

## Roger Williams University Law Review

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Volume 16

Issue 1 *Symposium: Methodological Approaches to  
Comparative Law*

Article 9

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Winter 2011

# The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: the Need for a Uniform Standard for Intercountry Adoption by Homosexuals

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### Recommended Citation

Schupp-Star, Rachael M. (2011) "The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: the Need for a Uniform Standard for Intercountry Adoption by Homosexuals," *Roger Williams University Law Review*: Vol. 16: Iss. 1, Article 9.

Available at: [http://docs.rwu.edu/rwu\\_LR/vol16/iss1/9](http://docs.rwu.edu/rwu_LR/vol16/iss1/9)

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## Notes and Comments

### **The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption: the Need for a Uniform Standard for Intercountry Adoption by Homosexuals**

Rachael M. Schupp-Star<sup>†</sup>

*[T]he future impact of the Hague Convention on Intercountry Adoption is uncertain, and seems to be in our hands. May we all work diligently toward the goals of implementing the Hague Convention to make intercountry adoption more abuse-free, lawful, and respectful of each nation's adoption policies and values to provide responsible family homes to more of this world's needy,*

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*parentless children.*<sup>1</sup>

## INTRODUCTION

The preservation of the family is often considered a fundamental right in society. However, the disagreement over what is in the best interests of children, whether biological or adopted, has been long debated, both domestically and internationally. One of the most important developments in international adoption law in recent years has been the promulgation of the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague Adoption Convention,” or “HCIA”).<sup>2</sup> The goal of the Hague Adoption Convention is to provide needed regulation for intercountry adoption, by seeking to ensure that children grow up in an adequate family environment.<sup>3</sup> The HCIA concurrently seeks to protect against the harms that may inherently arise when a country allows intercountry adoption.<sup>4</sup> In the United States, as well as other Western countries, intercountry adoption has traditionally involved the adoption of children from third world or developing countries, in which many of these Western countries once had colonies.<sup>5</sup> This is increasingly true as developing countries experience natural disasters, leaving many parents unable to care for their children, and the country further unable to

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1. Lynn D. Wardle, *The Hague Convention on Intercountry Adoption and American Implementing Law: Implications for International Adoptions by Gay and Lesbian Couples or Partners*, 18 IND. INT’L & COMP. L. REV. 113, 146 (2008).

2. Hague Conference on Private International Law: Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, available at <http://www.hcch.net/upload/conventions/txt33en.pdf> [hereinafter Hague Adoption Convention].

3. See *id.* art. 1. One of the stated objects of the Hague Adoption Convention is “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law” *Id.* art. 1(a).

4. See *id.* (these harms include “the abduction, the sale of, or traffic in children”). *Id.* art. 1(b).

5. Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 414 (2009) (positing a theory of “*MonoHumanism*,” meaning “that children are not seen in the context of their family, community, and culture, but instead, narrowly as the potential children of Western adults.”).

protect its already orphaned children.<sup>6</sup> International adoption has become progressively more visible over the years due to the trend amongst high-profile celebrities of adopting children from these third world countries.<sup>7</sup> Although the media coverage of these celebrity adoptions makes the process of international adoption seem relatively quick and easy, this is certainly not the case.

American families who wish to adopt a child from another country often face a great deal of legal challenges because the adopting parent(s) must comply with three sets of laws: (1) U.S. Federal law, (2) the laws of the child's home country, and (3) the laws of the state in which the family resides.<sup>8</sup> The Permanent Bureau of the Hague Conference on Private International Law ("HCCH") noted that the "dramatic increase in international adoptions which had occurred in many countries since the late 1960s" had resulted in a "worldwide phenomenon" of the extensive migration between vastly different societies and cultures.<sup>9</sup> This increased migration of children brought to the forefront challenging legal issues that have permeated the field of intercountry adoption and still remain today.

Over the past decade, the number of international adoptions to the United States has significantly increased, reaching a peak of 22,990 adoptions in 2004, thereby creating the necessity to

6. See, e.g., Ginger Thompson, *After Haiti Quake, The Chaos of U.S. Adoptions*, N.Y. TIMES Aug. 4, 2010, at A1, A6.

7. Vicki Peterson, *International Adoptions: Celebrities vs. Real People*, WASH. POST, (Oct. 26, 2006, 2:00 PM), <http://www.washingtonpost.com/wp-dyn/content/discussion/2006/10/26/DI2006102600640.html>. Additionally, the fear of being ordered to return adopted children to the biological parents after lengthy periods with adoptive families reportedly sparked increased interest in intercountry adoptions, believed by many to be less vulnerable to such disruptions. See Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 194-95 (2003). See also Kate Pickert, *Russian Adoption: What Happens When a Parent Gives Up?*, TIME (Apr. 14, 2010) <http://www.time.com/time/world/article/0,8599,1981872,00.html>.

8. U.S. Dep't of State, *How to Adopt*, <http://adoption.state.gov/about/how.html> (last visited Dec. 21, 2010).

9. G. PARRA-ARANGUREN, HAGUE CONFERENCE ON PRIVATE INT'L LAW, EXPLANATORY REPORT ON THE CONVENTION ON PROTECTION OF CHILDREN AND CO-OPERATION IN RESPECT OF INTERCOUNTRY ADOPTION ¶ 6 (1993), available at <http://hcch.e-vision.nl/upload/exp133e.pdf>.

protect such a large number of children.<sup>10</sup> The Hague Adoption Convention became effective in the United States in April 2008;<sup>11</sup> however, many scholars question whether the Hague Adoption Convention is actually accomplishing its intended goals and whether the welfare and safety of children is actually being satisfied.<sup>12</sup> Although international treaties “need implementing legislation in order to be effective, as they are not self-executing,” the treaty must be unambiguous in its terms in order to establish a binding agreement between countries.<sup>13</sup>

This Comment argues that although the Hague Adoption Convention is a necessary device to grant the security and welfare of adopted children, the treaty still has significant weaknesses. More specifically, the Hague Adoption Convention is ambiguous as to whether gays and lesbians may partake in intercountry adoption.<sup>14</sup> Through this ambiguity, the Hague Adoption Convention is limiting potential homes in which vulnerable children could be placed, thereby inadequately protecting these defenseless children. Part I of this piece provides a brief history of

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10. See U.S. Dep't of State, *Total Adoptions to the United States*, [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (last visited Dec. 21, 2010) [hereinafter *Total Adoptions*].

11. Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901-14954 (2000).

12. See generally Rebecca Worthington, *The Road to Parentless Children is Paved with Good Intentions: How the Hague Convention and Recent Intercountry Adoption Rules are Affecting Potential Parents and the Best Interests of Children*, 19 DUKE J. COMP. & INT'L L. 559, 560 (2009) (arguing that the Hague Adoption Convention “inadequately protects vulnerable children”). See also Lindsay K. Carlberg, *The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: A More Effective and Efficient Solution to the Implementation of the Hague Convention on Intercountry Adoption or Just Another Road to Nowhere Paved With Good Intentions?*, 17 IND. INT'L & COMP. L. REV. 119, 123-24 (2007) (arguing that the implementation of the Hague Adoption Convention is “a less promising solution than originally hoped for” because of cost and efficiency issues); Jennifer M. Lippold, *Transnational Adoption from an American Perspective: The Need for Universal Uniformity*, 27 CASE W. RES. J. INT'L L. 465, 497-98 (1995) (suggesting additional provisions be included in the Hague Adoption Convention, including, *inter alia*, an appellate review process for each member country and a monetary cap for each transnational adoption).

13. King, *supra* note 5, at 416.

14. It should be noted at the outset that gay, lesbian, and homosexual will be used interchangeably throughout this piece. This piece focuses on how intercountry adoption affects homosexuals, both as couples and individually.

the Hague Adoption Convention. Part II discusses the need for reforms in intercountry adoption by gay and lesbian couples. Part II focuses on how the Hague Adoption Convention is likely purposefully vague on the issue of gay and lesbian intercountry adoption and how current regulations are not ensuring that the best interests of children are realized. Part III demonstrates how restricting intercountry adoption to heterosexual couples can lead to less than optimal results for children.

Part IV suggests a proposal for a uniform standard to remedy the flaws in the current form of the Hague Adoption Convention. Part IV further explores how the world might look if we were to dismantle and reject the prominent position that only singles and heterosexual couples may partake in intercountry adoption. As discussed in Part IV, a world without this widely accepted notion might result in reforms that are more responsive to the child's rights and the rights of families worldwide.

#### PART I: THE GENERAL HISTORY OF THE HAGUE ADOPTION CONVENTION

On May 29, 1993, sixty-six nations first approved the multilateral treaty of the Hague Adoption Convention.<sup>15</sup> The HCIA became effective among the participating countries on May 1, 1995.<sup>16</sup> As of August 17, 2010, eighty-five nations have signed, ratified, or acceded to the Hague Adoption Convention,<sup>17</sup> and the Convention has been enforced in eighty-three nations.<sup>18</sup> The fact that more countries – sixty-six total – were involved in the negotiation of this Convention than for any other Hague Convention signifies the importance of the Hague Adoption Convention.<sup>19</sup>

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15. Hague Adoption Convention, *supra* note 2 at Status Table 33.

16. *Id.*

17. *Id.* (Fifty-four nations have signed this Convention; fifty-one nations have ratified it; thirty-one nations have acceded; fifty-two nations have both signed and ratified the Convention; and a total of eighty-five nations have taken some step to join by signing and/or ratifying and/or acceding.).

18. *Id.* It should be noted that although intercountry adoptions that occur with a nation that is not a signatory to the Hague Adoption Convention do not need to comply with HCIA provisions, these adoptions will not be afforded the protections provided for within the HCIA. *Id.*

19. See Peter H. Pfund, *The Developing Jurisprudence of the Rights of the Child – Contributions of the Hague Conference on Private International Law*,

The purpose of the HCIA is to establish uniform standards and procedures that will protect the rights and interests of adopted children, birth parents, and adoptive parents involved in intercountry adoptions.<sup>20</sup> The Hague Adoption Convention mandates that each signatory country establish a national Central Authority in order to oversee the HCIA's implementation in the signatory country, and the Central Authority will have an ongoing role in the country's international adoption process.<sup>21</sup> In the United States, the Central Authority is the Department of State.<sup>22</sup> Thus, the Department of State is charged, *inter alia*, with providing timely information to prospective adoptive families and working with U.S. embassies abroad to facilitate the cooperation with the governments of each adoptee's birthplace on issues relating to the adoption process.<sup>23</sup>

The Hague Adoption Convention has three primary segments.<sup>24</sup> First, it emphasizes the necessity of protecting children's rights in regard to international adoption.<sup>25</sup> This importance is demonstrated in the Preamble of the Hague Adoption Convention, which states in part, that the HCIA aims "to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights . . . ."<sup>26</sup> Second, it establishes a useful tool for the collaboration of the contracting States in intercountry adoption.<sup>27</sup> In other words, the Hague Adoption Convention creates a means for cooperation amongst the signatory countries to ensure the safeguards provided under the HCIA are respected.<sup>28</sup> Third, it makes certain that adoptions that occur through HCIA procedures are

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3 ILSA J. INT'L & COMP. L. 665, 671 (1996-97).

20. Hague Adoption Convention, *supra* note 2, art. 1.

21. *See id.* art. 6. *See also* Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, Hague Conf. on Private Int'l Law, May 29, 1993, S. Treaty Doc. 105-51, available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_cong\\_documents&docid=f:td051.105.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_documents&docid=f:td051.105.pdf) (last visited Dec. 21, 2010) [hereinafter S. Treaty Doc. 105-51] for a summary of the provisions of the Conventions.

22. 42 U.S.C. § 14911(a)(1) (2000).

23. *Id.* § 14912(b).

24. *See* S. Treaty Doc. 105-51, *supra* note 21.

25. *See id.*

26. Hague Adoption Convention, *supra* note 2, at Preamble.

27. *See* S. Treaty Doc. 105-51, *supra* note 21.

28. *See* Hague Adoption Convention, *supra* note 2, art. 1(b).

recognized and certified.<sup>29</sup> More specifically, the Hague Adoption Convention “secure[s] the recognition in Contracting States of adoptions made in accordance with the Convention.”<sup>30</sup>

With regard to the substantive provisions, the Hague Adoption Convention incorporates the domestic laws of the adoptee’s birthplace (state of origin) and the state in which the adoptive parent(s) reside (the receiving State)<sup>31</sup>. Although the HCIA commits signatory nations to minimum general policies, such as favoring the best interests of child,<sup>32</sup> as well as respecting the religious and cultural values of the child,<sup>33</sup> none of those policies or principles endorses or opposes adoptions by gays and lesbians.

#### *The Hague Adoption Convention and the United States*

Once the text of the Hague Adoption Convention was finalized, the product was sent to member countries for signature and ratification. The United States became a signatory to the Hague Adoption Convention on March 31, 1994, and the HCIA was transmitted to the Senate for its advice and consent on June 11, 1998.<sup>34</sup> In 2000, both Houses of Congress passed the Intercountry Adoption Act of 2000 (“IAA”) which provides for the implementation by the United States of the Hague Adoption Convention.<sup>35</sup> The United States Senate gave its advice and consent to the United States’ ratification of the Convention on September 20, 2000.<sup>36</sup> The United States completed the formal ratification procedures for the HCIA on December 12, 2007, and the Hague Adoption Convention was put into effect on April 1, 2008, in the United States.<sup>37</sup>

In implementing the requirements of the Hague Adoption

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29. See S. Treaty Doc. 105-51, *supra* note 21.

30. Hague Adoption Convention, *supra* note 2, art. 1(c).

31. *Id.* art. 7(2)(a), 15(1), 17.

32. *Id.* art. 1(a).

33. *Id.* art. 16(b).

34. On June 11, 1998, the Convention was read for the first time in the Senate, and together with the accompanying papers, was transferred to the Senate Committee on Foreign Relations. See S. Treaty Doc. 105-51, *supra* note 21.

35. 42 U.S.C. § 14901 (2000).

36. 146 CONG. REC. S8866-67 (daily ed. Sept. 20, 2000).

37. Hague Adoption Convention, *supra* note 2, at Status Table.



Convention, the IAA took several important steps. Aside from creating the Central Authority within the United States, the IAA: (1) required that any person or group providing international adoption services become accredited, and outlined the process in which to do so; (2) amended the definition of a child of § 101(b)(1) of the Immigration and Nationality Act to more aptly comply with the requirements of the Hague Adoption Convention; (3) provided for the enforcement of HCIA requirements; and (4) provided that the IAA and the Hague Adoption Convention preempts any inconsistent state law.<sup>38</sup>

The provision requiring accreditation was implemented primarily in response to the overarching concern of the international community to curb the problem of child trafficking.<sup>39</sup> The standards outlined in Section 96 of Title 22 of the U.S. Code include a myriad of provisions from the structure of agencies seeking accreditation, to ethical guidelines that must be followed in order to receive accreditation.<sup>40</sup> Each guideline and provision revolves around the core objective of the Hague Adoption Convention and the IAA, which is to ensure that all intercountry adoptions are in the best interests of the adopted child.<sup>41</sup> For example, in regard to the concern of child trafficking, the U.S. Code explicitly prohibits “giving money or other consideration, directly or indirectly, to a child’s parent(s), other individual(s), or an entity as payment for the child or as an inducement to release the child.”<sup>42</sup> Under the IAA, any violation of this accreditation requirement is subject to large monetary fines and a maximum of five years imprisonment.<sup>43</sup>

Additional significant developments have occurred in recent

38. Intercountry Adoption Act of 2000 42 U.S.C. §§ 14911-14924, 14944, 14953 (2000).

39. *See id.* § 14901.

40. *See* 22 C.F.R. § 96 (Subpart F) (2010). *See also* Accreditation of Agencies and Approval of Persons Under the Intercountry Adoption Act of 2000, 22 C.F.R. § 96 (2010); U.S. Dep’t of State, *Accreditation: Becoming Accredited*, available at <http://adoption.state.gov/hague/accreditation/process.html> (last visited Dec. 21, 2010) [hereinafter *Accreditation*].

41. Hague Adoption Convention, *supra* note 2, Intercountry Adoption Act of 2000, 42 U.S.C. §14901 (2000).

42. 22 C.F.R. § 96.36(a) (2010).

43. *See* 44 U.S.C.S. § 14944 (2000). Like other crimes, the severity of the sentence depends upon the gravity of the violation.

years. For example, federal law, which limits entry to foreign adoptees who are orphans, expanded the term to include not only children whose parents both have died but also those whose parents both have disappeared, have abandoned or deserted them, or have become separated or lost from them, as well as children for whom the sole surviving parent cannot provide care and has irrevocably released the child for adoption and emigration.<sup>44</sup> Moreover, some jurisdictions stopped requiring a full state proceeding if a foreign adoption has been completed.<sup>45</sup> Similarly, federal legislation now provides for automatic United States citizenship for many children adopted abroad by United States citizens.<sup>46</sup>

#### *General Success of the Hague Adoption Convention*

Generally, the Hague Adoption Convention has yielded great success. In the 2009 fiscal year, 12,753 adoptions were made to the United States.<sup>47</sup> The top five states of origin were China, Ethiopia, Russia, South Korea, and Guatemala, respectively.<sup>48</sup> In the United States alone, there are currently 170 accredited bodies and eight approved (non-accredited) individuals that are permitted to facilitate adoptions.<sup>49</sup> In cases in which the United States is the receiving state, the accredited agencies enhance the safety and well-being of the adopted child in numerous ways, including: counseling the prospective adoptive parent(s) about the child proposed to him or her (or them), “arrang[ing] to file documents with [the] Court or authority of State of origin” for intercountry adoption, “supervis[ing] the procedure for the adoption” and “evaluat[ing] the suitability of the prospective

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44. See 8 U.S.C. § 1101(b)(1)(F) (2006).

45. See, e.g., *In re Adoption of W.J.*, 942 P.2d 37, 41 (Kan. 1997) (accepting findings by Chinese government of birth parents' abandonment).

46. See 8 U.S.C.A. § 1431(b) (2006).

47. See U.S. Dep't of State, *Total Adoptions*, *supra* note 10.

48. *Id.* See also U.S. Dep't of State, *Visa Issuances for FY-2009*, available at [http://adoption.state.gov/pdf/adoption\\_visas\\_issuance\\_2009.pdf](http://adoption.state.gov/pdf/adoption_visas_issuance_2009.pdf) (last visited Dec. 21, 2010) (providing a breakdown of the types of visas issued to each nation in Fiscal Year 2009).

49. Questionnaire on Accredited Bodies in the Framework of the Hague Convention, [http://www.hcch.net/upload/wop/adop2010\\_us.pdf](http://www.hcch.net/upload/wop/adop2010_us.pdf) (last visited Dec. 21, 2010).

adoptive parents ('psychosocial criteria')."<sup>50</sup> In cases in which the United States is the state of origin, accredited bodies may: provide counseling and information to the birth parents, obtain consent from the birth parents, prepare the child for adoption, assume responsibility for the child prior to the adoption, decide which child will be matched with the adoptive parent(s), and search for socio-biological background information of the child and birth family and reunion with the birth family.<sup>51</sup>

The Hague Adoption Convention has met both praise and criticism. In short, observers predict that this regime will facilitate U.S. citizens' intercountry adoptions by removing procedural hurdles, such as the need for re-adoption in the parents' domicile, while also creating new barriers and increasing expenses.<sup>52</sup> Although the Hague Adoption Convention has added much-needed safeguards to the entire intercountry adoption process, ambiguities and uncertainties remain.

## PART II: THE AMBIGUOUS QUESTION OF WHETHER SAME-SEX COUPLES MAY PARTAKE IN INTERCOUNTRY ADOPTION

One of the most fundamental challenges that surrounds the Hague Adoption Convention is piloting through the myriad of laws with which all parties that partake in the international adoption process must comply. In order for an American family to adopt a child from another country, that family must comply with three sets of laws: (1) U.S. Federal law, (2) the laws of the child's home country, and (3) the laws of the state in which the family

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50. *Id.*

51. *Id.* Although accredited bodies in the United States provide these services and protections, the United States is the state of origin in less than one percent of its intercountry adoptions. *Id.*

52. See, e.g., Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 *BUFF. HUM. RTS. L. REV.* 151, 174-77 (2007); Amy Grillo Kales, Note, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 *GEO. WASH. INT'L L. REV.* 477 (2004). Further, concern persists that the United States regulations issued pursuant to the Hague Adoption Convention fail to address payments to birth parents and might increase child trafficking. See Trish Maskew, *The Failure of Promise: The U.S. Regulations on Intercountry Adoption Under the Hague Convention*, 60 *ADMIN. L. REV.* 487 (2008).

resides.<sup>53</sup> Because the states vary widely in their homosexual parenting laws, the difficulty in complying with these three sets of laws is exponentially multiplied for gay and lesbian couples in the United States who wish to adopt a child in a country abroad.<sup>54</sup> Any individual (whether heterosexual or homosexual) who is interested in adopting internationally should first determine whether or not he or she is eligible to adopt under the laws of the state in which he or she resides. For example, certain states, like California, permit adoptions by same-sex couples while others, like Utah, remain resistant to adoptions by same-sex couples.<sup>55</sup> Thus, the legal status of an international adoption by a same-sex couple residing in a state that forbids such adoptions may be challenged.<sup>56</sup>

Nothing in the text of the Hague Adoption Convention indicates any intent to directly encourage or discourage adoptions by gays and lesbians, nor is such intent provided for in the commentary or drafting history of the HCIA.<sup>57</sup> However, some of the substantive standards used in the Convention could operate to prevent placing children for adoption with American gays and

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53. *How to Adopt*, *supra* note 8. For an argument that states should accord full faith and credit to adoptions from other states, see Christine L. Olson, *Second-Class Families: Interstate Recognition of Queer Adoption*, 43 FAM. L.Q. 161 (2009). See also, Comment, Lisa S. Chen, *Second-Parent Adoptions: Are They Entitled to Full Faith and Credit?*, 46 SANTA CLARA L. REV. 171 (2005).

54. See LAMBDA LEGAL, *In Your State*, <http://www.lambdalegal.org/our-work/states> (last visited Dec. 21, 2010).

55. See *id.* See *infra* Table: Who May Adopt in the United States? It should also be noted that given the mobility of Americans today, it is nearly inevitable that a homosexual parent will move from a state that may permit an adoption to a state that prohibits this same adoption. This ordinarily would not become an issue other than in the context of a custody dispute in which the non-biological parent would have no rights whatsoever after the move. See generally, Robert G. Spector, *The Unconstitutionality of Oklahoma's Statute Denying Recognition to Adoptions by Same-Sex Couples from Other States*, 40 TULSA L. REV. 467 (2005).

56. See *In Your State*, *supra* note 54. For an explanation of the option of second-parent agreements, see Marissa Wiley, Note, *Redefining the Legal Family: Protecting the Rights of Coparents and the Best Interests of Their Children*, 38 HOFSTRA L. REV. 319 (2009).

57. Hague Adoption Convention, *supra* note 2, art. 16(1). In other words, the Hague Adoption Convention is "clean" (i.e. neutral and nonpartisan) regarding whether adoptions by gays and lesbians is permitted." Wardle, *supra* note 1, at 135.

lesbians. First, the Central Authorities in both nations must agree the adoption is suitable.<sup>58</sup> In such, the Central Authority in the receiving state must consider and report on the suitability of the prospective adopters, including their “background, family and medical history, social environment, [and] reasons for adoption.”<sup>59</sup> Although the Hague Adoption Convention states that the match with the prospective parents must be “in the best interests of the child,”<sup>60</sup> this suitability requirement could potentially weed out international adoptions attempted by gay and lesbian prospective adopters. This is particularly true in states such as Florida that formerly explicitly prohibited adoption (whether domestic or international) by any person that is a homosexual.<sup>61</sup>

Additionally, the language of the Hague Adoption Convention is silent in regard to compelling wide-ranging recognition of adoptions by homosexuals, whether individuals or partners.<sup>62</sup> The only implicit mention within the Hague Adoption Convention itself is in Article 24, which asserts that “an adoption may be refused in a Contracting State only if the adoption is manifestly contrary to its public policy.”<sup>63</sup> This is the extent of any remarks, explicit or implicit, regarding the perspective of the Hague

58. Hague Adoption Convention, *supra* note 2, art. 17(c) - (d).

59. *Id.* art. 15(1).

60. *Id.* art. 16(1)(d).

61. FLA. STAT. § 63.042 (2010). *See also infra* Table: Who May Adopt in the United States? Florida adoption law did not prohibit gays or lesbians from serving as foster parents, but it did prevent such parents from adopting their foster children. *Id.* However, in September 2010, the Third District Court of Appeals of Florida found “no rational basis” for the ban. *See Fla. Dep’t of Children & Families v. X.X.G.*, 45 So. 3d 79 (Fla. Dist. Ct. App. 3d Dist. 2010). The court noted, “[i]t is difficult to see any rational basis in utilizing homosexual persons as foster parents or guardians on a temporary or permanent basis, while imposing a blanket prohibition on adoption by those same persons.” *Id.* at 86. Because this decision is not applicable throughout the entire state of Florida, the plaintiff in this case and the American Civil Liberties Union, which represented the plaintiff and his partner, “want the state to take the case to the Florida Supreme Court to obtain a final statewide determination on the law.” Curt Anderson & Kelli Kennedy, *Florida Overturns Gay Adoption Ban*, THE HUFFINGTON POST (Sept. 22, 2010, 6:48 PM), [http://www.huffingtonpost.com/2010/09/22/florida-gay-adoption-ban-unconstitutional\\_n\\_735751.html](http://www.huffingtonpost.com/2010/09/22/florida-gay-adoption-ban-unconstitutional_n_735751.html).

62. *See generally*, Hague Conference on Private International Law (“HCCH”): Final Act of the Seventeenth Session, 10 May 1993, 32 I.L.M. 1134 (LEXIS).

63. Hague Adoption Convention, *supra* note 2, art. 24.

Adoption Convention on intercountry adoption by homosexuals.

Although the drafting history of the Hague Adoption Convention allows each signatory to determine whether adoption by homosexuals should be permitted, various provisions in the Hague Adoption Convention imply otherwise. First, the Hague Adoption Convention “[r]ecogni[zes] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>64</sup> This shows that the drafters of the Hague Adoption Convention may have preferred a “permanent” and “suitable” family environment, regardless of the sexuality of the adopting parent(s). Second, the Hague Adoption Convention obligates Central Authorities to cooperate and, “as far as possible, eliminate any obstacles to its application.”<sup>65</sup> When the Central Authorities discover that an adopting parent is homosexual and a host or receiving country denies the adoption, this discovery certainly may be considered an obstacle. Therefore, these obstacles should be eliminated, along with the eradication of prohibitions against intercountry adoption by gay and lesbian couples. Lastly, the Hague Adoption Convention mandates Central Authorities to “facilitate [ ] and expedite proceedings with a view to obtaining the [intercountry] adoption[s]”<sup>66</sup> and to “take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving state.”<sup>67</sup> This mandate signifies that the primary objective of the Hague Adoption Convention is to permanently place a child in a home, taking “all necessary steps” to do so.<sup>68</sup> Thus, if a permanent home is found for a child, “all necessary steps” should be taken for the child to reside in this home, even if this involves disregarding the sexuality of the adopting parent(s).<sup>69</sup> However, these particular interpretations of HCIA provisions may conflict with adoption laws in existence in various states in the United States.

As aforementioned, the Hague Adoption Convention (as well

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64. *Id.* at Preamble.

65. *Id.* art. 7(2)(b).

66. *Id.* art. 9(b).

67. *Id.* art. 18.

68. *Id.*

69. *Id.*

as the IAA) preempts any inconsistent state law.<sup>70</sup> Both federal law and the Hague Adoption Convention are seemingly silent on the issue of gay adoption.<sup>71</sup> However, because the aforementioned provisions in the Hague Adoption Convention imply the Hague Adoption Convention supports intercountry adoption by gay couples, any state law that is inconsistent with this view is therefore preempted. This is particularly confusing for couples seeking intercountry adoption when either the host or receiving nation has a myriad of contradicting state laws within that nation, as is the case with the United States.<sup>72</sup> For example, Mississippi law prescribes that “adoption by couples of the same gender is prohibited,<sup>73</sup> while Pennsylvania law permits any individual to adopt a child.<sup>74</sup> Logic therefore dictates that first resort should be made to the Hague Adoption Convention not only for the sake of uniformity across the country and internationally, but also to clarify the position of the law for an increasing number of gay couples seeking intercountry adoption.

### PART III: RESTRICTING ADOPTION EQUALS DEFICIENT ADOPTION

Several general concerns remain for the international community under the Hague Adoption Convention. First, although the stringent provisions of both the Hague Adoption

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70. Intercountry Adoption Act of 2000 42 U.S.C. §§ 14953(a) (2000).

71. The closest federal law comes to addressing gay adoption is the Defense of Marriage Act (DOMA). See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C, 104th Congress, available at <http://thomas.loc.gov/cgi-bin/query/z?c104:H.R.3396.ENR>: (last visited Dec. 21, 2010). However, on February 23, 2011, President Barack Obama instructed the Justice Department to stop defending the constitutionality of DOMA.” See Ian Saleh, *Defense of Marriage Act: Obama Administration Will No Longer Defend Legality of Measure*, WASH. POST Feb. 23, 2011, available at <http://www.washingtonpost.com/wp-dyn/content/article/2011/02/23/AR2011022305361.html>. Additionally, various federal courts already have or are in the process of declaring the definition of “marriage” in DOMA unconstitutional. See, e.g., *Massachusetts v. United States HHS*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

72. For an overview of each state’s laws on adoption by gay couples, see *infra* Table: Who May Adopt in the United States?

73. MISS. CODE ANN. § 93-17-3. See *infra* Table: Who May Adopt in the United States?

74. See 23 PA. CONS. STAT. § 2312 (2009). See also *infra* Table: Who May Adopt in the United States?

Convention and the IAA are aimed at inhibiting incidents of child trafficking, only agencies that facilitate adoptions between the United States and countries that are also signatories to the Hague Adoption Convention are required to be accredited.<sup>75</sup> In other words, any agency or individual that engages in adoptions between the United States and non-convention countries is not required to abide by the requirements for accreditation as outlined in 22 C.F.R. § 96.<sup>76</sup> Therefore, less reputable individuals or agencies could utilize this insecurity to facilitate and engage in the purchase of children, thus misusing and manipulating the adoption process altogether. Clearly not all unaccredited adoption agencies and individuals that facilitate adoptions (or those that are within non-signatory countries) engage in this illegal practice or are dishonest. However, the primary objective in intercountry adoption is to protect the well-being of the child. Prospective adoptive parents should thus be aware that an accredited agency under the Hague Adoption Convention must adhere to the highest standards of ethics and regulations. Therefore, an accredited body under the HCIA is the safest and most reliable route to successfully complete the international adoption process.

The second concern is the increased difficulty in navigating the international adoption process itself. In other words, adoptive parents will need to become familiarized with the adoption laws of not only the Hague Adoption Convention, the laws of their prospective child's nation, but also the laws of their own nation. This is especially true as parties to the Hague Adoption Convention make great effort to bring their laws into alignment with the strict provisions of the HCIA.<sup>77</sup> The confusion in trying to align laws has led not only "to a slow down" in the number of intercountry adoptions to the United States in recent years, but it has also left many families questioning whether their adoption

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75. See U.S. Dep't of State, *Accreditation*, *supra* note 40.

76. This includes several major sources of American adoptions, such as Kazakhstan and Russia. See Hague Adoption Convention, *supra* note 2, at Status Table.

77. Interview by Judy Woodruff with Susan Soon-Keum Cox, Holt International, and Kathleen Strottman, Executive Director of the Congressional Coalition on Adoption Institute, *NewsHour* (PBS television broadcast July 1, 2008), *transcript available at* [http://www.pbs.org/newshour/bb/social\\_issues/july-dec08/adoption-abroad\\_07-01.html](http://www.pbs.org/newshour/bb/social_issues/july-dec08/adoption-abroad_07-01.html) [hereinafter Judy Woodruff Interview].



will even occur.<sup>78</sup> Oftentimes, this uncertainty crops up after the adoptive parents have formed a precious bond and even fallen in love with the child.<sup>79</sup> Although this “slow down” is undoubtedly inconvenient, it is trivial compared to the devastation parents feel when their adoption is brought to a standstill.<sup>80</sup> The vast majority of adoption professionals, however, aver that this transitory inconvenience and uncertainty, albeit devastating to families seeking adoptions, is outweighed by the long-standing and durable benefits that strict ethical obligations for international adoptions will generate.<sup>81</sup> For example, Guatemala was the number one source of international adoptions to the United States in 2008, and has consistently been in the top States of origin for intercountry adoptions.<sup>82</sup> However, in September 2008, the United States Department of State announced an immediate halt to all adoptions coming from Guatemala until further notice.<sup>83</sup> The State Department reasoned that “Guatemala has had insufficient time to implement reform legislation that would create a Convention-compliant adoption process, and as a result, Guatemala cannot meet its Convention obligations.”<sup>84</sup> In other words, because Guatemala has signed onto the obligations and benefits provided by the Hague Adoption Convention, Guatemala must first meet its HCIA obligations before the United States is willing to lift the ban on adoptions

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78. *Id.*

79. For an example of the heartbreak that can result during the international adoption process, see Andrew C. Brown, Comment, *International Adoption Law: A Comparative Analysis*, 43 INT’L LAW. 1337, 1360-63 (2009).

80. *Id.* See also Judy Woodruff Interview, *supra* note 77.

81. See Brown, *supra* note 79.

82. *Total Adoptions*, *supra* note 10.

83. U.S. Dep’t of State, *Country Information: Guatemala*, available at <http://adoption.state.gov/country/guatemala.html> (last visited Jan. 27, 2011). However, as of December 20, 2010, the U.S. Department of State is in the process of compiling a list of all pending grandfathered adoption cases in Guatemala. See U.S. Dep’t of State, *Adoption Notice*, available at <http://adoption.state.gov/guatemala.html> (last visited Jan. 27, 2011).

84. *Country Information: Guatemala*, *supra* note 83 (stating that adoptions between the U.S. and Guatemala have been suspended because the U.S. Department of State is unable to verify if Guatemalan laws have been sufficiently amended to come into compliance with the Hague Adoption Convention.).

from Guatemala.<sup>85</sup> This situation is further complicated by the inability of U.S. authorities to verify what changes need to be made to Guatemalan laws and institutions, or the progress of Guatemalan authorities in making these changes.<sup>86</sup>

Furthermore, because of the diverse range of societal beliefs regarding what a “normal and desirable” family held throughout the world, there is even more diversity in views regarding international adoption by homosexuals.<sup>87</sup> These adoptions are controversial as a matter of public policy because such adoptions deviate from the universal ideal of a child being reared by a mother and father.<sup>88</sup> In fact, one scholar has noted that the nuclear family was “the type of family recognized to the exclusion of all others.”<sup>89</sup> Allowing a child to be raised by two mothers or two fathers assures that the child will be left without the missing-gender parent’s influence.<sup>90</sup> Furthermore, many people globally consider the potential harm to the child from being raised by homosexuals a serious concern.<sup>91</sup> Many of these same people often characterize the homosexual environment as hyper-sexualized; in fact, even “gay” and “lesbian” relationships are defined by sexuality.<sup>92</sup> These concerns over intercountry adoption

85. *See id.*

86. *Id.*

87. *See generally*, Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 605-06 (2001).

88. *See Developments in the Law – The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2001 n.15 (2003) (explaining that “[a]nthropologist George Murdock coined the term ‘nuclear family’ in 1949 to describe a married man and woman living together with their offspring”) (citation omitted).

89. *Id.* *See also id.* at 2065-66 (noting that “[s]tate prospective parent review processes almost universally prefer traditional families – heterosexual married couples – over less traditional adoptive parents (single parents and homosexual parents, for example).”).

90. *See* Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. LOUIS U. PUB. L. REV. 169, 187 (2005). *See also* David Blankenhorn, *Fatherless America: Confronting Our Most Urgent Social Problem*, [http://www.americanvalues.org/html/bk-fatherless\\_america.html](http://www.americanvalues.org/html/bk-fatherless_america.html) (arguing that separation of children from their fathers is “the engine driving our most urgent social problems, from crime to adolescent pregnancy to child sexual abuse to domestic violence against women.”) (last visited Dec. 21, 2010).

91. Wardle, *supra* note 90, at 187.

92. *See generally*, Lynn D. Wardle, *The “Inner Lives” of Children in Lesbian Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV.

by homosexuals are most likely the driving force behind the Hague Adoption Convention's reluctance to implement a precise uniform standard regarding the issue, as adoption by same-sex partners is still extremely controversial around the globe.

For example, even polls in progressive Europe show the majority of people in most European Union nations oppose allowing gays and lesbians to adopt.<sup>93</sup> However, "[f]amily constellations are changing, and adoption experts have been asking for a more flexible interpretation of the word 'family.'"<sup>94</sup> Unfortunately, those affected most by maintaining the status quo of the traditional nuclear family are the children who certainly cannot afford to remain in a static state of affairs.

The general concerns regarding the Hague Adoption Convention are not solely affecting a small and inclusive number of prospective adoptive parents. In the United States alone, an estimated 65,000 children are living with gay or lesbian parents.<sup>95</sup> However, this number indicates only the number of parents that were successful in completing the adoption process.<sup>96</sup> Many more homosexual couples anxiously await a change in the provisions of the Hague Adoption Convention, as well as in their state's adoption laws. For instance, the same study indicates that two million gays, lesbians, and bi-sexuals are interested in adopting.<sup>97</sup> A ban on same-sex couples adopting children affects not only those seeking to adopt, but the country as a whole. A national ban on

511 (2005).

93. GALLUP EUROPE, *The European Omnibus Survey, Homosexual Marriage, Child Adoption by Homosexual Couples: Is the Public Ready?*, available at <http://www.ilgaeurope.org/content/download/3434/20938/file/GALLUP%20Europe%C202003%20report.pdf> (survey was based on interviews with over 15,000 people living in thirty European countries) (last visited Dec. 21, 2010) [hereinafter GALLUP EUROPE].

94. Scott D. Ryan & Scottye Cash, *Adoptive Families Headed by Gay or Lesbian Parents: A Threat...or Hidden Resource?*, 15 U. FLA. J.L. & PUB. POL'Y 443, 444 (2004).

95. Gary J. Gates, et. al., *Adoption and Foster Care by Gay and Lesbian Parents in the United States*, URBAN INSTITUTE AND THE WILLIAMS INSTITUTE AT UCLA SCHOOL OF LAW, available at <http://www.urban.org/publications/411437.html> (last visited Dec. 21, 2010) (study revealing that gays and lesbians are parents to one in four adopted children in the United States, and that "more than half of gay men and forty-one percent of lesbians want to have a child.").

96. *See id.*

97. *Id.*

gay and lesbian foster care could cost from \$87 to \$130 million, with the cost to individual states ranging from \$100,000 to \$27 million.<sup>98</sup> Although this statistic measures the cost of foster care as opposed to the cost of a prohibition of adoption by gay and lesbian couples, one may draw a feasible comparison between the two as foster care is a major source of adoptive homes.<sup>99</sup>

*The Undeniable Need for Growth in Intercountry Adoption*

Despite these callous fears regarding adoption by homosexuals, the need for intercountry adoption is irrefutable. UNICEF estimates approximately 100 million children live on the streets in the world today.<sup>100</sup> UNICEF defines street children as: children living on the streets, whose immediate concerns are survival and shelter; children who are detached from their families and living in temporary shelters such as hostels and abandoned houses and who move from place to place with friends; children who remain in contact with their families but, because of poverty, overcrowding, or sexual abuse will spend some days and most nights in the cities; and children who are in institutional care, who have come from homelessness and are at risk of returning to a homeless existence.<sup>101</sup>

Moreover, these street children are not regarded highly in many of these third world countries.<sup>102</sup> Although “[t]he hidden and isolated nature of street children makes accurate statistics difficult to gather[,]” it is estimated that there are approximately

98. *Id.*

99. *See id.*

100. *See* WORLD HEALTH ORGANIZATION, PROGRAMME ON SUBSTANCE ABUSE: A ONE-WAY STREET? (1993), *available at* [http://www.pangaea.org/street\\_children/world/who3.htm](http://www.pangaea.org/street_children/world/who3.htm) [hereinafter WORLD HEALTH ORGANIZATION].

101. *Id.*

102. For example, in Columbia, street children are referred to as “gamines” (urchins) or “chinchas” (bed bugs). In Brazil they are called “marginais” (criminals/marginals), in Peru, “pajaros fruteros” (fruit birds), and in Vietnam, “bui doi” (dust children). Rwandans refer to these children as “saligoman” (nasty kids), and in Cameroon, “moustiques” (mosquitoes). *Id.* (Additionally, street children are targets of violence in some cities. Often times, however, these children at least have a place for themselves in the service business of major cities, working as shoe shiners, hawking goods, and performing other services.).

100 million street children worldwide.<sup>103</sup> For many street children, their problems vary - "living on the street is temporary for some children, for others it is a means of supplementing family income."<sup>104</sup> Regardless of the reason, it is predicted that the number of street children will continue to grow in the future.<sup>105</sup> "Many parentless children are unable to survive - they die, and often not tidily, not antiseptically, not with dignity, but horribly of starvation, with bloated bellies, listless, bony bodies, and huge pain-drenched eyes, with cries of hunger and fear."<sup>106</sup> The problem of the health and well-being of street children and orphaned children will not be improved and solved overnight. However, adopting these susceptible children is one small way that adults in more prosperous countries can make an impression on the huge problem of parentless children on an international scale.

#### *A Comparative Analysis*

Many prominent countries fully allow for same-sex joint adoption, including: Andorra, Belgium, Canada, the Netherlands, Sweden, the United Kingdom, and Spain.<sup>107</sup> Unfortunately, countries like China and Guatemala, where a significant number

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103. THE INTERNATIONAL CHILD AND YOUTH CARE NETWORK, *Street Children and Homelessness*, available at <http://www.cyc-net.org/cyc-online/cycol-0904-Homelessness.html> (last visited Jan. 27, 2011).

104. Susan O'Rourke von Struensee, *Violence, Exploitation and Children: Highlights of the United Nations Children's Convention and International Response to Children's Human Rights*, 18 SUFFOLK TRANSNAT'L L. REV. 589, 616 n.186 (1995).

105. *Street Children and Homelessness*, *supra* note 103.

106. Wardle, *supra* note 1, at 116.

107. See Deirdre M. Bowen, *The Parent Trap: Differential Familial Power in Same-Sex Families*, 15 WM. & MARY J. OF WOMEN & L. 1, 6 (2008). Adoptions by same-sex couples are currently legal in several jurisdictions internationally. See, e.g., Ellen Thomas, *New Legislation Sees Gay Scottish Couples Win Right to Adopt Children*, THE HERALD SCOTLAND (Sept. 20, 2009), <http://www.heraldscotland.com/news/home-news/new-legislation-sees-gay-scottish-couples-win-right-to-adopt-children-1.921121>. Additionally, several countries permit "stepchild-adoption," meaning that the partner in a registered partnership can adopt the natural child of his or her partner. See, e.g., *Gays Given Equal Adoption Rights*, THE COPENHAGEN POST ONLINE (May 5, 2010, 8:34 AM), <http://www.cphpost.dk/component/content/48896.html?task=view> (explaining that the "Danish parliament passed a vote giving equal adoption rights to couples in registered partnerships, but without the support of the government.").

of adoptions occur,<sup>108</sup> will not knowingly allow a gay or lesbian individual to adopt a child.<sup>109</sup> In these cases, not only is one member of the couple excluded from the adoption, but the individual who is adopting must remain closeted throughout the adoption process as well.<sup>110</sup> In other words, one partner must conceal the fact that he or she is indeed a homosexual or alternatively, the adoptive parent must conceal that he or she has a partner of the same sex.<sup>111</sup> Forcing this concealment is rather counterintuitive to the objective of the Hague Adoption Convention for the “full and harmonious development of [the adoptee’s] personality” by facilitating the child’s growth in a “family environment.”<sup>112</sup>

Even within the United States alone, one adoptive parent or couple that resides in one state may be treated differently than another adoptive parent or couple that resides in another state.<sup>113</sup> Because each individual state within the United States establishes its own family law, as opposed to a uniform law created by the federal government, such disparate treatment amongst adoptive parents arises.<sup>114</sup> Additionally, prospective parents must also satisfy the federal government’s requirements which are complicated by a merger of both federal and state law.<sup>115</sup> Satisfying three governments (the federal government, the individual state government, and the foreign government of the adopted child) to accomplish one objective is likely to result in both conflicts of authority as well as procedural uncertainties. Such overt problems begin with the inconsistencies in foreign and domestic law, which may ultimately cause an abandoned or

108. Scott D. Ryan et. al., *Coming Out of the Closet: Opening Agencies to Gay and Lesbian Adoptive Parents*, 49 SOC. WORK, Jan. 2004, at 86. See also Hague Adoption Convention, *supra* note 2, at Status Table.

109. Ryan, *supra* note 108, at 86.

110. Bowen, *supra* note 107, at 6 n.17.

111. See *id.*

112. Hague Adoption Convention, *supra* note 2, at Preamble.

113. See *infra* Table: Who May Adopt in the United States?

114. See U.S. CONST. amend. X. See generally, Lisa K. Gold, Comment, *Who’s Afraid of Big Government? The Federalization of Intercountry Adoption: It’s not as Scary as it Sounds*, 34 TULSA L.J. 109 (1998) (arguing for the federalization of intercountry adoptions to eliminate excessive and inefficient processes).

115. See Gold, *supra* note 114, at 113. See also Richard R. Carlson, *Transnational Adoption of Children*, 23 TULSA L.J. 317, 345-46 (1988).

unwanted child to be legally unadoptable.<sup>116</sup> The federal government has instituted further barricades with the requirements for immigration, orphanage, and citizenship.<sup>117</sup> Finally, the individual states often have their own standards and must approve and conclude the adoption.<sup>118</sup> "The greatest flaw in the existing system of transnational adoption is its division of authority between state and federal authorities in determining a child's adoptability."<sup>119</sup>

"The [physical] removal of a child from one country (the state of origin) to another country [altogether] (the receiving state)" is what makes the expansive issue of intercountry adoption so incredibly imperative in our culture.<sup>120</sup> Although removal may be by relatives, the majority of international adoptions are considered "stranger" adoptions by unrelated adults who become acquainted with the child only after the adoption process has begun.<sup>121</sup> Additionally,

[i]nternational adoptions make the world a better place; there are few international transactions that compare with the selfless, charitable, and compassionate act of responsible adults taking stranger children from foreign countries and cultures into their homes, as members of their own families, and assuming the obligation to feed, clothe, house, teach, love, nurture and protect the children until they become adults.<sup>122</sup>

Nevertheless, dishonest individuals seeking to obtain children for profit or other selfish reasons may abuse or manipulate a process involving the most vulnerable persons, such as orphaned children.<sup>123</sup> These reasons include "sexual labor, criminal

116. See e.g., Elizabeth Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, 13 J. AM. ACAD. MATRIM. LAW. 181, 186-90 (1996).

117. See generally, *Truax v. Raich*, 239 U.S. 33, 42 (1915); *Fong Yue Ting v. United States*, 149 U.S. 698, 713-14 (1893); *Waldei v. Immigration and Naturalization Serv.*, 938 F. Supp. 362, 364 (1996).

118. See Carlson, *supra* note 115, at 351-52. See *infra* Table: Who May Adopt in the United States?

119. See Carlson, *supra* note 115, at 371.

120. Wardle, *supra* note 1, at 115.

121. See *id.*

122. *Id.*

123. *Id.* See generally, CHRISTINA CRAWFORD, *MOMMIE DEAREST* (1978) (biographical account by Joan Crawford's adopted daughter, indicating the

exploitation, or personal aggrandizement (as a feather in the cap of adults seeking a particular status or reputation)."<sup>124</sup> It was these very abuses that led to the drafting of the Hague Adoption Convention to ensure the well-being of children adopted internationally.<sup>125</sup> Fueling the fire further, some also believe that gay and lesbian adopting parents will exacerbate these abuses and exploitation of children. Common myths regarding homosexuals as parents include the fear that children will be molested if they have homosexual parents.<sup>126</sup> However, there is no truth to this erroneous belief. In fact, "research suggest[s] that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents."<sup>127</sup>

#### PART IV: A BETTER APPROACH TO EFFECTIVELY PROTECT THE WELL-BEING OF CHILDREN WORLDWIDE

Although the Hague Adoption Convention is an effective tool for the international community to ensure that adoptions occur in the safest and most efficient way possible, there are areas in which the Hague Adoption Convention must be improved in order to be truly successful. First, the Hague Adoption Convention does not require that its signatories only authorize adoptions from countries that are also parties to the HCIA. However, member countries often discontinue adoptions from countries that are party to the HCIA but have not sufficiently implemented its requirements.<sup>128</sup> As aforementioned, in September 2008, the

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actress's motive in adopting several children was self-serving, to promote her image).

124. Wardle, *supra* note 1, at 115.

125. *See generally*, Hague Adoption Convention, *supra* note 2.

126. Carrie Craft, *Gay Adoption Basics*, ABOUT.COM, <http://adoption.about.com/od/adopting/tp/gayadoptionbasics.htm> (last visited Dec. 21, 2010).

127. R. U. Paige, *American Psychologist*, Vol. 60, Issue 5 (2005). Proceedings of the American Psychological Association, Incorporated, for the legislative year 2004. Minutes of the meeting of the Council of Representatives July 28 & 30, 2004, Honolulu, HI, available at <http://www.apa.org/about/governance/council/04july-crminutes.aspx> (last visited Dec. 21, 2010).

128. *See, e.g.*, Annette Schmit, *The Hague Convention: The Problems with Accession and Implementation*, 15 *IND. J. GLOBAL LEGAL STUD.* 375, 387 (2008).



United States discontinued all adoptions from Guatemala until that country could bring its adoption policies into sufficient compliance with the requirements of the Hague Adoption Convention.<sup>129</sup>

Meanwhile, the United States continued adoptions for quite some time with countries like Vietnam, which is not a party to the Hague Adoption Convention, and has even had problems with “fraudulent adoption practices.”<sup>130</sup> It was not until July 28, 2010 that the State Department announced, “[i]ntercountry adoption is not possible from Vietnam at this time.”<sup>131</sup> Therefore, there is a disincentive for non-signatory nations to become parties to the Hague Adoption Convention.<sup>132</sup> In other words, while signatory countries that have not fully implemented the requirements of the Hague Adoption Convention are punished by having their international adoptions suspended by other member countries, non-signatory countries are rewarded by being permitted “to ignore Convention requirements.”<sup>133</sup> Although the main objective of the Hague Adoption Convention is the well-being and safety of adopted children, this discrepancy between signatory and non-signatory countries can, and does, result in intense emotional effects on prospective adopters. To this end, regulation of family issues in the transnational context can be addressed through principles of territorial accommodation and/or agreement on universal norms.

A consensus about universal norms may be difficult to achieve given strong governmental interests in the structure of the family and the relationship of family members by respective states. Perhaps a central overseeing body to support the Hague Adoption Convention could improve the channels of communication between

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129. See *Country Information: Guatemala*, *supra* note 83.

130. See *Total Adoptions*, *supra* note 10 (stating that Vietnam was in the top fifteen countries for total adoptions to the United States from 2005-2009).

131. See U.S. Dep’t of State, *Adoption Notice*, available at <http://adoption.state.gov/news/vietnam.html> (last visited Jan. 27, 2011). “In June 2010, the Vietnamese legislature passed a new adoption law scheduled to take effect January 2011 . . . Vietnamese law requires that in order for adoptions to resume from Vietnam, either a new bilateral agreement must be in place between the United States and Vietnam, or Vietnam must accede to the Convention.” *Id.*

132. See Schmit, *supra* note 128, at 388.

133. *Id.*

signatory countries.

The second major problem in the implementation of the Hague Adoption Convention is that its broadly defined requirements allow individual nations considerable leeway in the rules and regulations that govern international adoptions from within their borders. The leeway that the HCLIA grants to countries to create and change their adoption laws often results in temporary delays of adoptions with little warning.<sup>134</sup> While universality between the adoption policies of countries that are signatories to the Hague Adoption Convention would help solve many of the problems created by discrepancies between the signatories, requiring such commonality would likely result in intense resistance from interference into the sovereignty of the individual nations. Perhaps the best solution to this area of weakness would be for member nations to the Hague Adoption Convention to reach an agreement on a future provision that would create enhanced consistency between the adoption laws of signatories, thus making international adoptions more efficient. More specifically, the position of the Hague Adoption Convention and adoptions by gay and lesbian couples needs to be clarified to create a more proficient and fruitful intercountry adoption process.

With a uniform standard and policy of permitting international adoption by gay and lesbian parents, not only will a more efficient intercountry adoption process result, but more homes will become available for the most vulnerable children. In the United States alone, an estimated two million gay, lesbian, and bi-sexual people are interested in adopting.<sup>135</sup> Additionally, according to the 2000 Census Report, an estimated 65,500 adopted children are living with a gay or lesbian parent, meaning that gay and lesbian parents are raising four percent of all adopted

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134. See, e.g., U.S. Dep't of State, *China Adoption Notice*, available at <http://adoption.state.gov/news/china.html> (last visited Dec. 21, 2010) (cautioning U.S. families seeking to adopt from China about potential suspensions that could result as China changes its process for handling adoption cases with other Hague Adoption Convention countries).

135. Carrie Craft, *How Many Children Have Gay Parents in the US?*, ABOUT.COM, <http://adoption.about.com/od/gaylesbian/fl/gayparents.htm> (last visited Dec. 21, 2010). It should also be noted that the number of children that have a gay or lesbian parent has increased three fold over the past thirty years. *Id.*

children in the United States.<sup>136</sup> There has been a recent rise of gay and lesbian adoptions in the United States and several other countries, which appears to coincide with the implementation in the United States of the Hague Adoption Convention.<sup>137</sup> This implies that perhaps gay and lesbian adoption is recognized under the Hague Adoption Convention by those that facilitate intercountry adoptions.

It is feasible that the Hague Adoption Convention could be interpreted to require intracountry adoptions by gays and lesbians.<sup>138</sup> As aforementioned, the issue is not expressly addressed in the Convention; however, some of the facially neutral provisions of the Convention might be interpreted as favoring placement of children into the homes of gay and lesbian couples over leaving the children in orphanages or foster care. Such provisions include promoting the placing of parentless children into "family environment[s]"<sup>139</sup> and the "best interests of the child."<sup>140</sup> Additionally, one of the presumed objectives of the Hague Adoption Convention is to encourage international adoption.<sup>141</sup> Although the problems of gay and lesbian adoptions are not explicitly under the scope of the Convention and are solved according to the internal law of each contracting state,<sup>142</sup> it would be both ironic and unfortunate if one effect of the Hague Adoption Convention was to actually reduce the number of legitimate international adoptions because of its ambiguity on gay and lesbian intercountry adoption.

#### CONCLUSION

*[W]ithout amendment and clarification[,] the Hague [Adoption] Convention[s] . . . reach is limited, and its ability to protect and serve children and families*

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136. Gates, et. al, *supra* note 95.

137. *See id.* *See also* GALLUP EUROPE, *supra* note 93.

138. *See generally*, Lisa Hillis, Note, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEGAL STUD. 237, 238 (1998) ("[P]erhaps the Convention can also serve as the first formal recognition of homosexual persons' desirability as intercountry adoptive parents.").

139. Hague Adoption Convention, *supra* note 2, at Preamble.

140. *Id.*

141. *See generally*, Hague Adoption Convention, *supra* note 2.

142. *See supra* text accompanying note 63.

*embroiled in the international adoption labyrinth remains restricted. Although the Hague Convention purports to safeguard and promot[e] legitimate international adoptions, it has yet to convey its true significance in the protection of children, birth parents, and adoptive families who cross international borders.*<sup>143</sup>

Despite the ambiguity regarding intercountry adoption by homosexuals, the Hague Adoption Convention is an essential instrument for providing for the protection of children adopted internationally and making the process more adept. It is logical to presume that as more countries bring their laws into further compliance with its provisions, the HCIA should become increasingly effective in meeting its goals. Therefore, if the Hague Adoption Convention is clarified in its endorsement of international adoptions by homosexuals, and if member nations commit to making necessary changes to come into compliance with the HCIA, intercountry adoptions are bound to become more proficient than ever.

Above all, the best-interests of the adopted children should be prioritized in the international adoption processes. The Hague Adoption Convention aims to “[r]ecogni[ze] that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her state of origin,”<sup>144</sup> and to “take all necessary steps to obtain permission for the child to leave the State of origin and to enter and reside permanently in the receiving State.”<sup>145</sup> Practically, the procedures and requirements established by the Hague Adoption Convention have created a system for international adoptions which could entice more nations to permit their parentless children to be adopted by families in other countries, thereby facilitating more adoptions globally. How the creation of a uniform standard of the Hague Adoption Convention to permit adoptions by homosexuals will impact the flow of intercountry

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143. Notesong Srisopark Thompson, Note, *Hague is Enough?: A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 469 (2004).

144. Hague Adoption Convention, *supra* note 2, at Preamble.

145. *Id.* art. 18.

adoptions into the United States remains to be seen.

Throughout the world, particularly third world countries, orphaned and abandoned children lack a loving home or family. International adoption appears to be a superior solution to the disparity in the number of orphaned children in these countries and the number of families and individuals wishing to adopt in others. The Hague Adoption Convention establishes a hierarchy that makes clear the importance of growing up in a family environment: the best possible situation is for a child to grow up in his or her family of origin; the second best situation is for the child to be adopted domestically; and if domestic adoption is not possible, the HCIA identifies international adoption as the third best situation. This hierarchy of preferred situations implies that the child's need to grow up in a family environment is superior to many other considerations in the adoption process. Although the Hague Adoption Convention cannot itself solve the underlying problems that have led to the need for international adoption, it has the potential for consequential long-term and extraordinary effects. Perhaps the worldwide attention that the Hague Adoption Convention brings will eventually lead to social and legal changes that will indeed decrease the number of children that are orphaned and abandoned throughout the world.

**APPENDIX**  
**TABLE: WHO MAY ADOPT IN THE UNITED STATES?<sup>146</sup>**

STATE	STATUTE	PROVISIONS OF INTEREST
ALABAMA	§ 26-10A-5	A husband and wife together; an unmarried adult; the unmarried parent of the adoptee
ALASKA	§ 25.23.020	A husband and wife together; an unmarried adult; the unmarried parent of the adoptee
ARIZONA	§ 8-103	Any adult resident of the State, whether married, unmarried, or legally separated; a husband and wife, who may jointly adopt
ARKANSAS	§ 9-9-204	A husband and wife together, although one or both are minors; an unmarried adult; the unmarried parent of the adoptee; a married individual without the spouse, under specified conditions
CALIFORNIA	§§ 8600, 8601	An adult at least 10 years older than the child, except under conditions specified
COLORADO	§ 19-5-202	Any person age 21 or older, including a foster parent, may adopt; minor may petition the court for approval; a person with a living spouse shall adopt jointly
CONNECTICUT	§§ 45a-724, 45a-726a, 45a-732	Any adult person may adopt; the Commissioner is not required to place a child with a person who is homosexual or bisexual
DELAWARE	Title 13, § 903	An unmarried person; husband and wife jointly; a divorced or legally separated person; residents of the State at time of filing; over age 21
FLORIDA	§ 63.042	No person is eligible to adopt if that person is a homosexual; husband and wife jointly; an unmarried adult; a married person without a spouse if excused by the court for good cause shown
GEORGIA	§ 19-8-3	Any adult person, including a foster parent, who: is at least 25 years old or married and living with his spouse; is at least 10 years older than the child; has been a resident at least 6 months; is financially, physically and mentally able to have permanent custody of the child;
HAWAII	§ 578-1	Any unmarried adult; the spouse of a birth parent; a husband and wife jointly
IDAHO	§§ 16-1501, 16-	Any adult resident of Idaho may adopt, subject to specific

146. The author would like to sincerely thank J. David Brems for his thorough research and assistance in compiling this chart.

	1502, 16-1503	provisions stipulated in statute; Person adopting, except the spouse of a natural parent, must be: At least 15 years older than adoptee; or Age 25 or older. If married, consent of the spouse is required.
ILLINOIS	750 ILCS 50/2	A resident for at least 6 months or a member of the armed forces domiciled in the state for 90 days; a reputable adult of either sex; a minor with leave of the court; husband and wife residing together must petition jointly; a husband or wife can adopt singly if he or she has been separated for one year or more; need not be a legal separation; residency requirement does not apply to a related child or to an agency placement
INDIANA	§§ 31-19-2-2, 31-19-2-3, 31-19-2-4	A resident of Indiana may adopt; a non-resident may adopt a hard-to-place child; husband and wife must petition jointly
IOWA	§ 600.4	An unmarried adult; husband and wife together; husband or wife separately under certain conditions
KANSAS	§ 59-2113	Any adult; husband and wife jointly
KENTUCKY	§ 199.47	Any person age 18 or older; a resident for at least 12 months; husband and wife jointly
LOUISIANA	Art. 1198, 1221	A single person, age 18 or older; a married couple jointly
MAINE	Title 18-A, § 9-301	A husband and wife jointly; an unmarried person; resident or non-resident
MARYLAND	§ 5-309	Any adult, regardless of marital status
MASSACHUSETTS	Ch. 210 § 1	Any adult; husband and wife jointly; a minor with his spouse to adopt the natural child of one of the parties
MICHIGAN	§ 710.24	Any person; a husband and wife jointly
MINNESOTA	§ 259.22	Any person; resident of the state 1 year or more
MISSISSIPPI	§ 93-17-3	Adoption by persons of the same gender is prohibited; an unmarried adult; a married person jointly with his spouse; state resident for at least 90 days, except in an agency adoption
MISSOURI	§453.010	Any person, regardless of residence; a person who petitions jointly with his spouse
MONTANA	§ 42-1-106	A husband and wife jointly; a stepparent; an unmarried individual over the age 18; a married person singly who is legally separated or whose spouse is incompetent
NEBRASKA	§ 43-101	Any adult person; a husband and wife must adopt jointly, unless the adoptive parent is a stepparent
NEVADA	§§ 127.020, 127.030	An adult person at least 10 years older than the adoptee; any adult; married persons must adopt jointly
NEW HAMPSHIRE	§ 170-B:4	Husband and wife together; an unmarried adult; any Foster Parent; the unmarried parent of the adoptee; a Stepparent
NEW JERSEY	§ 9:3-43	Any person who is at least 18 years of age and 10 years older than adoptee; married persons must adopt jointly

NEW MEXICO	§ 32A-5-11	Any resident who has been approved by the court; non-residents in cases in which a New Mexico agency or the department placed the child; a married person may file separately if a stepparent or legally separated
NEW YORK	NY Dom. Rel. § 110	An adult unmarried person; an adult husband and adult wife together; an adult married person legally separated
NORTH CAROLINA	§ 48-1-103	Any adult may adopt; spouses may not adopt each other
NORTH DAKOTA	§ 14-15-03	A husband and wife together if not separated, even if one or both are minors; an unmarried adult; the unmarried parent of the adoptee; a married individual legally separated
OHIO	§ 3107.03	A husband and wife together, at least one of whom is an adult; an unmarried adult or a married person singly if legally separated; an unmarried minor parent; a Stepparent
OKLAHOMA	Title 10, § 7503-1.1	A husband and wife jointly if both are least age 21; a stepparent; an unmarried or legally separated person at least age 21
OREGON	§ 109.309	Any person as long as at least one party in the proceeding is a resident of Oregon
PENNSYLVANIA	23 Pa. § 2312	Any individual
RHODE ISLAND	§15-7-4	Any resident; a non-resident who adopts a child in the custody of a child-placing agency; a husband and wife must petition jointly
SOUTH CAROLINA	§ 20-7-1670	Any South Carolina resident may adopt; A non-resident may adopt: A special needs child; if the child is being placed with a relative; if the adopter is a member of the military; a legally freed child in foster care
SOUTH DAKOTA	§§ 25-6-2, 25-6-3	Any adult person, at least 10 years older than the adoptee; a married person who has the consent of his or her spouse, unless legally separated
TENNESSEE	§ 36-1-115	Any person over age 18 who has been a resident for at least 6 months may adopt, with the following stipulations: Spouses must petition jointly; foster parents are given first preference on adopting their foster child
TEXAS	Fam. Code § 162.001	An adult



UTAH	§§ 78-30-1, 78-30-2, 78-30-3	Adults who are legally married to each other; a stepparent; any single adult; persons who are cohabiting but not legally married may not adopt; the adoptive parent must be at least 10 years older than the adoptee; in the case of a married couple, only one person needs to be 10 years older; a married person may not adopt without the consent of his or her spouse
VERMONT	Title 15A, § 1-102	Any person ; a parent's partner
VIRGINIA	§ 48.82	A resident of the State; a husband and wife jointly; a stepparent; an unmarried adult
WASHINGTON	§ 26.33.140	Any person who is: Legally competent; and age 18 or older
WEST VIRGINIA	§ 48-22-201	A stepparent; a husband and wife jointly; any married person with consent of spouse
WISCONSIN	§ 48.82	A resident of the State; a husband and wife jointly; a stepparent; an unmarried adult
WYOMING	§ 1-22-103	Any adult person who has resided in the State at least 60 days and determined to be fit and competent
DISTRICT OF COLUMBIA	§ 16-302	Any person may adopt; a married person must petition jointly with his spouse.