam,²³⁶ to pick some of the most blatant examples. As of this writing, the same pattern is being replicated in

²²⁸ See, e.g., Smolin, *supra* note 47, at 132–35 (describing the cycles of abuse in intercountry adoption).

²²⁹ See, e.g., *id.*; FUENTES ET AL., *supra* note 167, at 11–12; Smolin, *supra* note 11, at 433–40; *The Story*, *supra* note 166; Siegal, *supra* note 166.

²³⁰ See *supra* notes 173–226 and accompanying text.

²³¹ See sources cited *supra* note 161.

²³² See *supra* notes 166–170 and accompanying text.

²³³ See, e.g., Bunkers et al., *supra* note 7, at 133; Kathryn Joyce, *How Ethiopia’s Adoption Industry Dupes Families and Bullies Activists*, THE ATLANTIC (Dec. 21, 2011), <http://www.theatlantic.com/international/archive/2011/12/how-ethiopias-adoption-industry-dupes-families-and-bullies-activists/250296/>; *Adoption: Ethiopia*, SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM BRANDEIS UNIV., <http://www.brandeis.edu/investigate/adoptio/ethiopia.html> (last updated May 3, 2012).

²³⁴ See sources cited *supra* notes 162–163.

²³⁵ See sources cited *supra* note 165.

²³⁶ See sources cited *supra* note 164.

the Democratic Republic of the Congo (“DRC”)²³⁷ and Uganda.²³⁸ Even in sending nations considered to have long-standing and relatively stable intercountry adoption programs, such as China, Russia, and South Korea, substantial abusive practices have been identified, although in these instances the links to the United States may not be as determinative, and the misconduct may not be primarily responsible for the diminishing numbers of intercountry adoptions.²³⁹ Past instances indicate that there are some kinds of nations of origin that cannot safely link to the United States, under its current approach to intercountry adoption, without resulting in such a substantial degree of abusive adoption practices as to risk destroying the entire intercountry adoption program of that nation.

F. For-Profit and Non-Profit: A Problem of Relationship and Incentive

The inclusion of for-profit persons and organizations in the United States’ system makes the concept of reasonable compensation difficult to define and enforce. The implementing regulations make the for-profit status a relevant consideration in determining the reasonableness of compensation, allowing the implication that for-profit entities can have higher reasonable compensation

²³⁷ Adoptions rose quickly before the DRC government suspended exit permits in 2013. See *Democratic Republic of Congo*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT. OF STATE, http://adoption.state.gov/country_information/country_specific_info.php?country-select=democratic_republic_of_congo (last updated May 2012) (providing statistics demonstrating the rise of adoptions from the DRC). There is a significant Notice regarding DRC adoptions on the U.S. State Department’s web page. See *Notice: Reports of Removal of Children from Orphanages in the DRC*, BUREAU OF CONSULAR AFFAIRS, U.S. DEPT. OF STATE (Mar. 15, 2013), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=democratic_republic_of_congo_5 (discussing suspicious nature of birthparents removing children in orphanages set to be adopted by U.S. citizens). One agency active there and supportive of adoptions from DRC reports an arrest in the DRC for kidnapping a child for adoption. See Sonja Brown, *Combating Corruption in Congo*, MLJ ADOPTIONS INC. (June 20, 2012), <http://mljadoption.com/Media.aspx?articleID=512> (discussing arrest for kidnapping a child for purposes of adoption and many other reports of abusive practices in the DRC). This author has received a number of confidential reports indicating significant degrees of abusive practices.

²³⁸ See, e.g., Sara Brinton, *Speaking of Truth in Ugandan Adoptions*, FAMILY HOPE LOVE (Apr. 2, 2012), <http://www.familyhopelove.com/speaking-of-truth-in-ugandan-adoptions/>; Mark Riley & Karen Riley, *Update on Intercountry Adoption*, RILEYS IN UGANDA (Aug. 15, 2011, 3:35 PM), <http://rileysinuganda.blogspot.com/2011/08/update-on-intercountry-adoption.html>.

²³⁹ See JANE JEONG TRENKA, *FUGITIVE VISIONS* 9–16 (2009); Smolin, *supra* note 18, at 46–65; Smolin, *Future*, *supra* note 1, at 473–76, 480–83 (discussing Russia and South Korea); Jane Jeong Trenka, *Fugitive Visions*, 1.1 J. KOREAN ADOPTION STUD. 9, 9–24 (2009) (discussing South Korea); Jane Jeong Trenka, *Abuses in Adoptions from South Korea*, CONDUCTIVE CHRONICLE (Nov. 6, 2009, 12:01 AM), <http://cchronicle.com/2009/11/abuses-in-adoptions-from-s-korea>.

levels.²⁴⁰ Although there are only five approved for-profit persons/organizations, a small number in comparison to the approximately 200 accredited agencies,²⁴¹ their role is still potentially significant, particularly as related to certain kinds of adoptions. Thus, the for-profit entities are particularly significant in linking to certain nations of origin, as well as playing an apparently significant role in outgoing adoptions in which the United States acts as a country of origin.²⁴² Tracking the compensation levels of owners and important personnel for for-profit persons and organizations is extraordinarily difficult. Based on substantial research, but without claiming to describe any particular actual individual or organization, this section will discuss a hypothetical approved person/organization in the United States in order to make these difficulties more concrete.²⁴³ This hypothetical for-profit approved person/organization will be called by the name “Doe Adoptions.” The hypothetical principal/owner of Doe Adoptions is an attorney, a common pattern in for-profits,²⁴⁴ and also significant in terms of the historical and present role of attorneys in adoption services in the United States.²⁴⁵ This hypothetical principal/owner will be called Doe. Doe operates, alone or in conjunction with others, three entities: the for-profit adoption agency (Doe Adoptions), a for-profit law firm, and a non-profit charity/foundation. In terms of accountability, it is significant that the public has no access to the finances of either the for-profit adoption agency or the law firm, and only limited access to the finances of the non-profit.²⁴⁶ Based on common practices within the United States, it is apparent that the combination of entities could be used to operate for Doe’s financial benefit. Thus, Doe may direct financial benefit to himself/herself in a number of ways: as director/employee of the adoption agency, as director/employee of the related non-profit, as an attorney charging the agency or charity for legal services, as owner of the profits of the adoption agency, or as owner/co-owner of the profits of the law firm, and through financial transactions

²⁴⁰ See 22 C.F.R. § 96.34(e) (2012).

²⁴¹ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFAIRS, *Adoption Service Provider Search*, http://adoption.state.gov/hague_convention/agency_accreditation/agency_search.php (last visited June 12, 2013).

²⁴² See, e.g., *id.* (three of twenty-five entities approved for outgoing cases are for-profit).

²⁴³ In the context of this Article it could be a possible distraction to focus on any one particular person or organization. However, it should be easy enough for readers, as the author has done, to independently research the for-profit persons/organizations and to locate the organizations related to those persons/organizations. Again, this Article does not claim to describe specifically any of those approved persons/organizations. In addition, the specific characteristics of those approved persons/organizations vary significantly.

²⁴⁴ See U.S. DEP’T OF STATE, *supra* note 241 (four of five approved for-profit persons/organizations are a law firm/lawyer or have an attorney as primary/significant participant or owner of organization).

²⁴⁵ See *supra* notes 145–149 and accompanying text.

²⁴⁶ See Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111, 131–33 (2005).

between any of the entities and Doe's family members. In addition, where there are real property arrangements shared between the entities, as may be common practice in the United States, it is possible for Doe to benefit from real property transactions amongst these entities without necessarily reporting anything as compensation.²⁴⁷ In effect, Doe may choose forms of compensation with the greatest advantage, whether under tax law, or as a matter of creating an impression of charitable intent. Since a for-profit may legitimately generate profits,²⁴⁸ Doe could personally benefit from profits produced by Doe Adoptions, without disclosing the amounts to the public. Alternatively, however, Doe could also forego significant parts of some of the more obvious ways of obtaining personal financial benefit, such as profits or direct employment with Doe Adoptions or the non-profit entity, and still obtain very high compensation by other means. Thus, Doe could truthfully state on public web sites that he/she does not take any salary from the for-profit agency, and donates significant percentages of the earnings of the for-profits, and still receive extremely high financial gain from the combination of entities through other means beyond salary or profits, such as providing legal or other services to the for-profit agency or non-profit, or through property or other transactions.²⁴⁹ Because Doe does not fully disclose to the public in detail all financial arrangements among the three entities, there is also very little public accountability regarding Doe's actual levels of financial benefit. Under such circumstances, one would have to gain access to otherwise private data and do an in-depth accounting in order to ascertain how much financial benefit Doe ultimately has from his/her work in intercountry adoption.

Thus, a particular dilemma in the instance of the hypothetical "Doe Adoptions" is the intertwined relationship between the non-profit charity and the for-profit agency and law firm. For example, hypothetically, it would be possible for the non-profit run by Doe to make grants to clients of Doe Adoptions, to help them pay the fees for intercountry adoption due to or passed through Doe Adoptions. To the degree those funds are donated profits from the for-profit agency, that agency possibly may obtain a tax benefit for discounting their very

²⁴⁷ See, e.g., Sam Dolnick, *Halfway Houses Prove Lucrative for Those at Top*, N. Y. TIMES, Dec. 30, 2012, at 1, 4, available at http://www.nytimes.com/2012/12/30/nyregion/operator-of-new-jersey-halfway-houses-paid-millions-to-founder.html?nl=todaysheadlines&emc=edit_th_20121230&r=0 (describing how non-profit operator of halfway houses run these houses like a "well-heeled family business" that provided \$7 million in compensation and benefits to founder and \$2.5 million to three family members of founder over a decade); Mike Oliver, *Birmingham Health Care's CEO Became its Landlord, Renting Space From His Businesses*, AL.COM (Aug. 20, 2012, 1:48 PM), http://blog.al.com/spotnews/2012/08/birmingham_health_cares_ceo_be.html.

²⁴⁸ A for-profit corporation is "organized for the purpose of making a profit." BLACK'S LAW DICTIONARY 393 (9th ed. 2009).

²⁴⁹ See, e.g., Mike Oliver, *Ties Between Birmingham Nonprofit and Ex-CEO's Companies Raise Questions*, AL.COM (June 24, 2012, 6:15 AM), http://blog.al.com/spotnews/2012/06/ties_between_nonprofit_and_ex-.html.

substantial adoption fees through the channel of a donation to the charity.²⁵⁰ To the extent the funds come from outside donations, outsiders have been induced, in essence, to subsidize the very substantial fees of the for-profit agency.

In addition, hypothetically, the non-profit run by Doe could use some of its funds to help pay the costs of “hosting” trips to the United States. This hypothetical refers to a practice in which children are brought to the United States for a temporary period of time to live with host families in the hope that they will make contact with prospective adoptive parents who may seek to adopt them after they return to their nation (often Ukraine, but also including other nations).²⁵¹ If the for-profit agency donates funds to subsidize these trips, the agency is essentially getting a tax benefit for activities which could be seen as a kind of marketing for their for-profit agency; if outsiders donate for this purpose, Doe has succeeded in inducing charitable donations from others for what in effect is part of the marketing costs of the for-profit agency. (In calling this “marketing” I do not intend to enter into the debate over the ethics of bringing “orphans” to the United States for these temporary trips, nor indicate whether the practice is ultimately beneficial to children; I simply note that from a business standpoint that bringing the children to the United States where prospective adoptive parents will meet them is potentially a highly effective method of marketing the services of intercountry adoption.)

Similarly, hypothetically Doe’s non-profit could spend charitable funds to assist orphans in sending-nations from which Doe Adoption (the for-profit agency) may obtain children. It is entirely possible that this charitable spending in effect underwrites what would otherwise be costs associated with Doe Adoption’s for-profit adoption programs in those countries. Under these hypothetical interactions and activities among the different entities, where the non-profit succeeds in obtaining outside donations beyond those that come from the for-profit agency, Doe would have succeeded in getting others to donate in order to essentially subsidize the for-profit business, allowing Doe Adoptions to offer discounted prices and do adoption marketing and access children without having to pay all of the associated costs. Similarly, to the degree that the funds spent by Doe’s non-profit would come from donations from Doe’s for-profit agency, Doe may possibly receive a tax deduction for, in effect, discounting fees for selected clients, doing adoption marketing, and for some of the costs of establishing and running their programs in the sending nations.

Significantly, from the viewpoint of the United States, it appears that Doe’s non-profit activities are equally permissible regardless of whether they benefit the activities of the for-profit agency. Indeed, even if Doe’s charitable activities are entirely undergirding the work of the for-profit adoption agency, this would largely be seen positively as a form of social entrepreneurial activity within the United

²⁵⁰ 26 U.S.C. § 170(a)(1), (b)(1)(A)(iv) (2012).

²⁵¹ See, e.g., Martha Osborne, *Hosting a Child from China, Russia, Ukraine*, RAINBO WKIDS.COM (Feb. 1, 2011), <http://www.rainbowkids.com/ArticleDetails.aspx?id=741>.

States.²⁵² As noted above, within the United States, even non-profits in the field of adoption “are usually nonprofit organizations operating for-profit ventures to generate revenues.”²⁵³ Thus, coordinating separate for-profit and non-profit entities toward achieving financial goals is just another available strategy within the United States.

In the context of the United States, it is difficult under these circumstances to know whether our hypothetical individual, Doe, is earning nothing, or millions of dollars, from intercountry adoption.²⁵⁴ Thus, Doe’s capacity to present himself or herself simultaneously as a for-profit attorney, director of a for-profit agency, and director of a non-profit charity, with little public accountability as to the handling of the finances of these interconnected entities, makes the very concept of reasonable compensation illusory. To the degree that Doe Adoptions chooses to do only non-Hague adoptions—the majority of international adoptions to the United States²⁵⁵—there would be little or no scrutiny of his/her finances in many states. Because Doe Adoptions is a Hague-approved person/organization in the United States in this hypothetical, the United States government does have the opportunity to review the finances of that entity. Given that the United States has outsourced the accreditation and oversight function primarily to a non-profit agency—the Council on Accreditation (COA)—and given that COA uses a peer review system of accreditation that relies on volunteers who usually work for other agencies, there would seem to be little likelihood that the finances of the three intertwined entities would be reviewed in sufficient detail to determine the actual financial benefit obtained by Doe. Even if such information was established, there is little or no indication that there are any concrete limitations that would be applied.

It should be emphasized that the above is not intended to indicate that the hypothetical individual Doe or Doe Adoptions, or any other particular individuals or adoption agencies, whether for-profit or non-profit, currently operating in the

²⁵² “An ideal business structure” consists of more than one entity, specifically an operating entity and a holding entity; thus, the fact that both of Doe’s for-profit and non-profit entities are generating profit, in the form of monetary gain and recognition respectively, demonstrates wise business practice and efficient use of each business entity. *See Using Holding and Operating Companies to Protect Business Assets*, BIZFILINGS.COM (May 24, 2012), <http://www.bizfilings.com/toolkit/sbg/run-a-business/assets/using-holding-operating-companies-protects-assets.aspx>.

²⁵³ O’Connor & Rotabi, *supra* note 123, at 77.

²⁵⁴ The possibility of millions of dollars is not out of line, as the United States government estimated that one agency, Seattle International Adoptions, Inc., received over \$9 million over a four to five year period from Cambodian adoptions, with the individuals involved retaining a substantial portion of it in profits. This was in the context of the criminal investigation and conviction of Lauryn Galindo. In mentioning this actual situation, it is not intended to indicate that the hypothetical Doe is involved in any kind of wrongdoing under United States law, but rather to indicate that under some circumstances intercountry adoption can generate large amounts of money. *See Smolin, supra* note 47, at 141–45.

²⁵⁵ *See supra* note 218–225 and accompanying text.

United States, is doing anything illegal in the context of the laws of the United States. To the contrary, the hypothetical Doe and Doe Adoptions represent one possible variant within the broader pattern of the privatized, social entrepreneurial practice and culture of the United States in relationship to adoption. Indeed, persons and entities like Doe and Doe Adoptions could be seen by some as exemplary social entrepreneurs and experts in intercountry adoption. In addition, a fundamental point is that current regulations in the United States make both transparency and limits regarding intercountry adoption very difficult to achieve.

Some of these difficulties are also applicable to the much larger number of accredited, non-profit entities in the United States. It is commonplace knowledge that it is possible to earn hundreds of thousands of dollars annually—and sometimes far more—through work in the non-profit sector in the United States.²⁵⁶ Thus, the non-profit label is no guarantee that unreasonable compensation or earnings are not involved. In addition, the non-profit sector offers opportunities for individuals directing non-profits to derive substantial financial benefit through structuring service contracts or property transactions between themselves (or their relatives) and the non-profit entity, which can be difficult to evaluate without careful auditing.²⁵⁷ Of course there are presumably many people working in non-profit adoption agencies who are only modestly compensated. However, given the modest pay scale for social workers and other child welfare workers in the United States outside the context of intercountry adoption and private adoption,²⁵⁸ the earnings of a significant portion of those involved in intercountry adoption is comparatively beneficial. The concept of reasonable compensation within the United States is thus based on viewing intercountry adoption through the lens of the tradition of gray market, independent, or lawyer-arranged private adoption, rather than through the lens of the public child welfare and adoption system. This creates the irony that many earn a proportionately high income from intercountry adoption doing adoptions from developing nations, often through intercountry adoption programs that lack a consistent financial family preservation or reunification program. This is one reason that adoptions between wealthy and developing nations commonly cost in the range of \$20,000 to \$50,000. And again, under current legal standards in the United States, so long as high compensation

²⁵⁶ See, e.g., Dolnick, *supra* note 247 (founder of non-profit received \$7 million in salary and compensation over a decade); Marlys Harris, *Get Really, Really Rich: Form a Non-Profit*, CBSNEWS MONEYWATCH (Dec. 22, 2009, 5:01 PM), http://www.cbsnews.com/8301-505145_162-38140470/get-really-really-rich-form-a-non-profit/; Matthew Walberg & Joe Mahr, *Tribune Analysis: Average Raise in 2009–10 for CEOs of 18 Nonprofits Double that for Private-Industry Workers*, CHI. TRIB. (June 21, 2012), <http://www.chicagotribune.com/news/watchdog/ct-met-non-profit-executive-pay-20120621,0,1103859,full.story>.

²⁵⁷ See, e.g., Oliver, *supra* note 249.

²⁵⁸ Marsha Garrison, *Reforming Child Protection: A Public Health Perspective*, 12 VA. J. SOC. POL'Y & L. 590, 594 n.20 (2005) (child welfare workers endure “low pay, violence, high caseloads, and administrative burdens” and low tenure).

rates for work in the non-profit intercountry adoption sector are prevalent in a significant number of agencies, such high compensation rates will be considered reasonable compensation.²⁵⁹

The role of very large numbers of private adoption agencies—whether labeled for-profit or non-profit—is deeply embedded in adoption practice in the United States. The negative aspects include the creation of a kind of market-based competition for children with the most adoptable characteristics (young, healthy, and female), in a manner that can inadvertently lead to child trafficking while undercutting the subsidiarity principle. The positive aspects include a vibrant, innovative, social services sector: a kind of social entrepreneurial enterprise where the private social services and humanitarian entities sometimes can accomplish things that the public sector acting alone would not. Whatever the positives or negatives, there is extreme resistance to bringing financial limitations to this sector, which commonly views profits as an opportunity to expand into new service areas.²⁶⁰

G. *Outgoing Cases*

The United States is in the paradoxical position of being by far the most important receiving nation in the intercountry adoption system, and yet simultaneously being a significant nation of origin. The obvious question is why the United States is sending significant numbers of children in intercountry adoption to other nations.

One of the first difficulties in addressing this question is a lack of accurate statistical information. Under section 104(b)(2) of the Intercountry Adoption Act, the United States Central Authority in its annual report on intercountry adoption should include “[t]he number of intercountry adoptions involving emigration from the United States, regardless of whether the adoption occurred under the Convention, including the country to which each child immigrated and the State from which each child emigrated.”²⁶¹ Thus, the 2011 Report states a total of 73 outgoing cases, including 31 to Canada,²⁶² while the 2010 Report states a total of 43 outgoing cases, including 19 to Canada.²⁶³ Yet, a standard statistical report on intercountry adoptions to Canada reports much larger numbers of children coming

²⁵⁹ See *supra* notes 198–201 and accompanying text.

²⁶⁰ See *supra* text accompanying notes, 127, 137–154, 173–174 (arguing that most of the influential stakeholders have nurtured and protected precisely those attitudes, policies, and practices that make the United States a destructive force in the intercountry adoption system).

²⁶¹ IAA, *supra* note 175, at § 104(b)(2).

²⁶² FY 2011 ANNUAL REPORT, *supra* note 159, at 4 tbl. 3.

²⁶³ U.S. DEP’T OF STATE, FY 2010 ANNUAL REPORT ON INTERCOUNTRY ADOPTION (2010), http://adoption.state.gov/content/pdf/fy2010_annual_report.pdf.

from the United States to Canada: 148 in 2010, 253 in 2009, and 182 in 2008.²⁶⁴ Thus, in 2010, the United States reports sending 19 children to Canada for intercountry adoption, while statistics from Canada indicate that Canada received 148 children for intercountry adoption from the United States. A possible difference between calendar and fiscal year reporting cannot possibly explain such a differential. Presumably, the larger numbers are more accurate, but that indicates that the United States government is significantly failing in its statutory duty to track and report outgoing cases.

The second issue is the question of whether these adoptions could possibly be consistent with the subsidiarity principle. Is there really a lack of adoptive homes in the United States for the children being sent to other countries, when the United States receives thousands of children for adoption from other nations? One view in the United States is that the choice of the original parent(s) to place the child internationally trumps the subsidiarity principle. This concept that parents have a right to select an intercountry adoptive placement to unrelated adoptive parents over a domestic placement cannot be easily reconciled with the Hague Adoption Convention.²⁶⁵ Beyond the legal issue, there is the question of why parents would choose such out of nation placements. It is sometimes claimed that a primary motivation relates to race. A significant proportion of outgoing cases involve children who are of a “minority” race in the context of the United States. Given the difficulties with racism in the United States, it is often claimed that some first parents believe that their children will experience less racism in other nations.²⁶⁶ This kind of viewpoint is not unprecedented, as it was used as a reason for sending mixed race South Korean children—whose fathers were white or African-American United States soldiers—to the United States for intercountry adoption, particularly during the early years of Korean international adoptions to the United States.²⁶⁷ An additional factor stated is a supposed greater receptiveness to open forms of adoption by some foreign adoptive parents—such as Canadians.²⁶⁸

There is a troubling intersection between money and the outgoing cases from the United States. First, it appears that the for-profit entities are disproportionately involved with these cases.²⁶⁹ Second, the opportunity for significant financial gain

²⁶⁴ Robin Hilborn, *Canadians Go Abroad to Adopt 1,946 Children in 2010*, FAMILYHELPER.NET (Oct. 27, 2011), <http://www.familyhelper.net/news/111027stats.html>; see also *International Statistics for Canada*, FAMILYHELPER.NET (Feb. 17, 2012), <http://www.familyhelper.net/news/stats.html> (providing additional statistics of international adoptions in Canada).

²⁶⁵ See Naughton, *supra* note 10, at 161–71; see also Hague Adoption Convention, *supra* note 5, at art. 4(b) (explaining that an intercountry adoption shall only take place under the Convention if it has been determined that “an intercountry adoption is in the child’s best interests”).

²⁶⁶ Naughton, *supra* note 10, at 168–69.

²⁶⁷ See OH, *supra* note 1, at 92–151; Hubinette, *supra* note 1, at 31.

²⁶⁸ Naughton, *supra* note 10, at 168–70.

²⁶⁹ See *supra* note 241–242 and accompanying text.

from these cases, and the financial motivation to place outside of the United States, are substantial. Within the United States, private adoption agencies frequently charge much less for the placement of African-American or bi-racial children than for white children.²⁷⁰ By contrast, it appears that by sending minority-race children in intercountry adoption there are possibilities of intermediaries, attorneys, and agencies receiving significantly higher compensation, because the fees for these adoptions can be quite high. In a context where the counseling that relinquishing birth parents receive in the United States is quite mixed in quality and objectivity, and revocation of consent periods in many states are very short,²⁷¹ there is a grave concern that children are being sent internationally more for financial reasons than for reasons connected to the best interests of the child.

Sorting through all of the legal and ethical issues for outgoing cases is beyond the scope of this Article. The primary point herein is simply that nations accepting adoptive placements from the United States should be concerned not only with the proper implementation of the subsidiarity principle, but also with the impacts of financial incentives on the intermediaries, whether agencies or attorneys, involved in these adoptions. In a context where the United States government seems to be unaware of the majority of outgoing cases, and where a privatized system of adoption with little regulation of monetary incentives exists, it will be difficult to sort out cases where original parents with unbiased counseling truly “chose” relinquishment and international placement, and those instances where a combination of financial incentives, short revocation periods, and biased counseling procedures were the primary causes of international placements.

²⁷⁰ See Catherine Rampell, *Black Babies, Boys Less Likely to be Adopted*, N.Y. TIMES (Jan. 25, 2010, 4:26 PM), <http://economix.blogs.nytimes.com/2010/01/25/black-babies-boys-less-likely-to-be-adopted/>; Smolin, *supra* note 149, at 305 & n.60.

²⁷¹ See SMITH *supra* note 145, at 8–9; U.S. DEP’T OF HEALTH AND HUMAN SERVS., CHILD WELFARE INFORMATION GATEWAY, CONSENT TO ADOPTION: SUMMARY OF STATE LAWS (2010), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/consent.pdf; Clara Daniels, *A Mother’s Story*, 2 J. CHRISTIAN LEGAL THOUGHT 23 (2012), *available at* <http://www.clsnet.org/page.aspx?pid=473>; Elizabeth Samuels, *Legal Representation of Birth Parents and Adoptive Parents*, 9 ADOPTION Q. 73, 76–77 (2006); Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers’ Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 510, 511–12 (2005) (arguing that “many state laws appear to value an increase in infant adoptions over the goal of encouraging careful deliberation” by the consenting birth mother).

IV. CONCLUSION

*A. Reforming the United States' Approach to Intercountry Adoption: Building on Strengths While Limiting the Risks Inherent in a Privatized Adoption System**1. Building on Strengths*

The corrupting influence of the United States on the intercountry adoption system is not inevitable. Even given the characteristics of the legal and adoption culture of the United States described in this Article, including a privatized adoption system, it would be possible for the United States to be primarily a positive force in the intercountry adoption system. Indeed, there are certain actual and potential strengths in the United States, legally and culturally, which could positively contribute to the intercountry adoption system.

A primary strength is the number of prospective adoptive parents willing to adopt children with significant special needs. Particularly given the changing demographics of intercountry adoption, in which an increasing proportion of children available for intercountry adoption are special needs and much older children who have suffered serious trauma, the existence of a substantial number of suitable families willing to adopt such children is significant. A related strength is specialized health care services prepared to meet the medical needs of special needs children.²⁷²

These strengths, while very significant, also have serious limitations. While there are often excellent services available for the strictly medical needs of adoptees related to physical health, the available services in the United States for the educational, cognitive, behavioral, and mental health issues of older, traumatized, and special needs children is deficient in most of the United States. Availability is quite variable depending on geographic location, and since adoptive families rather than the government often must bear the costs, accessibility for some services can be limited by high costs and the financial circumstances of the adoptive family.²⁷³

Another limitation relates to the numbers of persons willing to adopt special needs and much older children. While the number is significant, nonetheless there do not appear to be nearly enough adoptive parents to provide families for such children even within the United States, given that there are approximately 100,000

²⁷² See, e.g., David Crary, *Adopted Chinese Orphans Often Have Special Needs: U.S. Couples Are Now Facing Tough Decisions*, BOSTON.COM (Apr. 3, 2010), http://www.boston.com/news/nation/articles/2010/04/03/adopted_chinese_orphans_often_have_special_needs/.

²⁷³ See EVAN B. DONALDSON INST., *KEEPING THE PROMISE: THE CRITICAL NEED FOR POST-ADOPTION SERVICES TO ENABLE CHILDREN AND FAMILIES TO SUCCEED* 55 (2010), http://www.adoptioninstitute.org/publications/2010_10_20_KeepingThePromise.pdf; Mary Mather, *Intercountry Adoption*, 92 ARCHIVES OF DISEASE IN CHILDHOOD 479, 479–82 (2010), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2066146/>.

mostly older and traumatized children waiting to be adopted from the United States' foster care system.²⁷⁴ The United States is failing to find sufficient numbers of foster and adoptive families for waiting special needs and traumatized older children within the United States, let alone all such children around the world. Although some blame "barriers" for the failure to find sufficient adoptive placements for children within the United States, and claim based on survey data that the numbers of those willing to adopt are sufficient, survey-based data on those willing to adopt much older and special needs children may not reflect what individuals are willing and able to act upon. While eliminating needless barriers to adoption from the foster care system in the United States may be a laudable goal, the number of families truly equipped and willing to parent much older, traumatized, and special needs children is likely less than the need.²⁷⁵

An additional strength is the generally pro-adoption culture in the United States, which provides significant cultural support for those who adopt and for the legal and cultural institution of adoption. The United States is the most adoption-orientated nation in the world, with almost half of all adoptions worldwide occurring in or to the United States (including both domestic adoptions and intercountry adoptions to the United States). This means that Americans adopt almost as many children as all other countries combined.²⁷⁶ Unfortunately there is serious weakness mixed with this strength, as this pro-adoption culture commonly includes naïve and false expectations about adoption, due in part to the unfortunate heritage of an "as if," closed-records system which denigrates the significance of original families and relies on an often exclusivist concept of the nuclear adoptive family.²⁷⁷ Nonetheless, if this pro-adoption culture could be channeled through more humane and realistic expectations and viewpoints on adoption, the generally pro-adoption culture in the United States could make a positive contribution to the intercountry adoption system.

2. Necessary Reforms

(a) *The United States is Moving Toward Universal Accreditation and Sometimes Taking More Seriously the Risks of Abusive Adoption Practices*

In order for the United States to be a primarily positive influence on the intercountry adoption system, it would need to make the reforms necessary to

²⁷⁴ See *supra* note 150 and accompanying text.

²⁷⁵ Cf. Elaine Kamarck et al., *Eliminating Barriers to the Adoption of Children in Foster Care* 6 (Harvard Kennedy Sch., Malcolm Wiener Ctr. for Soc. Pol'y, Working Paper, 2012), available at <http://www.hks.harvard.edu/centers/wiener/research-publication/s/working-papers>.

²⁷⁶ See U.N. DEP'T OF ECON. & SOC. AFFAIRS, CHILD ADOPTION: TRENDS AND POLICIES, at xv–xix, 66–67, 355 (2009), http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf.

²⁷⁷ See sources cited *supra* notes 139–140.

contain the risks inherent in the privatized adoption system that predominates in the United States. It is important to underscore that there are ways to reform the United States' system that are compatible with the privatized approach to adoption which seems likely to predominate for the foreseeable future in the United States. Indeed, some of the needed reforms are already occurring.

One of the needed reforms—universal accreditation—was finally passed by the Congress in January 2013. Universal accreditation extends the accreditation and approval processes to agencies and persons involved in intercountry adoptions to and from non-Hague nations, thereby closing the large loophole under which non-accredited agencies and persons in the United States have been able to serve as the primary providers for international adoptive placements. It is a positive, albeit belated, step that Congress finally enacted such legislation. The Intercountry Adoption Universal Accreditation Act of 2012 passed the Senate on December 5, 2012, the House on January 1, 2013, and was signed by the President on January 14, 2013, with implementation to take place in 18 months, on July 14, 2014.²⁷⁸

Second, there is some evidence that the United States government is taking the risks of abusive adoption practices more seriously than in the past, at least in some situations. This is evident, for example, in the decision that the United States government has made in not immediately re-opening adoptions from Cambodia and Vietnam after those nations ratified the Hague Adoption Convention.²⁷⁹ Both nations had deeply troubled histories regarding abusive adoption practices, and have been closed to adoptions to the United States for substantial periods of time.²⁸⁰ The decision to not re-open immediately upon a nation ratifying the Hague Adoption Convention indicates that the Central Authority of the United States believes it must be responsible to review the actual child welfare and intercountry adoption systems and processes in existence in potential partner nations, rather than merely relying on formal Hague ratification. This development also indicates that the United States government is acting based upon an institutional memory of at least some past intercountry adoption scandals, which can be a difficult

²⁷⁸ See S. 3331 (112th): *Intercountry Adoption Universal Accreditation Act of 2012*, *supra* note 226; U.S. Dep't of State, Bureau of Consular Affairs, *The Universal Accreditation Act of 2012 Becomes Law*, INTERCOUNTRY ADOPTION (Jan. 15, 2013), http://adoption.state.gov/about_us/uaa_becomes_law.php.

²⁷⁹ See U.S. Dep't of State, Bureau of Consular Affairs, *Country Information: Adoption Intercountry Adoption, Cambodia*, http://adoption.state.gov/country_information/country_specific_info.php?country-select=cambodia (last updated Oct. 2009); U.S. Dep't of State, Bureau of Consular Affairs, *Update on Intercountry Adoptions Between the United States and Cambodia*, INTERCOUNTRY ADOPTION (Jan. 2, 2013), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=cambodia_5; U.S. Dep't of State, Bureau of Consular Affairs, *Notice: Special Advisor Jacobs Visits Vietnam*, INTERCOUNTRY ADOPTION (Dec. 2012), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=vietnam_5.

²⁸⁰ See Maskew, *supra* note 161, at 621; *see also* sources cited *supra* notes 161, 164.

achievement in a context where there is substantial turnover of personnel in the relevant governmental offices.²⁸¹

(b) Necessary Reforms Which Are Not Currently under Active Consideration

Unfortunately, despite these positive developments, there is little or no movement in other areas where there is a critical need for reform. Not surprisingly, many of these needed areas of reform track areas of weakness noted earlier in this Article.

3. Financial Limitations

The United States government needs to create regularized procedures that would concretely limit the financial aspects of intercountry adoption. As noted above, Article 32 of the Hague Adoption Convention forbids unreasonable professional fees as well as remuneration which is “unreasonably high in relation to services rendered.”²⁸² In addition, Article 32 prohibits “improper financial or other gain.”²⁸³ Article 8 of the Hague Adoption Convention states that, “Central Authorities shall take . . . all appropriate measures to prevent improper financial or other gain in connection with an adoption and to deter all practices contrary to the objects of the Convention.”²⁸⁴

Unfortunately, the United States government in the Final Rule chose to define fees, wages, and salaries as reasonable so long as they are within the “norms for compensation within the intercountry adoption community in that country.”²⁸⁵ The United States’ interpretation entirely fails to fulfill the purposes of Articles 8 and 32 of the Convention, which are to create safeguards against the “abduction, the sale of, or traffic in children,” as well as to safeguard the subsidiarity principle.²⁸⁶ Indeed, this concern that intercountry adoption without financial controls could lead to child trafficking was clearly stated prior to the creation of the Hague Adoption Convention, when the Supreme Court of India in 1984 warned that foreign adoptions could become a form of “profiteering and trafficking in children.”²⁸⁷ The United States needs to change its definition of reasonable remuneration, fees, and compensation to norm it with child welfare work in the relevant country, keeping in view living standards in the relevant nation. The United States also needs to remove the current implication in its regulations that for-profit entities are permitted a greater amount or degree of financial gain, for

²⁸¹ See sources cited *supra* notes 161–166, 279.

²⁸² Hague Adoption Convention, *supra* note 5, at art. 32.

²⁸³ *Id.* art. 32(1).

²⁸⁴ *Id.* art. 8.

²⁸⁵ 22 C.F.R. § 96.34(d) (2012).

²⁸⁶ Hague Adoption Convention, *supra* note 5, at pmbl., art. 1.

²⁸⁷ See Smolin, *supra* note 11, at 435 (quoting Laxmi Kant Pandey, (1984), 2 S.C.C. at 264, 270, 273).

this undercuts the fundamental need for safeguards regarding the financial aspects of intercountry adoption.²⁸⁸

This change in the definition of reasonable compensation, however necessary, would not be sufficient. At present, regulation of financial gain, remuneration, fees, or compensation is relevant only within the context of the substantial compliance standard for accreditation or approval. Further, the substantial compliance standard is enforced in the context of the Central Authority outsourcing accreditation and oversight functions primarily to COA, which itself employs a volunteer-based system of peer-review in which adoption agency workers review the work of other adoption agencies.²⁸⁹ Such a system is incapable of altering the pre-existing culture of unbridled and unlimited fees, profits, compensation, and remuneration. Rather, the United States should create and enforce concrete and specific limits on the amounts that could be charged for adoptions to and from particular partner nations. Thus, the United States' Central Authority needs to create specific limits on, for example, adoptions of children from China, Ethiopia, and India, working with those governments where possible. Specific limitations would need to be developed and applied to those funds paid to persons or organizations working in the partner nation, with specific limitations also developed and applied to funds retained by agencies and individuals within the United States. In addition, the issue of donations, whether termed voluntary or not, should be addressed.²⁹⁰

4. *Increasing Financial Transparency*

Along with providing limits on the financial aspects of intercountry adoption, the United States must provide a greater degree of financial transparency. As a practical matter, the Central Authority is in a position to obtain financial information on each Hague and non-Hague adoption to the United States, since it must grant permission for the child to enter the United States under a Hague or orphan visa. The current degree of transparency, as provided by the Annual Reports dictated by the Intercountry Adoption Act of 2000, is completely inadequate on many levels: it is unclear what is being included in its lump-sum totals, it includes only Hague adoptions, and includes only a median and a high/low range.²⁹¹

²⁸⁸ See *supra* note 240 and accompanying text.

²⁸⁹ See 22 C.F.R. § 96.27. See generally *Hague Accreditation and Approval: Policies & Procedures Manual*, COUNCIL ON ACCREDITATION, https://coa.my.salesforce.com/sfc/p/300000000aAUdkOa6US_sg2UEif08XWFNvncz1A= (last visited June 15, 2013).

²⁹⁰ See Smolin, *supra* note 47, at 178–79 (arguing that the United States should limit donations and other fees for adoption).

²⁹¹ See, e.g., FY 2012 ANNUAL REPORT, *supra* note 159, at 4 tbl.5; FY 2011 ANNUAL REPORT, *supra* note 159, at 4 tbl.5; U.S. DEP'T OF STATE, *supra* note 263, at 5 tbl.6.

5. Agency Accountability: Unsupervised Providers and Waivers of Liability

Beyond financial limits and transparency, another critically important area is accountability for the agencies and persons in the United States primarily responsible for each adoption. As noted above, the loopholes of unsupervised providers and waivers of liability allow United States adoption agencies to shift almost all risks of abusive adoption practices to adoption triad members.²⁹² These loopholes need to be removed to provide concrete incentives for United States adoption agencies to take responsibility for the adoptions they facilitate. It is generally accepted, in the realms of international trade, or humanitarian aid, that entities in rich nations bear significant responsibility for what is done by their foreign partners in developing and transition economies. If a factory in a developing nation employs child labor or engages in other substandard labor practices, or if money from a United States NGO is diverted by their foreign partners for personal gain or illicit purposes, the assumption is that the United States or European entity that sent the money, chose their foreign partners, and initiated a relationship with a business or humanitarian purpose, is significantly responsible.²⁹³ The policy that United States adoption agencies have little or no legal responsibility for the sensitive tasks performed within nations of origin, even though United States agencies commonly choose their foreign partners, supply the funds, and often significantly structure the entire program, is precisely the kind of policy that is responsible for corrupting and destroying intercountry adoption systems.²⁹⁴

6. Investigating and Prosecuting Abusive Adoption Practices

The United States should operate under a legal and ethical mandate to investigate any credible claim of significant abusive adoption practices, including especially any credible claim of the “abduction, the sale of, or traffic in children”²⁹⁵ in the context of intercountry adoption. The duty should exist for both Hague and non-Hague adoptions, and should go back in time indefinitely.

The basis of this duty flows from the fact that the United States government is not a mere bystander in such cases, nor even a mere regulator of a category of cases where a certain number involve wrongdoing. Intercountry adoptions are processed individually. In each incoming case, the United States government has

²⁹² Smolin, *supra* note 47, at 192–200; see *supra* notes 206–217 and accompanying text.

²⁹³ See, e.g., Beenish Ahmed, *Chinese Labor Practices Sour Apple Consumers*, NPR (Feb. 6, 2012, 11:15 AM), <http://www.npr.org/2012/02/07/146466331/chinese-labor-practices-sour-apple-consumers> (suggesting Apple’s responsibility for poor labor conditions in its suppliers’ facilities in China); *Corporate Social Responsibility (CSR)*, INT’L LABOUR ORG., <http://www.ilo.org/ipecc/Action/CSR/lang--en/index.htm> (last visited Apr. 1, 2013).

²⁹⁴ See *supra* notes 206–217 and accompanying text.

²⁹⁵ Hague Adoption Convention, *supra* note 5, at art. 1(b).

issued either an orphan visa or a Hague visa.²⁹⁶ In either case, the United States government has, in effect, indicated that the child was a properly relinquished or abandoned orphan eligible for adoption, rather than the victim of the “abduction, the sale of, or traffic in children.”²⁹⁷ Where such victimized children have entered the United States under the guise of an orphan or Hague visa, the United States government has unwittingly allowed its official processes to be used for illicit purposes. This is the essence of the concept of child laundering: children are illicitly obtained by force, fraud, or funds, falsely represented as a properly relinquished or abandoned orphan, and then processed through the official channels of the intercountry adoption system.²⁹⁸ While the United States itself may be a victim of a scam, the United States is still responsible to adoption triad members who depend on the integrity of intercountry adoption systems, including the Hague and orphan visa processes provided by the government.

The duty of the United States to investigate cases of abusive adoption practices is also related to the problem of policy error and regulatory failure. For example, consider again the problematic history of intercountry adoptions from Guatemala to the United States. The government was aware—along with the adoption community—that a typical Guatemalan adoption involved paying a Guatemalan attorney \$15,000 to \$20,000 USD per child of unregulated money, but maintained its policy posture of not limiting adoption fees, costs, compensation, and remuneration. Indeed, there was substantial knowledge of wrongdoing pertaining to Guatemalan adoptions within the United States government for a very long period of time prior to the closure of the program.²⁹⁹ It is telling that Tom Difilipo, Executive Director of the Joint Council for International Children’s Services, which at various times has included as member organizations a significant percentage of United States intercountry adoption agencies,³⁰⁰ stated, “If we have the greatest laws and the greatest regulations but are still sending \$20,000 anywhere—well, you can bypass any system with enough cash.”³⁰¹ It is, in other words, completely predictable that a refusal to limit and regulate the money in intercountry adoption will lead to “the abduction, the sale of, or traffic in children” in the context of intercountry adoption.³⁰² When the United States processes large numbers of orphan visas while simultaneously permitting such large amounts of unregulated money to be paid to Guatemalan attorneys, the

²⁹⁶ See U.S. DEP’T OF STATE, OFFICE OF CHILDREN’S ISSUES, INTERCOUNTRY ADOPTION: FROM A TO Z 23–24, http://adoption.state.gov/content/pdf/Intercountry_Adoption_From_A_Z.pdf

²⁹⁷ Hague Adoption Convention, *supra* note 5, at art. 1(b).

²⁹⁸ Smolin, *supra* note 47, at 115.

²⁹⁹ See Smolin, *Future*, *supra* note 1, at 476–80. See generally ERIN SIEGAL, THE U.S. EMBASSY CABLES: ADOPTION FRAUD IN GUATEMALA (2011) (discussing government involvement with Guatemalan adoption fraud); *supra* Part III.C.

³⁰⁰ See JOINT COUNCIL ON INT’L CHILDREN’S SERVS., *supra* note 154.

³⁰¹ E.J. Graff, *The Lie We Love*, FOREIGN POL’Y, Nov.–Dec. 2008, at 59, 66.

³⁰² Hague Adoption Convention, *supra* note 5, at art. 1(b).

resulting cases of misconduct are to a significant degree due to the policy decisions and regulatory failure of the United States government. The government's duty to investigate is augmented by the fact that the government is investigating the results of its own mistaken policies and rules.

Cases in which a child obtained by abduction, purchase, or fraudulent misrepresentation are mislabeled as adoptable "orphans" and then processed for intercountry adoptions are in many respects the "plane crashes" of the intercountry adoption system. Just as an airplane crash is extensively investigated by the government to determine its cause, and see what changes are necessary to safeguard against those disasters in the future, there should be extensive investigation of child laundering cases in the intercountry adoption system, with the fruits of the investigation used as a basis for making systemic changes to the regulations and system.³⁰³

The duty to investigate is necessary to correct the misperception of child laundering as a victimless act. Until the government puts itself in the position of consistently interviewing the families that have wrongfully lost their children to illicit adoption practices, it is likely to discount the significance of such wrongdoing. Until the government puts itself in the position of interacting with the adoptee and adoptive families involved in such cases, those involved will abstract and minimize the wrongs involved. Indeed, the duty to investigate is necessary because abusive adoption practices are not victimless crimes. Adoption impacts those personally involved for a lifetime. Investigating abusive adoption practices itself sends a signal to victims that these wrongs matter. Conversely, failing to investigate sends a signal of impunity to wrongdoers and agencies while re-victimizing those harmed by the abusive practices.³⁰⁴

Unfortunately, government policy, with some notable exceptions, now is to accept largely as a *fait accompli* without remedy or need of substantial investigation any instance where a stolen, purchased, or kidnapped child is with their adoptive family in the United States. The U.S. government, by reference to a claimed lack of jurisdiction or simply inaction, appears not to feel responsible to take substantial action in such cases.³⁰⁵ In addition, the government frequently seems to step away from past abusive practices as though they did not matter and it

³⁰³ Desiree Smolin is the source for this plane crash analogy.

³⁰⁴ See generally Smolin, *supra* note 187 (detailing the harms of child laundering in intercountry adoption); David M. Smolin & Desiree L. Smolin, The Aftermath of Abusive Adoption Practices in the Lives of Adoption Triad Members: Responding to Adoption Triad Members Victimized by Abusive Adoption Practices, Presented at Joint Council on International Children's Services Annual Symposium (Apr. 18, 2012), available at http://works.bepress.com/david_smolin/12/.

³⁰⁵ See, e.g., Romina Ruiz-Goiriena, *Guatemalan Mom to Ask U.S. Court Help on Adopted Girl*, ASSOCIATED PRESS (May 15, 2012, 8:30 PM), <http://bigstory.ap.org/content/guatemala-mom-ask-us-court-help-adopted-girl>. The author's statements about the responses of the United States government to such cases are based in part on substantial but confidential interactions.

was only necessary to concentrate on the present and future. One difficulty with this practice is that, in the nature of adoption, many abusive practices only come to light years after the adoptive placement. Hence, a policy that past cases will not be investigated means that most cases will not be investigated.

It should be stressed that this duty to investigate applies equally to both Hague and non-Hague adoptions. So long as the United States chooses to allow non-Hague adoptions, it is responsible to ensure that these adoptions, often acknowledged to be relatively high-risk, do not involve the adoption of children obtained illicitly, or other significantly abusive practices. The United States cannot simultaneously operate systems involving a higher risk category of intercountry adoptions, while reducing the duty to investigate wrongdoing in such higher risk cases, as this represents an absurd policy which eliminates investigations in many instances where they are most needed.

Although there have been a few criminal prosecutions,³⁰⁶ the laws and policies of the United States regarding criminal or penal action have also sent a message of minimization, as though the government considered abusive adoption practices a victimless crime. For example, although the Intercountry Adoption Act of 2000 (IAA) does provide civil and criminal penalties for obtaining children through misrepresentation or financial inducement for intercountry adoption,³⁰⁷ this Act only applied to Convention cases.³⁰⁸ This limited application made this section inoperative until the United States ratified the Hague Adoption Convention in April 2008, and because most intercountry adoptions to the United States remain non-Hague adoptions, as of 2013 these enforcement provisions are inapplicable to the majority of intercountry adoptions to the United States.³⁰⁹ The passage of the Intercountry Adoption Universal Accreditation Act of 2012 (UAA) appears to make the civil and criminal penalties of the IAA applicable to non-Convention adoptions beginning July 14, 2014.³¹⁰ However, the wording of the UAA literally makes these provisions applicable only to “any person offering or providing adoption services,”³¹¹ which may not encompass all persons who could be involved in illicit acts regarding the “relinquishment of parental rights or the giving of parental consent”³¹²—although it should reach adoption service providers who engage others as agents, where the agents engage in such illicit conduct.³¹³

³⁰⁶ See, e.g., *supra* note 161 and accompanying text (describing criminal prosecution regarding misconduct in Cambodian adoptions); Beth Tribolet et al., *Four Sentenced in Scheme to ‘Adopt’ Samoan Kids*, ABC NEWS (Feb. 26, 2009), <http://abcnews.go.com/TheLaw/story?id=6958072&page=1#.UNMvcORIX9E>.

³⁰⁷ See IAA, *supra* note 175, at § 404.

³⁰⁸ See *id.* at 404(a)(2)(B), 42 USC § 14944(a)(2)(B).

³⁰⁹ See Smolin, *supra* note 47, at 189; *supra* notes 218–225 and accompanying text.

³¹⁰ See *Intercountry Adoption Universal Accreditation Act of 2012*, Pub. L. No. 112-276, § 2, 126 Stat. 2466, 2466 (2013).

³¹¹ *Id.* § 2(a).

³¹² 42 U.S.C. § 14944(a)(2)(B).

³¹³ *Id.* § 14944(a)(3).

The penal provision of the IAA on children obtained through misrepresentation or financial inducement for intercountry adoption originally was intended to fulfill a Treaty obligation created when the United States ratified the Optional Protocol to the Convention on the Rights of the Child (Sale of Children).³¹⁴ This Protocol requires ratifying states to cover within their criminal or penal laws “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”³¹⁵ The decision of the United States, prior to passage of the UAA, to treat this provision as only requiring a penal law literally for Hague Adoption Convention adoptions represented a very narrow interpretation of the Treaty. A more natural reading would be that it is necessary to have a criminal or penal law for all international adoptions that violate the standards of the Hague Adoption Convention on improper consents, regardless of whether it is literally a Convention adoption, because the norm of not obtaining children by fraud or financial inducement for adoption is presumably a broadly held, even universal, norm. Inducing consent to adoption by misrepresentation or monetary inducement is, after all, a *malum in se* (evil in itself) wrong, rather than merely a *malum prohibitum* (evil because prohibited) wrong. Yet, the narrow approach of the IAA treats these fundamental wrongs as though they are merely some kind of technical violation.³¹⁶

Similarly, the continuing insistence by the United States government that the term “trafficking” cannot be applied to obtaining children for adoption by abduction, fraud, or purchase, so long as the child ends up in an adoptive home that is not otherwise abusive, represents a minimizing interpretation of abusive adoption practices which is at odds with the language of the Hague Adoption Convention itself.³¹⁷ Both the preparatory materials of the Hague Adoption Convention and the Convention itself clearly use the word trafficking to include adoptions where children have been purchased, sold, abducted or otherwise obtained illicitly.³¹⁸ Practically speaking, the refusal of the United States government to use the trafficking terminology of a Treaty which the United States has ratified provides an unfortunate foundation for the government’s policy of not actively investigating or prosecuting most such cases. By contrast, the government has focused to a significant degree on assisting those whom it does view as

³¹⁴ See Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, May 25, 2000, G.A. Res. 263, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc A/RES/54/263 (Mar. 16, 2001).

³¹⁵ *Id.* art. 3(1)(ii).

³¹⁶ See Smolin, *supra* note 47, at 188–92; Smolin, *supra* note 149, at 281, 299–303.

³¹⁷ See Hague Adoption Convention, *supra* note 5, at art. 1(b) (noting that the object of the Convention is to prevent “traffic in children”); E.J. Graff, *Call it Trafficking*, AM. PROSPECT (Jan. 3, 2013), <https://prospect.org/article/call-it-trafficking>.

³¹⁸ See Hague Adoption Convention, *supra* note 5, at pmb., art. 1(b); Smolin, *Future*, *supra* note 1, at 447–62 (assessing the creation and final language of the Adoption Convention).

trafficking victims.³¹⁹ While there can be no doubt of the propriety of the government policy of focusing particularly on the victims of sex and labor trafficking, there is no need for such focus to come at the expense of such a strong minimization of the harms of adoption trafficking.

B. Differential Risks of Partnering with the United States

1. The United States as a Receiving Nation

Under its present policies, the United States as a receiving nation brings specific strengths and threats for nations of origin. Positively, the United States has large numbers of prospective adoptive parents, some of whom are willing to adopt special needs and older, traumatized children. The United States also has perhaps the most pro-adoption culture in the world, although tinged by unfortunate misconceptions and false expectations concerning the nature of adoption. Negatively speaking, the privatized adoption system of the United States threatens to corrupt and destroy intercountry adoption systems through large numbers of adoption agencies competing for adoptive children with inappropriately large financial inducements, including various combinations of fees, compensation, gain, and donations.

Although each nation must make its own determinations, it seems most likely that nations of origin that possess the capacities to limit the numbers of foreign adoption agencies, to limit and make transparent the financial aspects of intercountry adoption, and to otherwise safeguard against corruption and the falsification of documents, would have the best capacity to partner with the United States for intercountry adoptions without suffering negative impacts. Nations of origin have the right, and arguably the duty, to provide the limitations and transparency which the United States itself refuses to provide. Once such limitations and transparency are put in place by the nation of origin, the strengths of the United States as a receiving nation may become beneficial.

However, nations of origin that have poor governmental capacities, pervasive corruption, a significant number of families living in extreme poverty, and an inability or unwillingness to limit the number of foreign agencies and the financial aspects of intercountry adoption, are likely to experience the negative phenomena of cycles of abuse; slash and burn adoption; large-scale corruption and falsification of documents; and “the abduction, the sale of, or traffic in children”³²⁰ when they partner with the United States for intercountry adoption. While some actors in such

³¹⁹ See, e.g., U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 33 (2012), <http://www.state.gov/documents/organization/192587.pdf> (limiting definition of trafficking to “the act of recruiting, harboring, transporting, providing or obtaining a person for compelled labor or commercial sex acts through the use of force, fraud, or coercion”); *Identify and Assist a Trafficking Victim*, U.S. DEP’T OF STATE, <http://www.state.gov/j/tip/id/index.htm> (last visited June 16, 2013).

³²⁰ Hague Adoption Convention, *supra* note 5, at art. 1(b).

nations will become financially advantaged for a period of time by partnering with the United States, or achieve some other end, the results for the child welfare and adoption systems of such nations can be disastrous.

A significant issue for many nations of origin is the place and role of intercountry adoption in relationship to the development of a broader child welfare system. From a theoretical perspective, intercountry adoption is an option within broader child and human welfare systems, in which family preservation and domestic adoption are prioritized over intercountry adoption, and the determination of whether other options are considered ahead of intercountry adoption turns ultimately on the best interests of the child. However, the practical reality is that many—perhaps most—nations have either no real operational child welfare system, or a system that is seriously deficient. This raises the question of whether intercountry adoption, as an option that will serve only a relatively small minority of vulnerable children, will be neutral, helpful, or detrimental to the development of the overall child welfare system of the participating sending nations. Those who argue that it is beneficial point to the possibilities for creating a flow of donations and grants from abroad to child welfare systems and institutions in nations of origin, due to linkages created by intercountry adoption. Those who argue that intercountry adoption is detrimental argue that it can be impossible to develop a proper child welfare system in the face of the distortive financial incentives to place children internationally. Both arguments are likely to be true to varying degrees in varying places. The United States of course plays a critically important role in both the helpful and detrimental impacts of intercountry adoption for child welfare systems in sending nations, for the United States is both a primary source of donations and grants, and also a primary contributor to the distortive impact of intercountry adoption due to large-scale financial incentives to place children internationally. This makes the decision of whether or not to partner with the United States for intercountry adoption a double-edged sword. Of course, if the United States reformed its own policies and practices, this dilemma might be significantly reduced. In addition, in some nations intercountry adoption plays a minor role in both the strengths and flaws of the domestic child welfare system, making both intercountry adoption, and the relationship to the United States, insignificant to the question of how to improve the domestic child welfare system.

Nations—such as Russia—with significant numbers of children living in often poor-quality institutional care, including significant numbers of children with disabilities, severe medical conditions, and trauma potentially could benefit from a linkage to the United States. The willingness of some Americans to knowingly adopt much older children and children with various special needs could be highly beneficial. However, in the past such linkages have been marred by systemic failures that created a significant incidence of disastrous and tragic outcomes, such as death, disruption, returned children, abused children, and children adopted by pedophiles. Contributing to these disastrous outcomes have been systemic failures concerning the accuracy of the information about the children, the matching of such children to families that could safely and effectively respond to the special

needs of those children, the training and preparation of prospective adoptive parents, and the provision of post-placement reports and services. The United States has contributed to these difficulties in systemic ways by the flaws in its own laws and policies, as outlined in this Article.³²¹ The tendency of some in the United States to minimize these poor outcomes by minimizing their numbers and pointing to large numbers of successful adoptions unfortunately diverts attention away from the need for reform in these areas.³²² As in other areas of intercountry adoption, the failure of reform leads to an unfortunate all-or-nothing debate about either continuing a deficient set of practices in order to keep intercountry adoption open, or instead closing intercountry adoptions due to abusive practices despite potential benefit to some children. Of course in such cases of systemic deficient practices there is often fault as well on the side of the country of origin, with the most significant fault being the operation of a child welfare system that substantially relies on poor quality institutional care with often horrific results for children. Thus, the question is whether nations of origin can use their partnerships with the United States to create momentum for reform of both their own systems and the system of the United States.

There is a danger that the arguments used in this Article, or similar arguments, will be used as a justification for nations refusing to partner with the United States for intercountry adoption, when the real reasons for such decisions are political considerations unrelated to child welfare. For example, the Russian government's ban on adoptions to the United States that was to become effective on January 1, 2013, including a notification of termination of the bilateral U.S.-Russia Adoption Agreement that terminates the Agreement as of January 1, 2014, was retaliatory and based on diplomatic and human rights disputes unrelated to child welfare and adoption.³²³ This hardly seems like a proper occasion or method for making significant child welfare decisions. It is difficult to be hopeful that the provisions within the Russian law calling for improvements to their domestic child welfare system will be effectively implemented in sufficient time to avoid harmful impacts from the ban, given the origins of the bill in concerns unrelated to child welfare. However, it is possible that the ban may not even reduce intercountry adoptions

³²¹ See, e.g., Smolin, *Future*, *supra* note 1, at 466–67, 473–76 (detailing Russian child welfare system failures and adoption problems).

³²² See, e.g., Pamela Constable, *Russian Orphan Reaches D.C. Home Just as Moscow Bans Further U.S. Adoptions*, WASH. POST (Jan. 7, 2013), http://www.washingtonpost.com/local/russian-orphan-reaches-dc-home-just-as-moscow-bans-further-us-adoptions/2013/01/07/7ed81d3c-5688-11e2-8b9e-dd8773594efc_story.html.

³²³ See William Englund & Tara Bahrapour, *Russia's Ban on U.S. Adoption Devastates American Families*, WASH. POST (Dec. 28, 2012 9:00 AM), http://www.washingtonpost.com/world/europe/russia-set-to-ban-us-adoptions/2012/12/27/fd49c542-504f-11e2-8b49-64675006147f_story.html; U.S. Dep't of State, Bureau of Consular Affairs, *Russia Alert: Legislation to Ban Intercountry Adoption by U.S. Families*, INTERCOUNTRY ADOPTION (Jan. 3, 2013), http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=russia_8.

from Russia, as nearly 70% of adoptions from Russia in 2010 were to nations other than the United States.³²⁴ Thus, adoptions to other nations may increase as adoptions to the United States end. Hence, the reactions to the ban from both proponents and opponents of intercountry adoption may be misplaced, as the ban may be more significant for relations between Russia and the United States than for intercountry adoption itself. While it is easy—but still appropriate—to criticize the Russian government for the ban, the responsibility of the United States should not be overlooked. Tragic outcomes of intercountry adoptions helped make intercountry adoption controversial and relatively unpopular in Russia. Those tragic outcomes are directly linked to some of the weaknesses in practices and policies of the United States and American agencies noted in this Article. In addition, it should be noted that adoptions from Russia to the United States were already down by 80% from their 2004 peak prior to the ban, and certainly intercountry adoption to the United States was not going to reach more than a small proportion of vulnerable and institutionalized Russian children.³²⁵ Thus, while the Russian ban on intercountry adoption to the United States is not a proper child welfare decision, intercountry adoption apparently was a tempting target for diplomatic retaliation due to the numerous instances of tragic outcomes in Russian adoptions to the United States, the notorious role of money and corruption, and the related lack of popularity within Russia of sending children to the United States for adoption. Perhaps if the United States had instituted different and more effective policies regarding the regulation of non-Hague adoptions, agency responsibility for the accuracy of child study forms, and the enforcement of requirements for post-placement reports, as well as having a more effective system of post-adoption services, most of those tragedies could have been avoided, with the result that intercountry adoption to the United States would not have been targeted in this way.

2. *The United States as a Sending Nation*

The United States as a sending nation presents a paradoxical situation that seems to contradict some of the fundamental premises of the Hague Adoption Convention. It is illogical for the most adoption-orientated nation in the world, and the largest receiving nation by far, to be sending children to unrelated adoptive parents in other nations for intercountry adoption. While one might expect a limited number of intercountry adoptions in situations of relative adoption and due to special relationships between original and adoptive families, much more than

³²⁴ See Peter Selman, *Global Trends in Intercountry Adoption: 2001–2010*, 44 ADOPTION ADVOCATE 1, 11 tbl.16 (2012) (indicating that 1,082 of 3,387 adoptions from Russia were to the United States in 2010).

³²⁵ See Smolin, *Future*, *supra* note 1, at 473; U.S. Dep't of State, Bureau of Consular Affairs, *Country Information: Russia* (Apr. 2008), http://adoption.state.gov/country_information/country_specific_info.php?country-select=russia (last updated Apr 1, 2013) (noting 5,862 adoptions to U.S. in FY 2004 declining to 962 in FY 2011).

that is occurring. It is evident that there are some regularized programs of substantial size between the United States and at least Canada and the Netherlands, involving adoptive families who were unrelated strangers to the child. Significantly, these are officially Hague Adoptions, since both nations are parties to the convention, despite the fact that they appear to violate the subsidiarity principle of the Hague Adoption Convention.³²⁶

From this author's perspective, these regularized programs probably do not conform to the letter or spirit of the Hague Adoption Convention, and thus should not exist. Evaluating such programs requires an understanding of the privatized and financially lucrative system of infant relinquishment adoption in the United States. The laws of many states in the United States toward original parents are punitive in their extremely short revocation periods, toleration of bait and switch tactics used to induce original mothers and families to relinquish, and attorneys' use of harsh litigation methods against vulnerable single mothers. The privatized culture of these kinds of adoptions in the United States presents a multilayered and complex market in children, with sharply differential pricing depending on the child's race and health, and with a shadowy line between unacceptable baby-selling and acceptable, sometimes large-scale, financial "assistance." The counseling received by original parents remains largely in the shadow of private interactions between vulnerable, often very young, parents, and individuals with a financial incentive to ensure that a certain number of adoptions occur. While many of these adoptions may be ethical by many standards, within this shadowy, moneyed, privatized world, there is little way to be sure.³²⁷

The Central Authority of the United States appears to be in no position, at present, to monitor the ethics of these adoptions; indeed, the Central Authority of the United States somehow is unaware of a large majority of Hague outgoing cases.³²⁸ Certainly the Central Authority cannot play much of a role ensuring the legal and ethical integrity of adoptions that occur outside of its knowledge.

Ironically, these adoption programs mirror much that has been wrong with adoptions between the United States as a receiving nation and vulnerable sending nations such as Cambodia, Ethiopia, India, Nepal, and Vietnam.³²⁹ There is a grave risk that all too often the demand side, fueled by the desire of adults to parent, coupled with the role of money, overwhelms all other considerations, including the best interests of children and the rights of the original parents and family of the child. Here, ironically, it is the desire of adults in Canada and Europe for children that is finding a fertile field within the United States.

³²⁶ See *supra* Part I.A–B (discussing subsidiarity principle); see *supra* notes 260–271 and accompanying text (discussing outgoing cases).

³²⁷ See *supra* Parts III.B & III.D.

³²⁸ See *supra* Part III.G.

³²⁹ See *supra* notes 155–172 and accompanying text.

C. The Future of Intercountry Adoption

Much of the future of intercountry adoption depends on the United States. And much of what the United States does regarding intercountry adoption depends on the predominant viewpoints of the adoption community in the United States, and the expressed viewpoints of nations that partner with the United States. If those actors were to consistently and urgently argue for reform by the United States or a political constituency were to form for reform, there is no inherent obstacle to the United States being a positive force in the intercountry adoption system. However, if the adoption community in the United States continues to be an effective political obstacle to reform and the nations that partner with the United States tread softly in discussions with this adoption giant, then the same patterns of slash and burn adoption and cycles of abuse will continue down a pathway of recrimination and decline. The adoption community can continue to be its own worst enemy, or it can champion the path of reform. In the end, it is a matter of clarity of vision, and political will.

One possible criticism of this Article is that it over-emphasizes the role of the United States in the intercountry adoption system. If the proportion of adoptions to the United States continues to fall, it is possible that the real result of the failures of the United States in regard to intercountry adoption will be the decreasing significance of the United States to the intercountry adoption system. The assumption that the United States is the central actor in the intercountry adoption system may in the future prove false, as the pathways of intercountry adoption change over time. Thus, the failure of the United States to sufficiently reform may also lead to an intercountry adoption system which increasingly bypasses the United States. From this perspective, the primary significance of the United States to the intercountry adoption system for the future may be as a negative example to other nations of what can go wrong if intercountry adoption and child welfare systems are not properly implemented and regulated.