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# International Adoption: The Child's Story

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International Adoption: The Child's Story

by

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**Georgia State Law 10/01/07**

**INTERNATIONAL ADOPTION: THE CHILD'S STORY**

**By Elizabeth Bartholet<sup>1</sup>**

*Millions of infants and young children worldwide are desperately in need of nurturing homes. Many are living in institutions, and many on the streets, and almost all these children will either die in these situations, or if they survive, will emerge into adulthood so damaged by their childhood experience, and so deprived of parenting, educational and other essential childhood opportunities, that they will be unable to function in the worlds of family and work. International adoption could provide significant numbers of nurturing homes for these children. However current policy restricts international adoption, limiting its ability to provide such homes. Moreover most of the powerful organizations of the world that claim to represent children's rights and interests have joined with other forces opposing international adoption.*

*This article argues that effective child advocacy is a challenge, given the fact that infants and young children are unable to voice their views or promote their interests, and the related risks that adults will use children to further various adult agendas. True empathy is required to imagine what children would want were they able to think rationally and make informed decisions. But if we were to imagine homeless children capable of making such decisions, then it seems obvious that they would choose international adoption given the horrors of institutional and street life, and the limited options for any kind of adequate home care in their countries of birth. Opposition to international adoption cannot be justified based on any best interest of the child principle, despite the claims of many children's rights organizations. Instead it is grounded in a group of commonly shared but deeply flawed ideas about children and the role of the state, and driven by adult agendas that are not truly informed by children's interests.*

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<sup>1</sup>Prof. of Law, Harvard Law School. This article is adapted from a speech given at Georgia State University Law School, Atlanta, GA, on 3/29/07, as the 40<sup>th</sup> Henry J. Miller Distinguished Lecture, "International Adoption: The Child's Story." Related issues are discussed in *International Adoption: Thoughts on the Human Rights Issues*, Bartholet 13 Buff. Hum. Rts. L. Rev. \_ (2007) [hereafter Bartholet, *International Adoption: Human Rights Issues*]. For earlier Bartholet writings on international adoption see *id* at note 1. The author has been deeply involved in international adoption issues since 1985, and draws on this experience as well as cited materials throughout this article.

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## **I. Introduction**

### *A. The Challenge of Child Advocacy*<sup>2</sup>

Advocating for children is a challenge for many reasons. Children are powerless in ways that even other groups we describe as powerless are not. African-Americans, women, the elderly, and persons with disabilities, can all vote, use their purchasing power to wield influence, and get out onto the streets to demonstrate. Children by definition cannot vote, and even those old enough to shop and to demonstrate are subject to their parents' decision-making power, and to special state restrictions. Infants cannot even speak to express their needs and desires, and young children don't have the knowledge base or the developed reasoning powers to make rational decisions for themselves. Children depend on adults both to figure out what children's interests are and to protect those interests.

The challenge of child advocacy is to ensure that children's interests are served when in the end

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<sup>2</sup> The author is the founder and Faculty Director of Harvard Law School's new Child Advocacy Program (CAP). CAP was created based on the premise that children's interests are not adequately served by existing law and policy, and is designed to educate students about children's issues, and to inspire them to take on the challenge of child advocacy. See CAP website, [www.law.harvard.edu/academic/CAP](http://www.law.harvard.edu/academic/CAP).

adults make the decisions. One favorite legal solution has been to rely on each child's birth parents to make decisions for that child, based in part on the idea that parents will be "naturally" motivated to promote their own children's best interests. Another favorite legal solution has been to rely on the state to act as "parens patriae," based in part on the idea that parents cannot be entirely trusted, and so the state should ensure that at least certain basic interests of the country's children are served. In the United States, as in other countries, we rely on both solutions in combination.<sup>3</sup> We give parents powerful rights to raise their children without undue interference by others including the state. At the same time we give the state some right to intervene in the family to protect children against abuse and neglect by their parents, and to insist on certain basics in terms of education, health, and protection against such exploitation as child labor.

People who see themselves as child advocates tend to divide between those who argue for more powerful parents' rights, and those who argue for a more powerful state. Some also argue for giving children their own legal "rights" – rights, for example, to make certain decisions, to take certain actions, and to speak and be represented in court,<sup>4</sup> but this kind of solution has limited applicability. As noted above, many children are too young to speak, or to make rational decisions, and appointing someone to represent them simply means assigning some adult to decide for them; moreover it is obviously not practicable to provide paid representatives or individual hearing rights to all children for all of the issues that matter. In the end we have to

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<sup>3</sup> See Douglas Abrams and Sarah Ramsey, CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 14-16 (3<sup>rd</sup> ed., West 2007).

<sup>4</sup> See discussions of children's liberation theories in Abrams and Ramsey, *supra* n.3, at 108-20.

rely for almost all decisions regarding children on adults, and as a practical matter this usually means relying either on their parents, or on the state in its *parens patriae* capacity.

The problem is that neither parents nor the state can be entirely trusted to promote children's best interests. Parents may be self-interested, or simply not especially fit as parents. The state may be helpful in countering parents' selfish interests or incompetence, but the state is selected and administered by adults, and there is always the risk that it may operate to further various adult group interests at the expense of children's interests. Indeed as I look at history and the current situation in terms of children's interests, it seems to me clear that children get the short end all too often, despite the regularly repeated mantra that children's best interests should be the guiding principle for law and policy. Policy makers – themselves adults of course – have to acknowledge the risk that children will not be well served, and then rise to the challenge of trying to understand in different substantive areas involving children, what truly will serve their interests, and how best to structure legal systems to promote those interests in an ongoing way.

### *B. The Challenge Exemplified: International Adoption*<sup>5</sup>

The issues at the heart of international adoption have to do with children too young to be making decisions by themselves, and often too young even to voice feelings, desires, views. Millions on millions of infants and young children are growing up in orphanages or on the streets having been orphaned, or abandoned, or placed by parents unable to care for them, or removed from

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<sup>5</sup> The term international adoption is used to refer to adoption of a child born to citizens of one nation by citizens of another.

such parents.<sup>6</sup> Ideally from the child's point of view, placement in a permanent nurturing home should be made as early in life as possible to maximize the chances for healthy emotional and physical development.<sup>7</sup> And since most potential adoptive parents want to parent children who have a decent chance at such development, there is much greater likelihood of placing children in adoptive homes if they are placed early. To date, the overwhelming majority of children placed in international adoption are placed in relatively early childhood.

International adoption is characterized by controversy, with most participants in the debate arguing that children's interests should be seen as central.<sup>8</sup> All claim to speak for the child, but some promote international adoption, arguing that it generally serves children's interests,<sup>9</sup> and others criticize it, arguing that it puts such interests at risk,<sup>10</sup> or condemn it altogether as an

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<sup>6</sup>There are said to be some 100 million children with no available caregivers. USAID, UNICEF, and UNAIDS, CHILDREN ON THE BRINK 2002: A JOINT REPORT ON ORPHAN ESTIMATES AND PROGRAM STRATEGIES at 22-24 (2002), available at [http://www.dec.org/pdf\\_docs/PNACP860.pdf](http://www.dec.org/pdf_docs/PNACP860.pdf). UNICEF reports that at least 2.6 million live in institutional care, noting that this is a significant under-estimate. Presentation by Alexandra Yuster, Senior Adviser, Child Protection, UNICEF, New York, NY, "Why Children are Homeless and Effective Responses – Socio-economic Factors," at conference, "Looking Forward: A Global Response for Homeless Children," Holt International Children's Services, Eugene, Oregon, Oct. 19-21, 2006.

<sup>7</sup> See Bartholet, Guiding Principles for Picking Parents, 27 Harv. Women's L. J. 323, at 333 and n. 63. See also Abrams and Ramsey, *supra* n.3, at 1-2.

<sup>8</sup> For a good recent discussion of the debate, see McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of the Children?*, 6 Whittier J. Child & Fam Advocacy 361 (2007) [hereafter McKinney, *International Adoption*].

<sup>9</sup> See, e.g., Bartholet, *International Adoption: The Human Rights Issues*, *supra* n. 1; Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. Intl. L.J. 179 (2003); McKinney, *International Adoption*, *supra* 8.

<sup>10</sup> See, e.g. Smolin, *Intercountry Adoption as Child Trafficking*, 39 Val. U.L. Rev 281 (2004); Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 Wayne L. Rev. 113 (2006); Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. Third World L.J. 25 (2006); Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 Yale J.L. & Feminism 101 (1998).

inherent violation of children's rights.<sup>11</sup>

International adoption is heavily regulated by the state, with applicable law typically describing itself as guided by the best interest of the child. Such law includes the domestic law of what are called "sending" and "receiving"<sup>12</sup> countries, and international law like the Convention on the Rights of the Child,<sup>13</sup> and the Hague Convention on Intercountry Adoption.<sup>14</sup> To date all this law has tended to function generally to restrict rather than to facilitate international adoption. The law focuses on the bad things that might happen when a child is transferred from a birth parent to an international adoptive parent, and then purports to try to protect against those things happening. So there are always rules about not paying or otherwise pressuring birth parents to surrender their children, and rules about screening prospective international adoptive parents for fitness. There are often rules designed to promote placing children in their country of birth if at all possible, whether with kin or in stranger foster care or in-country adoptive homes, in preference to placing them in adoptive homes abroad. There are sometimes rules forbidding international adoption altogether. There are very typically so many restrictions that even when international adoption is officially allowed it is effectively not allowed except for a tiny

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<sup>11</sup> Bainham, *International Adoption from Romania – Why the Moratorium Should not Be Ended*, 15 CHILD & FAM. L.Q. 223 (2003).

<sup>12</sup> Most countries function primarily as either sending or receiving countries, and as a general matter poorer countries fall into the sending category, and richer countries into the receiving category. The United States functions primarily as a receiving country, although it sends some number of children to other countries each year for adoption.

<sup>13</sup> G.A. Res. 44/25, Annex, U.N. GAOR, 44<sup>th</sup> Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter CRC].

<sup>14</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M 1134, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=69](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=69) [hereinafter Hague Convention].

percentage of all those who in its absence will grow up in institutions or on the streets. And almost never are there any rules that are designed to facilitate international adoption – to ensure that when children cannot be raised by their birth parents they are transferred as quickly as possible to those interested in adopting, most of whom will be available in the foreseeable future only through international adoption.

I believe that if policy-makers thought empathically as they should when dealing with children's issues, they would understand that international adoption generally serves children's interests. I believe they should lift the heavy hand of state regulation in this area, giving greater freedom to the private adult parties centrally involved – birth and potential adoptive parents – to do what they think best for themselves and the children at issue, which typically means transferring the children from the birth parents who are not in a position to care for the children to the adoptive parents who are. I say this not because I generally think parents can be trusted to protect children's best interests and see myself as a "parent rights" rather than a "state *parens patriae*" person. Indeed I often promote greater state intervention in the family to protect children against their parents.<sup>15</sup> I say it because in this international adoption area the negative, restrictive nature of typical governmental regulation seems to me to hurt children's interests by denying them what they most need – nurturing homes. I also believe that policy-makers should develop a new kind of positive regulation in this area that would function to facilitate rather than restrict

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<sup>15</sup> See Elizabeth Bartholet, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

international adoption.

However many who claim they speak for children, including powerful organizations like UNICEF, and many NGOs that purport to represent children's rights, take a negative view of international adoption, and accordingly argue that governing law should become ever more restrictive, and that the state should eliminate the private intermediaries that facilitate the transfer of children from birth to adoptive parents. Some contend that international adoption should be eliminated altogether.

These critics of international adoption have been both active and significantly successful.

Romania was forced to eliminate international adoption as a condition of being admitted to the European Union, by people in control of the European Parliament's process at the time who relied on the U.N. Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms to argue that international adoption was inherently a violation of children's rights.<sup>16</sup> UNICEF's official position gives a preference for

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<sup>16</sup>See generally *European parliamentarians break the Nicholson monopoly on international adoptions*, BUCHAREST DAILY NEWS, Mar. 8, 2006 [hereinafter *European parliamentarians*], available at <http://www.charlestannock.com/pressarticle.asp?ID=1190> (reporting on how the European Parliament's prior rapporteur on Romania, Baroness Emma Nicholson, had worked to make the EP's official position that Romania should ban international adoption, relying on unproven claims of adoption abuses; how the European commissioners had as a result pressured Romania into passing its new law banning such adoption; and how the current EP rapporteur on Romania, Pierre Moscovici, and many current members of the EP were now in favor of reversing the EP position, and urging Romania to open up international adoption again, based on disagreement with Nicholson's anti-international adoption philosophy, and on belief that such adoption was needed to serve children's needs). Romania's law banning international adoption except by a child's grandparents went into effect on January 1, 2005. See Testimony of Maura Harty, Asst. Secretary of State for Consular Affairs, Commission on Security and Cooperation in Europe (Helsinki Commission) (2005) [hereinafter *Harty Testimony*], available at [http://travel.state.gov/law/legal/testimony/testimony\\_2635.html](http://travel.state.gov/law/legal/testimony/testimony_2635.html). For the positions taken by Baroness Nicholson and Andrew Bainham, Special Adviser to her in her role as Rapporteur for Romania, and Fellow of Christ's College, Univ. Of Cambridge, see, e.g., Emma Nicholson, *Red Light on Human Traffic*, GUARDIAN UNLIMITED, July 1, 2004, available at <http://society.guardian.co.uk/adoption/comment/0,,1250913,00.html> (last visited March 13, 2007) (opposing international adoption, claiming with no substantiation that "[c]hildren exported abroad...are often subjected to paedophilia, child prostitution or domestic servitude"); Bainham, *supra* n. 11 (international adoption "amounts to a fundamental failure ...to comply with the

in-country foster care over out-of-country adoption.<sup>17</sup> UNICEF tends to see any country releasing significant numbers of children for international adoption as a problem, requiring restrictive regulatory attention,<sup>18</sup> and it often urges sending country governments to take monopoly control over the adoption process, eliminating the private intermediaries that tend to facilitate the adoption process. UNICEF and other adoption critics have in recent years focused particular attention on achieving such “reform” in Guatemala, a country that has for many years stood out in the international adoption world as a leader in terms of facilitating the adoptive placement of children in significant numbers and at young ages, so that they have a decent chance to develop normally.<sup>19</sup> Indeed, as this article goes to press, the U.S. State Department has called for an end to adoptions from Guatemala for the foreseeable future.<sup>20</sup> State monopoly power over international adoption has resulted in many other countries in South America effectively shutting down international adoption, so that only a small trickle of children get out, and these only after having spent two or three years or more in the kind of institutional care that puts children at high risk for permanent disabilities.

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requirements of the European Convention [for the Protection of Human Rights and Fundamental Freedoms 1950]” and the CRC, and accordingly no countries should be allowed to join the EU that engage in such adoption).

<sup>17</sup> See UNICEF’s position on intercountry adoption, “Inter-country adoption,” *available at* [http://www.unicef.org/media/media\\_15011.html](http://www.unicef.org/media/media_15011.html) (last visited April 23, 2007). UNICEF makes clear in this policy statement and in discussions of its significance that “permanent family” care in the form of foster care in-country is preferred to out-of-country adoption. Of course there is little to no foster care in most sending countries today, and even in countries like the U.S. where foster care is the primary placement for children in state care, it is rarely “permanent” even when it takes the form of kinship foster care.

<sup>18</sup> See, e.g., UNICEF, GUIDANCE NOTE ON INTERCOUNTRY ADOPTION IN THE CEE/CIS/BALTICS REGION 4 (2003), *available at* [http://www.unicef.org/ceecis/Guidance\\_note\\_Intercountry\\_adoption.pdf](http://www.unicef.org/ceecis/Guidance_note_Intercountry_adoption.pdf) (arguing for very last resort status for international adoption, claiming that it involves significant abuses, and stating that an increase in intercountry adoption numbers in any country should be taken as indication of a problem.).

<sup>19</sup> See discussion *infra* III B 2, text at nn. 64-65.

<sup>20</sup> See Warning on Guatemala dated September 2007, [http://travel.state.gov/family/adoption/country/country\\_389.html](http://travel.state.gov/family/adoption/country/country_389.html) (last visited 9/25/07).

The future of international adoption is uncertain. Such adoption has been increasing at a fairly steady pace since World War II, but it is not clear whether this pattern will continue. New countries keep opening up, and at the present time countries in Africa which never used to place any significant numbers of children in international adoption, have begun to do so, in part because of the pressure of the AIDS crisis. However adoption critics are having an impact. There is a general pattern of countries opening up with relatively few restrictions on international adoption, and then tightening the regulatory process so that fewer and fewer children are placed. Russia and China provide recent examples of this pattern, with Russia's figures falling in recent years,<sup>21</sup> and China having just announced a restrictive new set of rules, disqualifying many potential adoptive parents including, for example, singles.<sup>22</sup> For the first time since 1992, the numbers of international adoptees coming to the U.S. dropped in 2005 and then again in 2006,<sup>23</sup> and the numbers projected for 2007 indicate the likelihood of a significant additional drop. In the past couple of decades close to one-half of what were the top sending countries of the international adoption world effectively closed down international adoption.<sup>24</sup>

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<sup>21</sup>Numbers of children coming to the U.S. from Russia for adoption dropped from 5,865 in FY 2004, to 4,639 in FY 2005, to 3,706 in FY 2006. Russia went from being the leading country in terms of numbers of children sent to the U.S. in FY 1997-1999, to the third in line behind China and Guatemala in FY 2006. U.S. Dept. Of State, "Immigrant Visas Issued to Orphans Coming to the U.S.," *available at* [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html).

<sup>22</sup> U.S. Dept. of State, Requirements for Intercountry Adoption from the Republic of China to Take Effect on May 1, 2007 (Preliminary Version), [http://www.travel.state.gov/family/adoption/intercountry/intercountry\\_3110.html](http://www.travel.state.gov/family/adoption/intercountry/intercountry_3110.html) (last visited Mar. 14, 2007). *See also* Pam Belluck & Jim Yardley, *China Tightens Adoption Rules for Foreigners*, N. Y. TIMES, Dec. 20, 2006, at A1.

<sup>23</sup> U.S. Department of State, "IMMIGRANT VISAS ISSUED TO ORPHANS COMING TO THE U.S.," *available at* [http://travel.state.gov/family/adoption/stats/stats\\_451.html](http://travel.state.gov/family/adoption/stats/stats_451.html).

Looked at overall international adoption has in any event only ever happened very rarely, given the vast numbers of homeless children and of adults who would want to parent them if they could without overcoming huge barriers.<sup>25</sup> If policy-makers thought positively about international adoption they could easily increase the numbers of children placed many times over, particularly given that such adoption is self-financing, with adoptive parents paying the costs not simply of the children's future support but also of the services involved in facilitating adoption arrangements.

All sides in the international adoption debate contend that important issues for children are at stake, and that they are on the children's side. In earlier eras policy-makers often openly asserted that children's interests were entitled to less respect than those of adults, but today is the era of children's rights, at least officially. The Convention on the Rights of the Child has been ratified by virtually all countries in the world, and although the U.S. is one of the only two that has not so ratified, policy-makers in this country regularly proclaim the best interest of the child as a primary guiding principle in matters affecting children. The risk remains, however, that policy-makers will either make mistakes in assessing what is truly in children's interests, or will simply

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<sup>24</sup> Ethica, *The Statistics Tell the Story*, <http://www.ethicanet.org/item.php?recordid=statistics> (last visited Mar. 14, 2007) (found that over past 15 years, of 40 top 20 countries of origin for U.S., 13 currently closed or effectively closed, an additional 4 closed reportedly temporarily, to investigate concerns or establish new procedures, with the total of 17 countries accounting for 43% of the 40).

<sup>25</sup> In the U.S. alone, some one million have expressed interest in adopting, and some 6.1 million or 10% of the reproductive age population are infertile. See Martha Henry, *et al*, *Teaching Medical Students About Adoption and Foster Care*, 10 ADOPTION QUARTERLY 45, 46 (2006) (relying on data from Centers for Disease Control). See also Bartholet, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* (Beacon Press 1999) (1993) at 29 (approximately 15% of couples who want to have children may not be able to produce their own biological children).

use children in a more deliberate way to further various adult agendas. In this essay I discuss why I think that the right children's rights position is the one promoting international adoption, and analyze the reasons why those who in my view get the children's rights position entirely wrong, do so.

## **II. Conflicting Versions of the Child's Story**

Policy-makers need to think empathically about the child at the heart of the international adoption debate. They need to try to understand how the child would think if the child was capable of rational decision-making, as judges are supposed to do when they make substituted judgment decisions on behalf of infants or young children.

There are of course many children, in varying situations, at issue. But let's imagine one child whose situation is typical of that of myriad others. Let's imagine the infant in a large institution. It could be a boy or girl. If this is China, the top sending country for U.S. adoptions for the last three years (2004-2006), and one of the two top countries from 1995 through 2006,<sup>26</sup> it will almost certainly be a girl, since infant girls there are abandoned in large numbers due to the one-child policy. Let's assume this one is a girl. I'm situating the infant in a large institution because that's where most children in the world who can't be raised by their birth parents are living, except for those many millions who are growing up on the streets. It is only in privileged, wealthy countries like the United States that foster family care is used in place of institutions on

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<sup>26</sup> See "Immigrant Visas Issued to Orphans Coming to the U.S.," *supra* n. 21.

any significant scale.

If we could have a rational conversation with this infant about her needs and wants, and about the choices she would make among the real-world options she has, how would this conversation go? First the infant would presumably want on an immediate basis to be held and fed and comforted and played with and kept in clean, dry clothes. She would want attention when awake, and someone to respond when she cries. As months of infancy went by, she would want to see a familiar face, to connect with someone emotionally. If we could explain to her about childhood development, about the social life that normal non-institutionalized adolescents and adults live, about education and the world of work, she would want to make sure that she got the nurturing and education as a child that would enable her to grow up as the kind of emotionally and physically healthy person who could have good relationships with friends and family, and who could survive and thrive in the world of work.

Would she care about her “birth heritage”? Would she want to make sure that she would grow up in her country of birth? If there was a chance for her to be adopted, would she place an overwhelming priority on being adopted by someone from “her” country? Would she choose to be kept in an orphanage in preference to being placed abroad in a loving adoptive family, either because in that way she could at least experience her heritage, or because there might be some very slight hope that she would find an adoptive home in her country, or because she might see her birth parents once a year or so when they visited the orphanage?

To help the infant make a rational choice among possible future options we should give her some more information. She knows from her daily experience that the orphanage is a horrible place. Her bottle is propped, with a large hole gouged in the nipple so that the milk pours out – the idea is to give her a better chance to take in some milk since she is too young and weak to suck strongly, but she often chokes on the milk flooding into her mouth and throat, and spits the bottle out. When she screams for attention because she's hungry or cold or wet or just alone, nobody comes – attendants arrive only every four or six hours and then leave immediately after hurried diaper-changing and bottle-propping events. She would notice if she were capable of understanding that infants around her stop screaming after a while – they learn that screaming doesn't produce any result. We could tell her that those who study child institutions often remark with horror on the silence that characterizes them – horror in part because those experts know that for an infant to learn the lesson that it's not worth screaming is terribly damaging to their prospects for normal development. We could also tell her what the research shows about the range of institutions that exist for homeless children like her, and the problems inherent in even the best institutions.<sup>27</sup> Her current orphanage is fairly typical. Some are better, providing a little more care, but still little if any opportunity to develop the kind of relationship with a

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<sup>27</sup> Important early studies of children placed in residential nurseries in London in the 1960s showed the destructive impact of even these relatively “model” institutions. Tizard, B., & Hodges, J. *The effect of institutional rearing on the development of 8-year-old children*, 19 *Journal of Child Psychology, Psychiatry, and Allied Disciplines* 99 (1978); Tizard, B., & Rees, J., *The effect of early institutional rearing on the behavior problems and affectional relationships of four-year-old children*, 27 *Journal of Child Psychology, Psychiatry, and Allied Disciplines* 61 (1975). See also, e.g., MENTAL DISABILITY RIGHTS INTERNATIONAL, HIDDEN SUFFERING: ROMANIA'S SEGREGATIONS AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES at iii-v, 1, 3, 4 (2006), <http://www.mdri.org/projects/romania/romania-May%209%20final.pdf> [hereinafter MDRI REPORT]. The MDRI REPORT, while focusing on children with disabilities, documents the fact that even infants and children without disabilities continue to be sent to and kept in institutions, the horrific conditions characterizing many of these institutions, and the fact that even the new, smaller, and allegedly improved institutions function as devastatingly damaging places for children: “Romania’s newer, cleaner, and smaller institutions continue to constitute a threat to children’s right to life and protection from inhuman and degrading treatment....” *Id.* at iv. See also n.30 *infra*.

nurturing parent figure that is essential for normal human development. Some are far worse, with infants dying at a high rate, with children whose chronological age is in the teens lying in cribs looking as if they were toddler age, unable to talk or walk because they have been so deprived of the attention it takes for a human being actually to develop. Photographs of some of the still-living children in certain of these institutions look like photographs that could have been taken in the Nazi death camps, except here the subjects are all children, bone-thin, expressionless, staring back emptily at the camera eye.<sup>28</sup>

We should also give the infant other information. We should tell her that many adults in the world seem to place significant value on birth and national heritage. We should tell her that if she were to grow up adopted abroad, many people would ask about her “real parents,” referring to her birth parents, and many would think of her as in some sense truly “Chinese.” Indeed her adoptive parents might well send her in her childhood summers to one of the many Chinese culture camps that now exist in the U.S., and might at some point take her on a “heritage” trip to her country of birth. She might grow up wondering about her racial or national identity – wondering if she is truly “American” or more truly something else. However we should also tell her that many people in her country of birth would be thrilled if they had the opportunity to go live in the U.S., especially if they could get the kind of education and other advantages that most adoptive children will enjoy, so that they could participate in what is still seen by many throughout the

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<sup>28</sup>See MDRI Report *supra* n. 27; “The Dying Room,” BBC Documentary, available at [http://www.channel14.com/four\\_docs/archive/the\\_dying\\_room\\_player.html](http://www.channel14.com/four_docs/archive/the_dying_room_player.html). (documenting conditions in Chinese orphanages where infants left to die), and related report by Human Rights Watch, *Death by Default: A Policy of Fatal Neglect in China’s State Orphanages*, <http://www.hrw.org/summaries/s.china961.html> (Jan. 1996). For a graphic picture of the conditions characterizing the lives of homeless children living on the streets in Romania, see, e.g., *Children Underground* directed by Edet Belzberg, HBO/Cinemax Documentary (2002).

world as “the American dream.” And we should tell her that the research shows adopted children do very well on all measures that social scientists use to assess human happiness, and that it reveals no evidence that children are in any way harmed by being placed internationally.<sup>29</sup> Finally we should tell her that the research shows that children raised for significant periods of time in institutions do terribly badly on all of those social science measures.<sup>30</sup>

It seems obvious to me what this infant would choose if she could choose. She would choose not to spend another day or hour in the institution if at all possible, and she would choose to go to

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<sup>29</sup> See, e.g., Femmie Juffer and Marinus H. van IJzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees*, 293 J.A.M.A. 2501 (2005) (a meta-analysis of research on international adoptees showing the adoptees generally well-adjusted with those living with their adoptive families for more than 12 years the best adjusted, and with preadoption adversity increasing the risk of problems). See also Bartholet, *FAMILY BONDS*, *supra* note 25, at 158-59 and nn. 23-29; Elizabeth Bartholet & Joan Heifetz Hollinger, *International Adoption: Overview*, in *ADOPTION LAW AND PRACTICE* 10-1 (Joan Heifetz Hollinger, ed., 2006) at 10-15 - 10-21 [hereafter *Overview*]. See also evidence discussed at nn.52-53 *infra*.

<sup>30</sup> See, e.g., Nelson, *A Neurobiological Perspective on Early Human Deprivation*, 1 *Child Devel Perspectives* 13 (2007) (summing up half century of evidence demonstrating damaging impact of institutionalization on children); Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 *DEV. & PSYCHOPATHOLOGY* 885, 886-88 (2003), summing up previous research on deleterious effects of institutional rearing, including recent research on many problems of children adopted out of institutions in Eastern Europe, Russia, and other countries, as well as ameliorating effects of early intervention. This article describes the Bucharest Early Intervention Project (BEIP), an ongoing randomized controlled trial of foster placement as an alternative to institutionalization designed to document scientifically both the effects of institutionalization and the degree of recovery that foster care can provide, and to assist the government of Romania in developing alternative forms of care beyond institutionalization. Research already produced by BEIP “Core Group” documents some of the damage Romanian children have suffered by virtue of institutionalization. See Peter J. Marshall & Nathan A. Fox and the BEIP Core Group, *A Comparison of the Electroencephalogram between Institutionalized and Community Children in Romania*, 16 *J. COGNITIVE NEUROSCIENCE* 1327 (2004); Susan W. Parker and Charles A. Nelson, *The Impact of Early Institutional Rearing on the Ability to Discriminate Facial Expressions of Emotion: An Event-Related Potential Study*, 76 *CHILD DEV.* 54 (2005); For other recent research see the St. Petersburg-USA Orphanage Research Team, *Characteristics of Children, Caregivers, and Orphanages For Young Children in St. Petersburg, Russian Federation*, 26 *J. OF APP. DEV. PSYCHOL.* 477 (2005) (giving comprehensive, empirical description of orphanage environments, describing most salient deficiencies as in social-emotional environment, and describing harmful impact on children, all consistent with reports on other countries’ orphanages); Bilge Yagmurlu et al., *The Role of Institutions and Home Contexts in Theory of Mind Development*, 26 *J. APP. DEV. PSYCHOL.* 521 (2005) (documenting harmful impact of institutionalization on “theory of mind” development of children in Turkey, relevant to social, cognitive and language development, and psychological adjustment, all related to deprivation of normal adult-child interaction, and all consistent with other research findings). See also MDRI REPORT, *supra* note 27, at 5, 20-21, nn 25-34 ; authorities cited in McKinney, *International Adoption*, *supra* n. 8 at 383 n. 130; *Overview*, *supra* note 29, §§ 10-17, § 10.03 [1] [c], at. 10-20 and notes. 36-37; Bartholet, *FAMILY BONDS*, *supra* note 25 at 150-51, 156-57.

the first good adoptive home available, regardless of whether that was in her country of birth or abroad, so that she could begin living the kind of life infants deserve and need both in terms of their day-to-day life satisfaction, and in terms of their prospects for normal development so that they can live and thrive as adults.

International adoption provides good homes to some 30,000 plus children a year, with roughly two-thirds of those children coming to the U.S. The real-world alternatives for these children are quite horrible. They will grow up in life-destroying conditions in institutions or on the streets. Very, very few of the homeless children in the sending countries of the world will be returned to birth families capable of nurturing them or find adoptive homes in their countries of birth. Very few will be released from institutions to foster care, and even if poor countries were to make dramatic progress in developing foster care as an alternative to institutions, it is extremely unlikely that foster care in the poor countries of the world will work better than it does in the privileged U.S. This means that even for those children lucky enough to be released to foster care they will not be nearly as well off as they would be if adopted.<sup>31</sup> The research shows internationally adopted children doing essentially as well as other adopted children and it shows all adopted children doing essentially as well as children raised in good, nurturing birth families – at least it shows this for adopted children placed very early in life. For children placed after months and years of life have gone by, adoption doesn't work as well, quite obviously because the damage done in institutions and other far-from-ideal post-birth circumstances takes its toll.<sup>32</sup>

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<sup>31</sup> See Barthetalet, *NOBODY'S CHILDREN*, *supra* n. 15, at 81-97.

<sup>32</sup> See authorities cited *supra* n. 30.

The international adoption story looks very positive from the perspective of the children placed, and would look even more positive if we changed laws and policies to facilitate placement very early in life.

I think the international adoption story is also a positive one when we include other key players – the birth parents and the adoptive parents. For adoptive parents international adoption provides the satisfying experience of parenting, and research shows a high level of satisfaction from this particular kind of parenting. For birth parents the picture is more of a bitter-sweet mix, since obviously most birth parents would want to live in circumstances that made it possible to get pregnant only as a matter of choice, and to be able to raise the children they create. But the birth parents whose children end up in institutions or on the streets don't have that luxury. They have a set of choices that likely feel like bad and not-so-good choices. They can surrender their child to an institution or abandon them to the streets, knowing that the child will likely have a very unhappy life both short and long term, assuming the child lives to the long term, they can keep their child knowing that this will make it hard or impossible for them to feed themselves and their other children, hard or impossible to keep the job that enables them to survive, or they can give their child to another to parent. These are the real-world choices of most of the birth parents of the world who surrender or abandon their children. Many of the children growing up in institutions or on the streets are true orphans, whose parents have died. For these parents we have to imagine what they would want for their child after their death. Given the real-world choices, I think that almost all birth parents would choose, if they could choose, for their child to grow up in an adoptive home, and to be placed in that home as soon as possible, whether in their

home country or abroad.

Finally I think the story is a positive one if we think about the much larger picture that includes other and future children, other and future adults. It is true that international adoption only provides concrete help to a tiny percentage of the many millions of homeless children in need, and this would still be true even if we multiplied by a factor of five or ten or one hundred the number of children placed in adoption. Nonetheless international adoption, in my view, does at least push us a bit down the road toward solving problems for a larger group of children and adults, rather than pushing us backwards.<sup>33</sup> It brings new resources into the sending countries in connection with the adoptions, often in the form of “orphanage fees” or other support targeted to help the children left behind. But likely more significant is the fact that it creates these new international adoptive families living in the privileged countries of the world, in which both parents and children are sensitized to the conditions of poverty and deprivation characterizing the children’s birth countries. Many of these parents and children will want to “give back” in some way – we know that many international adoptive parents provide ongoing financial contributions to orphanages and other social service organizations in the children’s sending countries. It seems likely that these parents and children will be more likely to support government policies that are generous and friendly, rather than stingy and hostile, toward the children’s sending countries, that they will be more likely to vote for public officials that will support efforts to alleviate world poverty. It seems likely that when people form the kind of

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<sup>33</sup> For a more extensive discussion of this argument, see Bartholet, *International Adoption: Human Rights Issues*, *supra* n. 1, Section IV B. See also McKinney, *International Adoption*, *supra* n. 8 at 381.

powerful loving bonds across racial and national lines that they form in international adoptive families, it will affect their feelings in a larger political context about who is “us” and who is “other” in ways that will be positive for the world more generally. Similar ideas helped motivate some of those who fought for the passage of the Multiethnic Placement Act (MEPA).<sup>34</sup> MEPA prohibited any preference for placing children within their racial community in the U.S., changing policies that had dominated child welfare systems for decades. MEPA advocates argued that knocking down racial preferences would help black children by facilitating early adoptive placement. But many of us also argued that state policies promoting same-race families were wrong in terms of the larger picture of race relations in our society – we believed that transracial families were a positive good.<sup>35</sup> International adoptive families seem to me a positive good for similar reasons. The world is regularly torn by conflicts between people of different national, ethnic and religious backgrounds, whose leaders regularly proclaim the importance of their national, ethnic and religious identities. International adoptive families demonstrate the ultimate insignificance of our national, ethnic and religious differences compared to our common humanity.<sup>36</sup>

The story told by many people and organizations who claim to speak for the child is quite

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<sup>34</sup> For description of the campaign that resulted in passage of MEPA, and the story of MEPA Implementation, see Barholet, *NOBODY’S CHILDREN*, *supra* n.15, 125-40, and Barholet, *The Challenge of Children’s Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3:2 *WHITTIER J. OF CHILD AND FAM. ADVOC.* 215 (2004) at 221-26.

<sup>35</sup> *Id.* See also Jim Chen, *Unloving*, 80 *Iowa L. Rev.* 145, 159 (1994); Randall L. Kennedy, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY AND ADOPTION* (Pantheon Books 2003).

<sup>36</sup> See Sen, *IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY* (Norton 2006).

different. They describe international adoption as exploitative, with the child as the victim-in-chief. For some critics it is inherently exploitative, as it deprives children of their birth and their national heritage. For some it is exploitative as practiced, since it so often, according to this story, involves illegal payments to birth parents, or kidnapping children from birth parents, or lying to birth parents about the consequences of surrendering their parental rights, or giving children to adoptive parents from abroad in preference to adoptive parents in the child's home country solely because of the foreigners' wealth. International adoption is regularly equated with child trafficking, putting it in the same class as vicious forms of child exploitation like sexual abuse, child prostitution, and slavery,<sup>37</sup> although the evidence is clear that such adoption almost always provides children with good, nurturing homes, and that any kind of exploitation in the international adoption context is aberrational.<sup>38</sup>

Those telling the negative story often describe international adoption as victimizing not just the child placed but also all those children *not* placed, as well as the birth parents. They talk of the \$35,000 fees paid by international adoptive parents all for the privilege of removing one child to the U.S., arguing that that money could be better used to improve orphanage conditions, or to enable the birth parent to keep and raise the child. They claim – or imply – that international adoption is somehow incompatible with efforts to address larger issues of social justice in the

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<sup>37</sup> A recent UNICEF document setting forth guidelines for child trafficking equates “illicit adoption” with forms of trafficking like selling children into prostitution and slavery, and killing for the removal of organs. UNICEF, GUIDELINES ON THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING, Provisional Version 2.1, Sept. 2006, p. 9; *See also* UNICEF, Combating Child Trafficking (2005), available at [http://www.unicef.org/protection/files/IPU\\_combattingchildtrafficking\\_GB.pdf](http://www.unicef.org/protection/files/IPU_combattingchildtrafficking_GB.pdf).

<sup>38</sup> *See* n. 29 *supra*.

sending country, issues that include the provision of welfare support for poor parents, and the development of decent family foster care systems as an alternative to institutions.

The negative story appears regularly in the media. Newspapers give front-page coverage to adoption scandal stories involving baby buying or kidnapping. These stories often trigger the closing down of adoption from a particular country, on either a temporary or a permanent basis, but rarely do the papers cover what happens to children when adoption is not an option and they are relegated to the orphanages.

Media coverage of the recent adoption by Madonna of a year-old boy from Malawi, who had spent most of his life in an orphanage, is classic. Madonna is featured as the selfish and significantly absurd, rich American, descending from her airplane to swoop up a child and take him away from all he knows and loves, carelessly violating the law in the process, and getting away with this because of her wealth.<sup>39</sup> The story makes it easy to condemn both Madonna and the practice of international adoption – Madonna is clearly the evil exploitative character, and the child and his birth father the innocent victims. Some 67 children’s rights and human rights groups are described as joining forces to create a “Human Rights Consultative Committee” to challenge in court the government’s decision giving Madonna temporary custody enabling her to take the child out of the country while adoption proceedings ran their course. The human rights position was that she should have followed the law: “We note that laws were flouted and our

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<sup>39</sup> See, e.g., “Madonna’s Adoption Goes to Court,” ABC News, 10/16/06, <http://abcnews.go.com/print?id=2572108>.

concern is that government may set a precedent that can legalize human trafficking.”<sup>40</sup>

Madonna’s \$3 million donation to help children in Malawi infected with HIV was characterized as a corrupt act designed to help her buy her way around the law.<sup>41</sup> Little attention was paid in most of the stories to the fact that the law Madonna apparently found her way around was one that required that prospective adoptive parents be monitored in Malawi for 18 to 24 months to determine their fitness, with no exceptions to accommodate those adopting from another country – a rule that excludes international adoptive parents for all practical purposes since almost none will be able or willing to adopt under these conditions.<sup>42</sup> And only in the end did some stories acknowledge that the birth father felt that surrendering this child for adoption was a good choice for him and for the child,<sup>43</sup> or report Madonna’s statements that the child had been ill with

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<sup>40</sup> See “Judge delays Madonna adoption hearing,” USA Today 10/20/06, <http://usatoday.printhis.clickability.com/pt/cpt?action=cpt&title=Judge+delays+Madonna...>

<sup>41</sup> See ABC story, n. 30 *supra*.

<sup>42</sup> See USA Today story, n. 40 *supra*.

<sup>43</sup> The father apparently denounced the human rights coalition efforts, saying: “Where were these people when David was struggling in the orphanage? These so-called human rights groups should leave my baby alone....As father I have okayed this, I have no problem. The village has no problem. Who are they to cause trouble?” *Id.* See also USA Today 10/26/06, “Madonna speaks out over furor,” <http://usatoday.printhis.clickability.com/pt/cpt?action=cpt&title=Madonna+speaks+out+o...>; MSNBC.com 11/13/06, “Malawi court to rule on Madonna adoption,” <http://www.msnbc.msn.com/id/15700348/print/1/displaymode/1098/>

pneumonia and at risk of dying in the orphanage, or report that she funds a number of orphanages in Malawi and was in the process of setting up a new one for some 4,000 children.<sup>44</sup>

Popular films in recent years have told the negative story in compelling ways. John Sayles' film "Casa de los Babys" of a few years ago features an all-star cast, and tells the story of a group of mostly neurotic infertile white women from the U.S. landing in an un-named Latin American country, insensitive to the cultural issues surrounding their intended adoptions, and impatiently waiting out the time required before they are allowed to carry off the prized babies to their privileged homes in the U.S., leaving behind the unhappy birth parents and street children to struggle on with their lives. "The Italian," a recent Russian-made film shown recently in the U.S., features a winning six-year-old waif in a Russian orphanage, who fights off his impending adoption by a not especially sympathetic Italian couple, against the forces of the system as personified by the evil adoption facilitator in it only for the profit. In the end the boy triumphs by running away from the orphanage to find his birth mother, with their reunion symbolized by the subtle but beatific light in his eyes when he sees her for the first time since infancy, but of course knows her as any good child would know his birth or "true" mother.

The conflicting stories lead to conflicting versions of what would be the appropriate direction for law reform to take in the area of international adoption. My view is that we need reform that

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<sup>44</sup> BBC News, 10/26/06, "Madonna attacks adoption coverage," <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/entertainment/6083...>

will enable more children who cannot live with their birth parents to be placed in adoptive homes, whether domestic or international, as early in life as possible, so that children can escape the unhappy conditions in which they live prior to adoption, and can have the best chance for healthy development into adults who can thrive in their social and work lives. Accordingly I think we need to get rid of much of the restrictive adoption regulation that delays or entirely prevents international adoption, and we need to develop new, facilitative regulation.

Those who tell the negative story about international adoption have a very different idea about the direction for law reform. Some contend that international adoption should be entirely prohibited, as the National Association of Black Social Workers argued in 1972 that transracial adoption should be.<sup>45</sup> The recent Romanian law eliminating international adoption represents a victory by this camp. As noted above, it was a victory achieved by people who argued that international adoption was inherently a violation of children's rights – the people who at the time were in charge of the European Parliament's process for admitting Romania into the European Union, and who pressured Romania to pass this law as a condition for gaining entry.<sup>46</sup>

Most of those who tell the negative story about international adoption say that they don't want to entirely prohibit it, but simply to restrict it to last resort status and to eliminate adoption abuses. UNICEF falls into this camp. They argue for a set of law reform positions that would add to the restrictions on international adoption, and do nothing to facilitate it.

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<sup>45</sup> Barholet, *NOBODY'S CHILDREN*, *supra* n. 15, at 124.

<sup>46</sup> *See* n. 16 *supra*.

The restrictive regulation that is popular among those who tell the negative story includes preferences for keeping homeless children in their country of origin, whether with adoptive or foster parents, over placing them in out-of-country adoptive homes, greater government power over international adoption, the elimination of private intermediaries, and additional rules designed to protect against such adoption abuses as baby buying and kidnapping.

The war between these two opposing positions is ongoing. But those telling the negative story and pushing for more restrictive regulation are winning many battles as noted in section I above. Law “reform” efforts tend to produce more and more restrictions, and very little facilitation.

And yet the positive story about international adoption has a lot of power. I believe that most regular people – not child welfare professionals or child welfare organization bureaucrats but the famous men and women “on the street” – think that for children who don’t have a loving permanent home, what is important is that they get one, and as soon as possible, with whomever can provide it. Most would probably also think it good if there was a choice to provide the child with a home with parents of the same national and ethnic background, but I doubt that many would think it made any sense to keep a child waiting for that home in the hellish conditions characterizing institutional care. I doubt that many would find in-country foster care preferable from the child’s point of view to out-of-country adoption. It’s worth trying to understand what is really driving the negative positions about international adoption taken by UNICEF and others with power to affect policy, and whether their positions can in any way be reconciled with a true

children's rights perspective.

### **III. Issues at the Heart of the Opposition to International Adoption**

The opposition to international adoption, and the restrictive regulation surrounding it, seem to me driven by some profoundly powerful but also profoundly wrong ideas about children and about the role of the state.

#### *A. Wrong Ideas about Children*

##### 1. Children as "Belonging" to the Community of Origin: Of Ownership and Heritage Rights

Children are thought of as "belonging" to their community of origin – to birth parents, to others in their birth country, and to the country itself – both in the sense that the community has ownership rights to hold onto them, and in the sense that the children have heritage rights to stay in the only place where allegedly they will truly feel at home.

These ideas play a powerful role in shaping and justifying international adoption policies.

Children whose parents are alive are typically seen as still belonging to those parents even if there is no realistic possibility that they will ever be able to live together. This helps explain why throughout the world most of the children in orphanages are not available for adoption.

Typically there is no system in place to terminate parental rights so the children can be adopted, even if the parents visit rarely or not at all. Nor is there any significant movement to *create* such a system to free up children for adoption. Indeed many oppose adoption for such children

arguing that even tenuous ties with birth parents should be maintained. UNICEF points to the fact that the majority of children in orphanages are not actually orphans but in fact have one or more living parents as if that in itself proved that no efforts to place them in adoption would be appropriate. UNICEF and other critics of international adoption use children's links to birth parents as part of the justification for preferring in-country foster care over out-of-country adoption.<sup>47</sup>

Children are similarly seen as belonging to their country of origin regardless of that country's apparent capacity to care for them. Countries are seen as having property-like ownership rights over their children: many talk of international adoption as robbing sending countries of "their precious resources." National pride appears to be a major reason sending countries often refuse to allow their children to be adopted internationally, with countries embarrassed to be shown up as unable to care for "their own," and willing to claim ownership rights even if in fact they are unable to provide such care. International law accords total control over children to each nation, and the Convention on the Rights of the Child, as well as the Hague Convention on Intercountry Adoption, pay deference to these ownership rights by leaving it entirely to countries to decide whether to allow their children to be placed in other countries for adoption or not, even if there is no in-country option except institutionalization.<sup>48</sup> An important part of why virtually everyone,

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<sup>47</sup> See Yuster, *supra* n.6; Presentation by Karin Landgren, Chief of Child Protection, UNICEF, New York, NY, at Conference "Promoting Children's Interests: Preparation, Practice & Policy Reform," co-sponsored by American Bar Association Center on Children and the Law and the Harvard Law School Child Advocacy Program, at Harvard Law School, at the Workshop Session on "International Adoption: Policies, Politics and the Pros & Cons," April 14, 2007.

<sup>48</sup> Bartholet, *International Adoption: Human Rights Issues*, *supra* n. 1, at TAN 51-52, TAN 56-57.

even including most supporters of international adoption, supports a preference for in-country adoption over out-of-country, is that a country and its citizens are seen as having ownership rights over the children born in that country in preference to the citizens of other countries, and it is assumed that the children will be better off if they can stay in the country of origin.

Those who believe in children's rights, in the idea that children enjoy full personhood, should find it easy to reject claims based on ownership rights by birth parents and nations that treat children effectively as property. And, perhaps because we live in an era in which children's rights are given official recognition, and the Convention on the Rights of the Child or the "best interests of the child principle" is supposed to govern, few would overtly assert that adult ownership rights could justify opposition to international adoption. Instead, birth parent and national community rights over children are typically justified by the claim that they will serve children's interests.

One argument is that those who produce children and are related to them by kinship or race or national identity, are the ones who will "naturally" care most about them. But obviously there's a risk that these people will *not* always operate to serve children's interests. This is why in the U.S., although we give parents enormous power to determine the fate of their children, we counter that power with the state *parens patriae* role – giving the state the right to intervene to protect children against parental abuse, neglect, and abandonment. It is why in the U.S., after years in which family preservation policies were overwhelmingly dominant, Congress passed the Adoption and Safe Families Act (ASFA) in 1997, in which it tempered the deference to birth

parent rights in order to make children's interests a higher priority than previously, and in which it specified that children in foster care who could not appropriately be reunited with their birth parents had to be moved on to adoption within a reasonable time, rather than being held in foster limbo.<sup>49</sup> It is why in the U.S., after two decades in which policy-makers gave the African-American community significant ownership rights over black children, deferring to the National Association of Black Social Workers' demand that black children be kept if at all possible within the black community, whether in birth, foster or adoptive families, and not be placed in white adoptive families, Congress finally passed the Multiethnic Placement Act (MEPA).<sup>50</sup> In MEPA, which like ASFA was enacted in the mid-1990's, Congress recognized that the rules preferencing same-race over transracial placement had been harmful to black children, denying and delaying adoptive placement, and provided that race could not be used as a factor in foster or adoptive decision-making by any agency receiving federal funds. Within the U.S. the passage of MEPA constituted a powerful rejection of the idea that a racial community of adults should have any ownership rights over its children, and the related idea that such rights necessarily further children's interests.<sup>51</sup>

The other argument used to justify birth parent and national community rights over children as

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<sup>49</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 102 (amending Title IV of the Social Security Act, 42 U.S.C. 601 *et seq.*).

<sup>50</sup> See The Howard M. Metzenbaum Multiethnic Placement Act of 1994, 42 U.S.C. § 622(B)(9), 5115A, Pub. L. No. 103-382, §§ 551-554, 108 Stat. 4056, as amended by the Removal of Barriers to Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C. §§ 671, 674, 1996B, Pub. L. No. 104-188, § 1808, 110 Stat. 1903.

<sup>51</sup> But see the Indian Child Welfare Act (ICWA), in which Congress gave Native American tribes significant rights to hold onto the children they defined as tribal members, justifying such rights as consistent with the children's best interests. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-63 (1988)).

consistent with children's interests, is the idea referred to at the beginning of this section: children are said to have their own heritage rights to their birth parents and their country of origin; they are said to belong to the community into which they were born in the sense that they will be best off living there, with their "own" people, where they will truly feel "at home." This essentialist argument is regularly deployed by those calling for restrictions on or the elimination of international adoption. But there is little reason in common sense or the existing research to buy into this argument. Infants do not come into the world with any inborn sense that they are in some essential sense Russian or Kenyan or Peruvian. It is true that they will grow up in a world that will often see them as identified with the group they look like in terms of skin tone or facial features. It may be useful to minority group children to identify to some degree with "their" group in a world in which those who see themselves as belonging to other groups often discriminate. But there's actually no evidence supporting the idea that children with a strong sense of racial or ethnic or national group identity are any happier or have any better sense of self-esteem than children who think of themselves primarily as belonging to the human race, or as belonging to groups defined in non-racial and non-national ways.<sup>52</sup> And the studies of children adopted across racial and national lines reveal no evidence that growing up separated from one's group of origin has any negative impact whatsoever on the child.<sup>53</sup> What the studies

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<sup>52</sup> William E. Cross, *Shades of Black: Diversity in African-American Identity* (Philadelphia: Temple University Press, 1991), pp.108-14. See also Barry Richards, *What is Identity?* in *IN THE BEST INTERESTS OF THE CHILD: CULTURE, IDENTITY AND TRANSRACIAL ADOPTION* 77,84,86 (Ivor Gabor & Jane Aldridge eds, 1994) (personal as opposed to social identity central to emotional security, and its formation is independent of ethnicity of parents); Tizard and Phoenix, *Black Identity and Transracial Adoption*, in *id.*, at 94-95, 99 (no persuasive evidence linking self-esteem with black or racial group identity measures).

<sup>53</sup> See, e.g., authorities cited *supra* nn. 29,52. Transracial adoption within the U.S. has been extensively examined for

show, what developmental psychologists have long known, what common sense tells all with any experience with parenting, is that what is key to enabling children to grow up with a healthy sense of self-esteem and identity is a loving, permanent home as early in life as is possible.

The idea that children “belong” to their birth parents and their countries of origin is used to promote and justify policies that are clearly very harmful for children. Children are held in horribly destructive institutions rather than having parental rights terminated so that they have a chance to be placed in adoption. UNICEF and others promote the placement of children in in-country foster care rather than out-of-country adoption, even though this means holding children in institutions now in the hope that foster care will be created in the future, even though it is not clear when if ever such foster care will be created, and whether if created it will help these or only some future children, and even though research shows that such foster care as exists in the world today (primarily in the U.S.) doesn’t work for children nearly as well as adoption. The universally popular idea that in-country adoption should be preferred over out-of-country adoption<sup>54</sup> has often been translated into rules requiring a six-month or longer in-country search before out-of-country homes can be considered.<sup>55</sup> The problem for children is that such

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evidence that it might put children at some risk for identity confusion or other problems, and the entire body of research has revealed no such evidence whatsoever. See, e.g., Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 *U. PA. L. Rev.* 1163 (1991) at 1207-26; Bartholet, *Commentary: Cultural Stereotypes Can and Do Die: It’s Time to Move on With Transracial Adoption*, 34 *J. Am. Psychiatry L.* 315 (2006) at 319.

<sup>54</sup> This idea is incorporated in the Hague Convention which states 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*,” Hague Convention pmb., *supra n.14* (emphasis added), and provides that intercountry adoption can only take place after competent authorities in the state of origin give “due consideration” to the possibility of domestic placement. *Id.*, Chapter II, Art. 4(b).

<sup>55</sup> See, e.g., McKinney, *International Adoptions*, at 374-375, discussing Russian government institution of six-month wait rule. Even the U.S. has felt compelled by the Hague Convention to issue regulations that require a two-month search for in-

preferences will almost always mean that children are delayed in getting adoptive homes or denied such homes altogether. Typically there are very few potential adopters in the child's home country as compared to the large pool of potential adopters abroad. Accordingly, rules that require an in-country six-month "search" will not likely mean that the child is placed in-country, but instead, in the best-case scenario, that children who could be placed abroad wait six months longer for placement, something that very few children would choose for themselves were they able to choose, given the horrible conditions in most institutions and the damage done by any such six-month period to the child's life prospects. But the additional harm such rules cause is that they decrease the likelihood that children will be adopted at all. The message to the bureaucrats such a rule gives is that international adoption should be seen as a failure, so there's a risk that even after the six months such a rule deters placement. Also, as children age, their prospects for placement fade because the pool of potential adopters shrinks, largely because they know that the child's life prospects are so damaged by additional months of institutional life. Our experience here in the U.S. in the pre-MEPA era is informative. For over two decades we had policies that on paper supported only a mild preference for placing children within their racial community – stronger preferences were considered unconstitutional. Yet state agencies

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country adoptive homes prior to placement abroad pursuant to the Hague of any U.S. children. In 2000 Congress passed the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. sec 14901(b)(1) (2006), in order to begin implementing the Hague Convention. The IAA implements the Hague's "due consideration" standard by requiring "reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States ... in a timely manner." *Id.* Sec. 14932(a)(1)(B)(I), (ii). As of April 2007, the State Department had finalized various regulations governing outgoing adoptions, codified at 22 C.F.R. secs 96 and 97, which mandate, as does the IAA, that agencies make "sufficient reasonable efforts" to find a placement in the U.S. before they can place a child abroad, and which spell out that obligation as meaning that information about a child must be listed on a national or state adoption exchange for at least two months after the child's birth prior to placement abroad, subject to certain exceptions. These regulations are in arguable conflict with MEPA, *supra* n. 50, which forbids federally funded agencies from delaying or denying placement based on the child or the prospective parents "race, color, or national origin" (emphasis added). *See generally*, Galit Avitan, *Protecting Our Children or Our Pride? Regulating the Intercountry Adoption of American Children* (draft 2007, pending publication, on file with Prof. Bartholet).

nonetheless engaged in stronger preferences, holding black children for years and often their entire childhoods in foster care rather than releasing them for transracial placement. In 1994 Congress passed the first version of the Multiethnic Placement Act, MEPA I, which prohibited any delay or denial of placement based on race, but allowed genuinely mild preferences. Only two years later Congress amended the law to enact MEPA II which prohibited any same-race preference whatsoever, in recognition of the fact that MEPA I was failing and would fail to accomplish its purposes, and that the only real way to eliminate significant delays in placement, and denials of placement, was to tell the social workers engaged in placement that they could not use race as a factor in placement at all.<sup>56</sup>

## 2. Children as the Means to Further Others' Ends: Of Hostages and Sacrificial Pawns

Another idea that seems to play a powerful role in shaping and justifying international adoption policies is what I call the hostage theory. This theory holds that children who could be placed for adoption should instead be held in institutions, which everyone knows are intolerable, because this will create pressure on all to do something to solve the poverty and injustice in the sending countries of the world which cause birth parents to surrender their children, which cause baby girls in particular to be abandoned in China, which mean that adoptive parenting is stigmatized in many sending countries in ways that deter domestic adoption, and which mean that foster care is rare or non-existent and that orphanages have miserable conditions. UNICEF and other powerful players in the international adoption area do not as best I am aware openly

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<sup>56</sup> See generally, *NOBODY'S CHILDREN*, *supra* n. 15, at 123-33; For details of the pre-MEPA history see Bartholet, *Where Do Black Children Belong?*, *supra* n. 53.

argue for a hostage strategy. But nonetheless they talk in a way that indicates this is indeed part of what is going on. They argue that sending country governments and all others should be focused not on international adoption but on improving social welfare services in poor countries, creating foster care in place of institutional care, and improving conditions in institutions. They argue that international adoption corrupts the system, diverting attention from the important social reform agenda, and creating incentives to place children abroad rather than improve conditions in-country.<sup>57</sup> They talk about the immorality of adoptive parents swooping in to carry off the prized adoptive child, leaving other children to languish in the institutions of the country, and leaving birth parents cut off from their child for no reason other than poverty. They talk as if the funds spent on adoption could simply be transferred instead to the other children or the birth parents, and as if it is therefore clearly right to prevent the adoption. On one level this idea seems simply absurd – potential adoptive parents are not going to send over checks for \$30,000 to \$40,000 because someone tells them they cannot adopt but that there are lots of children and parents in need. On another level though, this idea is very troubling. Because even if the strategy might, to some degree at least, work, even if some potential adoptive parent might if denied the chance to adopt, decide to “foster” some number of needy child abroad by sending a regular donation, the decision denying the adoption means condemning a particular individual child who could have been placed in a nurturing home, to live or die in the often-torturous conditions of an orphanage.

The hostage theory does nonetheless have some power. We have a group of children who could

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<sup>57</sup> See, e.g., Bainham, *supra* note 11; See also Landren, *supra* n 47.,

be released in international adoption, but it is a tiny group compared to all those children in need, and compared to the birth parents who surrender because they don't have better options. If we hold these children, refusing to release them, maybe this will put pressure on all to do the truly right thing – fix the conditions of injustice that mean birth parents surrender, and alleviate the conditions under which the larger group of homeless children are living. Releasing children for adoption will at best help only a very few children, and may reduce the pressure to help solve the larger problem.

But in the end I think we have to reject the hostage strategy. First, it violates the principle that children should be seen as fully human, as true persons, whose rights and interests deserve respect as much as if they were adults. This is of course why nobody openly argues for this strategy, even if they operate in a way that indicates they may be motivated by it. We subscribe in this society and this era to the idea that all individual humans, including children, are entitled to be treated as ends, and should not be treated as means. We subscribe to the idea that identifiable groups of individuals should not be sacrificed for other persons even if some rational utilitarian calculus would indicate that greater happiness for a larger group would result. The hostage theory would mean the deliberate sacrifice of an identifiable group of children who could have been placed in loving homes and enabled to live a meaningful life.

It would be different if it was just a question of how a government was deciding to allocate resources. A particular sending country, or UNICEF, or some NGO with funds to give out, might legitimately make the decision to allocate scarce resources in a way that helped a larger

group as compared to a smaller group. But in the case of international adoption, private parties are willingly offering the resources needed to place children. There is no resource trade off that the sending country must engage in. They can simply allow the adoptions to take place, charging the costs of the transactions to the adoptive parents as adoption costs are traditionally charged. Indeed many sending countries charge additional fees for each adoption specifically designated to help pay the costs of supporting some of the children not placed. China, for example, charges an orphanage fee of \$3,000-\$5,000 for each international adoption. Sending countries also save the costs of supporting the children placed in adoption. Closing down international adoption and denying one group of children the international adoptive homes they might have received doesn't save resources which can then be spent on a larger group of children.

If we value children as true persons, the hostage theory should be rejected out of hand. Children who can be placed with international adoptive parents, should not be denied homes and condemned to institutions because some believe this would serve the needs of others.

Moreover, even if sacrificing some identifiable children to benefit a larger group could be morally justified, it seems this should only ever be acceptable if one was *very sure* that the strategy would work. And there is no way that anyone *can* be very sure it would work. There is no apparent evidence in support of the hostage strategy. Countries have regularly closed down international adoption at various points over the last few decades, and I don't see these close-downs translating into dramatic improvements in conditions for children or birth parents. Critics

of international adoption don't cite any evidence of such improvements.

Indeed I think there is more reason to believe that the existence of international adoption operates to help push down the road of broader social reform, as discussed above in section II.<sup>58</sup> I think such adoption increases awareness of the problems within sending countries, brings in at least some new resources to help solve those problems, and creates political support for more significant change. It's hard to know for sure. But we do know for sure that placing those children we can place in adoptive homes dramatically changes those children's lives for the good. Given this knowledge, and given that there is reason to believe that helping these children pushes us further down the road to larger social reform rather than backwards, the hostage theory has to be rejected.

Children are being used in the debate over international adoption to promote all kinds of causes that have nothing to do with their own interests. Children are at particular risk of being used in this way as sacrificial pawns. They have powerful symbolic value, ironically for the very reason that we all like to think that we truly care about children and are guided by their best interests. Political leaders in sending countries often have reason to "attack" the U.S., at least in ways that are safe. Opposition leaders in such countries often have reason to challenge those in power. Talking about how the U.S. is once again exploiting some impoverished country by stealing its children, and accusing those in power of selling the nation's children to the U.S., can be powerful rallying cries for one's troops. And this is a battle by the relatively powerless with the relatively

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<sup>58</sup> See pp ---, and nn. 33-36.

powerful that can be won. The U.S. government is not particularly concerned with capturing the poorest children from the poorest countries of the world as new “resources.” It has been quick to respond in recent decades to any allegations of adoption abuses by calling for a temporary moratorium in the sending country at issue, or by instituting new U.S. requirements designed to counter such abuses.<sup>59</sup>

The truth is that the children languishing in institutions in poor countries are not really seen as precious resources by political leaders in either sending or receiving countries. They can be used by the relatively powerless to promote other agendas. They are easy give-aways for the powerful.

Again there is a parallel with what happened within the U.S. in the transracial adoption debate. Black leaders interested in promoting black power and racial separatism attacked transracial adoption in 1972 as racial genocide, and called for keeping homeless black children in black foster homes in preference to their being placed in white adoptive homes. There was no reason to think that keeping black children in foster care would empower the black community, and much reason to think it would hurt the black children who otherwise might be adopted. But the racial genocide claim had rhetorical power, linked as it was by political leaders with the historical image of black slave children being sold away from their birth parents to white slave holders. The white power establishment backed off immediately in the face of the black demand to keep “their” children, with state agencies instituting powerful race-matching policies that

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<sup>59</sup> See Barholet, *International Adoption: Human Rights Issues*, *supra* n.1, TAN 37-38.

lasted until the passage of MEPA in the mid-90's. Tellingly, this concession to black demands to hold onto their children was a uniquely positive response by whites to black power demands. There was strong resistance to black progress in taking over jobs and housing and other of the good things in life from privileged whites. There was strong resistance to black demands for control over schools and other institutions located within the black community but dominated by white principals and other white professionals. But the black children within foster care were an easy give-away for the white power establishment, just as homeless children throughout the world are today an easy give-away.

## *B. Wrong Ideas about the State*

### 1. The State as Ideal Parent

Critics of international adoption rely on the idea that it is the state – rather than parents and other private parties – we can trust to protect children, and accordingly, the more powerful we make the state's role, the more protected children will be. They generally condemn “private adoption” in the international area, and call for governments in sending countries to exercise monopoly power over international adoption, eliminating the private agencies and other intermediaries who facilitate adoption arrangements between birth parents or orphanages and adoptive parents. They argue that all countries should ratify the Hague Convention, claiming it establishes important new regulatory standards for international adoption, and then use the Hague's requirement that each country create a “Central Authority” as a basis for arguing that in any Hague-compliant country the government should exercise total control over international

adoption. In doing this they conveniently ignore the fact that the Hague Convention was deliberately designed to allow for the ongoing operation of private intermediaries under the overall aegis of the newly required Central Authority.<sup>60</sup>

This idea of increasing the power of the state in order to provide greater protection to children has a lot of appeal in the international adoption area. There is much talk about the need to curb the “greedy” intermediaries and the selfish prospective parents, and prevent them from preying upon children by carrying them off into foreign adoptive homes.

It is understandable why this idea has appeal: children *are* at risk of violation by more powerful private party adults, and so we do need the state *parens patriae* power to temper private power and protect children. But as discussed at the beginning of this essay, the state is chosen by adults and not children, and cannot be entirely trusted to faithfully represent children’s interests any more than private parties can be. We have to keep a balance between the two, and we have to look carefully at the substantive issues in any particular area involving children to try to figure out how best to strike the balance in a way that will genuinely advance children’s interests.

In the international adoption area the governments in sending and receiving countries tend to be driven by all kinds of wrong ideas about children, and to use children for all kinds of adult agendas, as discussed in section III A above. State monopoly power over international adoption

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<sup>60</sup> For discussion of Hague Convention specifics see Bartholet, *International Adoption: Human Rights Issues*, *supra* n. 1, TAN 56-69.; McKinney, *International Adoption*, *supra* n. 8, 384-90.

has resulted in many countries in recent years in effectively shutting down such adoption. In South America, various countries that used to release significant numbers of children for adoption in early infancy, now release them only in very small numbers and only after they have spent two to three years in damaging orphanages. As noted above the Hague Convention has been used to justify calls for states to take monopoly control over international adoption and thus to justify this kind of shut down.<sup>61</sup> This constitutes a sad irony given that the Hague officially constituted a major legal step forward in the legitimization of international adoption, since it recognized such adoption as preferable to in-country institutional and foster care, by contrast to the earlier Convention on the Rights of the Child.<sup>62</sup>

If we care about children we would do better to limit state power and defer significantly to private parties – birth parents and potential adoptive parents, along with the intermediaries that facilitate the adoptive placement of children – to do the right thing for children. There are many promising models for this reform direction.

One model is the Hague Convention on Intercountry Adoption itself – the most recent and by far the most explicit international expression of agreement on principles for the regulation of international adoption. During the negotiations over what shape the Hague Convention should take, many of us fought to preserve the option of private adoption within the international

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<sup>61</sup> See also McKinney, *International Adoption*, *supra* n 8, at 386, 390.

<sup>62</sup> Bartholet, *International Adoption: Human Rights Issues*, *supra* n. 1, TAN 50-56 ; McKinney, *International*

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*Adoption, supra n 8, 376-90.*

adoption context, believing it essential if homeless children were to be placed promptly, given the history in many countries in which the government exercised monopoly power over the adoption process.<sup>63</sup> The U.S. delegation fought for the preservation of the private adoption option and as discussed above the Hague Convention allows such adoption. This does not mean that any international adoption is truly private in the sense that it is free of governmental regulation – an extensive body of law governs all such adoption, law of the sending country, law of the receiving country, and international law. That law ensures that the basic principles that virtually all agree should govern adoption apply, for example that birth parents are subject to no coercion in deciding whether to surrender their parental rights, that adoptive parents are screened for parental fitness, that adoption abuses such as baby buying are outlawed. What the Hague Convention’s preservation of the private adoption option means is simply that birth and potential adoptive parents, with the help of intermediary agencies, lawyers, and others, can function to make adoption happen in ways that they often cannot when the state in the sending country exercises monopoly power over the adoption process.

Another model is private adoption within the U.S. While public adoption – adoption of children out of state foster and institutional care – is heavily regulated in the U.S., private is not. Birth parents and adoptive parents who choose to make their own arrangements for the transfer of children can do so, largely free from the heavy hand of state. As under the Hague, the basic

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<sup>63</sup> The author served as a member of an advisory group to the U.S. Department of State in connection with its role in representing the U.S. in the Hague Convention negotiations.

rules of the adoption game apply: birth parents cannot be pressured into surrendering their children with money or other inducements; adoptive parents must be approved by a court as satisfying minimum fitness criteria prior to the adoption decree issuing. But other restrictions characteristic of the public adoption system operated by state child welfare and foster care systems are largely absent. Birth and adoptive parents with the luxury of choice typically choose the private system in preference to the public system because in their view it works best for them and for the children at issue – children tend to be placed as newborns, avoiding the damage caused by the lengthy stays in foster and institutional care typical of public adoptions.

A third model is the kind of informal adoption that goes on all the time in sending countries. Birth parents who are unable to parent their children because of poverty, disease, war, or other disaster, regularly transfer their children to family members, friends, and others who seem in a better position to offer parenting. Most of those in the regulatory business seem to think this is a good thing, as they have kept their regulatory hands off. And it does seem to be a good thing. When the state gets involved it has a tendency to prevent parenting transfers from happening, and a tendency to lock children into institutions that are extremely destructive.

## 2. The State as Weapon against Adoption Abuses

The critics of international adoption focus single-mindedly on the things that can go wrong in such adoption, as opposed to the things that can and typically do go right, and as opposed to the things that can and typically do go wrong if such adoption does not take place. The focus is on

preventing evils, rather than facilitating good things, and on preventing only particular evils like baby selling and kidnapping and the mistreatment or exploitation of children that might (but hardly ever does) occur in adoption. This focus fits logically with the critics' call for ever-greater restrictions on international adoption. This approach has proved very successful with law-makers. Adoption abuses are seen as of central importance, and as a guide to law reform. Any given adoption scandal, involving allegations of baby selling or kidnapping, is taken as reason to clamp down further on international adoption, often to create a moratorium, prohibiting all such adoption at least temporarily, and also to create new restrictions designed to reinforce those that already exist everywhere prohibiting such abuses. Almost all adoption "reform" consists of piling on additional restrictions designed to protect against adoption abuses. No attention is paid to facilitating the good things that happen when children are placed in adoptive homes, or preventing the evils that come from children not being placed – the destruction wrought by days and months and years spent in institutions.

Examples abound. When Romania first opened up its institutions to permit the placement of children abroad, after the fall of Ceausescu, thousands of children were released from truly horrendous institutions to be placed in international adoptive homes. Then a baby-buying story broke, with accounts of adoption intermediaries paying birth parents in connection with the surrender of children. Various children's rights groups reacted with horror and Romania then instituted a moratorium on all such adoptions for several years. Nobody involved in this close-down apparently stopped to count how many birth parents had actually been paid, or to assess whether the payments had actually persuaded parents to surrender children they otherwise would

have kept to raise themselves, or to weigh the evil represented by these transactions against the evil represented by thousands of children now being condemned to live and die in the institutions to which they were relegated instead of being released for adoption. Since the early 1990's Guatemala has been one of the leading sending countries of the world, releasing large numbers of children for international adoption within 6-8 months of birth, with the children often kept from birth until adoptive placement in good foster care rather than in destructive institutions.<sup>64</sup> These policies have given large numbers of poor children born in Guatemala an excellent prospect for happy and healthy development, as compared to adoption policies typical of most other sending countries. Not surprisingly, Guatemala has become in the past few years the focus for negative regulatory attention. There has been much righteous condemnation by UNICEF, the U.S. State Department, and a variety of NGOs of the greedy intermediaries and selfish adoptive parents engaged in the "buying" of children.<sup>65</sup> They have called for a government monopoly over adoptions so as to cut down on the evils of baby buying and other alleged adoption abuses. Some critics have called for a temporary moratorium while such "reform" is implemented, and as this

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<sup>64</sup> Guatemala ranked second in 2006 for the number of children placed in the U.S. for adoption and ranked first for children placed as a percentage of population. U.S. Dept. of State, "Immigrant Visas Issued to Orphans Coming to the U.S.," *supra* n. 21. The author has had extensive experience with the Guatemalan situation, including a trip to Guatemala in 2005 to speak at a conference addressing the controversy over international adoption. Elizabeth Bartholet, Keynote Speech at conference in Guatemala City, Guatemala, "In the Best Interests of Children: A Permanent Family," Jan. 25, 2005. For detailed discussion of Guatemalan situation, see McKinney, *International Adoption*, *supra* n. 8 at 401-11.

<sup>65</sup> See, e.g., ILPEC GUATEMALA, ADOPTION AND THE RIGHTS OF THE CHILD IN GUATEMALA (2000), available at [http://www.iss-ssi.org/Resource\\_Centre/Tronc\\_DI/ilpec-unicef\\_english\\_report\\_2000.pdf](http://www.iss-ssi.org/Resource_Centre/Tronc_DI/ilpec-unicef_english_report_2000.pdf) (study commissioned by UNICEF, conducted by Latin American Institute for Education and Communication (ILPEC), claiming that international adoption in Guatemala is characterized by rampant profiteering and baby buying); Marc Lacey, *Guatemala System Is Scrutinized as Americans Rush in to Adopt*, N. Y. TIMES, Nov. 5, 2006 at A1 (illustrating popular press assumptions that Guatemala is characterized by child trafficking). But see, e.g., FAMILIES WITHOUT BORDERS, UNICEF, GUATEMALAN ADOPTION, AND THE BEST INTERESTS OF THE CHILD: AN INFORMATIVE STUDY (2003), available at <http://www.familieswithoutborders.com/FWBstudyGuatemala.pdf> (report issued by coalition of prospective and already adoptive parents, refuting UNICEF claims as grossly misrepresentative of Guatemalan adoption situation). On debate over what's happening in Guatemala. See, e.g., D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U.L. REV. 349, 366 (2005).

article goes to press the U.S. State Department has issued an official warning that U.S. prospective parents should not pursue adoption from Guatemala until and unless various alleged reforms are instituted.<sup>66</sup> The critics have made no effort to weigh the costs and benefits of such action, which would very likely result in effectively closing down adoption out of Guatemala as it has in other South American countries, reducing the number of children placed in adoption from thousands annually to a small trickle, and condemning even those few placed to spending two or three years in poor institutional conditions, thus guaranteeing that even those few are at high risk for permanent damage.

This mindless failure to look at the whole picture, to weigh different types of evils in the balance, to consider facilitative as well as restrictive modes of regulation, makes no sense for children. I agree that we should have laws prohibiting baby-buying – prohibiting payments to birth parents that are designed to induce them to surrender their children for adoption. But I don't believe there is any evidence that much true baby-buying, as so defined, is going on. Payments are sometimes made to mothers for expenses related to their pregnancies and surrender, and these kinds of payments are entirely legal. Payments are also sometimes made that go beyond such expenses, and these are illegal under generally applicable law throughout the world governing adoption, but there is no good evidence as to how frequent such payments are, and even when they happen, it seems clear that they are very rarely the *reason* the birth parents surrender their children for adoption. Birth parents surrender overwhelmingly because they have no real choice to raise their children – often the mothers had no choice in getting

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pregnant, as they had no access to birth control.<sup>67</sup> Typically the birth parents are desperately poor, and simply unable to raise these children. Giving them money may be wrong because it will always be hard to know for sure that the money given was not the reason for surrender. But giving money to desperately poor birth parents almost all of whom would likely surrender their children in any event, is not the worst evil that such birth parents or their children are faced with. Locking large numbers of children into institutions in which they will either die, or suffer on an ongoing basis and fail to thrive in ways essential to growing up able to function in the world, is a far more significant evil. *And the law makers simply don't let it count in the balance.* Instead, any indication that birth parents are getting payments, regardless of whether those payments are likely to have motivated the surrender decision, is considered sufficient to call for a moratorium on international adoption, new restrictions preventing any such adoption abuses, and the elimination of private intermediaries who are seen as more likely to allow such abuses than the government.

Those who care about children need to promote a different idea about the role of the state in regulating international adoption. Policy-makers need to consider the range of dangers facing children, weighing them against each other, and not take action against baby buying that will cause greater harm to children by locking them into damaging institutions. If they conclude that baby buying is going on, they need to enforce the laws against it, and think of ways to put pressure on others to enforce such laws that don't have the effect of simultaneously eliminating

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<sup>66</sup> See n. 20 *supra*.

<sup>67</sup> See e.g., for circumstances in Guatemala, McKinney, *International Adoption*, *supra* n. 8, 402-03.

entirely legitimate adoption arrangements. In other areas involving abusive practices that affect children we don't systematically "throw the baby out with the bath water." When the laws protecting children against abuse and neglect by their parents are violated we don't stop sending infants home with the parents who gave birth to them as a way of making sure that no such maltreatment occurs. Instead we try to do a better job of enforcing the laws against child maltreatment.

Policy-makers also need to focus on the good things that happen in international adoption, and develop facilitative law to enable such adoption to serve children's needs better. We need law that requires that children in need of homes be identified, whether they be in institutions or on the streets, and that children whose birth parents are not realistically likely to be in a position to care for them in the immediate future, be freed for adoption by having those parents' rights terminated. We need law that requires that those in charge of such children act expeditiously to find them true families and homes. We need law that helps sending and receiving countries coordinate their regulatory action so that children's placement in international adoptive homes is not delayed by the need to satisfy meaningless and repetitive regulatory requirements, and so that the number of potential adoptive parents is not needlessly limited by such requirements.

The Adoption and Safe Families Act (ASFA), noted above, represents one model of such facilitative law.<sup>68</sup> It requires that children within the U.S. foster or institutional care system be held for no longer than 15 of the prior 22 months and then be moved to a real home, whether that

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<sup>68</sup> *Supra* n. 49.

be the original biological home or an adoptive home. The federal tax law providing tax credits for all adoptions including international adoption,<sup>69</sup> and the federal citizenship law providing automatic U.S. citizenship for children adopted from abroad<sup>70</sup> are other examples of facilitative law. At one point in time many of us hoped that the Hague Convention on Intercountry Adoption would function as facilitative law. In the early days of Convention negotiations there was talk about the importance of designing the Convention so that it would facilitate the prompt placement of children, by encouraging countries to coordinate their regulatory laws. But critics of international adoption, taking advantage of the press accounts of alleged baby selling in Romania at the time, successfully shot down the idea of any such facilitation goal for the Hague.<sup>71</sup>

#### **IV. Conclusion**

A truly child-friendly regime would be one which recognized that as a general matter more good than harm comes from the transfer of children who cannot be raised by their birth parents, to adoptive parents. Such a regime would enable more children to be placed, and placement to happen as early in children's lives as possible, so that homeless children can escape the unhappy conditions in which they typically live, and can have the best chance for healthy development into adults who can thrive in their social and work lives. It would limit restrictive regulation, focusing such regulation on preventing genuine and serious harms, which should be seen as including not just what are today recognized as adoption abuses, practices like baby buying and

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<sup>69</sup> See Laura P. Hampton, *The Aftermath of Adoption: The Economic Consequences—Support, Inheritances and Taxes*, in *ADOPTION LAW AND PRACTICE*, *supra* note 19, at §12.05(1)(c); I.R.C. 137 (West Supp. 2006).

<sup>70</sup> 8 U.S.C. §1431 (2000); 8 U.S.C. §1433 (2000 & Supp. 2003).

kidnapping, but also the holding of children for prolonged periods of time in damaging foster and institutional care. It would jettison all forms of restrictive regulation that seem on balance to do more harm than good. This would mean getting rid of preferences for in-country placement,<sup>72</sup> and getting rid of other unnecessary barriers between waiting children and parents, such as repetitive forms of parental screening and arbitrary parental fitness criteria that condemn children to grow up with no parent at all because available parents have been found less than perfect. Such a regime would never close down international adoption as a method of preventing adoption abuses, but instead would find other ways to enforce the laws against such abuses. It would also create facilitative law, identifying and freeing up for adoption children in need of homes, identifying potential adoptive parents and smoothing the way for them to adopt, and expediting the placement of children with these parents. It would limit the expenses of adoption and seek to subsidize those expenses that stand in the way of adoptive parents coming forward. It would allow private intermediaries to operate because such intermediaries have a history in the adoption area of doing more to facilitate adoption than do public agencies, and because state monopoly power over international adoption has so often operated to effectively close it down. Law generally appears to be moving in more child-friendly directions in today's world. The Convention on the Rights of the Child has been ratified by almost all countries, demonstrating how popular the *idea* of children's rights is throughout the world. South Africa's constitution,

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<sup>71</sup> See n. 64 *supra*.

<sup>72</sup> For more extensive discussion of these issues, see Barholet, *International Adoption: Human Rights Issues*, *supra* n. 1, TAN 101-106. Given that the Hague Convention creates a preference for in-country adoption over out-of-country adoption, countries that ratify the Hague might have to figure out ways to comply with that preference without delaying child placement. They could adapt the concurrent planning model used in connection with some U.S. domestic adoptions, to plan simultaneously for both forms of adoption, so that if no domestic family is available at the time the child is ready for placement, the child could be immediately placed with a waiting international family.

which incorporates many progressive trends in the world's legal systems, gives children powerful rights on paper.<sup>73</sup> Within the U.S. there are a series of legal developments in what looks to be a child-friendly direction.<sup>74</sup>

However we cannot count on the fact that the law *proclaims* children's rights as central, actually meaning that children's rights *will be* central. The Convention on the Rights of the Child (CRC), for example, is the ultimate expression to date of international support for children's rights, but it constitutes one of the major problems for those of us who believe that international adoption serves children's interests. The CRC leaves countries free to eliminate international adoption as an option, limiting homeless children to such options as foster and institutional care. It provides that even if countries allow international adoption it should constitute only a last resort, putting such adoption lower on the hierarchy than in-country foster care and any other "suitable" in-country care, a phrase which could be interpreted to include institutional care.<sup>75</sup> The CRC talks of the importance, in considering alternatives for homeless children, of paying "due regard... to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."<sup>76</sup> The CRC is regularly used by those like UNICEF who press for more restrictions on international adoption, limiting it to extreme last-resort status. The CRC is

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<sup>73</sup> Barbara B. Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1(1999).

<sup>74</sup> See Bartholet, *International Adoption: Human Rights Issues*, *supra* n. 1, TAN 45-47.

<sup>75</sup> Article 21 of the CRC, *supra*, n. 13, provides that nations that recognize international adoption "shall ... recognize that [it] 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."

<sup>76</sup> Article 20 of the CRC, *supra* n. 13.

also used by those who want to close down international adoption entirely as the basis for arguing that such adoption always constitutes a violation of children's rights since it deprives them of continuity with their background.<sup>77</sup>

For children's "rights" to mean anything good for children, adults have to act appropriately in promoting those rights. This is a challenge. There is no easy way to guarantee that the powerful will speak truthfully or accurately when they purport to speak for the powerless.

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<sup>77</sup> See, e.g., Bainham article *supra*, n. 11.