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Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption

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RED THREAD[1] OR SLENDER REED: DECONSTRUCTING PROF. BARTHOLET'S MYTHOLOGY OF INTERNATIONAL ADOPTION

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INTRODUCTION

In her recent piece, "*International Adoption: Thoughts on Human Rights Issues*,"[2] Professor Elizabeth Bartholet leaves no doubt where she stands: International adoption[3] should be if not *the* preferred alternative, then at least *a* preferred alternative for the "millions on millions"[4] of chil-

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[1] According to ancient Chinese belief, an invisible red thread connects those who are destined to meet, regardless of time, place, or circumstance. The thread may stretch or tangle, but never break. The red thread is the dominant image of international adoption among American families who have adopted from China. *See*, e.g., Red *Thread to Our Daughter*, *available at* http://redthreadtomydaughter.blogspot.com/2007_04_01_archive.html (last visited Feb. 12, 2008); *see also Nancy and Dave's Journey to Parenthood*, *available at* http://nancydave.blogspot.com/2008/02/fcc-chinese-new-year-celebration.html (last visited Feb. 12, 2008).

[2] Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights* Issue, 13 BUFF. HUM. RTS. L. REV. 151 (2007).

[3] International adoption, also called transnational or perhaps more precisely, intercountry adoption, is the process by which children who reside in and are citizens of one country are adopted by parents who reside in and are citizens of another county.

[4] Bartholet, *supra* note 2, at 165.

dren in the developing world who would otherwise be doomed to living out their childhoods in damaging institutions or on the streets.[5] She believes that structuring legal regimes in ways that enable as many children as possible to avoid such fates should be at the core of any human rights-based discussion of international adoption.[6] But in Bartholet's view, this is not the case. Instead, she maintains that discourse and policy-making on international adoption are controlled by a human rights community at worst hostile to, and at best profoundly suspicious of, international adoption.[7] Bartholet accuses this community, and particularly entities like UNICEF and the Committee on the Rights of the Child,[8] of setting up legal, ideological, and rhetorical roadblocks to international adoption. In her view, this community's anti-adoption attitude is based on little more than naive romanticism of "culture"[9] and unreflective hostility toward a perceived "colonialism" deemed inherent in transferring children from the developing to the developed world.[10] Bartholet contends that not only is this discourse blind to the pragmatic realities of suffering children, it is based on overestimates of abuses in the international adoption process.[11]

For Bartholet, the facts and the solutions are straightforward. She argues that international adoption offers perhaps the only reasonable alternative for millions of children in institutions and on the streets.[12] Developing countries lack the resources and sometimes the political will to care for children in need.[13] Thus, Bartholet contends that domestic adoptions are unlikely to occur in large number.[14] In the developed world, on the other hand, significant numbers of would-be parents wrestle with infertility and are increasingly open to building their families through international adoption.[15]

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5 *Id.* For additional writings on international adoption, *see* ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING Ch. 7 (1993); Elizabeth Bartholet, *International Adoption: Propriety Prospects, and Pragmatics*, 13 J. AM. ACAD. MATRIMONIAL L. 181 (1996); Elizabeth Bartholet, *International Adoption* (Criminal Law and Urban Problems PLI Order No. 7583 2005).

6 *See* Bartholet, *supra* note 2, at 165, 176.

7 *Id.* at 152.

8 *Id.*

9 *Id.* at 180.

10 *Id.* at 154, 182.

11 *Id.* at 186-87.

12 *Id.* at 154.

13 *Id.* at 181.

14 *Id.*

15 *Id.* at 164.

Bartholet dismisses the contention that monies that currently flow into international adoption could instead be used to preserve families of origin.[16] She further contends that even if such funds might be expended in building foster or other systems of in-country care in developing countries,[17] the American example clearly demonstrates that foster care is, at best, an inadequate alternative to placement in a permanent loving family.[18]

For Bartholet the "goods" of international adoption consist of far more than a fortuitous confluence of supply and demand best equilibrated through a private ordering system. These "goods" include prospects for a more just world, made possible by an increased willingness to build families across races and cultures.[19] Adoptive families' increased awareness of, and personal concern for, improving conditions in their child's country of origin lead to humanitarian initiatives,[20] which have had a significant positive impact on the welfare of children left behind.[21] It is far less likely that these initiatives would have occurred had adoptive parents not experienced direct personal engagement with the plight of children in the country of origin. For Bartholet then, international adoption is a "win-win" situation for all involved.

Bartholet also argues that it is extremely unlikely that the "core form of baby-buying,"[22] actually occurs. Even if it does, she contends, "a multitude of overlapping laws" provide a safety net to protect against abuses.[23] She never specifies the exact nature of these laws,[24] or their relationship to the private agency-based adoption system through which most

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[16] *Id.* at 183.

[17] *Id.* at 181.

[18] *See id.* at 169-70, 181 (describing the U.S. Adoption and Safe Families Act that rejects the "option of last choice status" for adoption and recognizes the importance of prompt movement out of the legal limbo of foster care).

[19] *Id.* at 183.

[20] *Id.* at 183-85 (noting that contributions to orphanages by American adoptive parents of Chinese children in 2005 would have been close to $23,700,000).

[21] *Id.*

[22] *Id.* at 187 (Bartholet defines "core baby buying" as payments to birth parents made to induce relinquishment).

[23] *Id.*

[24] Bartholet simply notes that "baby buying not only violates the laws of all sending and receiving countries, but also a variety of international laws." *Id.* at 185 and accompanying text. She does not cite to any law of *any* sending or receiving country, much less to the laws that she maintains exist in *all* countries. The international Conventions she cites, *see id.*, either are not self-executing or the United States is not a party.

international adoptive placements are mediated. Nonetheless, she argues that this private agency system, though much-maligned by the international human rights mainstream,[25] more effectively and efficiently meets the needs of children than the central government controlled systems favored by the international human rights community and institutionalized in the Hague Convention on Intercountry Adoption.[26] In Bartholet's view, enabling the private system to function free of needless government oversight and bureaucratic hurdles offers the most humane and realistic means of moving children quickly into adoptive homes.[27]

Bartholet does admit that international adoption helps only a small fraction of children[28] and that, at least to some extent, international adoption involves a balancing of evils.[29] But in contrast to the human rights mainstream, she casts herself as a pragmatist, concerned with meeting the concrete needs of existing children.[30] She dismisses, as impractical and misguided, the international human rights community's concern for continuity of culture and heritage.[31] Though she does recognize that the majority of children in institutions and on the streets are not technically orphans in the sense that both of their parents are dead,[32] she contends that poverty and economic dislocation make it unlikely that these children will ever enjoy significant familial relationships.[33] Nor, she argues, will these children participate meaningfully[34] in the cultural life of their community of origin (although she does not indicate what type of cultural experience is "mean-

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[25] *Id.* at 176.

[26] *Id.* at 175-76.

[27] *Id.* at 176.

[28] *Id.* at 182.

[29] *Id.* at 188. Bartholet contends that she grapples with issues of adoption abuses and the actual impact of international adoption in improving child welfare, yet for her, the balance clearly favors facilitating international adoptions. Bartholet claims:

> The opponents of international adoption *never weigh the evils on each side*. Instead, they focus solely on the evils of adoption abuses, and then argue for restrictive regulation to address those evils. They don't consider the evils represented by failing to place children in adoptive homes and the good that comes from placing them.

[30] *Id.* at 187.

[31] *Id.* at 180.

[32] *Id.* at 170.

[33] *Id.* at 163.

[34] *Id.* at 181.

ingful").[35] Under these circumstances, any damage caused by removing a child from his or her culture is far outweighed by the advantages of a permanent home in another culture. She buttresses this contention by arguing that, "[a]ge at adoptive placement regularly shows up in adoption studies as the prime predictor of likelihood of successful life adjustment."[36] For Bartholet, the facts demonstrate the utility, and indeed the humanitarian necessity, of moving marginalized children into adoptive homes as quickly as possible.

Some of Bartholet's arguments are powerful and generally accepted. No right-minded person would quarrel with her claims that orphanage care significantly damages children or that the length of time they spend in an institution is highly correlated with negative developmental outcomes,[37] even if a child is eventually placed in an adoptive home. Nor would anyone seriously question Bartholet's observation that many sending countries are unlikely, in the foreseeable future, to have the resources or political will to build viable alternatives to institutional care. It is also true that in the developed world, high infertility rates coupled with a high demand for, and limited supply of, healthy infants for adoption make it likely that more adoption-friendly legal regimes both in this country and abroad

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[35] *Id.* The question of what it means to participate in a culture is problematic. Culture is defined as, "the characteristic features of everyday existence as diversions or a way of life shared by people in a place or time." The Merriam-Webster Dictionary (5th ed. 2004). No one would argue, for example, that American foster children are culturally American, despite their lack of a permanent home, or for that matter that children who grew up in American's orphanages of old were not culturally American. A child "participates" in a culture by virtue of his or her presence within the culture. The quality and degree of participation, however, is much more difficult to determine.

[36] Bartholet, *supra* note 2, at 179.

[37] For an excellent collection of resources, including clinical research studies on the effects of institutionalization on learning, behavior, and social adjustments, s*ee,* Association for Research in International Adoption, *ARIA Table of Contents Page*, http://www.adoption-research.org/toc.htm (last visited Feb. 12, 2008). *See also, e.g.,* Boris Gindis, *Language-Related Problems and Remediation Strategies for Internationally Adopted Orphanage-Raised Children, in* INTERNATIONAL ADOPTION: CHALLENGES AND OPPORTUNITIES, T. Tepper, et al. eds. (2d ed. 2000). Unicef has also gone on record as stating that institutional placements should be avoided where possible through creation of deinstitutionalization programs. *See* U.N. Children's Fund [UNICEF], Int'l Child Dev. Centre, *Intercountry Adoption*, 4 Innocenti Digest 11 (UNICEF ICDC, Florence, 1999).

might substantially increase the number of internationally adopted children.[38]

The obvious questions, then, are why would human rights organizations and governments[39] argue that international adoption should *not* be the preferred alternative for homeless children? Why would they advocate that instruments designed to regulate international adoption, like the Hague Convention on Intercountry Adoption, focus more on eliminating perceived abuses than on efficiently moving children into adoptive homes? Why would they favor state regulation of the international adoption process over a private system that places more infants, more quickly, into adoptive homes? And why, given the likelihood that an impoverished and unprotected child will be especially vulnerable to exploitation of the worst kinds in his or her native culture, would the international human rights community adopt such a limited, doctrinaire approach to questions of cultural continuity?

Like Bartholet, we are international adoptive parents, and like Bartholet, we place ourselves in the camp of those generally supportive of international adoption. Where we part company with her is in our characterization of the bigger picture.[40] Bartholet's position seems appealing because it relegates to the periphery of the analysis disturbing and problematic questions that should be at its core, specifically troubling practices like child-buying, coercion of vulnerable birth parents, weak regulatory structures, and profiteering. Our analysis breaks little new theoretical ground, and we do not propose programmatic solutions. Rather we identify and explore complexities that Bartholet for the most part ignores, but which are central to the viability and integrity of any international adoption process. To that end, we address the following questions: First, whether Bartholet's claim that there are millions of *adoptable* children "in institutions and on the streets" has sufficient empirical support to be credible? (Part I). Second, to what extent does the private adoption agency system actually serve the needs of children, maintain the integrity of the adoption process, and protect the rights of children, birth, and adoptive families? (Part II) To what extent do existing legal frameworks in sending countries and in the US, specifically the Immigration and Nationality Act's (INA) orphan pro-

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[38] *See* Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER F. WORLD AFFAIRS, 181-82 (2004) (noting that, "[t]he baby market reflects a crisis in family relations and economics: the inability of birth families to sustain all their members and the inability of the modern, Western family to meet all its reproductive needs").

[39] Bartholet *supra* note 2, at 157, 166-67.

[40] *Id.* at 178.

visions[41] and the Hague Convention,[42] provide the overlapping layers of protection against abuses that Bartholet claims exist? (Part III) To what extent does the available evidence support Bartholet's contention that abuses like child buying, kidnapping, and coercion in international adoptions are over-estimated? (Part IV). And finally, is Bartholet correct when she argues that issues of culture, heritage, identity, and integrity of process should, in effect, be relegated to the background of any analysis of international adoption? (Part V). We contend that the available evidence, while clearly incomplete, offers virtually no support for any of Bartholet's contentions.

PART I: MILLIONS ON MILLIONS?

Bartholet's starting point is an unsupported assumption that that there are, "millions on millions" of children on the streets and in damaging institutions[43] *who are adoptable*.[44] This assumption can neither be proved nor disproved with any certainty, particularly in the developing world,

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[41] Immigration and Nationality Act, 8 U.S.C. § 1101(b)(1)(F)(i) (2006).

[42] Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, [hereinafter Hague Convention]. The Intercountry Adoption Act of 2000, *Pub. L. No. 106-279*, 114 Stat. 825 (2000), codified at, 42 U.S.C. § 14901-56 (2008) [hereinafter IAA] is the implementing legislation for the Convention.

[43] Bartholet, *supra* note 2, at 158.

[44] Other scholars of international adoption have argued that more empirical evidence on the number of adoptable children is needed. *See, e.g.,* Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT'L L.J. 179, 187-88 (2003) (discussing what she terms the "adoptability conundrum" which she defines as the difficulty of distinguishing between children who would be in the system of orphanage care (in any event) from those brought into the system by the lure of the profitability of international adoption who would not otherwise be in care). Dillon argues, "[w]hat seems to be needed above all other interventions . . . . is an empirically-oriented, rigorous, objective search to identify who is in . . . . the child care systems of each country, how that got there, and what options are truly available to them." *Id.* In Dillon's view, what is needed are "findings of fact." *Id.* at 227. Only in this way can we make accurate assessments about relative weight given to human rights imperatives of moving children into adoptive homes vs. controlling against abuses in international adoption. *Id.*

where an estimated forty million births go unrecorded each year.[45] Hard data simply do not exist on many children, making it difficult to determine their legal status and hence, potential adoptability.[46]

More seriously, adoptability is not a self-defining construct. Bartholet, however, does not grapple with the complex and inconsistent legal and cultural issues that need to be addressed to determine whether a child is, in fact, adoptable.[47]

To support her contentions, Bartholet relies on UNICEF estimates of the number of orphans.[48] However, the UNICEF orphan figures are problematic, at least in terms of demonstrating that a given child would actually be free for adoption. UNICEF defines an orphan as a child who has lost *at least one parent* to death.[49] Under this definition, there are ap-

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[45] *See, e.g.*, Plan UK, http://www.planuk.org/action/campaigns/birthregistration (last visited Feb. 12, 2008). ("Every year, some 40 million children are born but not registered, in other words, given no nationality, no official existence").

[46] For instance, a USAID sponsored survey of the Cambodian orphanage population in 2005 revealed that the majority of children in care population had no clear legal status. USAID/Cambodia, CAMBODIA ORPHANAGE SURVEY, at 7, 12 (2005) [hereinafter USAID Cambodia].

[47] *See, e.g., Hearing to Review Asian Adoptions to the United States: Hearing Before the East Asian and Pacific Affairs Subcomm. of the Senate Foreign Relations Committee*, 108th Cong. 7-8 (2004) (statement of Thomas C. Atwood, President and CEO National Council for Adoption), *available at* http://www.senate.gov/~foreign/testimony/2006/AtwoodTestimony060608.pdf (stating that of countries most devastated by 2004 tsunami, only India had an international adoption program. Indonesia and Sri Lanka rarely allowed adoptions by US couples and in Indonesia, only if the couple resided there for two years); Dillon, *supra* note 44, at 187 ("It is important not to confuse the concept of 'adoptable children' with that of 'children currently in out-of-home care'") (quoting Nigel Cantwell, Intercountry Adoption: A Comment on the Number of Persons Seeking to Adopt Internationally, 5 Judges' Newsletter (Hague Conference on Private Int'l Law) 70, 71 (2003)). The United States' Immigration and Nationality Act has a highly specific definition of orphan which permits children with one or two living parents to be deemed orphans for the purposes of orphan visa petitions. *See infra* notes 106 to 110 and accompanying text.

[48] *See* Bartholet, *supra* note 2, at 183.

[49] *See* UNAID et al., CHILDREN ON THE BRINK: A JOINT REPORT OF NEW ORPHAN ESTIMATES AND A FRAMEWORK FOR ACTION (2004) [hereinafter CHILDREN ON THE BRINK] ("*Total orphans* are children under age 18 whose mothers or fathers (or both) have died. The total number of orphans is equal to the sum of maternal orphans and paternal orphans, minus double orphans (because they are counted in both the maternal and paternal categories)" [emphasis added]).

proximately 143 million orphans in the developing world.[50] However, an estimated 88.7% of the 143 million have one living parent.[51] Potentially, then, the UNICEF orphan definition is over-inclusive, and thus misleading because it does not specify whether the living parent is capable of providing care for the child. In addition, even where a child has no parents or a living parent incapable of providing proper care, many societies have well-established extended family or community care networks that provide both short and long-term care for children in need.[52]

Bartholet does note that UNICEF reports that only 2.6 million children are actually housed in institutions[53] and that this number may be a low estimate. But she discounts UNICEF's contention that up to 80% of the children in institutions in some countries actually have families and thus, may not be eligible for adoption.[54] Bartholet's claim that there are "millions" of adoptable orphans is furthered weakened by the fact that it is common practice in some countries for families to send children to orphanages for schooling, short–term care through emergency situations, or other reasons.[55] In some cases, these children have contact with their families of

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[50] *Id.* at 32.

[51] *Id.* at 31 (noting that double orphans account for 16,200,000 of the 143,400,000 total orphans).

[52] Bartholet, *supra* note 2, at 163; *see also* Children on the Brink, *supra* note 49, at 9-10 (discussing the need for support for extended families and communities who house orphans in Latin America and African countries). For an in-depth discussion of extended and community care networks among residents of Brazil's shanty towns, *see* Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 30 LAW & SOC'Y REV. 397 (2002).

[53] Bartholet, *supra* note 2, at 183.

[54] *Id.* at 194.

[55] *See, e.g.*, Howard E. Bogard, Comment, *Who are the Orphans? Defining Orphan Status and the Need for an International Convention on International Adoption*, 5 EMORY INT'L L. REV. 571, 605, 608-09 (1991) (noting that many children in Romanian orphanages following passage of the 1990 law requiring parental consent for adoption did not meet either the Romanian requirement for desertion or the U.S. requirement for unconditional abandonment to an orphanage because, "they were left for safe keeping by parents who plan to reclaim them later"); *see also* David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 199 and accompanying text (2006) (citing studies on practices in Brazil and India which result in placement of children of the poor in orphanages for, "education, food, housing and care without intending to sever parental rights"); USAID Cambodia, *supra* note 46, at 6 (noting that of the reasons given for referral to an orphanage, "other" ranked fourth on a list of 12

origin and there is no intent to relinquish the child permanently.[56] Thus, the western notion that placement in an orphanage is always synonymous with intent to relinquish the child *permanently* simply does not comport with reality in the developing world.

These facts, in turn, have important implications for international adoption practice. Making determinations about whether a child has actually been relinquished permanently requires a much more searching investigation than Bartholet's sweeping presumption that children living in institutions will never enjoy significant family relationships. Accurate determinations of adoptability that respect the rights of children and birth families require time and resources. The necessity and the inherent complexity of making these vital determinations render simplistic Bartholet's contention that what institutionalized children need is a system that moves them as quickly as possible to adoptive parents in the developed world.

Despite the fact that we do not know how many "orphans" -however the term is defined are actually adoptable, the evidence does show clearly that at least in one demographic dimension, the characteristics of the world's orphans differ significantly from those of children who are adopted internationally. UNICEF and USAID estimate that approximately 88% of the world's orphans are over the age of 5.[57] But a review of the children adopted by U.S. citizens over the last 11 years shows that on average, 85-89% of the children adopted were *under* the age of 5.[58] This disparity sug-

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reasons. Of the factors listed in the "other" category, the largest number was for education); Posting of Elizabeth Mallory, Mallory@nclo.org, to CambodiaAdopt List@yahoogroups.com (Sept. 17, 2007) (copy on file with author) (as director of Children's Home for orphan children, Mallory developed extensive, though anecdotal knowledge about Cambodia's post-suspension orphanage population. In this post she states, "[e]very orphanage in Cambodia has children. Sometimes [sic] very many. . . .But I would be willing to bet that the majority of the children in [Kep orphanage] have either a mother, a father, or both").

[56] Smolin, *supra* note 55, n.11 and accompanying text.

[57] CHILDREN ON THE BRINK, *supra* note 49, at 14 (noting that over half were over the age of 12, and that only 12 percent are under the age of 6).

[58] Department of Homeland Security, Yearbook of Immigration Statistics, 1996-2006, available at http://www.dhs.gov/ximgtn/statistics/publications/yearbook.shtm [hereinafter DHS statistics]; U.S. Dep't of State, *Immigrant Visas Issued to Orphans Coming to the U.S.*, BUREAU OF CONSULAR AFFAIRS, *available at* http://travel.state.gov/family/adoption/stats/stats_451.html (last visited Feb. 12, 2008) [hereinafter Dep't of State Stats]. Both DHS and the Dept. of State keep statistics on adoptions. The only statistics publicly available from 1990-1995 are the Department of State statistics on the top 20 countries for adoption each year. DHS statistics, available from 1996-2006 reveal breakdowns of age categories (under 1; 1-4; 5

gests that prospective adoptive parents in the U.S. view only a small fraction of the world's orphanage population as "adoptable."[59] It also suggests that it is unlikely that children languish in orphanages primarily because of anti-adoption sentiment or restrictive state policies but rather because they do not satisfy the well-documented preference of adoptive parents for infant and toddler girls.[60] Finally, Bartholet's repeated assertions that children who are not adopted will live and die in institutions and on the street[61] create a false dichotomy that appeals to the emotions but fails to take into account that, without an adoption option, some children would likely remain with (or return to) their families of origin.[62]

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and over), and sex for each country, providing a much more complete picture. The two sets of statistics rarely match exactly. The calculations and cites in this article draw on both sets of statistics.

[59] *See, e.g.*, ILPEC GUATEMALA FOR UNICEF, ADOPTION AND THE RIGHTS OF THE CHILD IN GUATEMALA at 18, 55 (2000) [hereinafter ILPEC Guatemala], *also available at* http://www.iss-ssi.org/Resource_Centre/Tronc_DI/ilpec-unicef_english_report_2000.PDF (analyzing adoption figures from Guatemala and concluding that parents generally prefer children under one. In contrast, the Guatemalan orphanage system is filled with older children).

[60] John Gravois, *Bringing Up Babes: Why do Adoptive Parents Prefer Girls*, SLATE (Jan. 16 2004), available at http://slate.msn.com/id/2093899 (last visited Feb. 12, 2008) (noting that whether prospective adoptive parents are adopting from China (where girls greatly outnumber boys), Russia (where the numbers are equal), or Cambodia (where there is a, "glut of orphan boys and a paucity of girls," somewhere between 70 and 90 percent of prospective adoptive parents register, "some preference for a girl with an agency"). *See also*, European Adoption Consultants, About Us, available at http://www.eaci.com/info-center/about-us.htm (last visited Apr. 29, 2008) ("Infants and toddlers are waiting for you. Their lives will be forever changed through adoption by loving and caring couples. These wonderful little children live in orphanages in Russia, China, Ukraine, Kazakhstan and Guatemala").

[61] *See* Bartholet, *supra* note 2.

[62] This point will be discussed in greater detail in *infra* Part IV.

PART II: THE PRIVATE AGENCY SYSTEM[63]

The overwhelming majority of international adoptions are arranged by private adoption agencies[64] in the United States that match adoptive parents with children overseas.[65] Adoption agencies routinely claim that they exist to serve the best interests of children and to match children with parents, not parents with children.[66] Some international adoption agencies

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[63] U.S. adoption law underwent a significant change on April 1, 2008 with the entry into force of the Hague Adoption Convention. *See* U.S. Hague Convention Ratification, *available at* http://travel.state.gov/family/adoption/convention/convention_3900.html (last visited Apr. 5, 2008); *see also* Hague Convention, *supra* note 42; IAA *supra* note 42; Final Rules Implementing the Convention were issued by the U.S. Department of State in February 2006. These rules, however, do not apply to all adoptions. It is thus important for us to outline how adoptions have historically been structured. The changes that will be effected under Hague rules are discussed in Part III *infra*.

[64] The alternative to an agency adoption is an independent adoption in which the adoptive parents perform for themselves the functions of an agency. Needless to say, relatively few parents have the time or resources to handle their own adoptions. In addition, some countries including China and Korea, prohibit independent adoption altogether, leaving prospective adoptive parents with no choice but to use an agency. The South Korean government has licensed four adoption agencies; children are adopted through U.S. adoption agencies affiliated with the government licensed agencies. *See Adoption.com: Korea Adoption Overview*, *available at* http://korea.adoption.com/foreign/korea-adoption-overview.html (last visited Feb. 12, 2008); U.S. Dep't of State, *Intercountry Adoption China*, *available at* http://travel.state.gov/family/adoption/country/country_365.html (last visited Feb. 12, 2008) [hereinafter State Dep't China Adoption Information] (stating that the Chinese central adoption authority, the China Committee of Adoption Affairs (CCAA) matches Chinese children only with families working with a CCAA-licensed U.S. adoption agency).

[65] The family will obtain a required home study from a local provider, and then contract with a placement agency that will locate a child abroad and facilitate the entry of the child into the United States. *See, e.g.*, JEAN NELSON-ERICHSON & HEINO R. ERICHSON, HOW TO ADOPT INTERNATIONALLY 28 (2000) (noting that most local agencies will provide a home study for adoption even though they will not be able to refer a child from abroad, and that U.S. based international agencies have child-placing contracts with foreign governments, attorneys, and liaisons in foreign countries).

[66] *See, e.g.*, Global Adoption Services, Inc., Statement of Ethics, *available at* http://www.adoptglobal.org/ethics.htm (last visited Apr. 29, 2008) ("It is the responsibility of agencies or others involved in international adoptions to find families for children, not children for families"); Caring Adoptions: Finding Families for Children Since 1991, *available at* http://caringadoptions.org/AdoptionProcess.

have long traditions of successful and ethical placements. They educate adoptive parents and organize substantial child welfare programs in sending countries.[67] However, whether an agency actively tries to implement best practices is generally a matter of agency discretion, not law or regulation. Under U.S. law, agencies are treated as market actors, not fiduciaries.

The international adoption agency system is structured in ways that shift the lion's share of risk from the agency onto the adoptive parents. Virtually all agency contracts contain broad exculpatory clauses absolving agencies from liability for a child's medical condition[68] and, more impor-

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asp., (last visited Apr. 29, 2008); Families Thru International Adoption (FITA), Mission Statement, *available at* www.ftia.org/aboutftia.asp#mission (last visited Apr. 29, 2008):

> Families Thru International Adoption is committed to providing assistance to children around the world. When remaining or reuniting with the birth family is not possible, we work diligently to find caring families who long to provide permanent, stable, and loving homes for these children. We believe this to be our highest calling.

Holt International, Introduction to Holt, *available at* http://www.holtintl.org/intro.shtml (last visited Apr. 29, 2008) ("We consider each child's situation individually to find the best long-term solution for that child. Because we also investigate the possibilities of preserving the birth family or domestic adoption, you can be assured that international adoption was the best solution for your child").

[67] *See, e.g.*, Jane Gross & Will Connors, *Surge in Ethiopian Adoptions Raises Concerns,* N.Y. TIMES, June 4, 2007, at A1 (detailing work of Children's Home Society and Wide Horizons, which established programs, schools, and medical clinics in Ethiopia).

[68] A typical exculpatory provision reads as follows:

> We release and discharge [the agency] from any and all causes of action, claims, demands, damages, costs, loss of services, and expenses that may arise, now or in the future, as a result of my/our attempt to adopt a child. Our release includes, but is not limited to, the potential claims set forth below. [The agency] will not be held responsible for any mental and physical problems, which the child is predisposed to or may develop in the future. Since adoptive parents have determined that the child is appropriate for placement with them, full medical responsibility after the child's placement and/or adoption is with the adoptive parents. It is not the responsibility of [the agency] to assist in the termination of the adoption nor will [the agency] assume custody of the adopted child. . .

tantly from a human rights standpoint, any aspect of the adoption process[69]

Adoptions: Agreement of Understanding, Seattle International Adoptions (2000) (on file with authors). Courts have upheld the validity of adoption agency exculpatory clauses, at least with respect to wrongful adoption actions initiated by adoptive parents. *See e.g., Ferenc v. World Child Inc,* 977 F. Supp. 56, 60 (D.D.C. 1997) *aff'd.,* 172 F.3d 919 (D.C. Cir. 1998) (upholding validity of exculpatory clause in contract between adoptive parent and agency and absolving agency from responsibility for investigating health of children referred for adoptive placement); Dresser v. Cradle of Hope Adoption Center, Inc., 358 F. Supp. 2d 620, 639 (E.D. Mich. 2005) (denying summary judgment for defendant adoption agency on negligence claim by adopted child on grounds that he was not party to contract between parents and agency and thus, not bound by the waiver provisions).

[69] *See, e.g.,* Contract of Adoptions from the Heart (copy on file with author), stating:

> The Adoptive Parent(s) hereby agree to waive liability against, and hold harmless, each of AFTH and its successors, assigns, officers, directors, employees, owners, agents, volunteers, attorneys, representatives and corporate affiliates (collectively, the "Released Parties"), and to fully and forever release the Released Parties from any and all actions, causes of action, suits, debts, accounts, liability, damages, attorney's fees, claims, counterclaims, and demands whatsoever, whether arising in contract or in tort, including claims for negligence, and whether in law or in equity, which the Adoptive Parent(s) had, now have, or hereafter can, shall, or may have for, upon, or by reason of any matter, cause, or thing whatsoever arising out of or relating to an International Adoption Risk, and, including, without limitation, (a) the political, governmental and administrative conditions in the foreign country; (b) any problems, delays, or failures relating to US-International relations; (c) the medical, mental, social, emotional, and developmental condition of the Child(ren); (d) the family background, prior history and care and previous experiences of the Child(ren); (e) any changes in the laws, regulations, policies, or administrative requirements of the international placing country, the United States or the Adoptive Parent(s)' Country; (f) any failure of any governmental or administrative judge, agency, official, employee, or agency to approve or promptly process the adoption; (g) war, terrorism, crime, acts of God, natural disasters, or any other conditions, matters, or causes beyond the control of AFTH; and (h) any or all of the risks set forth on *Disclosure of International Adoption Risks* hereto. The Adoptive Parent(s) further agree to indemnify each of the Released Parties for any claims, costs, damages, or expenses incurred relating to, or aris-

including whether a child placed for adoption will qualify for an orphan visa, or even whether an internationally adopted child has been placed in a safe home.[70] Agency fees are generally non-refundable whether the agency succeeds in completing an adoption or not.[71] Many international adoption contracts contain "gag" clauses.[72] Adoption agencies have actually com-

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> ing from, the occurrence of an International Adoption Risk, including without limitation, unknown medical conditions of the Child(ren). All hold harmless and other provisions contained in this Paragraph, elsewhere in the Agreement, and the Attachments thereto are each to be construed to have the broadest meaning permitted by law.

[70] *See, e.g.*, Contract of Commonwealth Adoption (Jan. 2008) (copy on file with author) stating:

> Any child brought to the United States must qualify for entry under applicable U.S. Citizenship and Immigration regulations and obtain the proper documentation. Application to the USCIS is the obligation of Family and while CAII shall provide Family with assistance to evaluate the qualifications and the necessary documentation, CAII cannot guarantee that every child will qualify.

In addition, adoption agencies in the United States are not required by U.S. law to ensure that post-placement reports required by many sending countries are actually completed. This omission led to a tragic situation in which a five-year old Russian girl, Masha Allen, was adopted by a single male who sexually abused her for over 6 years. The case raised the obvious question of how a child could have been allowed to suffer in such horrendous conditions without any apparent social service agency supervision. The resulting public outcry led to a Congressional investigation which revealed that the international adoption agency responsible for Masha's placement fabricated at least one post-placement report and that no social workers had ever visited the home to do follow-up reports. *See Sexual Exploitation of Children Over the Internet: Follow-up Issues to the Masha Allen Adoption: Hearing Before the House Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. (2006), *available at* http://www.access/gpo./gov/congress/house (last visited Feb. 12, 2008).

[71] *See, e.g.*, Adoptions: Agreement of Understanding, Seattle International Adoptions, *supra* note 68 ([The agency] shall be compensated for its services prior to travel. If the adoption is for any reason discontinued, fees paid or incurred for services rendered up to the date of discontinuance shall not be recoverable and shall remain the obligation of the Adoptive Parents); *see also* Commonwealth Adoptions Contract, *supra* note 70 (stating, "the [f]amily understands that all payments made during the term of this Agreement are earned in full at the time of payment and are therefore non-refundable").

[72] Building Blocks International Contract (on file with author):

menced defamation suits against adoptive parents who have complained about agency practices or services.[73]

Adoption agencies in the U.S. rely heavily on in-country intermediaries, many of whom are unlicensed and whose activities are not closely monitored by the agencies to locate children, complete adoption paperwork, accompany U.S. parents to appointments with foreign officials and the U.S. embassy, and sometimes obtain consent from the birth parents.[74] These intermediaries are not employees or agents of the adoption agency; thus, the agencies assume no legal responsibility for their facilitator's negligent or criminal acts. Adoptive parents, who are not in

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> The Adoptive Parent(s) shall not issue any false or misleading communication of any kind or nature concerning Building Blocks or any of its agents, servants, employees or foreign contacts (including foreign representatives, foreign and domestic facilitators and physicians). The restricted communications shall include but be not limited to written, oral, internet posting, web sites or other such mediums of communication. False or misleading communications shall include but not be limited to representations that Building Blocks provided an unhealthy child (Building Blocks does not guarantee the past, present or future health of the child or the child's personality, learning disabilities, appearance or inherited characteristics) and communication concerning the length of time an adoption required (each case is subjected to too many foreign influences beyond the control of Building Blocks to guarantee a time frame for the completion of the adoption). In the event of a violation of this paragraph, the Adoptive Parent(s) shall be subjected to injunctive relief limiting the communications and liquidated damages in the amount of $3,500 for each day in which an occurrence of this violation has been identified.

[73] *See, e.g.*, LaTrace v. Mosely, No. 04-4547-C1-13 (Fla. Cir. Ct. 2007) (order granting summary judgment for defendants dismissing plaintiff (adoption facilitator's) defamation claims), *available at* http://www.ethicanet.org/Order_Granting_LaTrace.pdf (last visited Apr. 6, 2008).

[74] Kristina Wilken, *Controlling Improper Financial Gain in International Adoptions*, 2 DUKE J. GENDER L. & POL'Y 85 (1995); Telephone Interview between Trish Maskew and Thomas J. DiFilipo, President and CEO, Joint Council on International Children's Services (Mar. 4, 2007) (commenting that some agencies treat overseas personnel as employees and that the employer/employee model could be used by other agencies, but that the vast majority of overseas workers are independent contractors, and noting that overseas agents of any variety, including employees, agents, facilitators, and attorneys, are key to the process of adoption and that adoption would not be possible without the involvement of key personnel in the foreign country).

privity of contract with the facilitator, have no legal recourse against the intermediary or the agency when things go wrong.[75] Agencies can, therefore, turn a blind eye to questionable and even illicit activities without suffering legal exposure or consequences.

The fee structures and procedures that agencies employ are also highly problematic. The fees charged for international adoptions are extremely high, often outlandishly so in relation to the per capita income of sending countries.[76] A significant amount of the adoption fee is not for specific services, as Bartholet contends, but is denominated a "country fee."[77] The country fees are paid to an agency's facilitators or by the

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[75] For example, in September, 2006, adoption facilitator, Amrex, Inc., declared itself bankrupt, leaving over one hundred prospective adoptive parents with no children and no refunds of payments made. The families had contracted with agencies which, in turn, contracted with Amrex. The Amrex contract indemnified the agency, and the agency contracts indemnified Amrex. The prospective adoptive parents had no recourse against Amrex because they had no contractual relationship with Amrex. *See also*, Michael Pearson, *Adoption Services Firm Investigated over Missing Funds*, ATLANTA J, CONST., Oct. 3, 2006, at 3B; *but see Dresser v. Cradle of Hope Adoption Center, Inc*, 358 F. Supp. 2d 620, 639 (holding that issue of fact existed with respect to whether defendant adoption agency's coordinator in was an "agent" of the adoption agency).

[76] *See, e.g.*, Children's Home Society and Family Services, *Guatemala Adoption Fees*, *available at* http://www.childrenshomeadopt.org/Guatemala_Adoption_Fees.html (last visited Apr. 5, 2008) (listing Guatemala Country Program fees as $20,000 to $21,000). Guatemala's annual per capita income is approximately $2,400. World Bank, *Key Development Data and Statistics* (2005), *available at* http://web.worldbank.org/WBSITE/EXTERNAL/DATASTATISTICS/0,,contentMDK:20535285~menuPK:1192694~pagePK:64133150~piPK:64133175~theSitePK:239419,00.html (last visited Apr. 5, 2008).

[77] A Cambodian adoption in 2001 cost approximately $12,500, in a country with an average per capita income of $200. Of this amount, $5,500 were "country fees" and were not itemized. Cambodia, however, had no formal adoption fees. Government Sentencing Memorandum, USA v. Lauryn Galindo, No. CR-03-187Z (W.D. Wash 2004) [hereinafter Galindo Sentencing Memorandum] (statement of Dr. Kek Galabru of the Cambodian League for the Protection and defense of Human Rights (LICADHO)) (noting that "there are no Cambodian government fees for the processing of adoption"). A Guatemalan adoption can cost over $25,000; of this over $20,000 represents country fees. In Russia, the cost is $20,000 to $35,000, with country fees ranging from $22,000 to $28,000. In China the total cost of an adoption is $13,000 with approximately $8,000 being the country fee. Adopting parents in China are also required to make a fixed "donation" of U.S. $3,000 to $5,000 to the Children's Welfare Institute where the child was being raised prior to the adoption. State Dep't China Adoption Information, *supra* note 64.

agency to government authorities in the sending country. There is no requirement that agencies itemize either the country fee or any other "service" fees it charges.[78] Often, fees are paid to foreign contractors on a per child or per adoption basis rather than as a salary.[79] The prospect of earning large amounts of money, none of which needs to be accounted for, on what amounts to a contingency fee basis, creates significant incentives for individuals, particularly in desperately poor countries, to obtain children by any means possible. This creates a profound absence of transparency at the most critical level of the adoption process, making it virtually impossible to determine how a child came into care and whether the process was free of coercion, deception, or payments to induce relinquishment.

PART III. THE REGULATORY SCHEME

As we have seen, the private agency system is structured to maximize profit potential for the agency, while minimizing its legal exposure and responsibilities to those it serves. Thus, the regulatory challenge, and one of the major purposes of laws in the U.S. and foreign countries, must be to police the private agency system and ensure the integrity of the adoption process.

Bartholet argues, with no analysis of any specific laws, that there exist overlapping layers of legal protection against adoption-related abuses.[80] Her position is curious because on the one hand, she argues that these overlapping laws serve a positive function by ensuring the integrity of the system. On the other hand, she is highly critical of central government systems, which in her view create needless layers of bureaucracy that result in children being housed in damaging institutions for far too long.[81]

This section of the paper will demonstrate that the overlapping system of legal protections that Bartholet mentions, but never analyzes empirically, simply does not exist. In Bartholet's view, Guatemala is a model system because it moves young infants quickly through a private system,

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[78] Even under the Hague Convention, the foreign fee does not have to be itemized. *See* 22 C.F.R. § 96.40 (agencies must disclose the, "expected total fees and estimated expenses for all adoption services that will be provided in the child's Convention country").

[79] This practice is so prevalent that the Hague Regulations require agencies to pay supervised providers on a salary basis or a fee for service basis rather than a contingency fee. However, the fee for service/contingency fee requirements create a distinction without a difference because the end result is the same: remuneration is received only if a child is placed. 22 C.F.R. § 96.34.

[80] *See* Bartholet *supra* note 24, at 185 and accompanying text.

[81] Bartholet, *supra* note 2, at 190.

with minimal central government oversight or regulation. But, as we will demonstrate, the evidence clearly shows that laxly regulated systems, like Guatemala's, are particularly vulnerable to abuses, while centrally controlled government systems do a better job of preventing child buying activities (though not necessarily against other abuses).[82] Finally, this section of the article will demonstrate how the existing regulatory framework in the United States does not effectively limit abuses or offer meaningful protection to children or families.

Foreign Country Systems

On the U.S. side, virtually all adoptions follow the same procedures,[83] but there are significant differences in the laws and procedures governing international adoption in foreign countries. Countries generally fall into one of two broadly defined categories: government controlled systems and privately run systems. The main differences between the two types for the purposes of our discussion are the manner in which the entry of children into the child welfare system is controlled, and the point at which a child intersects with a particular adoption agency that matches him or her with adoptive parents in the U.S. It is at these stages that the process is most vulnerable to abuse.

Government-controlled systems normally have offices specifically tasked with facilitating and controlling adoption. Countries may create rules

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[82] In China, a government authority, the China Center for Adoption Affairs (CCAA) oversees international adoptions. The U.S. views the Chinese system as one of the most, "predictable, efficient, and transparent [systems]." *Hearing on Intercountry Adoption, Before the Subcomm. on East Asian and Pacific Affairs, Senate Comm. on For. Rel.*, 109th Cong. 5 (2006). *See also* Smolin, *supra* note 55, at 124-25:

> Significant sending nations many be divided into various groups. One group of nations is generally free of child buying kidnapping and trafficking, while a contrasting group of nations is mired in recurrent child laundering and profiteering scandals. Thus, China and South Korea generally have positive reputations. Cambodia, India, Guatemala and Vietnam have suffered from significant scandals involving child laundering. A third group of nations, particularly including Russia, rarely suffer from child laundering as their "orphans" are legitimately available for adoption. However, the adoption process in these nations is sometimes subject to corruption, profiteering and bribery.

[83] For discussion of adoption laws in the U.S., *see infra* notes 98 - 133 and accompanying text.

about who can place children for adoption,[84] and how children who enter the foreign adoption process are assigned to agencies and parents abroad.[85] These countries may require efforts to maintain the child within the birth family or to search for domestic adoption alternatives before placement abroad.[86] Adoption fees may be mandated by the government and more

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[84] For example, they may require U.S. agencies to prove they are licensed by the state in which the agency is located. *See* China Center of Adoption Affairs, *Basic Requirements for Foreign Adoption Organizations*, *available at* http://www.china-ccaa.org/site%5Cinfocontent%5CZCFG_20050930040325140_en.htm (last visited Apr. 6, 2008). Some countries, such as Russia, may also require that adoption agencies be accredited by the foreign government. *See* Department of State, *Russia Adoption Information*, *available at* http://travel.state.gov/family/adoption/country/country_441.html (last visited (Apr. 10, 2008) ("Adoptive parents who work through an adoption agency must use an agency that the Russian Government has accredited to provide adoption services").

[85] China has, arguably, one of the most tightly controlled adoption systems in the world, and the China Center of Adoption Affairs (CCAA) is:

> Responsible for selecting and placing adoptees for foreign adopters; making regular notifications of adoptees' status' communicating with adoption registry offices in provinces in case that problems arise during the course of registration; making studies and proposing regulations of inter-country adoption work in welfare institutions, making training courses and giving instructions.

CCAA, *Basic Requirements for Foreign Adoption Organizations in Cooperation with the China Center of Adoption* Affairs, *available at* http://www.china-ccaa.org/zxjj/zxjj_index_en.jsp (last visited Apr. 9, 2008). This central referral system eliminates private agency contact with local orphanages that have proven problematic in other countries. *Id.* In the Philippines, the central adoption authority, the Intercountry Adoption Placement Committee, matches children with families. U.S. DEP'T OF STATE, *Intercountry Adoption:* Philippines, *available at* http://travel.state.gov/family/adoption/country/country_437.html (last visited Apr. 9, 2008).

[86] For example, see Russia's requirement that children be available for domestic adoption for six-eight months before being offered for international adoption. U.S. DEP'T OF STATE, *Intercountry Adoption: Russian Federation*, *available at* http://travel.state.gov/family/adoption/country/country_441.html (last visited Apr. 9, 2008):

> The Russian government maintains a database of children without parental care. Russian law requires that a child be registered first on a local databank for one month and a regional data bank for a month plus six months on the federal databank. Therefore, the total amount of time before a child is released for international adoption is usually eight months.

tightly regulated than in the private system,[87] although issues of transparency remain problematic.[88]

By contrast, in countries without centrally controlled processes, intercountry adoption often operates in an *ad hoc* fashion: laws and procedures are poorly defined[89] or non-existent. In such systems, U.S. agencies and their overseas contacts may enter into placement agreements with private orphanages. These agreements may include monthly or annual support of the orphanage in exchange for exclusive rights to place any children housed there for adoption.[90] In countries where no orphanages or other

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[87] *See, e.g.,* The Philippines, which mandates the following fees: Adoption Application Fee, US $200.00 (non-refundable upon endorsement of the Adoption Application and Supporting Documents); Processing Fee US $2,000.00—for all categories (regular, relative, special needs children); Pre-travel Expenses—The cost of the passport, visa, medical examination, psychological evaluation, travel expenses of the child within the Philippines and for abroad (the cost varies on a country to country basis); US $1,000 Child Care Support Fund for the Child Caring Agencies. Republic of the Philippines, *Frequently Asked Questions: How to Adopt a* Child, *available at* http://www.gov.ph/faqs/adoption.asp (last visited Apr. 9, 2008).

[88] Smolin, *supra* note 55, at 125-26 (noting that in Russia, abuses in child procurement are relatively rare, but there is little transparency about where the fees paid to Russian intermediaries or the Russian government actually go). Similarly, according to Bartholet's estimate, American adoptive parents send over $23 million dollars in orphanage donations to officials in China. *See* Bartholet, *supra* note 2, at 183-85. Bartholet assumes that all of those funds benefit Chinese orphanages, but the CCAA does not document or itemize how orphanage fees are expended. Although anecdotal reports indicate that some donations have been used to improve conditions in some orphanages, it is unclear what percentage of the required orphan donation directly benefits institutionalized children.

[89] *See, e.g.,* Cambodian Subdecree of 2001, *available at* http://www.cambodia adoptionconnection.com/rules_and_regulations.htm (defining criteria for selection of adoptive parents, but containing no provisions defining the circumstances under which a child can be relinquished for adoption or procedures for determining whether relinquishment was voluntary or made by a parent of guardian, not a third party).

[90] For example, placement agreements are common in Vietnam where agencies provide aid and assistance to orphanages and are specifically licensed to work in certain provinces. This practice has proved problematic when agencies began "outbidding" each other for referrals, leading the Joint Council on International Children's Services to propose voluntary standards requiring agencies to work cooperatively in establishing such agreements. *See* Joint Council on Int'l Children's Services, *Standards of Practice for Vietnam, §§* 3.02, 6.01, *available at* http://www.jcics.org/Standards%20of%20Practice%20for%20Vietnam.pdf., U.S.

state institutions exist, U.S. agencies may build or fund orphanages or develop a network of foster homes.[91] The U.S. agencies or their foreign agents may have direct contact with birth families, accept consents, and prepare paperwork to file for termination of parental rights and for adoption.[92] Adoption fees in such countries are generally market-based and are often set by the agents that contract with U.S. agencies.[93]

Countries with strong central government systems are relatively free of child buying abuses and have rarely attracted the attention of the human rights organizations. Indeed, six countries with centrally controlled systems, China, Russia, the Philippines, India, Columbia, and the Republic of Korea have lengthy (15-17 year) histories of steady to slightly increasing

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Embassy, Summary of Irregularities in Adoption in Vietnam (April 25, 2008) [hereinafter Vietnam Embassy Report] *available at http://vietnam.usembassy.gov/irreg_adoptions042508.html* ("According to DIA [Vietnamese Department of International Adoption], orphanages are required to refer one child for foreign adoption for every x dollars donated by the ASP [adoption service provider]. Thus, if the ASP funds a $10,000 project and the per-child donation is set at $1000 per child, then the orphanage would be required to refer 10 children for intercountry adoption to the ASP).

[91] In Guatemala, private intermediaries such as adoption attorneys have developed a network of private foster care. *See* Bartholet, *supra* note 2, at 190. *See also, e.g.*, Dillon International, Inc., Haiti Adoption, available at http://dillonadopt.com/Haiti-A.htm (last visited Apr. 29, 2008) (describing collaboration with sister institution The Foundation for the Children of Haiti, which built complex to care for the waiting children including the Rainbow Of Love Nursery, School of the Good Sower, and Hope Children's Hospital; Vietnam Embassy Report, *supra* note 90 (noting that "one orphanage, which is entirely funded by an American ASP submits expense reports and receipts to the ASP on a monthly basis. The ASP then transfers funds to reimburse the orphanage for its expenses").

[92] *See, e.g., infra*, note 192 and accompanying text (detailing preparation of adoption paperwork by facilitators in Cambodia).

[93] *See, e.g.,* Vietnam Embassy Report, *supra* note 90 (noting that "several orphanage directors have told the Embassy that they actively bargain with multiple ASP's and choose to work with the ASP that offers the highest donation per child referred").

numbers of placements.[94] Together, these six countries account for 82% of all adoptions by U.S. citizens from 1990-2006.[95]

It is only in laxly regulated systems that human rights organizations have voiced significant concerns about adoption abuses.[96] These systems often lack legal and statutory frameworks to police child buying, provide mechanisms for parents to locate and reclaim abducted children, or control bribery and money laundering.[97] The statistics clearly show that centrally controlled systems do a far better job of both controlling illegal activity *and* providing homes for children, than the loosely regulated systems, like Guatemala's, whose virtues Bartholet extols.

Where no foreign controls adequately address adoption abuses, the burden of regulating adoption falls to the receiving country. In this respect U.S. law, at both the state and federal levels, creates far more gaps than it closes, rendering Bartholet's contentions about the existence of an overlapping safety net of laws suspect.

U.S. State and Federal Regulation

Regulation by U.S. States

Although domestic adoptions are regulated at the state level, the existing state licensing system is not designed for, nor in most cases does it

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[94] China (16 years of steadily climbing rates before a small decrease in 2006 for total of 62906, with a high of 7906 and low of 61 (in its first year) for an average of 3932); Russia (15 year history of relatively steady growth until decreases in the last two years for total of 52940, with a high of 5865, and low of 324 (in its first year) for an average of 3530); Philippines (total 4469, low 163, high 421 and average of 263); India (total of 6996, low of 320, high of 543 and average of 412; Colombia (total 5819, low of 231, high of 631 and average of 343); S. Korea (low 1,376, high 2,620, average over the 17 year span for which statistics are available (1990-2006) was 1,793 for a total of 30,476). Together these six countries account for 82% of all adoptions by U.S. citizens from 1990-2006. Of these six, only India has been the subject of significant concern by local NGOs. U.S. DEP'T OF STATE, *U.S. Adoption Statistics* (1990-1995), and DHS Statistics (1996-2006).

[95] *See* U.S. Dep't of State, *supra* 94.

[96] For a more detailed discussion, *see infra* Part IV.

[97] *See*, e.g. *Dateline NBC*: *To Catch a Baby Broker*, *available at* http://www.msnbc.msn.com/id/22756856/ (NBC television broadcast Jan. 20, 2008) (detailing adoption irregularities in Guatemala, including the story of a family whose three daughters were kidnapped and placed for adoption. The family filed a complaint with local police who did not provide assistance or investigation in locating the missing children); *see* Vietnam Embassy Report, *supra* note 90 (outlining how Vietnamese officials were unable to control rampant corruption).

effectively regulate, the agencies involved in international adoptions.[98] For instance, international adoption "agencies" do not need to be licensed at all in some states, nor, in some states is there any requirement that agencies operate as not for profit enterprises.[99] Only three states have specific licensure requirements for international adoption.[100] Moreover, licensing requirements vary widely from state to state and seldom cover the most problematic issues in inter-country adoption.[101] For instance, only two states require that agencies provide educational background information on their overseas employees.[102] Perhaps most importantly, no state requires

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[98] Presentation of Elena Langrill, Asst. Attorney General, MD, at the Adoption Ethics and Accountability Conference, October 16, 2007 (outlining a lack of consumer protection and licensing provisions dealing with international adoption) (audio recording available at http://www.adoptioninstitute.org/events.)

[99] Some so called "agencies" are actually adoption facilitators, not social service agencies. For example, the State of California allows for profit adoption facilitators to be licensed as businesses rather than adoption agencies. *See* CAL. DEP'T OF SOC. SERV. ADOPTIONS SUPPORT SERV., *Registry of Cal. Adoption Facilitators*, *available at* http://www.childsworld.ca.gov/res/pdf/RegistryAdoptionFacilitator.pdf (last visited Apr. 13, 2008).

[100] *See* Cal. Fam. Code § 8900 (2007). California: "Intercountry adoption services shall be exclusively provided by private adoption agencies specifically licensed by the department." *But see* Cal. Dep't of Soc. Serv. Adoptions Support Serv., *supra* note 99 (allowing facilitators to operate without licensure); Colorado:

> The department is authorized to select nonpublic, licensed child placement agencies authorized to handle adoptions or nonpublic agencies that meet the qualifying criteria to be licensed child placement agencies pursuant to article 6 of title 26, C.R.S., and any implementing rules or regulations promulgated by the department for the provision of services to individuals seeking assistance in nonpublic agency interstate or foreign adoption cases pursuant to this part 2. The department shall, by rule, establish qualifying criteria by which such nonpublic agencies shall be selected for this purpose.

COLO. REV. STAT. 19-5-205.5(2)(a) (2008): "If approved by the Administration, the agency may provide services related to an international adoption." MD. CODE REGS. 07.05.03.18(A); *see also*

[101] For example, no state mandates that adoption fees must be refundable if services are not rendered and no state prohibits blanket waivers of liability.

[102] *See* ALASKA ADMIN. CODE 56.670(g) (2007): "An agency providing intercountry adoption services shall verify the credentials and qualifications of agents in foreign countries working in the agency's behalf on adoption matters"; UTAH ADMIN. CODE R.501-7-119(D)-(2007)- "A child placing adoption agency that provides

agencies to take legal or contractual responsibility for the acts of their overseas employees and contractors.[103]

U.S. Federal Regulation

As of April 1, 2008 when the Hague Convention on International Adoption[104] entered into force in the U.S., two distinct bodies of law at the federal level govern international adoptions. Adoptions between the U.S. and Non-Hague countries are governed by the Immigration and Nationality Act's orphan regulations; adoptions between the U.S. and Hague signatories are governed by the Hague Convention and the U.S. implementing legislation, the Intercountry Adoption Act (IAA).[105]

Immigration and Nationality Act

In adoptions between the U.S. and non-Hague countries, the Immigration and Nationality Act (INA) is normally the only federal law governing international adoption.[106] The INA provides an incomplete, and often ineffective, means of regulating international adoptive placements. The most significant problem is that there is no provision in the INA or elsewhere in the federal statutory scheme that criminalizes the purchase of children or trafficking in children for *the purposes of international adoption.*[107]

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intercountry adoption services shall verify and maintain documentation regarding the credentials and qualifications of agents working in their behalf in foreign countries."

[103] *See* Ethica, *Adoption Regulation Research Project*, Preliminary Results (April 15, 2008) (on file with author) (finding no state regulations specifically require such vicarious liability provisions).

[104] *See* Hague Convention, *supra* note 42; *see also* IAA, *supra* note 42.

[105] *See* Thomas E. Cook: Acting Assistant Commissioner of Adjudications Division, U.S. DEP'T OF JUSTICE: IMMIGRATION AND NATURALIZATION SERVICE, *Memorandum for All Regional Directors: Intercountry Adoption Act of 2000* (Jan. 17, 2001) (outlining conditions under which IAA will govern international adoptions and when INA's orphan definition will control) (on file with author).

[106] The INA's orphan definition governs the determination of whether the child will receive a visa to enter the U.S. *See* 8 CFR 204.3 (2003). While some federal laws regarding document fraud, money laundering, or other crimes can have applicability to adoptions, the INA is the only law impacting every international adoption to the U.S.

[107] In 2000, the United States passed the Trafficking Victims Protection Act, Pub. L. No. 106-386, 114 Stat. 1466 (2000) (codified as amended in scattered sections of 8, 18, and 22 U.SC.). The act criminalizes a number of human trafficking offenses, but not trafficking for purposes of international adoption. For an in-depth discus-

In adoptions between the US and non-Hague nations, the only determination made at the federal level is whether the prospective adoptive child satisfies the Act's orphan definition and qualifies for an "Immediate Relative Visa" to enter the US.[108] In every other aspect of the adoption process, the law of the marketplace governs. For instance, though the INA does require prospective adoptive parents to meet specific standards to

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sion of the Trafficking Victims Protection Act, *see* Developments in the Law, *Jobs and Borders, The Trafficking Victims Protection Act*, 118 HARV. L. REV. 2180 (2005). For an excellent historical survey of international conventions that define human trafficking, as well as an in depth discussion of the indeterminate nature of these definitions, particularly as they may (or may not) apply to international adoptions, *see* David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281 (2004):

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

[108] 8 U.S.C. 1101(b)(1)(F)(i) (2006). The statute defines an orphan as:

> a child under the age of sixteen at the time a petition is filed in his behalf to accord classification as an immediate relative under section 1151(b) of this title, who is an orphan because of the death or disappearance of, abandonment of desertion by, or separation or loss from, both parents, or for whom the sole surviving parent is incapable of providing proper care and has in writing irrevocably released the child for emigration and adoption.

If a child is not deemed an orphan, the Immediate Relative Petition must be denied. For a discussion of the procedural requirements for visa denial *see infra* note 111 and accompanying text.

The INA's orphan definition is cumbersome and conceptually dense. For instance, in its advice to adoptive parents on "Difficult Issues in Orphan Cases," USCIS notes:

> The laws of some countries do not permit adoption. Laws of other countries restrict persons eligible to adopt children. There are children legally adopted abroad who do not qualify as orphans according the U.S. immigration laws (*see* definition of orphan in Appendix B). The adoptive and prospective adoptive parent(s) should be aware that NOT ALL CHILDREN ADOPTED ABROAD ARE ORPHANS, and what appears to be a foreign adoption may not comply with the laws of the foreign state; and some valid foreign adoptions are not sufficient to classify the adopted person as a "child" under U.S. immigration law.
>
> *It is the responsibility of the petitioner* [adoptive parents] to prove to the USCIS that a child is eligible for classification as an orphan for immigration purposes. The evidence must be in the form of documents. This evidence may vary, depending on the facts of the case (emphasis added).

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, *Difficult Issues in Orphan* Cases, *available at* http://uscis.gov/graphics/services/diocase.htm (last visited Mar. 29, 2008). *See also* Sara Goldsmith, *A Critique of the Immigration and Naturalization Service's New Rule Governing Transnational Adoptions*, 73 WASH. U. L.Q. 1173 (1995) (noting that adoptive parents have the burden of proving whether an adopted child satisfies this complex definition).

It should also be noted that the vast majority of international adoptive parents do not retain attorneys to assist them with this part of the process, but instead, rely on foreign intermediaries, discussed in Part II *infra*, none of whom are regulated by US law and the majority of whom have no training in US immigration or state adoption law. More seriously, as discussed in the previous section, definitions of orphan status and adoptability differ across cultures. In testimony before Congress in 2002, then INS Commissioner James M. Ziglar noted that a significant risk faced by American adoptive parents was that the child they adopted might not qualify for an orphan visa, thus rendering the adoption for all intents and purposes a nullity. Ziglar's testimony is noteworthy because he shed light on the lack of transparency in some country's adoption systems and the ways in which lack of transparency interacts with and can fuel corruption:

> The most serious problem with international adoptions is that in many countries, the process by which governments decide that birth parents are no longer providing care for their child and that the child is available for intercountry adoption is not always transparent.
>
> As a consequence, some American prospective adoptive parents have experienced the heartbreaking situation in which they have traveled abroad and adopted a child, only to discover that the child does not meet the orphan definition and cannot immediately immigrate to the United States. For example, sometimes a foreign

adopt (including the requirement of a home study by a qualified social worker),[109] there are no conduct requirements for the professionals who facilitate those adoptions. The INA does not establish fee parameters, requirements on who can facilitate adoptions for U.S. agencies, or contractual arrangements between agencies and families or foreign partners.[110] In effect, then, the INA fails to regulate all of the most essential and potentially problematic aspects of the international adoption process.

The INA addresses the question of child trafficking for purposes of adoption obliquely (and inadequately) in the Federal Regulations governing adjudication of Immediate Relative Petitions. Section 204.3 of the Regulations stipulates that:

> [A]n orphan petition must be denied . . . if the prospective adoptive parents or adoptive parent(s), or a person or entity working in their behalf, have given or will give money or other consideration either directly or indirectly to the child's parent(s), agent(s), other individual(s), or entity for the child or as an inducement to release the child.[111]

The Regulation, therefore, does not criminalize or otherwise penalize child buying, it merely imposes the *administrative* penalty of visa denial.[112] The regulation does not address the real evil because it does not

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> country allows Americans to adopt a child who is not an orphan because their laws are different than ours. Sometimes, particularly in poor and underdeveloped countries, unregulated and unscrupulous agents and facilitators take advantage of inadequate infrastructure and safeguards to lead American prospective adoptive parents to believe a particular child is an orphan when a professional review of the paperwork reveals serious problems and irregularities.

Hearing on International Adoptions: *Hearing Before the House Committee on International Relations (testimony of James M. Ziglar)*, 107th Cong. 4 (2002), *available at* http://www.uscis.gov.files/testimony/1ZIGHOUS.pdf) (last visited Feb. 12, 2008).

[109] 8 C.F.R. 204.3(c)(2) (2003).

[110] *See, e.g.,* Wilken, *supra* note 74, at 87 (noting that "U.S. adoption laws" fail to regulate payments made by adoptive parents of a child to the child's birth parent or to an adoption intermediary").

[111] 8 C.F.R. § 204.3 (g)(14)(i) (2003).

[112] The administrative penalty is USCIS's denial of the orphan petition. Adoptive parents have a right to appeal at the administrative level, as well as a right to judicial review after exhaustion of administrative remedies. However, adoptive parents bear the burden of proving that their child was properly relinquished with-

provide sanctions against individuals who may have induced or coerced birth parent consent through improper payments. Instead, under current law, the innocent parties —adoptive children and parents— are penalized by denial of an immigrant visa for the child while perpetrators suffer no consequences at all.

The Hague Convention

The Hague Convention has the potential to remedy some of the defects in the current INA framework. The IAA does penalize child buying and other forms of coercion in adoptive placements.[113] Thus, the Hague Convention (which Bartholet contends has been hijacked by the international human rights community and turned into a barrier to international adoptions, especially in countries like Guatemala)[114] is the only instrument

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out monetary inducements. This often entails undertaking private investigations in the sending country, as well as great emotional and financial cost to the adoptive parents, not to mention the adoptive child, who cannot emigrate and who may face being placed back into an institution, should the adoptive parents appeal be unsuccessful. *See, e.g.,* In re *[redacted],* Petition to Classify Orphan as Immediate Relative, U.S. Citizenship and Immigration Services Administrative Appeal, Tampa, Florida Office (Oct. 20, 2003) (public copy with identifying information deleted to prevent invasion of privacy), *available at* http://www.uscis.gov (last visited December 22, 2004) (denying self-represented adoptive parents appeal of Notice of Intent to Deny Immigrant Visa on grounds that child was not surrendered to state run orphanage, private orphanage or other competent authority prior to adoption and thus, did not qualify as an orphan under the statute) (copy on file with author) ; *In re _[redacted]* Petition to Classify Orphan as Immediate Relative, Ho Chi Minh City, Vietnam Office (Mar. 7, 2003) (public copy with identifying information deleted to prevent invasion of privacy), *available at* http://www.uscis.gov (last visited December 22, 2004) (reversing Officer in Charge's determination that child did not meet orphan definition on grounds that even though person who relinquished child to orphanage was not child's mother, insufficient evidence existed that child had been relinquished by parent for specific adoption and that sufficient efforts had been made to locate birth parent).

[113] IAA, *supra* note 42; 42 U.S.C. § 14944 (2000).

[114] Bartholet, *supra* note 2, at 154. Bartholet argues that:

> International human rights organizations succeeded in changing the focus of the Hague Convention negotiations so that [the goal of facilitating international adoptive placements] was eliminated and the thrust became more single-mindedly focused on preventing adoption abuses. . . the Hague Convention seems, to date, to have functioned in numerous instance to effectively close, not open, opportunities for adoption.

in U.S. federal law that will actually criminalize child trafficking for the purpose of international adoption.[115] The U.S. regulations implementing the Convention also create an accreditation scheme to regulate adoption agencies.[116] Whether the Hague Convention will in fact improve current practices, is however, very much in doubt.

First, the Convention applies only to adoptions between signatories.[117] Currently only about half of the countries involved in international adoptions with the U.S. will be subject to the Convention.[118] Second, and more seriously, the Convention's implementing regulations were heavily influenced by the adoption agency community in the United States, with the result that important protections envisioned by the Convention have been all but eviscerated.[119] For example, adoption fees can still be non-refund-

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[115] 42 U.S.C. § 14944 (2000).

[116] *See* 42 U.S.C. § 14921(a)(1)-(2) (2000):

> Except as otherwise provided in this title, no person may offer or provide adoption services in connection with a Convention adoption in the United States unless that person (1) is accredited or approved in accordance with this subchapter; or (2) is providing such services through or under the supervision and responsibility of an accredited agency or approved person.

[117] Hague Convention, *supra* note 39, Art. 42, provides:

> The Convention shall apply where a child habitually resident in one Contracting State ("the State of origin") has been, is being, or is to be moved to another Contracting State ("the receiving State") either after his or her adoption in the State of origin by spouses or a person habitually resident in the receiving State, or for the purposes of such an adoption in the receiving State or in the State of origin.

[118] The Convention is not in effect in Russia, South Korea, Vietnam, Ethiopia, Kazakhstan, Ukraine, Liberia, Haiti, Taiwan, Nepal or Nigeria, eleven of the top twenty source countries for U.S. adoption in 2006. Hague Conference on Private International Law, *Status Table*, *available at* http://www.hcch.net/index_en.php?act=conventions.status&cid=69 (last visited Apr. 2, 2008).

[119] The Department of State issued a proposed set of regulations on September 15, 2003 and received some 1,500 comments in response, most from adoption agency personnel objecting to particular standards. Maura Harty, Asst. Secretary of State for Consular Affairs, Department of State, Remarks at Holt International Conference, *Looking Forward, Getting it Right*, October 2006 (stating that the final regulations were "the product of considerable research, interagency coordination, and input from the adoption community – including roughly 1,500 public comments, which we painstakingly reviewed and considered").

able,[120] agencies can still shift all risk to the adoptive parents,[121] and "country fees" still do not require itemization.[122]

While a full discussion of the U.S. regulations implementing the Hague Convention is beyond the scope of this article, a few salient issues must be addressed to refute Bartholet's claims about the IAA's protection against abuses. As noted above, the IAA provides for civil and criminal penalties for child trafficking activities.[123] However, the regulations which address child buying also make it legal for agencies and their overseas agents to pay monies for, *inter alia*, locating a child for adoption, pre-natal and living expenses for a pregnant woman before the birth of a child, expenses for the mother and child following the birth, as well as medical, legal and translation costs.[124] While some believe that because most U.S. states allow such expenses, they should be allowed overseas, it must be noted that there are protections here in the United States that are not present in other countries. Significantly, in 49 of 50 U.S. states, the payment of expenses does not obligate a pregnant woman to place her child for adoption. No such protections exist under the IAA regulations.[125] This is particularly problematic because the solicitation of children for adoption is a major problem in some countries. These payments may be dubbed "expenses" but often these payments greatly exceed any expenses the families in developing countries would incur during the pregnancy and birth.[126] Such payments can, therefore, have substantial coercive effects; indeed, it is

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[120] 22 C.F.R. § 96.40(a) (2006):

> The agency or person provides to all applicants, prior to application, a written schedule of expected total fees and estimated expenses and an explanation of the conditions under which fees or expenses may be charged, waived, reduced, or refunded and of when and how the fees and expenses must be paid).

[121] 22 C.F.R. § 96.39(3)(d) (2006) (providing that agencies can do so only where the waiver complies with State law, but no state outlaws them).

[122] 22 C.F.R. § 96.40(b)(3) (2006) (requiring agency to disclose only the "total fees and estimated expenses for all adoption services that will be provided in the Convention country").

[123] 42 U.S.C. § 14944 (2000).

[124] 22 C.F.R. § 96.36 (2006).

[125] *Id.*

[126] See, e.g. Ethica, "Child Trafficking, Why Can't the Immigration Service Prove It?" *available at* www.ethicanet.org/INSEvidence.pdf (outlining case in which a Vietnamese birth mother was paid an equivalent of 125% of the annual per capita income as "expenses"); *see also infra*, notes 203 and 204 and accompanying text, outlining problems with payments to birth families in Guatemala.

difficult analytically to view them as anything other than a legalized way to pay indigent families for their children.

The permissible fee provision of the new regulations interacts in a dangerous way with two other problematic provisions. First, the Convention expressly states that compensation to adoption service providers must be "reasonable."[127] Yet, contrary to the purposes of the Convention and the IAA,[128] the U.S. implementing regulations do not base reasonableness determinations on the cost of living in the child's country of origin or the cost of comparable legal services in that country. Instead, the regulations require that agencies keep their fees reasonable in relation to *the norms for the inter-country adoption community.*[129] In other words, agencies can charge as much as the market will bear, provided all other agencies are doing the same.

Finally, while the Hague regulations lay out a complicated accreditation scheme that purportedly holds agencies accountable for adoptions, there is a broad exception to the regulation's vicarious liability provisions. This exception has the potential to undermine a number of the regulation's protections. In section 96.14 of the Hague regulations, agencies are informed that they must supervise all foreign providers of services *unless* the provider obtains the consent to adoption or writes the child study report on the potential adoptee.[130] Arguably, this exclusion enables agencies to avoid legal responsibility for facilitators and agents who perform these func-

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[127] Hague Convention, *supra* note 42, art. 32 (stipulating that no one should derive improper financial gain from an activity related to an intercountry adoption and that adoption personnel should not receive compensation that is "unreasonably high in relation to services rendered.; *Id.* art. 8 (requiring each country's Central Authority to take "all appropriate measures" to prevent improper financial gain).

[128] *Id.*; *see also* 146 Cong. Rec. H6389 (July 18, 2000) (statement of William D. Delahunt) (noting that documented abuses in intercountry adoptions range from the charging of exorbitant fees by so-called "facilitators" in some countries to child kidnapping, baby smuggling; and coerced consent from birth mothers).

[129] *See* 22 C.F.R. §96.34 (2006) (requiring agencies to ensure that fees paid to directors, officers, employees, and supervised providers of the agency are not unreasonably high in relation to services rendered, "taking into account the country in which the adoption services are provided and norms for compensation within the Intercountry adoption community in that country").

[130] *See* 22 C.F.R. § 96.14(c)(3) (2006). The child study is a particularly significant piece of any adoption because it details the circumstances surrounding the child's relinquishment. *See* Hague Convention, *supra* note 42, art. 16 (listing requirements of child study report, including information about [the child's] identity, adoptability, background, social environment, family history, medical history, including that of the child's family, and any special needs of the child").

tions.[131] The State Department has stated it will not allow agencies to interpret section 96.14 as a loophole to enable agencies to avoid supervising (and thus responsibility for) their overseas agents.[132] It remains to be seen, however, whether the unsupervised provider liability exclusion will become an exception to agency responsibility that swallows the rule.[133] Thus, these three provisions, alone or in combination, may actually legitimize activities that amount to child trafficking.

At the federal level, then, the framework within which international adoptions take place lacks significant safeguards. Although adoption agencies are subject to accreditation requirements under IAA, as the discussion above makes clear, the Act's implementing regulations may not significantly change — and at least in the area of permissible payments to birth families, may actually increase — problematic aspects of the market-driven system. In addition, over half of the most popular countries for U.S. adoption are not governed by the Hague scheme. Thus, there is simply no evidence supporting Bartholet's claims that a safety net of any kind exists for any member of the adoption triad in countries without centrally controlled systems.

These issues would be less problematic if it were possible to state with Bartholet's confidence that adoption abuse is, in fact, rare. However, as the next section of this article will demonstrate, Bartholet's confidence is misplaced.

PART IV ADOPTION ABUSES

Bartholet argues without support that adoption abuses like kidnapping and child buying occur infrequently.[134] In her view, human rights or-

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[131] 22 C.F.R. §96.46(c) allows agencies to "verify" these items were done in accordance with the Convention through "document review" and other unspecified means, but do not have to take supervisory responsibility for the agents.

[132] Email from Katherine E. Monahan, Chief, Hague Intercountry Adoption Unit Office of Children's Issues, U.S. Department of State to Trish Maskew, President & Linh Song, Executive Director, Ethica, Inc. (Dec. 07, 2007) (on file with author).

[133] For a detailed discussion on the supervised provider exemption, *see* Trish Maskew, *The Failure of Promise: The U.S. Regulations on Intercountry Adoption under the Hague Convention*, 60 AM. U. ADMIN. L. REV. (forthcoming June, 2008) (copy on file with editors).

[134] The historical data, however, suggest otherwise. Allegations of widespread adoption abuses first emerged in Latin America in the 1980's and 1990's and in Romania in the early 1990's. *See. e.g.*, Jorge L. Carro, *Regulation of Intercountry Adoption: Can the Abuses Come to an End*, 18 HASTINGS INT'L & COMP. L. REV. 121, 131-41 (1994). Carro details adoption abuses in Peru (1992) in which an

American attorney was arrested by Peruvian authorities and the special prosecutor found evidence that an American attorney "falsified birth records, bribed judicial officials, bought children from mothers for as little as $5, outright kidnapped some children and allegedly ran three day-care centers where poor working mothers were pressured to sell their children." The attorney and the American agencies with which he worked denied allegations. *See* U.S. DEPT OF STATE, Travel Advisory No. 91-252 (Dec. 27, 1991) (advising travelers of adoption problems in Peru). Carro also notes that Brazil implemented restrictions on intercountry adoption after rumors of baby selling surfaced. In 1992, evidence that senior government officials were involved in baby trafficking resulted in the Honduran government closing its international adoption program. *See* Michael Riley, *Deceit Takes Babies Away in Honduras; Adoptions: Poor, Illiterate Women in Honduras Are Easy Prey for Lawyers Serving as Brokers for U.S. Couples Seeking to Adopt*, *Balt. Sun* (July 2, 1998). In the early 1990's well-documented reports of a Romanian "baby bazaar" surfaced. Carro notes that many prospective adoptive parents realized that large numbers of children in Romanian orphanages were either HIV or Hepatitis B positive; abortions, which had been illegal under the Ceacescue regime, increased in 1990, further decreasing the number of available infants. As a result, many Romanian parents realized that they could, in effect, sell their child to the highest bidders. This led to an increase in the number of baby brokers. *Id.* at 148. The activities of the brokers were documented by New York Times reporter Kathleen Hunt. *See* The Romanian Baby Bazaar, N.Y. Times, Mar. 24, 1991 (Magazine). *See also* 60 Minutes Broadcast, Apr. 14, 1991 (documenting Romanian baby trade). *See* Bogard, *supra* note 52, at 608-09 (noting that 1990 Romanian adoption law requiring parental consent to adoption helped to create burgeoning black market in adoption of Romanian children. The number of children in orphanages decreased; foreign adoptive parents began to rely on baby brokers, who preyed on the poverty of Romanian families to induce them to relinquish their healthy children to foreign adoptive families for as much as the equivalent of several years of wages. Concerns about adoption irregularities in Romania continued throughout the 90s and early 2000s despite several revisions to adoption procedures. More recently, as will be discussed in greater detail, *infra* Part IV, credible (and in the case of Cambodia, substantiated) reports of similar patterns of adoption abuses have surfaced in numerous countries.

Interestingly, Bartholet minimizes the significance of the Romanian adoption scandals, contending that:

> [T]he evil represented by the fact that some impoverished Romanian birth parents accepted money incidental to relinquishment of their children, with there likely being only a handful who were motivated by money to relinquish children they otherwise would have kept is miniscule, in my opinion, by comparison to the evil represented by the thousands of Romanian children condemned to live and die in horrible institutions, who could have had loving, nurturing adoptive homes.

ganizations have greatly overestimated the incidence and significance of abuses within the overall picture of international adoption in order to further their own anti-adoption agendas.[135] Interestingly, Bartholet does admit that payments to birth parents do sometimes occur.[136] But she rationalizes these payments by creating a distinction between payments made to induce relinquishment and humanitarian assistance provided after relinquishment.[137] The distinction is meaningless because the *known* possibility of assistance, whether pre or post relinquishment, has the same effect: It creates an *incentive* to relinquish,[138] particularly when the birth family is destitute or in crisis.[139] By minimizing the ethical significance of payment in connection with relinquishment Bartholet can then cast the human rights community's legitimate concern with the integrity of process as mere anti-adoption sentiment.

Interestingly, however, the human rights community has voiced significant objections to international adoption in only a small fraction of countries,[140] most of which share characteristics which, as we will show,

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Bartholet, *supra* note 2, at 188-89. While no one disputes the tragedy of children in Romanian institutions, Bartholet provides no empirical support for her claims about the frequency and impact of payments made by baby brokers to Romanian birth parents. Moreover reports of the Romanian baby bazaar made it abundantly clear that in many cases, the children being adopted were not, and had never been, part of the Romanian orphanage population.

[135] Bartholet, *supra* note 2, at 186-87.

[136] Bartholet, *supra* note 2, at 186-87.

[137] Bartholet, *supra* note 2, at 186-87.

[138] Smolin, *supra* note 55, at 127 (noting ethical ambiguities of payments to birth parents and manner in which payments are made create problems drawing useful distinctions between "lawful relinquishment and illicit purchase of a child").

[139] Bartholet goes on to make the argument that payment to gestate children for the purposes of international adoption is "what we call surrogacy." *See* Bartholet, *supra* note 2, at 188. But in fact, this is not the case at all. Where surrogacy is permitted, it is generally viewed as a gratuitous transfer whose promises cannot be enforced contractually. Where contractual surrogacy is recognized, it is premised upon the capacity of the parties to contract. Such capacity cannot be presumed if the birth mother is, as Bartholet herself admits, so poor that she simply does not have a choice. Bartholet, *supra* note 2, at 187.

[140] In 2004, Ethica published, *The Statistics Tell the Story*, *available at* http://www.ethicanet.org/item.php?recorded=statistics (last visited Apr.12, 2008) (finding that over past 15 years, of 40 top 20 countries of origin for U.S. adoptions, 13 were currently closed or effectively closed, an additional 4 were closed reportedly temporarily, to investigate concerns or establish new procedures, with the total of 17 countries accounting for 43% of the 40). Vietnam has since reopened. These coun-

make international adoption programs particularly vulnerable to abuse. We do not intend to imply that all adoption service providers in these countries are participating in abusive adoption activities. Rather, the characteristics of these countries make them particularly ripe for abuse by those who do engage in such activities.

Though an in-depth discussion of human rights abuses in international adoption is beyond the scope of this article,[141] the available evidence strongly suggests that international adoption abuses follow a remarkably consistent and predictable cycle in country after country. The countries in which significant international adoption abuses have been alleged and documented — Latin America in the 1980's, Romania in the early 1990's, Cambodia in 2000-01, and now Vietnam and Guatemala — often suffer from extreme poverty or have recently emerged from war or social unrest. As a result, these countries often lack child welfare infrastructures of any but the most basic kinds.[142]

Absence of child welfare infrastructures results in a lack of basic safeguards against illicit child procurement practices: births are not re-

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tries had adoption numbers ranging from 79 to 1122. *Id.* Romania and Peru were the only countries to ever exceed 500. The average was 307. *Id.* It should be noted that, according to the author's calculations based on the USCIS statistics, even if such countries had continued at their highest levels until the present, it would only have raised the total number of children adopted by approximately 40,000 over the 17 year period from 1990-2006. These additions would have amounted to about 15% of all adoptions. As noted in note 94, six countries account for 82% of all adoptions and have remarkably steady numbers for 15-17 years. Countries that have closed after human rights allegations were, thus, a small percentage of the total number of adoptions over the years, lending further weight to the contention that state run systems do a better job of both curtailing abuses and placing children. *See* U.S. DEP'T OF STATE, *U.S. Adoption statistics* (1990-1995), and DHS Statistics (1996-2006).

[141] For a comprehensive survey and analysis of human rights abuses in international adoption, *see* Smolin, *supra* note 55.

[142] ILPEC Guatemala, *supra* note 59, at 48 (quoting director of US adoption agency with program in Guatemala, a country which suffers from extreme poverty and had only recently emerged from decades of civil war, stating that, "Guatemala is one of the few countries in the world - if not the only one in which the legal possibility exists of formalizing an adoption without mediation by a judicial resolution." (quoting Revista Domingo, Prense Libre, Oct. 5, 1997, at 10). ILPEC concludes that "[t]hese circumstances have, in large measure, generated the widespread trafficking of Guatemalan children,"; Smolin, *supra* note 55, at 126 (noting that countries with significant child laundering problems typically have "a large proportion of the population lives in or near extreme poverty").

corded,[143] the state does not intervene to investigate abduction or the sale of children,[144] and it lacks the resources to provide care for vulnerable populations. When these problems are coupled with dire poverty and the lure of large amounts of western money, it is not at all difficult to see how resourceful entrepreneurs can easily procure, by all manner of illicit means, the kinds of children who will satisfy market demand.

Historically, word of fast, easy placements of infants and toddlers spreads and such countries become "hot spots" for international adoption.[145] Typically, the children offered for placement will have characteristics valued by American adoptive parents[146] and may not be representative of the country's population of legitimate orphans. The number of children adopted begins to spike rapidly and more and more agencies become active in the country.[147]

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[143] *See* Plan UK, *supra* note 45 and accompanying text.

[144] Dateline, *supra* note 97 and accompanying text.

[145] Currently, Vietnam and Ethiopia are the international adoption "hot spots." USCIS has reported receiving 2000 I-600A applications stating intention to adopt from Vietnam (where the highest number ever adopted in one year was 820 (2007)); Ethiopian adoptions rapidly escalated in number between 2003 to 2007, showing 166, 277, 430, 711 and 1,255 adoptions respectively.

[146] U.S. visa statistics show that 84-89 percent of all adoptions are for children under the age of 5. Most of these children are actually under 18 months because Chinese children tend to be between one year to 15 months at arrival. *See* Ralph Stirling, *China Referral and Age Statistics*, *available at* http://chinastats.org/statsdisplay.htm#WAIT (last visited Apr. 12, 2008). Americans also tend to prefer to adopt girls. *See* Gravois, *supra* note 60; Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 115, 119 (Nov/Dec/ 2003) (stating that stopping the baby trade in international adoption will be "no small feat. . ." Infants can fetch anywhere between $5,000 and $25,000). China tends to skew the male/female ratio for adoptive placements because nearly all Chinese adopted children are girls. When China is removed from the U.S. visa statistics, the male/female ratio remains close to 50/50 over the 10 year span from 1996-2006. In countries that experience significant problems, children tend to be very young. For example, over the three year period of 2004-2006, children under age of one totaled 40-42% of adoptions across all countries. However, Guatemalan children were under the age of 1 in 65% (2004); 79% (2005) and 80% (2006) of the cases. During their peak years, Vietnam averaged 75% under the age of one, with 62% being female; Cambodia averaged 65% under the age of one, even with the considerable processing delays, and rising percentages of girls: 51% in 1999, 54% in 2000 and 63% in 2001.

[147] Smolin, *supra* note 55, at 126 (identifying a second factor that characterizes countries with child laundering problems: "the nation sends a sufficient number of

Although practices differ somewhat from country to country, the typical scenario involves some sort of recruitment scheme in which locals identify poor pregnant woman who may be willing to consent to adoption. These recruiters offer to pay parents compensation for releasing their child for adoption.[148] Often the payments are characterized as reimbursement of "expenses" for the pregnancy and birth or as humanitarian aid.[149] Recruiters may promise the birth family that the child will return, that the adoptive parents will send money to the birth family, or that the child will someday sponsor the family for immigration to the U.S.[150] The recruiter then delivers the child to an orphanage or foster home and receives compensation. Facilitators or attorneys who act as intermediaries between U.S. adoption agencies and the foreign orphanages, in turn, compensate orphanage directors or child recruiters for each child referred.[151] Stateside agencies compensate the facilitators, often at rates grossly disproportionate to the per

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children for intercountry adoption to enable it to become a significant sending nation"). *Id.* at 123-33.

[148] *See infra*, notes 203-04 and accompanying text (regarding the use of jaladores in Guatemala); *infra*, notes 184-95 (outlining child buying in Cambodia); *see* Vietnam Embassy Report, *supra* note 90 (noting that in 75% of cases investigated, parents reported receiving expense reimbursement *and* an additional sum of money for consenting).

[149] *See, e.g.*, Vietnam Embassy Report, *supra* note 90 ("in five provinces, the Embassy discovered unlicensed, unregulated facilities that provide free room and board to pregnant women in return for their commitment to relinquish their children upon birth"); *see also* Ethica, *supra* note 126 and accompanying text.

[150] The U.S. Embassy in Ethiopia recently raised concerns about contact between adoptive parents and birth parents and the issue of promises of support and contact, which might violate U.S. law. Email from Paul Cantrell, Consular Section Chief, U.S. Embassy, Addis Ababa, Ethiopia to adoption agencies, Jan. 23, 2008 (on file with author). In Vietnam, some families are being promised that the child will return at age 11 or 12 or will send support. Vietnam Embassy Report, supra note 95. Associates of adoption facilitator Lauryn Galindo made promises of support, contact and emigration to destitute parents in Cambodia as an inducement to relinquish their children. Richard Cross, Rushton Distinguished Lecture Series – Reforming Intercountry Adoption: Present Realities and Future Prospects, Samford University, Cumberland Law School (Apr. 15, 2005), [hereinafter Cross Lecture], audio and video *available at* http://cumberland.samford.edu/cumberland_programs.asp?ID=630 (last visited Feb. 12, 2008).

[151] *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Backgrounder, Operation Broken Hearts (Nov. 19, 2004), *available at* http://www.ethicanet.org/galindo_backgr.pdf. (last visited Apr. 12, 2008)(outlining Cambodia recruitment scheme); *see* Vietnam Embassy Report, supra note 90.

capita income of the sending country.[152] In some sending countries, bribes are paid to government officials to produce false paperwork or to obtain approvals for adoption.[153]

As the popularity of the country increases, competition for available infants becomes more intense. Government officials and NGOs raise concerns about adoption abuses, often leading to investigations and changes in procedures. In virtually all cases, however, the outcome is the same: the sending country closes its adoption program for a time (or sometimes completely),[154] or the United States acts by denying visas (as we are seeing in Vietnam today),[155] or by stopping the adoption process entirely, as it did in Cambodia in 2001.[156]

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[152] *See generally* Sara Corbett, Where *Do Babies Come From?*, N.Y. Times, Magazine, June 16, 2002, *available at* http://query.nytimes,com/gstfullpage.html?res=C00EEDF113DF935A25755CoA9649L (last visited Feb. 12, 2008) (Director of the Asian Orphan Association, Serey Puth, received $6,900 per child placed through his partner agency in the U.S.). Current fees to adoption facilitators in Vietnam range from $12,000 to $14,500. *See* International Child Foundation, Inc. *fee schedules*, *available at* http://www.childfound.org/vietnam_adoption.html); *see also* Adoption International, *available at* http://www.adoptioninternational.net/program_vietnam.shtml (last visited Apr. 2, 2008).

[153] Documents Point to Bribes in Adoption Scandal, *Cambodia Daily* (Aug. 6, 2004) (reporting that Lauryn Galindo paid approximately $3,500 of the $10,500-$11,500 she received in adoption fees to "clerks, employees or officials to facilitate the adoption process in Cambodia"). The report goes on to note that "[i]f the fee was standard for each adoption, as court documents suggest, Cambodia officials may have profited $2.45 million during the time Galindo operated in Cambodia. *Id.*; *see also*, *Adoption Official Convicted of Bribery*, The Independent, Dec. 31, 2002, *available at* http://findarticles.com/p/articles/mi_qn4158/is_20021231/ai_n12663313 (a court sentenced an Italian citizen for bribing Russian adoption officials); Dateline, *supra* note 97 (where adoption facilitator admits that it was previously possible to pay Guatemalan officials $1,500 to get paperwork processed).

[154] Ethica, *supra* note 140. Ethica research found that in a fifteen-year period between 1988 and 2003, "40 different countries were in the Top 20 Countries of origin for U.S. families." Of these 40 countries, 13 were closed in 2003 and another 4 were temporarily closed. Therefore, of the top 40 countries from which US citizens adopted from 1988-2003, 43% were closed. According to Ethica's research, "[v]irtually all of these countries closed due to concerns about rampant corruption or child trafficking and abduction." *Id.*

[155] Elizabeth Olson, *Families Adopting from Vietnam Say They are Caught in Diplomatic Jam*, N.Y. Times, Feb. 11, 2008, at A14.

[156] Press Release, U.S. Immigration and Naturalization Servs., *INS Announces Suspension of Cambodian Adoptions and Offer of Parole in Certain Pending Cases*,

Before continuing further, it is important to note that evidence of adoption abuses often remains at the level of allegations, not because abuses are not occurring, but because, like any criminal enterprise, those who engage in illicit adoption practices must necessarily conceal the true nature of their activities.[157] It is also important to note that in some cases these networks maintain their existence through intimidation and outright violence.[158]

In fact, the only country in which a comprehensive investigation of adoption abuses has occurred is in Cambodia. Bartholet, relegates the Cambodia scandal to a footnote.[159] This is particularly disturbing because the evidence obtained in the investigation is extremely detailed and for the most part, unassailable.

Cambodia

Cambodia is unique because its international adoption practices were subject to extensive investigation by the U.S. Bureau of Customs and Immigration Enforcement.[160] The results of the investigation, the charges filed, and the guilty pleas[161] obtained are all part of the public record.[162] In

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December 21, 2001, *available at* www.uscis.gov/files/pressrelease/CamAdopt_12 2101.pdf (last visited Feb. 12, 2008).

[157] Smolin, *supra* note 55, at 117 (noting that, "abuses of the adoption system could not last long if they were not usually hidden; these crimes would not exist if they were not successful in achieving the aims of their perpetrators").

[158] *See, e.g.* Alan Zarembo, *A Place to Call Home: The Anger, Tears and Frustrating Runarounds of a Guatemalan Adoption Case*, NEWSWEEK, July 15, 2002, at 27 (reporting case in which machete-wielding men attack a birth father to stop him from trying to reclaim his child).

[159] Bartholet, *supra* note 2, at 167 and accompanying text.

[160] The United States government has not launched formal criminal investigations into the adoption practices of any other country. *See* Corbett, *supra* note 152. The purpose of the investigation was to determine whether American citizens were involved in any adoption-related crimes. The lead investigator in Cambodia was Immigration and Customs Enforcement Senior Special Agent Richard Cross. The Internal Revenue Service was also involved in the investigation. *See* U.S. Immigration and Customs Enforcement News Release, *Woman Sentenced to 18 Months in Prison for Visa Fraud and Money Laundering in Connection with Cambodian Adoption Scam*, Nov. 19, 2004 , *available at* http://www.ice.gov/newsreleases.articles.adoptionscam11904.htm (last visited Feb. 12, 2008).

[161] The chief perpetrator, American adoption facilitator, Lauryn Galindo, pled guilty to one count of conspiracy to commit visa fraud, one count of conspiracy to commit money laundering, and one count of structuring transactions to evade reporting requirements. *See* USA v. Lauryn Galindo, No. CR 03-0187Z (W.D.

addition, those ultimately charged with adoption-related crimes were given the full panoply of Constitutional due process protections. As a result, the Cambodia case provides us with the best and most comprehensive look into the shadowy world of illicit child procurement networks that can operate in a laxly-regulated system particularly vulnerable to abuse.[163]

Cambodia became a hot spot for international adoptions in the late 1990s.[164] Like many countries in which systemic abuses have been alleged, Cambodian adoptions spiked rapidly. In 1997, 66 Cambodian children were adopted to the U.S.[165] and in 1998 and 1999, the numbers rose almost

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Wash. May 6, 2003); No. CR 03-00178DAE (D. Haw. Apr. 9, 2003). She received three concurrent 18 month prison sentences, 3 years of supervised release and 300 hours of community service. She was also ordered to forfeit the proceeds of her illegal operations and to make restitution to some of her victims. *Id.* Although Galindo pled guilty to only one count of conspiracy to commit visa fraud, lead investigator Richard Cross stated that she could have been charged with hundreds of counts. *See* Cross Lecture, *supra* note 150.

[162] *See* USA v. Lauryn Galindo, Superseding Indictment No. CR-00187TSZ-1 (W.D. Wash. May 6, 2003); USA v. Lauryn Galindo CR-00270TSZ-1 (W.D. Wash. June 8, 2004) (Lauryn Galindo indicted for structuring transactions to evade reporting requirements). For detailed information found relating to Galindo's criminal activities in Cambodia. *See* Galindo Sentencing Memorandum, *supra* note 77.

[163] *See* Corbett, *supra* note 152. Corbett notes that because of agency attempts to meet the desires of adoptive parents for the youngest children with the quickest adoption processing times, agencies often flock to less developed countries where adoption regulations are loose and the large amounts of money in play are "dazzlingly influential."

[164] Cambodia had all of the characteristics—particularly, widespread, severe and intractable poverty, *see* Smolin, *supra* note 55, at 124, and lax regulation that would make it a "hot spot for international adoption." Corbett observed that fertility rates in Cambodia were among the highest in Southeast Asia. On the other hand, war, genocide and the ensuing decades of political unrest, coupled with epidemic levels of AIDS and tuberculosis rendered Cambodia a dysfunctional society. *See* Corbett, *supra* note 152. *See also* USAID Cambodia, *supra* note 46, at 6. Corbett also observed that Cambodia ha[d] no central registry for births or deaths. "record keeping [was] usually done at the village level, if at all, and children generally [did] not have birth certificates unless they were to be adopted. *Id.* Currently, Vietnam and Ethiopia are the international adoption "hot spots." USCIS has reported receiving 2000 I-600A applications stating intention to adopt from Vietnam (the highest number ever adopted in one year was 820 (2007)); Ethiopia rapidly escalated in number between 2003 to 2007, showing 166, 277, 430, 711 and 1,255 adoptions respectively.

[165] U.S. DEP'T OF STATE, *U.S. Adoption statistics* (1990-1995), and DHS Statistics (1996-2006).

four hundred percent to 249 children.[166] In 2000, the number nearly doubled again to 402,[167] placing Cambodia as the ninth most popular country for international adoptions. In 2001, 384 children were placed to the US,[168] prior to the United States' government's adoption suspension. By the summer of 2001, nearly 100 adoption petitions per month were being filed.[169] Had the U.S. not effectively stopped most adoptions in October 2001, the number of visas issued would likely have been higher.[170]

Although baby-buying allegations surfaced as early as 2000,[171] it was not until 2001 that the situation received extensive attention from the U.S. authorities. In early September, two Cambodian mothers who at-

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[166] *Id.*

[167] *Id.*

[168] *Id.* The 2001 figure is somewhat misleading, however. A number of cases were in process at the time adoptions closed. In large part as a response to a widespread public outcry by American adoptive parents caught in the "pipeline," the United States began a Special Humanitarian Initiative. INS sent teams of investigators to Cambodian orphanages to inspect paperwork to determine whether children's visa petitions could be processed to completion. Corbett, *supra* note 152 (describing Special Humanitarian Initiative). As a result of the Special Humanitarian initiative which did not conclude until 2004, an additional 473 children were issued visas. Immigrant Visas Issue to Orphans, *supra* note 119. Despite the fact that virtually all of the cases in the Special Initiative were cleared, a concurrent criminal investigation, discussed in detail in *infra* notes 169 to 180 and accompanying text, found widespread evidence of fraudulent and criminal activity. In explaining why so many of the Special Initiative cases were cleared, INS spokesperson, Bill Strassberger's analysis was far from reassuring: due to poor record keeping and endemic corruption, in his view, "[w]e know that something is not right, but we can't prove it in U.S. courts under the U.S. systems of justice, we have no choice but to approve [an application] and allow the child to come in as an orphan." Corbett, supra note 152. *See also* Trish Maskew, *Child Trafficking and International Adoption: The Cambodian Experience*, 35 CUMB. L. REV. 619 (2005).

[169] *See* Corbett, *supra* note 152.

[170] *See* Corbett, *supra* note 152.

[171] *See, e.g.*, Stephen O'Connell & Bou Saroeun, *Babies Bought for Sale to Foreigners*, PHNOM PENH POST (May 25, 2000) (implicating an orphanage supported by American facilitator Lauryn Galindo in baby buying schemes) (on file with author); Stephen O'Connell et al., *Big Bribes Key to US baby-buying*, PHNOM PENH POST (Aug. 18-31, 2000) (alleging that American families' adoption fees were used as bribes and detailing baby-buying incident at same orphanage supported by American facilitator) (on file with author); Stephen O'Connell & Chea Sotheacheath, *Tourism Officials Quit Ministry to Run Adoption Business*, PHNOM PENH POST (detailing allegations of baby selling at the newly created Asian Orphan Association orphanage) (on file with author).

tempted unsuccessfully to retrieve children whom they had placed temporarily in an orphanage complained to an NGO, The Cambodian League for the Defense and Promotion of Human Rights (Licadho), that their children could not be found.[172] One of the children was found in the custody of Sea Visoth, a facilitator operating an orphanage called KAOA. The child had been given a new identity, had been adopted by an American family under Cambodian law, and was later determined to be just days away from receiving a U.S. immediate relative visa.[173] In September 2001, Licadho also raided two private houses, described as "medical clinics" in the Tuol Kork district of Phnom Penh. There, Licadho found thirteen children: 10 babies and 3 young children, some of them quite ill, registered to a Cambodian facilitator, named Serey Puth who owned the Asian Orphans Association Orphanage.[174] After the Licadho raid, U.S. Embassy officials began to look critically at the integrity of pending orphan petitions.[175] Further scrutiny

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[172] *See* Corbett, *supra* note 152. Corbett also tells of an impoverished, pregnant Cambodian birth mother who sold her daughter to a "medical clinic' in the red light district of Phnom Penh. The mother was given $50 and promised another $100 the next week. When the child's aunt learned what had happened, she borrowed $50 at 25% interest per month to buy the child back. The child's birth mother was a garment worker whose salary fluctuated considerably, depending on the work available. The mother later sold her son to the same clinic. His whereabouts are unknown.

[173] U.S. DEP'T OF JUSTICE, *Questions and Answers - Adoption Processing in Cambodia, available at* http://www.uscis.gov/files/pressrelease/AdopProcCambodia_020702.pdf (last visited Feb. 7, 2008) (noting that, "[a]lthough the Cambodian government already had given permission for this child to be adopted, the supporting documentation – birth certificate, certificate of abandonment, certificate of orphan status, and biography of the alleged abandoned child – was false").

[174] *See* Corbett, *supra* note 152; *see also* Cambodian League for the Def. and Promotion of Human Rights [LICADHO], *Case Summary – Asian Orphan Ass'n [AOA]*, 209-10 (Mar. 10, 2004) [hereinafter LICADHO] (on file with author) (reporting an impoverished Cambodia mother had asked Licadho to locate her two missing children whom she had relinquished to a children's center, but had not allowed to reclaim. Licadho did not find the children among the thirteen it located at the "clinic," but the next day, an AOA representative returned her children to her at a Phnom Penh police station. The Cambodian courts returned the other children to AOA's custody. Later, the mother signed a document presented to her by a "lawyer" in which she withdrew her complaint against AOA. Interestingly, the mother was illiterate).

[175] LICAHDO Report, *supra* note 174, at 210 (noting that there were many inconsistencies in the orphanage and official documents relating to the 12 children. The names and dates of birth on the Ministry and AOA documents did not match). The

revealed that virtually all of the paperwork filed in support of orphan petitions listed the child as abandoned with unknown birth parents.[176] This identical paperwork, coupled with the Licadho reports, raised a number of red flags. In November, the United States began conducting field investigations to verify the orphan status of adopted children.[177] These investigations indicated that adoption paperwork (and other irregularities) made it impossible to determine whether a child was, in fact, an orphan.[178] The INS suspended adoptions from Cambodia on December 21, 2001.[179]

In early 2002, the United States government sent two Customs and Immigration Enforcement agents to Cambodia to investigate adoption practices.[180] The investigation, code-named "Operation Broken Hearts,"[181] was launched in part because the leading adoption facilitator in Cambodia, Lauryn Galindo, was an American citizen.[182] Galindo is estimated to have completed over 800 adoptions (or almost 80% of all Cambodian adoptions since 1990) and to have grossed nearly 9.2 million dollars in adoption

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United States began an informal slowdown of adoption processing in October 2001 that lasted until adoptions were formally suspended on December 21, 2001.

[176] Corbett, *supra* note 152.

[177] INS spokesperson Bill Strassberger stated, "[d]ocuments didn't match up, signatures were forged. The paperwork would say babies had been abandoned in a certain village, and then an investigation would show that no baby had been abandoned there for years." Corbett, *supra* note 152.

[178] U.S. DEP'T OF JUSTICE, *supra* note 173 (explaining that documentation irregularities made it impossible for INS investigators to, "determine that the prospective adoptive children have been made available for international adoption under circumstances that meet the requirements of U.S. immigration laws").

[179] INS Press Release, *supra* note 156. Then INS Commission Zigler stated, "INS' responsibility to determine that a child is truly an orphan must never be tainted by any action that results in the exploitation of innocent children by separating them from their biological families as a result of fraud, trafficking in human beings or other criminal activity."

[180] Cross Lecture, *supra* note 150. Cross spent two months in Cambodia investigating whether any American citizens were involved in illegal activities involving adoptions. Originally Cross investigated whether children had been kidnapped for adoption. Although there is no evidence that the Galindo organization engaged in kidnapping, Cross immediately found evidence of significant federal crimes including visa fraud.

[181] U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Backgrounder, *supra* note 151.

[182] U.S. citizens are often not directly involved in the foreign country, making it difficult for U.S. authorities to investigate or prosecute offenders.

fees.[183] Federal investigators obtained considerable evidence that Galindo and her organization engaged in widespread solicitation and purchase of children for adoption.[184] After executing search warrants in the U.S., lead investigator Richard Cross found numerous post-it notes in Galindo's house detailing money Galindo paid as "nurse care" for adopted children.[185] Nurse care, according to Cross, was a euphemism for either care for a birth mother prior to adoption or money paid by a recruiter for a child.[186] Impoverished birth parents were offered as little as $15, and sometimes as little as a bag of rice, for their children. "Helpers," some of whom had sold their children earlier and convinced other birth parents to do the same, purchased children from their parents.[187] The helpers turned the children over to recruiters who sold the children to orphanages for about $300-$400 each.[188] Before children were accepted into orphanages, they and sometimes their birth parents were taken to a clinic in Phnom Penh, where they were tested for, HIV, Hepatitis A, B, C, and Syphilis.[189] Children who tested positive were returned to their birth families.

Galindo's recruiters induced consents from birth parents by promising that the American adoptive families would send money to the family in Cambodia and that when the child turned eighteen, he or she would support the family and sponsor them for emigration to the US.[190] Shockingly, photos that adoptive parents were required to send to Cambodia to report on the well-being of the child were used on recruitment posters to convince other Cambodian parents to relinquish their children.[191]

Galindo's staff created a false identity — including false names, false birthplaces, and false birth certificates and abandonment papers — for each child.[192] According to Cross, all of the paperwork submitted in support of each child's visa application was false.[193] The Cambodian children adopted to the U.S. through Galindo were effectively laundered. In some cases, one false identity was switched for another, all in order to enable

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[183] *See* Galindo Sentencing Memorandum, *supra* note 77, at 28.

[184] Cross Lecture, *supra* note 150.

[185] Cross Lecture, *supra* note 150.

[186] Cross Lecture, *supra* note 150.

[187] *Id.*; *see also,* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Backgrounder, *supra* note 151.

[188] Cross Lecture, *supra* note 150.

[189] *Id.* Cross Lecture, *supra* note 150.

[190] *Id.* Cross Lecture, *supra* note 150.

[191] *Id.* Cross Lecture, *supra* note 150.

[192] *Id.*; *see also* Galindo Sentencing Memorandum, *supra* note 77, at 20.

[193] Cross Lecture, *supra* note 150.

Galindo to maintain a steady flow of easy and highly lucrative adoptive placements.[194] Galindo's staff also bribed numerous officials in the Cambodia government to sign off on fraudulent paperwork.[195]

While only U.S. citizen Galindo was prosecuted, investigators have stated that they believe all other adoption facilitators in Cambodia engaged in similar practices to one degree or another.[196] Because child trafficking for purposes of international adoption is not criminalized under federal law, the only adoption fraud-related crime with which Galindo could be charged was conspiracy to commit visa fraud.[197] And this was only possible in cases where adoptive parents could offer credible evidence in support of the visa fraud allegations.

Creating Orphans?

While some, including Bartholet, might argue that the Cambodia case is merely an aberration, the abuses so thoroughly documented there are remarkably consistent with concerns raised in other countries, most recently Guatemala and Vietnam. Bartholet speaks in glowing terms of the private system in Guatemala, because it places large numbers of infants in the relatively short time frame of 6-8 months from a privately controlled foster care system that often avoids institutionalization altogether.[198] In Bartholet's view, Guatemala is a model system; she bemoans the fact that not only is the Guatemalan system not the norm, it is under attack from organizations like UNICEF.[199]

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[194] *USA v. Lauryn Galindo*, Superseding Indictment, *supra* note 162, at 2-4, 6-9 (describing baby switches).

[195] Cambodia Daily, *supra* note 153; *see also*, Galindo Sentencing Memorandum, *supra* note 77, at 8 (statement of Dr. Kek Galabru of LICADHO) (noting that, "[t]here should be no doubt that the payments made to Cambodian ministry clerks, employees or officials in order to facilitate the adoption process in Cambodia. . . are bribes. *There are no Cambodian government fees for the processing of adoption*") (emphasis added).

[196] Cross Lecture, *supra* note 150.

[197] The U.S. government, however, referred to this as a "child trafficking" enterprise. *See* U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, Backgrounder, *supra* note 151. Galindo was also charged with and pled guilty to conspiracy to Launder Money and Structuring Financial Transactions. She was ordered to forfeit the proceeds of her crimes to the government, along with her home in Hawaii worth $1.4 million and her $25,000 Jaguar. ICE News Release, *supra* note 160.

[198] Bartholet, *supra* note 2, at 156-57.

[199] Bartholet, *supra* note 2, at 156-57.

Bartholet's choice of Guatemala is curious, because allegations of baby buying, kidnapping, and other illicit practices in Guatemala have circulated for years.[200] Guatemala does have an orphanage population in the thousands, but these children have virtually no chance to be adopted.[201] Instead, the children adopted from Guatemala come primarily from a private system developed by Guatemalan attorneys and foreign agencies. Prospective adoptive parents contract with U.S. agencies, which, in turn, have contracts with Guatemalan attorneys.[202] The attorneys operate a network of

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[200] *See, e.g.,* Hague Conference on Private International Law, *Report and Conclusions of the Special Commission on the Practical Operation of the Hague Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, 28 November-1 December 2000*, 28-29 (reporting that several states and organizations expressed concern about Guatemalan adoptions); ILPEC Guatemala *supra* note 59; *See also, e.g.,* Zarembo, *supra* note 158; Jan McGirk, *Guatemala Starts Crackdown on Illegal Baby Trade*, THE INDEPENDENT, Apr. 5, 2000, *available at* http://www.independent.co.uk/news/world/americas/guatemala-starts-crackdown-on-illegal-baby-trade-719128.html (last visited Apr. 12, 2008).

[201] ILPEC Guatemala, *supra* note 59, at 56:

> In all of Guatemala, there are approximately 300 institutions, housing an estimated 23,000-25,000 children, the majority of whom have been abandoned alongside of some who have been placed temporarily as a protective measure. These institutions are saturated with children who are not being adopted. It would be worthwhile to further investigate this circumstance since those actually being adopted are, to a large extent, being "produced" for this end, while those who are truly in need of a family are being condemned to institutionalization until they reach the age of adulthood. It is also necessary to consider that the majority of institutionalized children are awaiting a formal abandonment ruling which can take up to seven years.

See also Jennifer Banks, Note, *The U.S. Market for Guatemalan Children: Suggestions for Slowing Down the Rapid Growth of Illegal Practices Plaguing International Child Adoption*, 28 SUFFOLK TRANSNAT'L L. REV. 31, 40 (2004) (stating that, "[i]nternational adoptions comprise ninety-five to ninety-eight percent of all adoptions of Guatemalan children and virtually all of these adoptions take place through an extrajudicial notary system").

[202] The cost of a Guatemalan adoption is high, even by international adoption standards: Adoptive parents pay fees of $20,000 and more (U.S.) *See, e.g.,* ILPEC Guatemala, *supra* note 59, at 40 (citing U.S. Embassy compiled figures showing cost of Guatemalan adoption was $23,000, of which $15,000 went to Guatemalan attorney [in 2000]); Banks, *supra* note 201, at 38 (in 2004, fees for a Guatemalan adoption ranged from $12,000 to over $20,000).

private foster homes and orphanages. Credible reports abound that the attorneys find children for adoption by paying a jaladore, or child finder, from $5,000 to $10,000 per child to locate children for international adoption.[203] The jaladores often provide money to the birth parent in amounts ranging from several hundred to up to $2,000 USD.[204] Over the years, as the number of Guatemalan adoptions have risen to record levels,[205] allegations that women are intentionally becoming pregnant and placing children for adoption in order to receive payments have multiplied.[206] Substantiated reports

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[203] The existence of *jaladores* has been confirmed since 2000 when the ILPEC report was published. *See* ILPEC of Guatemala, *supra* note 59, at 49 ("Presently, there exists a sector of middlemen or "jaladoras" who act as intermediaries in the trafficking of children, actively seeking out pregnant women in the markets, parks, buses, or among groups of street girls and offering them sums up to Q. 5,000.00 for their future baby"). In 2007, the Hague Conference sent a delegation to Guatemala and documented their findings in *Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption 26 February - 9 March 2007.* Hague Conference on Private International Law, *Report of a Fact-Finding Mission to Guatemala in Relation to Intercountry Adoption 26 February 9 March 2007, available at* http://www.hcch.net/upload/wop/mission_gt33e.pdf. They define a *jaladora* as a person who traces pregnant women or women with small or very young children to convince them to relinquish their children for money. *Jaladores* may include a physician, social worker, nurse, teacher, community member, etc. *Id.* at 7.

[204] Hague Conference, Fact Finding Mission, reporting on the work of jaladores, and including a story of a woman offered 20,000 Quetzal for her child, which is approximately $2600. http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=GTQ); ILPEC, 2000 (reporting payments of approximately $700 USD).

[205] Adoptions from Guatemala rapidly rose: 1609 (2001); 2419 (2002), 2328 (2003), 3264 (2004), 3783 (2005), 4135 (2006), 4,728 (2007) In FY 2006 and 2007, Guatemala jumped ahead of Russia to become the second most popular sending country (behind China) for adoptions to the US. Dep't of State Statistics, *supra* note 58. Guatemala has the highest per capita adoption rate in the world, with 1 out of every 100 children born in Guatemala coming to the United States for adoption. In 2006, Guatemala report 368, 910 births and 4,135 children were placed in the United States (or 1.1%) www.census.gov/cgi-bin/ipc/idbagg.

[206] *See* Bartholet, *supra* note 2, at 188. *See also Guatemala Starts Crackdown on Illegal Baby Trade*, The Independent, April 5, 2000 *available at http://www.independent.co.uk/news/world/americas/guatemala-starts-crackdown-on-illegal-baby-trade-719128.html* (citing Ofelia Calcetas-Santos, a UN childcare official who visited Guatemala City, said poor women were often "contracted" to produce babies and give them away"); McGirk, *supra* note 183; Dr. James White, M.D., *GSSG News,* Vol. IV, No. 1 (Feb. 2006)(reporting on thirteen year old patient purposely impregnated to produce child for adoption in Guatemala, and subsequent investigation revealing existence of residence housing many other teen girls in same situa-

of child abduction for international adoption have surfaced in Guatemala. In response, the U.S. government has instituted requirements for two DNA tests during the adoption process;[207] however, while DNA tests may prevent abducted children from being granted visas, they cannot determine whether illicit payments occurred in the adoption process. Recently, very similar allegations have arisen in Vietnam with documented reports of child finders,[208] payments for children,[209] child abduction, and the erasure of identities.[210]

The situations in Guatemala, Vietnam, and Cambodia raise significant concerns about whether these systems found homes for children in need or instead, created paper orphans whom, absent payments, might not have been made available for adoption.[211] The available evidence, at least

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tion); U.S. DEP'T OF STATE, FREQUENTLY ASKED QUESTIONS: PROSPECTIVE ADOPTIVE PARENTS OF GUATEMALAN CHILDREN, *available at* http://travel.state.gov/family/adoption/convention/convention_3170.html#3 (last visited Mar. 30, 2008) (discussing problems in Guatemala and the psychological harm that can come to children who "discover that he, and perhaps siblings, were produced for the sole purpose of adoption").

[207] U.S. DEP'T OF STATE, *U.S. Embassy in Guatemala Adds Second DNA Test to adoption procedure*, *available at* http://travel.state.gov/family/adoption/intercountry/intercountry_3751.html (a second procedure was added after reports that some DNA results had been proven false).

[208] U.S. EMBASSY, Adopted Children Immigrant Visa Unit, *Announcement Regarding Adoption in Vietnam*, *available at* http://vietnam.usembassy.gov/adoptionstatement1107.html (last visited Apr. 12, 2008) (citing "insufficient control of so-called child finders"); Vietnam Embassy Report, *supra* note 90 (outlining activities by finders).

[209] Vietnam Embassy Report, *supra* note 90.

[210] Vietnam Embassy Report, *supra* note 90.

[211] The American Ambassador to Cambodia in 2001 remarked that growing interest in Cambodian adoption had caused new orphanages to be built stocked "with infants seemingly expressly ordered to meet American tastes." Corbett, *supra* note 152. The Asian Orphan Association facility, completed in 2000, housed 157 children under age 1. Ninety-five or nearly two-thirds of the infants were girls. *Id.* The evidence shows that American adoptive parents overwhelmingly prefer girls. *See* Gravois, *supra* note 60. In contrast, the state-run orphanage, The Nutrition Center in central Phnom Penh housed a large number of older disabled children as well as AIDS affected infants. Corbett, *supra* note 152. It is clear then, that the Cambodian "adoption population" differed significantly from the state run orphanage population. This fact was confirmed by a survey undertaken by Holt International in 2005, which found that between the shutdown and 2005, the number of infants and toddlers in Cambodian orphanages did not increase, and indeed would not have met US demand for children in 2001. In 2005, only 329 children under

in these countries, suggests the latter. For instance, one humanitarian aid group founded by parents who adopted from Cambodia ceased operations in the fall of 2007 when it announced that there were simply not enough orphans to justify the organization's continued involvement in Cambodia.[212] Recently, a U.S. agency traveled to Vietnam and reported that there were few young babies available and that the children who needed adoption were older and had special needs.[213] Yet, reports indicate that the majority of children placed from Vietnam are infants. The U.S. Embassy notes that with the reopening of Vietnam-U.S. adoptions, some orphanages experienced a 2000 percent increase in the number of "deserted" children entering institutions.[214] In Guatemala, virtually all international adoptions involve children relinquished directly by their parents and placed into foster care pending international placement, not children in orphanages.[215] These situations strongly suggest that the presence of inadequately regulated adoption programs in these countries has resulted in children being placed into, not removed from, institutional and foster care. When the adoption option is removed, the number of children in such institutions drops, sometimes precipitously.[216]

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age three were in orphanage care; whereas more than 75% of children were over the age of 9 and thus, ineligible for placement for adoption. *See* USAID Cambodia, *supra* note 46, at 8; *see also* Smolin, *supra* note 55, at 145-46:

> The Cambodian orphanage survey suggests that most of the children who were adopted internationally from Cambodia were a distinct population of children, separate from Cambodia's orphan population. Demographically, Cambodian adoptees were predominantly female infants and toddlers, while Cambodia's orphanage population is overwhelmingly children nine and older, and predominantly male.

[212] Posting of Elizabeth Mallory, *supra* note 55 (stating that her organization, No Child Left Out, was closing its Cambodian orphanage program in fall 2007 because of lack of orphans, which she defined as children without any parents).

[213] Leonette Biorski, Pearl S. Buck International, *A Visit to Vietnam*, *available at* http://www.psbi.org/site/PageServer?pagename=WH_Newsletter_HTML_Nov07 (last visited Apr. 14, 2008) (noting that "although there are some infants available, the majority of the children are older or have special needs").

[214] Vietnam Embassy Report, *supra* note 90.

[215] *See* Banks, *supra* note 201 and accompanying text.

[216] For instance, *compare* USAID Cambodia, *supra* note 46, at 3-4 (numbers and ages of orphans) with Cambodian international adoption statistics, *supra* notes 164 68 and accompanying text and Corbett figures on children at AOA, *supra* note 211. *See also* Corbett, *supra* note 152 (stating that "if birth parents knew Phomn's village as a friendly place to abandon infants, then word curiously seemed to spread

These facts raise disturbing questions that must be answered in developing or critiquing an adoption regulatory scheme. Are "desirable" children being placed into institutional care as a way station to adoption? Are the families who are relinquishing such children being provided with any support to parent their children? Does international adoption have any palpable effect in reducing the numbers of older and disabled children in care or would the vast majority of these children continue to comprise the majority of the orphanage population, even if international adoptions were conducted in the largely unregulated manner that Bartholet advocates?

If, as in the case of Guatemala, the vast majority of adopted children are not actually institutionalized children or street children, then the dichotomy that Bartholet presents of children being adopted internationally or "living and dying in institutions or on the streets" might often change to "living with their families of birth or being adopted internationally." Then, the choices, and the moral questions those choices raise, are not so easily defined or answered. Instead, they raise an entire spectrum of additional human rights issues that Bartholet, for all intents and purposes, ignores.

PART V: WHY THE FULL HUMAN RIGHTS PICTURE MATTERS

Why do any of the ethical concerns raised in this article matter? If we accept Bartholet's contention that the key human rights issue in international adoption is moving the millions of orphans languishing in damaging institutions and on the streets as quickly as possible into adoptive homes, these concerns should at best be relegated to the periphery.

When, however, we strip away the emotional but overly simplistic appeal of her language, many of the more problematic aspects of Bartholet's position become clear. Leaving aside the racist and colonialist notions that some see in positions like hers,[217] it is by no means clear that

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following the U.S. suspension, that the Asian Orphan Association was no longer accepting children.").

[217] For articles critiquing positions like Bartholet's, *see, e.g.*, Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 135 (1998). Perry notes:

> As troubling as it may be for many to admit, a conception of poor, third-world countries as subordinate nations fits very comfortably with the practice of international adoption. This kind of view translates easily into the idea that Western adoptive parents are simply saving unfortunate third-world children by bringing them out of primitive, impoverished and disease-ridden countries into the more affluent life that the West can offer. It permits a discourse that allows Westerners to take the high ground and por-

international adoption, if it occurs early enough, actually results in relatively uncomplicated adoptee adjustment. Nor is it at all clear that adoption abuses have no consequences on those affected.

Bartholet claims that critics of international adoption radically overestimate the importance of cultural continuity and heritage.[218] Indeed, for her, the street child and the institutionalized child will never participate meaningfully in the cultural lives of their communities; therefore, the supposed harm of removing these children from their communities of origin is clearly outweighed by the good achieved by placement with "loving families."[219] Bartholet claims that not only are internationally adopted children well adjusted, but they have, to a greater extent than non-adoptees, the added unique advantage of being able to straddle multiple worlds.[220]

Bartholet's claims about the degree of identity integration among international adoptees must be balanced against the growing body of work by international adoptees, much of which chronicles alienation both from birth and adoptive cultures, significant identity and role confusion, and profound degrees of depression and anger over the loss of identity, family and heritage. Much of this discourse is recent and much of it has been produced by Vietnamese and Korean adoptees, the cohort of international adoptees now old enough to reflect critically on their experiences.[221] These adult adoptees paint a decidedly different, and more complicated, picture of their own experiences than Bartholet does. As Ami Inja Mafzger observes:

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tray their international adoptions as simple acts of humanitarianism and altruism.

See also INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 93, (Howard Alstein & Rita J. Simon eds.) (1991) (discussing imperialist implications of international adoption).

[218] Bartholet, *supra* note 2, at 180.

[219] Bartholet, *supra* note 2, at 181.

[220] Bartholet, *supra* note 2, at 179-80.

[221] Adult adoptee groups provide resources and support to adoptees and their families. *See, e.g.*, Vietnamese Adoptee Network, http://www.van-online.org/Resources/Links.aspx; Adopted Vietnamese International, http://www.darlo.tv/indigo/Vietnam1.html;Korean American Adoptee, Adoptive Family Network, http://www.kaanet.com/; Korean Adoptees Worldwide, http://www.geocities.com/Tokyo/Shrine/8654/kaw.html. The blogosphere is home to numerous blogs by adult adoptees who share their thoughts on their adoptions, culture, and the attitudes of adoptive parents and agencies. *See, e.g.*, Jae Ran Kim, Harlow's Monkey, *available at* http://harlowmonkey.typepad.com/; Jane Jeong Trenka, Jane's blog, *available at* http://harlowmonkey.typepad.com/; Sunny Jo Johnsen (Park Young-Joo) *available at* http://www.geocities.com/sunny_jo888/.

When people of color grow up in a predominantly white society, its difficult to realize that being different doesn't mean that one measures up any less—especially when there is little to explain how one is different, and any reinforcement given about being different is negative. . .. I grew up in Minong, Wisconsin, a small town of 500 people. There I was called racist names such as chink, jap and nigger. I was even told to go back to my own country. I didn't understand what the words meant but I could feel the rejection by others tied to my appearance. I always knew I was different and did not like it one bit. I wanted to explain myself, but I didn't have the knowledge of who I was myself, nor could my family teach me about my background.[222]

Adoptees also speak eloquently and with great insight about their struggles with their sense of loss and the sometimes deliberate, but often unexamined, silencing of their experience as adoptees.

> At a certain point [the adoptee] may recognize that it is not permitted to express her sadness, grief or even disapproval with the decisions that have been made for her. . . At the moment I have decided that I may feel deeply the loss of my biological parents, extended family, village, native language, food, customs, solid trees, fields, rivers, streams, sea, ancestor's graves and the places where my umbilical cord was cut and my placenta buried, while still enjoying and marveling in the love of my adopted parents, siblings, health, education and other opportunities. I feel my ever-present loss which in some days is as tangible as a taste on the tongue, a whispered breeze on the skin, a pain in the stomach, a breathlessness, a nausea, a mal du pays, a homesickness, an empty place at the table - will and should never be ignored or denied, and to speak of this loss is not to be ungrateful, or unappreciative, or unthankful for my chance to live.[223]

To argue, then, that reconciliation of the irreconcilable of the unwanted "chosen child" is a relatively uncomplicated process, is to grossly simplify and disrespect the significant struggles faced by adoptees.[224]

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[222] Ami Inja Nafzgar, *Proud to be Me*, in OUTSIDERS WITHIN: WRITINGS ON TRANSRACIAL ADOPTION 233 (Jane Jeong Trenka et al., eds.) (2006).

[223] Rachel Quy Collier, *Performing Childhood*, in OUTSIDERS WITHIN, *supra* note 222, at 210-11.

[224] *See, e.g.*, Betty Jean Lifton, JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS 11 (1994) (discussing genealogical bewilderment of adopted chil-

Indeed, adoptees who do question the, "assimilation is healthy assumption" are often considered unhealthy and abnormal."[225] Few people would expect an international adoptee to be grateful for being "saved." However, when the angry adult adoptee is pathologized or marginalized within her presumably psychologically healthy cohort, it is difficult to see how to see how rejection of the mythology of healthy, uncomplicated adjustment is not actually a more pernicious labeling of the adoptee as ungrateful.[226]

Thus, as the voices of adult adoptees show us, the "saved" children grow up; they become thinking, feeling, and articulate human beings. The data show unequivocally that questions of identity, origins, and relinquishment are highly salient, and sometimes highly problematic. The inability to answer these questions inflicts profound, long-lasting damage. In this context, then, the evils of laundering children to erase their identities or rendering them fungible commodities become clear.

Some of Bartholet's fellow adoptive parents also acknowledge the difficulties that many adult adoptees face, and how important it is for adop-

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dren); Toby Alice Volkman, *Embodying Chinese Culture: Transnational Adoption in North America*, 74 SOC. TEXT 29, 48-49 (2003) (discussing growing awareness among professional social work community of grief issues faced by adopted children, even those adopted in early infancy).

[225] Kirsten hoo-Mi Sloth, *Researching Adoption*, in OUTSIDERS WITHIN, *supra* note 222 at 254.

[226] *See, e.g.*, Ji In Lutgo, "Beyond Good Intentions," *Twice the Rice* blog (June 28, 2006) *available at* http://twicetherice.wordpress.com/2006/06/28/beyond-good-intentions/ (commenting on the hate mail received from adoptive parents when she posted her experience); Sumeia Williams, "Well-adjusted", NY Times, December 1, 2007 *available at* http://relativechoices.blogs.nytimes.com/2007/12/01/well-adjusted/#more-29:

> When I first started reading about adoption, I kept coming across the words "well-adjusted adoptee." In 1970s the thinking was that adoptees should be content with their present lives and not think about their adoptions. . .Questions beyond childhood curiosity and looking anything other than "happy" would get you labeled as having psychological problems or "issues.". . .Today, it's more acceptable for adoptees to question, to seek answers and even mourn their losses as some of us often do. As long as we eventually come to some sense of "peace" and go about our daily lives, all is well. It isn't until some of us become critical that we are confronted by a revised version of "maladjusted." This new term implies the same thing as the old but with a twist. We've come to be known as "the bitter, angry adoptees.

tive parents to examine old attitudes and rethink assumptions that adoption is always positive.[227]

At this point, a word about birth families is also in order. Bartholet contends that birth families relinquish their children because they simply have no choice.[228] In reality, the voices of the poor and powerless are rarely heard,[229] and in the majority of cases, we simply do not know why a child

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[227] *See, e.g.,* Cheri Register, *Beyond Good Intentions, a Mother Reflects on Raising Internationally Adopted Children* (2005). Register notes in her introduction:

> I too have been listening to the voices of adult adoptees. They testify to the strengths and faults of adoptive family life on Internet lists and websites, at conferences on international adoption, and in poetry, memoirs, and documentary films. Their voices are on the leading edge of adoption literature, claiming the fertile ground where new truths arise to squeeze out the old, tired ones. Many of the voices are critical, and some of the testimony is difficult for parents to hear. . . Nevertheless, we parents are eager to join the conversation, and we are accustomed to setting the terms. I watched this happen at the publication reading of Jane Jeong Trenka's memoir, The Language of Blood. . .adoptees in the audience affirmed Trenka's account of her childhood in rural Minnesota and her reunion with her Korean birth family; they added their own stories, which were sometimes halted in mid sentence by tears. Some of the adoptive parents seemed perplexed and distressed by this emotional intensity. They homed their questions in on the reasons for it and even tried to explain it away. An earnest couple, prospective parents waiting for a child from Guatemala, asked what they could do differently to make life turn out well for their own child so she would not end up sad or angry—in other words, like Jane and the adoptees in the audience.

[228] Bartholet, *supra* note 2, at 187.

[229] Galindo Sentencing Memorandum, *supra* note 77 at 17 (statement of Dr. Kek Galabru of LICADHO):

> Licadho seeks to offer a voice for a particular group of victims – Cambodian birth families of the children concerned —- which would otherwise not be heard. Because the defendant's visa fraud crimes obscured the identities and origins of the children, these birth families have not been identified and cannot speak for themselves. . . . . It is known that at least some of the children in adoptions in question had birth families. It is most unlikely that any of these families had formally consented in circumstances complying with U.S. or Cambodian law - to relinquish their children for international adoption. Now they must suffer the loss of

became available for adoption internationally or how the birth family actually perceives the decision to relinquish. We need much more empirical data[230] about how birth parents decide —or even if they decide[231]— to relinquish children before it is credible to assume, as Bartholet does, that the poor and destitute have no choice but relinquishment.[232]

Finally, the effects of adoption abuse and fraud on the integrity of the adoptive family require consideration. In many cases, children who were victims of adoption abuses are too young to have discovered, or to be told of, questionable practices that may have surrounded their adoptions.[233] But for thoughtful parents and adoptees alike, the possibility that a family was founded upon a dishonest or criminal act has profound consequences both in the present and the future. Once again, the Cambodia case offers us the best evidence. Dr. Kek Galabru of Licadho noted in her letter to the sentencing judge that, "the American adoptive parents have been caused by the defendants to become complicit in visa fraud and have suffered distress which will mount as their children grow older and ask questions about their origins and circumstances of their adoption."[234]

Adoptive parents submitted numerous victim impact statements to the court prior to Galindo's sentencing.[235] The statements provide at least

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> these children for the rest of their lives, with no practical means of obtaining redress.

[230] For one of the few examples of empirical research on birth parents in the international adoption context, in this case China, *see* Bhabha, *supra* note 38, at 186:

> Much less information exists on the circumstances of birth mothers themselves and whether they voluntarily relinquish their babies . .According to one study of over 600 families who had adopted or abandoned Chinese-born children, the vast majority of abandoning parents were married and from rural areas, almost 90% of abandoned babies were female, and birthmothers frequently expressed emotional pain and remorse for the act.

[231] *See* Vietnam Embassy Report, supra note 90, (relating incidents of children being processed for adoption without parental consent).

[232] Bartholet, *supra* note 2, at 187.

[233] Many of the Cambodian children are 7-11 years old at present; the same is true of many of the children from Vietnam and Guatemala.

[234] Galindo Sentencing Memorandum, *supra* note 77, at 19 (statement of Dr. Kek Galabru).

[235] *See* Galindo Sentencing Memorandum, *supra* note 77, at 19-23. In fairness, it should also be noted, that the record also includes at least 64 letters of support for Galindo from adoptive parents. Many of the letters speak of Galindo's selflessness and apparent concern for Cambodian children. *See USA v. Lauryn Galindo*, No. CR-030187Z (W.D. Washington, No. CR03-00178DAE (D. Haw. Apr. 9, 2003));

some insight into the effect of adoption abuses, at least on the adoptive parents. One adoptive parent contributed a lengthy statement to the court in which she detailed how Galindo coerced her into paying what she believed was gift to her child's nanny, only to discover later that she had made a payment to her child's mother.[236] The adoptive parent noted that the effects of this act, coupled with the false representations about the child's identity that Galindo made, have affected her subsequent parenting:

> The circumstances of Pheary's adoption did make it more difficult for me to bond with her in the beginning. I was full of guilt and suffered great depression over the knowledge that Pheary already had a family. I still have days when I feel guilt and ambivalence over what I have done by bringing Pheary to America and taking her away from her biological family.[237]

If the data are correct, that even a relatively uncomplicated adoption raises significant identity issues and difficulties, then it appears almost certain that as the children of Cambodia, Guatemala, Vietnam, and other countries implicated in fraudulent or criminal adoption practices grow up, their journeys will be far more complicated and painful than those of their predecessors. Nor should the effects of years of grief, worry and guilt on the parent/child bond be underestimated, even though their full effects will not be fully known for years.

Defense Memorandum Describing Exhibit A, Support Letters from Adoptive Families (Nov. 10, 2004); Defendant's Sentencing Memorandum No. CR03-187Z (2004) Appendices. The court, however, did not find these statements of Galindo's humanitarian motivations persuasive. *See* ICE News Release, *supra* note 160:

> At the sentencing hearing, Galindo's defense attorney argued that the Judge should consider his client's charitable work and mental state and sentence his client to probation. Judge Zilly rejected these arguments saying her "charitable work made it possible to commit the crimes" and noting that while there had been a great deal of discussion about Galindo's childhood trauma, his concern was the trauma suffered by children "ripped from their parents and robbed of their identities."

[236] Galindo Sentencing Memorandum, *supra* note 77, at 21 (statement of Catherine Last).

[237] *Id.* at 21 (statement of Catherine Last).

CONCLUSION

At the end of the day, Bartholet's argument is a factually unsupported, analytically simplistic justification for what is, in reality, the profoundly problematic institution of international adoption. She does not address any of the complexities involved in determining the true number of adoptable children. She offers no analysis or evidence in support of her claim that existing laws provide an effective safety net against abuse. She underestimates, perhaps radically, the true incidence of adoption abuses; and she incorrectly assumes that saving children from the streets or institutions is all that is necessary. It is irresponsible to begin the analysis, as Bartholet does, by looking at the end of the international adoption process. Before we can assess the utility of international adoption as a child welfare institution, and certainly before we can make authoritative claims about ideal adoption systems, we must answer the hard, empirical questions that Bartholet ignores. We cannot responsibly conclude that a child must be adopted internationally before we know how the child got to the orphanage, where his or her parents are, and whether the cause of the family separation is permanent and cannot be remedied in a less radical manner than moving the child from its original family and culture to another. As our analysis has shown, the current system, in too many cases, simply does not allow us to answer these questions with any degree of confidence.