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Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children

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THE PRACTICES OF BUYING, TRAFFICKING,
KIDNAPING, AND STEALING CHILDREN**

DAVID M. SMOLIN[†]

Table of Contents

I. INTRODUCTION	115
II. THE INCIDENCE OF CHILD BUYING, STEALING, KIDNAPING, AND TRAFFICKING WITHIN THE INTERCOUNTRY ADOPTION SYSTEM . . .	117
A. <i>Methods of Operation</i>	117
1. <i>Child Buying Scenario I</i>	118
2. <i>Child Buying Scenario II</i>	119
3. <i>Child Stealing/Kidnaping Scenario I: Kidnaping Children Placed into Orphanages, Hostels, or Schools for Purposes of Education or Care</i>	119
4. <i>Child Stealing/Kidnaping Scenario II: Obtaining Children Through False Pretenses</i>	121
5. <i>Child Stealing/Kidnaping Children Scenario III: Lost Children</i>	121
6. <i>Child Stealing/Kidnaping Scenario IV: Traditional Kidnaping</i>	122
7. <i>Child Stealing/Kidnaping Scenario V: Intra-Familial Kidnaping</i>	123
8. <i>Child Stealing/Kidnaping Scenario VI: “Your Money or Your Baby:” Taking Children in Payment of a Debt</i>	124
B. <i>Extreme Poverty and Sending Nations</i>	124
C. <i>Cycles of Abuse</i>	132
D. <i>Stories of Abuse: Tracking Child Laundering Within Various Sending Nations</i>	135
1. <i>Cambodia</i>	135
2. <i>India</i>	146
a. <i>Andhra Pradesh Adoption Scandals</i>	148
b. <i>The Mystery of Maharashtra</i>	155
3. <i>Child-Stealing in Tamil Nadu</i>	157
4. <i>German Cases</i>	159

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5. <i>The Indian Adoption System: Conclusions</i>	161
E. <i>Guatemala</i>	163
III. REFORMING INTERCOUNTRY ADOPTION: OVERCOMING THE WEAKNESSES IN THE CURRENT INTERCOUNTRY ADOPTION SYSTEM	171
A. <i>Money as the Root of All Evil</i>	175
1. <i>Weaknesses in the Intercountry Adoption System</i>	175
2. <i>Reforms and Money</i>	176
a. <i>Required Fee Disclosure in Standardized Format</i>	177
b. <i>Fee and Mandatory Donation Limitations</i>	178
3. <i>Government Disclosure of Agency Fees/Mandatory Donations</i>	179
B. <i>Ineffective Licensing and Regulation of Adoption Agencies within the United States</i>	181
1. <i>The Dangers of Weak Licensing and Regulation of Adoption Agencies</i>	181
2. <i>Reforming the Licensure of Adoption Agencies</i>	185
C. <i>Child Laundering As a Crime</i>	188
1. <i>The Lack of a Child Trafficking or Child Laundering Criminal Prohibition Breaches the Treaty Obligations of the United States and Weakens the Intercountry Adoption System</i>	187
a. <i>The Lack of a Child Trafficking or Child Laundering Criminal Prohibition Breaches the Treaty Obligations of the United States</i>	188
b. <i>The Absence of a Criminal Prohibition of Child Trafficking or Child Laundering Weakens the Intercountry Adoption System</i>	191
2. <i>The United States Congress Should Enact a Modified Version of the Criminal Prohibitions of the Intercountry Adoption Act Pertaining to Child-Buying or Child- Stealing</i>	192
D. <i>See No Evil, Hear No Evil: The Problem of United States Agency Irresponsibility</i>	192
1. <i>United States Agencies: Incentivizing Irresponsibility</i>	192
2. <i>Incentivizing Responsible Action: Regulating Liability Waivers</i>	195
3. <i>Incentivizing Responsible Action: United States Agency Liability for the Acts of Their Foreign Partners</i>	197
IV. CONCLUSION	200

I. INTRODUCTION

The term “child laundering” expresses the claim that the current intercountry adoption system frequently takes children illegally from birth parents, and then uses the official processes of the adoption and legal systems to “launder” them as “legally” adopted children. Thus, the adoption system treats children in a manner analogous to a criminal organization engaged in money laundering, which obtains funds illegally but then “launders” them through a legitimate business.¹

The article title further claims that the adoption system both legitimizes and incentivizes stealing, kidnapping, trafficking, and buying children. The title does not claim that the adoption system explicitly authorizes these pernicious practices, but rather claims that the adoption and legal systems create incentives to engage in these destructive practices. In addition, the legal rules and processes associated with adoption are clearly inadequate to prevent these illicit practices from becoming a significant part of the intercountry adoption system. Indeed, the legal rules of the adoption system are systematically used to “launder” or legitimize these practices, by processing as “orphans,” and then adoptees, infants and children who were stolen, bought, or kidnapped from their birth families.

The claims made by this article are necessarily difficult to establish, given the nature of the conduct in question. Those who traffic, buy, or steal children for processing through the adoption system do not advertise their illicit activities. Moreover, most within the adoption system, including adoption agencies, adoptive parents, and sometimes even adoptees, have motivations for minimizing or ignoring evidence of such conduct. Nonetheless, child laundering within the intercountry adoption system is becoming increasingly apparent, and the patterns are clear for those with eyes willing to see. Hence, this article will seek to demonstrate, through evidence, analysis, and the citation of a wide variety of sources, the widespread existence of child laundering.

The implications of child laundering for the intercountry adoption system are grave. Other forms of corruption within the intercountry adoption system, such as bribery of government officials to facilitate the speedy adoption of a true orphan or extra payoffs to an orphanage to secure a ready supply of orphans, could be viewed by some as necessary or peripheral evils toward a greater good. The good of providing orphans with families could be viewed as justifying a broad variety of otherwise

1. My use of the term in the context of intercountry adoption is not unique, but echoes similar uses of the term “baby-laundering” by the press and a government investigator. See *infra* notes 70-72 and accompanying text.

questionable acts. However, child laundering needlessly and illicitly makes children in intact families into paper orphans, by using illegal means to separate them from their families. In such cases there is no countervailing good to justify the egregious harm of breaking the original child-birth family relationship. Child laundering reduces the humanitarian rationale for intercountry adoption into a cruel façade or pretext. Stripped of all humanitarian justification, intercountry adoption is a commercialized and corrupt system driven by the demand of rich Western adults for children. Thus, if child laundering is present to a significant degree within the intercountry adoption system, as this article claims, then the ethical and legal legitimacy of intercountry adoption is threatened.

There are several possible responses to this threat. A common response is to ignore or minimize the incidence of child buying, kidnapping, and trafficking within the intercountry adoption system.² Others may concede the existence of the problem, yet view even a large amount of child laundering within the intercountry adoption system as unfortunate “collateral damage” which mars but does not undermine the system’s humanitarian results. Thus, if at least the majority of international adoptees were “true orphans,” then some might justify the system even where a substantial minority were not; the system would produce more good than harm. Some might go so far as to argue that even the laundered children are “better off” living in the affluent West, apart from the economic, educational, cultural, and gender limitations that would have hindered their development in their families of origin.³ This “better off” argument is usually not urged in public, as it lies perilously close to controversial notions of cultural or national superiority. In private conversations within and outside the adoption world, however, it is repeatedly whispered, and perhaps accounts for a certain lack of urgency in responding to the problem.

This article argues that all of these responses to the “threat” of child laundering in the intercountry adoption system amount to either

2. See, e.g., Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 THE FUTURE OF CHILDREN 89, 96 (1993) (stating “[there is] no evidence that these practices are widespread, and it is quite unlikely that they are.”). See also, Sara Corbett, *Baby Laundering: Where Do Babies Come From?*, N.Y.TIMES, June 16, 2002 (quoting a prospective adoptive parent regarding the Cambodian adoption scandal: “The government’s holding up my adoption because maybe somebody gave the birth mother \$25?” and noting denial of widespread abuse by adoptive parents and adoption agencies).

3. Cf. *Intercountry Adoption*, INNOCENTI DIGEST 4, 1999, at 6: “During the adoption process, violations of the most basic rights of the child can occur. These violations are often perpetrated under the cover of the supposedly humanitarian aim of the act and ‘justified’ by the simplistic view that a child will somehow always be ‘better off’ in a materially rich country.” *Id.*

unproductive hiding of heads in the sand, or unnecessary and counterproductive rationalization of illicit conduct. The point is neither to justify nor excuse the intercountry adoption system as it is, but to reform it. There is no need to make a tragic choice between shutting down or continuing a flawed system, at least not until serious efforts have been made to reform the system. A family living in a filthy house does not face a “tragic” choice between homelessness or substandard housing, but rather faces the practical necessity of a clean-up. In the same way, it is time to “clean up” the intercountry adoption system.

Part II of the article documents and describes a significant incidence of child laundering within the intercountry adoption system. Part III evaluates those features of the adoption system which contribute to the incidence of such illicit practices, and then proposes reforms which could make the intercountry adoption system less hospitable to child laundering.

II. THE INCIDENCE OF CHILD BUYING, STEALING, KIDNAPING, AND TRAFFICKING WITHIN THE INTERCOUNTRY ADOPTION SYSTEM

There is, of course, no way to precisely measure the incidence of illicit child buying, stealing, kidnaping, and trafficking within the current intercountry adoption system. Indeed, given the premise of this article—that this illicit conduct is “laundered” into legitimate adoptions—it is necessarily impossible to present official statistics of its incidence. Logically, the vast majority of such cases would never come into public view, for the illicit aspects of the case would remain hidden under the legitimating veil of legal adoption. These abuses of the adoption system could not last long if they were not usually hidden; these crimes would not exist if they were not usually successful in achieving the aims of their perpetrators.

Nonetheless, this section will cite a wide variety of sources to substantiate a significant incidence of such abusive practices. The point, however, is not merely to document individual instances of such practices, but more broadly to understand patterns of abusive practice. From these patterns, the nature and causes of the abuse, and the weaknesses in our legal and adoption systems which permit them, will become clearer.

Thus, this section overviews the methods of operation, the role of poverty, and the cycles of abuse, before specifically documenting a number of instances of abusive adoption practices.

A. Methods of Operation

Child laundering does not occur in a random way, but generally reflects

distinctive methods of criminal activity. The following are the typical methods of operation. Often real cases are in fact combinations of these various illicit methods:

1. Child Buying Scenario I

Citizens of sending countries, including independent facilitators, attorneys, orphanage directors, and others, create a system for purchasing infants and children from birth families. These systems usually involve persons at the head of the conspiracy who possess the language and literacy skills, and the financial and social position, to interact with first-world adoption agencies and prospective adoptive parents. These persons usually send out intermediaries, generally of a lower social station, to serve as scouts or recruiters.⁴ The targets of this recruiting are generally the poor of poor societies, who earn less than one dollar per day.⁵ By Western standards, the amounts the scouts offer to poor parents often seem tragically small, which underscores the desperate financial circumstances of the birth parents. Often, the inducements are as much false statements as money. The parents may be told that they will be able to stay in touch with their children, receive continuing payments and letters from the adoptive parents, or immigrate to a first-world nation.⁶ The person at the top of this criminal conspiracy may receive \$2,000 to \$20,000 for each child who is placed for adoption overseas, with funds coming from purportedly legitimate adoption fees and "orphanage donations."⁷ Out of these funds, there are ample amounts to pay intermediaries (recruiters), the birth family, bribes of government officials (if necessary), as well as pay the legitimate costs of child care and intercountry adoption, while still making a large profit. The profits are particularly attractive given that these schemes generally occur in societies with a per capita annual income of less than \$800, where even an educated, "middle class" individual may earn less than \$10,000 annually.⁸

Significantly, in these instances the placement agencies in recipient countries (such as the United States, Canada, and Europe) are generally

4. See, e.g., David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 Seton Hall L. Rev. 403, 451 (2005).

5. For a popularized but helpful overview of the situation of those living in extreme poverty, see Jeffrey D. Sachs, *The End of Poverty* (2005).

6. See, e.g., *Operation Broken Hearts*, *infra* note 15.

7. See Smolin, *supra* note 4, at 449-50.

8. See, e.g., Smolin, *supra* note 4, at 450-74 (2005). See, for example, Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFF., Nov./Dec. 2003, for general comments on the problem of baby-buying in intercountry adoption.

legitimate, licensed agencies who do not intentionally participate in illicit activities, even as they facilitate the contacts, flow of funds, and legal undertakings that make them possible.⁹

2. Child Buying Scenario II

Sometimes the kind of child buying scheme described above will include citizens of the recipient nation, such as the United States, who intentionally facilitate child buying or other illicit conduct. In these instances, a citizen of the recipient nation operates within the sending nation as the head of a criminal conspiracy, and is directly involved in hiring recruiters, bribing government officials, and other illicit conduct. As a practical matter, this scenario, although apparently much rarer, is more likely to lead to criminal prosecution, because the recipient nation may be more willing to investigate criminal acts by their own citizens.¹⁰

3. Child Stealing/Kidnaping Scenario I: Kidnaping Children Placed into Orphanages, Hostels, or Schools for Purposes of Education or Care

The child stealing/kidnaping schemes in certain respects have a similar structure to those involved in child buying, in that they involve corrupt individuals obtaining children in illicit ways for purposes of adoption. As in the child buying schemes, the motivation is primarily financial.

These schemes build upon the fact, often not widely understood in recipient countries, that some sending nations have a custom, particularly among the poor, of placing children in institutions for purposes of education, food, housing, and care, without intending to sever parental rights. These institutions, whether called orphanages, schools, or hostels, are commonly used by the poor as a kind of safety net or extended family resource.¹¹ The existence of this custom makes it relatively easy for

9. See, e.g., Smolin, *supra* note 8. See also, *International Adoption: Respecting Children's Rights*, Report of Social, Health and Family Affairs Committee, Council of Europe, Doc. 8592 (Dec. 2, 1999), available at <http://assembly.coe.int/Documents/WorkingDocs/doc99/EDOC8592.htm> (last visited Oct. 2, 2006) (including a quote from Mr. Nicolas: "although by no means all adoptions are commercial transactions that ride roughshod over children's rights, there is—as pointed out by the International Social Service in Geneva—a trend in that direction because many of the associations and well-meaning individuals that operate alongside the criminals, mafia elements and other middlemen are dangerously incompetent.").

10. See *infra* notes 69-121 and accompanying text (describing Cambodian adoption scandal and related criminal prosecution).

11. See, e.g., Claudio Fonseca, *Patterns of Shared Parenthood among the Brazilian*

facilitators and scouts to persuade poor birth parents to place children into institutions, for the parents do not understand themselves to be severing their parental rights or ties.¹²

Sometimes, the child laundering scheme includes deliberately recruiting children into the institution based on false pretenses.¹³ In other instances the family, on its own initiative, places a child into the institution for temporary care or education, and then the child is laundered through the adoption system as an “orphan,” and then adoptee.¹⁴ However it is done, from the parents’ point of view the child has been kidnaped or stolen, as consent was never given for relinquishment or adoption, let alone adoption in another country. Nor were these children abandoned, for the parents intended to maintain family ties, even if the child spends a substantial amount of their childhood living in these institutions.¹⁵

By way of analogy, imagine the reaction of a Western parent who placed a child in boarding school, only to discover that the school had placed the child for adoption in a foreign country. Such an act would clearly constitute a form of kidnaping or child stealing, because the school had no authorization to sever family ties or place the child into another family and nation.

Poor, 21 SOC. TEXT 74, at 111, 113-15 (2003); Asha Krishnakumar, *The Adoption Market*, 22 FRONTLINE, at 9, available at <http://www.flonnet.com/fl2211/stories/20050603006700400.htm> (last visited Oct. 2, 2006) (reporting that at model orphanage in India most children were not free for adoption and had a family member with whom they maintained a bond).

12. See, e.g., Fonseca, *supra* note 11.

13. See, e.g., *Operation Broken Hearts*, *infra* note 15.

14. See, e.g., S. Munari, *An Adoption Racket in Chennai Backfires on Parents*, DECCAN HERALD, May 15, 2005.

15. See U.S. Immigration and Customs Enforcement, Background, *Operation Broken Hearts* (2004) [hereinafter *Operation Broken Hearts*] (describing a criminal investigation into a Cambodian adoption scandal involving baby buyers who persuaded birth families to give up their children using false statements that the families “could have their child back at any time,” and could “visit [their] child at the orphanage” and the child would receive food, medical care, and an education). See also, Murari, *supra* note 14 (investigating an agency in Tamil Nadu, India involved in intercountry adoption scandal that had attempted to place a child for adoption who had not been surrendered for adoption); Fonseca, *supra* note 11, at 114 (describing a poor Brazilian family who regularly relied on an orphanage for temporary care of their children and were surprised when the youngest, a “fairly light-skinned, healthy infant,” had been put up for adoption); Mary Ellen Fieweger, *Stolen Children and International Adoptions*, 70 CHILD WELFARE (1991) (providing evidence that suggests a child left in temporary care of orphanage in Ecuador was given false death certificate and then put up for international adoption); Kiran Bhandara, *The Business of Foster Children*, SAMAY NAT’L WKLY., August 27, 2004 (describing how a widow and mother of seven in Nepal fights for return of three children she placed in orphanage for care, where children were sent to Spain for adoption without her consent).

4. Child Stealing/Kidnaping Scenario II: Obtaining Children Through False Pretenses

Closely related to the above scenario involving orphanages is the use of false statements to induce parents to give their children to various intermediaries. Thus, birth families may be told that their children are only going away for an education, or for a better life, or temporarily. Birth families may be promised that they will receive updates about or from their children, support payments from adoptive families, or the right to immigrate to the recipient nation after their child grows up.¹⁶ In all these ways, the birth parents are led to believe that they are not really giving up their parental connection to their child, but are merely providing for a better life for their child and perhaps themselves. These false statements are used as inducements to gain physical custody of children. Subsequently, the children are laundered through the adoption system, often by falsifying the identities and histories of the children.¹⁷ Particularly if the children are too young to know and remember their own histories, this laundering is likely to be effective. The parents generally will never see or hear from their children again, and will not receive any of the promised financial or legal benefits.¹⁸

5. Child Stealing/Kidnaping Children Scenario III: Lost Children

There are reports of “lost” or “missing” children being prepared or placed for adoption.¹⁹ Of course not all instances of “lost” children involve child stealing or kidnaping. If a child is accidentally lost or separated from their family, and the authorities and orphanages make reasonable efforts to find the family but fail, then it may at some point be appropriate to pursue a placement. Moreover, from the perspective of the authorities or

16. See, e.g., *Operation Broken Hearts*, *supra* note 15.

17. See, e.g., Smolin, *supra* note 4.

18. See, e.g., *Operation Broken Hearts*, *supra* note 15 (describing a method of operation used by criminal conspiracy in Cambodia to obtain children); *Intercountry Adoption*, *supra* note 3, at 6; Fieweger, *supra* note 15.

19. See, Smolin, *supra* note 4, at 460-61 (citing Syed Amin Jafri, *Missing Girl Among Children Rescued in Tandur* (May 1, 2001), available at <http://www.rediff.com/news/2001/may/01ap1.htm> (last visited Oct. 2, 2006); Syed Amin Jafri, *Adoption Home Tampered with Children's Records* (May 2, 2001), available at <http://www.rediff.com/news/2001/may/02jafri.htm>; Ambujam Anantharaman, *Big Racket of Small Babies*, THE RISING NEPAL (July 27, 2005), available at <http://www.gorkhapatra.org.np/pageloader.php?file=2005/07/20/editorial/editorial1> (last visited Oct. 2, 2006).

orphanage, it may be difficult to distinguish between accidentally “lost” children and deliberately abandoned children, absent some evidence which points in one direction or another. It is understandable that after sufficient efforts are made to find the family, plans are made to place the child for adoption.

Unfortunately, however, the existence of an adoption system sometimes provides an incentive to, in essence, kidnap a lost or missing child. Thus, in some cases of lost children it appears that no efforts are made to find the family, and indeed the child may be given a deliberately false history and name.²⁰ The orphanage may be induced by financial considerations to re-label a lost child into an “orphan” eligible for adoption. Instead of seeking to restore that which is lost, the adoption system illicitly and purposely makes the unwitting separation of parent and child permanent.²¹ Under these circumstances, the orphanage is really a kidnapper, because it is abusing the unfortunate situation of a lost child to make a financially lucrative international adoption.

Within this category lurks a legal issue: how much effort is required when an infant or child is “found” by public or private authorities? It is clearly illicit to alter the known history of the child in order to facilitate the adoption. Is it permissible, however, to simply make no effort to find the family? If not, what degree of effort is reasonable, particularly in societies where many parents are illiterate?

6. Child Stealing/Kidnaping Scenario IV: Traditional Kidnaping

There are reports of children being kidnaped from hospitals, streets, and homes, for the specific purpose of sale to an orphanage and/or profit from an adoptive placement.²² The orphanage may or may not be directly involved in the kidnaping. Even if the orphanage is not directly involved in the kidnaping, the kidnaping itself would only happen if someone (such as the orphanage) was willing to pay for a child.²³ Of course these cases

20. See, e.g., Smolin, *supra* note 4, at 460-61..

21. See *id.* Some of the missing children cases unfortunately seem to involve intentional kidnaping, rather than merely lost children.

22. See, e.g., Krishnakumar, *infra* note 23.

23. See, e.g., Asha Krishnakumar, *Behind the Facade*, 22 FRONTLINE (May 22, 2005), available at <http://www.frontlineonnet.com/fl2211/index.htm> (last visited Oct. 2, 2006) (documenting an organized scheme to kidnap children and sell them to adoption agencies in Tamil Nadu, India); *Intercountry Adoption*, *supra* note 3 (documenting abuses of intercountry adoption including kidnaping); Kapstein, *supra* note 8 (noting the problem of abductions as a method of sourcing children for intercountry adoption); Fieweger, *supra* note 15 (documenting an international adoption ring in Ecuador that paid women to kidnap

involve no ransom demand, as the intent is to receive money from someone other than the birth family. Poor birth parents in developing nations are not in a financial position to outbid Western adoptive parents, even for their own children.

7. Child Stealing/Kidnaping Scenario V: Intra-Familial Kidnaping

Particularly complex are those cases in which extended or immediate family members remove a child from the parent(s). The child may be taken to a distant location and abandoned, or brought to an orphanage. Often there are financial motivations involved, as family members wish to avoid the burden involved in raising the child.²⁴ Sometimes the burden involved is culturally connected to gender, as in South Asian situations where the family dreads having to pay the costs of marrying off a daughter.²⁵ Sometimes one parent is involved in the plot to abandon a child, against the wishes of the other parent. Often, the parent who wishes to keep the child is, in cultural terms, virtually powerless to withstand the wishes of the other parent or extended family members.²⁶

Although debatable, it seems legally accurate to describe most of these cases as a kind of kidnaping, for a parent is by force and/or trickery deprived of their child. Moreover, despite the cultural difficulties, the family members removing the child often lack the legal authority to remove or abandon the child, particularly against the wishes of a parent who wants to keep the child.

These intra-family cases create difficulties for the adoption system. Even a diligent and well-intentioned adoption system could inadvertently process as an "orphan" a child who has in this manner been taken from a parent. In some of these instances, the adoption system may be relatively faultless; in others, the credulity and lack of diligence of the adoption system may play a role in facilitating the permanent and tragic taking of a

children of vendors who took their children to work with them).

24. See, e.g., Krishnakumar, *supra* note 23, at 5.

25. See, e.g., Gita Ramaswamy & Bhangya Bhukya, *The Lambadas: A Community Besieged* 10-12, 23-30 (2001)(on file with author).

26. One of the best publicized cases of this kind concerns a Korean adoptee, Sunny Jo, whose story is told in a variety of places. See, e.g., *After the Morning Calm: Reflections of Korean Adoptees* (ed. Dr. Sook Wilkinson & Nancy Fox); *Welcome to Sunny's World*, available at www.geocities.com/sunny_jo888 (last visited Oct. 2, 2006); Jane Cooper, *Coming of Age*, available at <http://www.seoulclassified.co.kr/comingofage.htm> (last visited Oct. 2, 2006); Sunny Jo, *From Morning Calm to Midnight Sun*. A heart-breaking Indian case where the husband and his mother sold an infant over the strenuous resistance of the mother is described in Gita Ramaswamy & Bhangya Bhukya, *The Lambadas* 10-11 (2001).

child from a loving parent.

*8. Child Stealing/Kidnaping Scenario VI: "Your Money or Your Baby:"
Taking Children in Payment of a Debt*

There are reports of women being forced to give up their baby because they were unable to pay off a debt.²⁷ Some involve a woman unable to pay the costs of childbirth.²⁸ Others involve money-lenders indebting a vulnerable woman, and then in some manner proposing or demanding the placement of a child in the orphanage.²⁹

The motivating impetus for these cases, as in the other kinds of cases, is the availability of thousands of dollars of adoption fees which will remain within the sending nation. These funds are more than sufficient to make it worthwhile for intermediaries or orphanages to demand a child in lieu of a debt, or even to deliberately entrap a woman into debt in order to obtain a child.

Even if the debt is legitimate, obtaining a child in this manner is of course illegal and amounts to kidnaping. Unfortunately, the relative powerlessness of poor families and women in many societies makes it difficult for them to obtain redress in such cases. In some cases they may receive assistance in getting their child back before the adoption is completed; otherwise, they will lose their child. In either case, charges are unlikely to stick, even with police investigation, due to the capacity of wealthier elements in many societies to ultimately escape criminal conviction, particularly for acts committed against the poor.

B. Extreme Poverty and Sending Nations

Significant sending nations may be divided into various groups. One group of nations is generally free of child buying, kidnaping, and

27. See Vinod Kumar Menon, *infra* note 28.

28. See, e.g., Vinod Kumar Menon, *Doctors Take Away Baby from Mother*, MIDDAY NEWS, July 26, 2004 (describing a mother and child's rights organization in India complaining that doctors took a newborn from a mother and placed it up for adoption due to her inability to pay caesarean birth costs); K. Venkateshwarlu, *Longing For a Hug*, THE HINDU, April 23, 2004 (available from author).

29. Although it has not been covered by the Western press, the author is aware of a case from Andhra Pradesh, India where a petty-money lender indebted parents, and then proposed that they place children in an orphanage later implicated in a major Indian intercountry adoption scandal. The lender apparently told the parents that the children were only going to the hostel for temporary care. The money lender was allegedly receiving payments from the orphanage to obtain the children.

trafficking, while a contrasting group of sending nations is mired in recurrent child laundering and profiteering scandals. Thus, China and South Korea have generally positive reputations, although recent reports of child trafficking in China have raised concerns.³⁰ Cambodia, India, Guatemala, and Vietnam have suffered from significant adoption scandals involving child laundering.³¹

A third group of nations, particularly including Russia, rarely suffer from child laundering, as their “orphans” are legitimately eligible for adoption.³² However, the adoption process in these nations is sometimes subject to corruption, profiteering, or bribery.³³ In addition, due to the existence of large numbers of children receiving very poor institutional

30. See Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597 (2005) (regarding China as a sending nation). See also KAY ANN JOHNSON, *WANTING A DAUGHTER, NEEDING A SON* (2004); LAURA A. CECERE, *THE CHILDREN CAN'T WAIT* (3d ed. 2001). Press reports concerning a child trafficking scandal include Peter S. Goodman, *Stealing Babies for Adoption*, March 12, 2006, at A01, available at [http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01;China's great baby sell-off](http://www.washingtonpost.com/wp-dyn/content/article/2006/03/01;China's%20great%20baby%20sell-off), The Sunday Telegraph, March 12, 2006, available at <http://www.sundaytelegraph.news.com.au/print/0,9362,18429861-28779,00.html>. For an overview of Korean adoption which lacks the warnings about purchased children or document fraud found in other nations, see International Adoption South Korea, available at <http://travel.state.gov/family/adoption/country/country-410.html> (last visited Oct. 2, 2006). The relatively positive reputation of the Chinese and Korean adoption system does not, of course, mean that their adoption systems operate perfectly. Moreover, there remain significant issues concerning inter-racial and cross-cultural adoption which are beyond the scope of this article.

31. Regarding Vietnam, see, for example, *International Adoption Vietnam*, available at http://travel.state.gov/adoption_vietnam.html (warning of documented instances of “payment to birth mothers to induce them to give up a child,” and stating that “Document fraud is widespread in Vietnam”). *Vietnam Tightens Adoption Controls*, GUARDIAN UNLIMITED, July 22, 2002; Kit R. Roane, *Pitfalls for Parents*, U.S. NEWS, June 06, 2005, at 56 (discussing case involving a facilitator labeled a child trafficker by the Vietnamese government). An agreement signed in July 2005 is re-opening adoption between Vietnam and the United States after more than two years of closure. See U.S. Department of State, *U.S. and the Socialist Republic of Vietnam Reach Agreement on International Adoptions* (June 14, 2005), available at http://www.travel.state.gov/family/adoption/notices/notices_2542.html?css=print (last visited Oct. 2, 2006); Susan Soon-keum Cox, *Vietnam Adoption Re-Opens*, available at http://www.rainbowkinds.com/2005/07/news/Vietnam_adoption.shtml. The closure had been due to concerns with illegal baby-selling. Jeff D. Opdyke, *Adoption's New Geography*, WALL ST. J., Oct. 14, 2003, at D1. Cambodia, India, and Guatemala are discussed extensively in Part II(D), *infra*.

32. See, e.g., David Filipov, *Russia's abused children suffering grim neglect*, Boston Globe, January 2, 1999, at A1.

33. See, e.g., David Ryan, *Napa adoption firm closes under fire*, January 7, 2006, available at [http://www.napaalleyregister.com/articles/2006/01/07/news/local/iq_3238658.prt.](http://www.napaalleyregister.com/articles/2006/01/07/news/local/iq_3238658.prt;); Madelyn Freundlich, *The Market Forces in Adoption* 49 (2000) (last visited Oct. 2, 2006).

care, and a large incidence of fetal alcohol syndrome, issues related to the undisclosed condition of children play a particularly prominent role.³⁴ There has been a disturbing incidence of Russian adoptees killed by their adoptive parents within the United States, which seems to be related to the placement of deeply disturbed children who are victims of substandard institutional care to adoptive homes that are neither prepared nor able to deal with their special needs.³⁵

While this simplistic division of significant sending nations does not account for all situations, it does point toward the factors that correlate with child laundering. Thus, by comparing the characteristics of the various groups of sending nations, it is possible to identify the factors which correlate with child laundering. It turns out that two factors characterize sending nations with significant child laundering difficulties:

- (1) A large proportion of the population lives in or near extreme poverty (per capita income under one dollar per day).³⁶
- (2) The nation sends a sufficient number of children for intercountry adoption to enable it to become a significant sending nation.³⁷

Paradoxically, the incidence of extreme poverty is not in itself predictive of child laundering problems. The reason is that most of the poorest developing nations play no significant role in the intercountry

34. See Peter Selman, *The Movement of Children for Intercountry Adoption: A Demographic Perspective*, Presentation at IUSSP General Population Conference, Aug. 18-24, 2001, at 17.

35. See, e.g., Eric Peterson, *Knowledge Fuels Successful Adoptions*, CHI. DAILY HERALD, Nov. 15, 2004, at 1; Miriam Horn, *A Dead Child, a Troubling Defense*, U.S. NEWS & WORLD REP., July 14, 1997; *New Adoption Death Alarms Russia*, BBC NEWS (July 12, 2005), available at <http://news.bbc.co.uk/2/hi/europe/4676513.stm> (last visited Oct. 2, 2006).

36. On the problem of extreme or absolute poverty, including plans to alleviate it, see, for example, JEFFREY D. SACHS, *THE END OF POVERTY* (2005); Jeffrey D. Sachs, *Can Extreme Poverty Be Eliminated?*, SCIENTIFIC AMERICAN, Sept. 2005, at 56-65. On issues related to the measurement of extreme poverty, see Shaohua Chen & Martin Ravallion, *How Have the World's Poorest Fared Since the Early 1980s?* This article will not try to address the various methods of measuring extreme poverty, or the question of whether the \$1 per day line should reference Purchasing Power Parity (PPP) estimates, or nominal dollars, nor the question of how to account for inflation. See *id.*

37. See U.S. DEP'T. OF STATE, BUREAU OF CONSULAR AFFAIRS, *Immigrant Visas Issued to Orphans Coming to the U.S.*, available at http://travel.state.gov/family/adoption/stats/stats_451.htm (last visited Oct. 2, 2006). [hereinafter STATE DEP'T ADOPTION STATISTICS] (providing statistics for significant sending countries).

adoption system, particularly in relationship to the United States.³⁸ Nations which place children internationally only sporadically, at very low levels, or not at all, are not in a position to harbor large-scale child laundering conspiracies within their intercountry adoption system.

However, once the numbers placed for international adoption begin to rise, the dangers for poor sending nations emerge. The reasons for this include the following:

(1) In such nations, a significant cause of child abandonment or relinquishment is often extreme poverty. However, the ethics of intercountry adoption becomes problematic where poverty induces the family to give up their child. Under such circumstances, even the cost of transporting the child from sending to receiving nation, if spent instead to aid the family, could have kept the family intact. It is ethically questionable to spend thousands of dollars (or tens of thousands of dollars) to arrange an intercountry adoption, when aid of less than a thousand dollars would have kept the child with their birth family. Yet, under current law and practices, there is no requirement that aid be given or offered to the birth family, on an unconditional basis, prior to accepting a relinquishment of a child. Further, where “assistance” is given only to those parents who relinquish for adoption, even modest assistance can serve as an unwitting (or purposeful) incentive for placement of a child. Under these circumstances, it is very hard to draw a clear line between lawful relinquishment and illicit purchase of a child. Where there is no clear line between lawful adoption and illicit child buying, even notorious systems of explicit child buying seem difficult to prosecute or prevent.

By contrast, in countries where there are substantial numbers of children abandoned or relinquished for reasons other than poverty, there is unlikely to be much incidence of buying or kidnaping children in order to supply “orphans” for adoption. For example, in China the combination of population-control policies and cultural need for a male child produced large numbers of abandoned baby girls.³⁹ Various social problems in Russia have produced large numbers of institutionalized children.⁴⁰ As South Korea has developed economically, the primary cause of relinquishments has become the social stigma associated with single motherhood.⁴¹ Thus, the Chinese, Russian, and South Korean adoption systems have apparently been

38. See Selman, *supra* note 34, at 16.

39. See Luo & Smolin, *supra* note 30; CECERE, *supra* note 30; JOHNSON, *supra* note 30.

40. See, e.g., *Russia's abused children suffering grim neglect*, *supra* note 32.

41. See, e.g., Peter Selman, *supra* note 34, at 18; Rick Reilly, *Seoul Searching*, *Time*, August 28, 2000, at 42-44.

largely free of “child laundering” practices.

Recent reports of child trafficking within the Chinese system, if confirmed, suggest that the large (and increasing) numbers of intercountry adoptions over the last decade have begun to exhaust the number of babies and toddlers who are legally available for adoption, causing the temptation to illicitly launder and traffic children for purposes of intercountry adoption.⁴² Thus, even intercountry adoption systems created in a national context of substantial numbers of orphans must be carefully monitored to ensure that they do not, over time, inadvertently create the conditions for illicit child laundering.

(2) In societies with very low per capita incomes, adoption fees, and other costs that can seem very reasonable from a Western perspective are sufficient to create an incentive for middle-class persons to illicitly obtain children for adoption. Spending five to twenty thousand dollars within India or Guatemala on an adoption would be like spending fifty to five hundred thousand dollars on an adoption within the United States. Large amounts of money, relative to the economy of the sending country, create a temptation to launder children.⁴³

(3) In many poor and developing societies, the majority of children living in orphanages are not orphans. . . . Poor families tend to rely on a complex web of extended family, community, and institutional care to raise their children, while still maintaining family ties.⁴⁴ Many who are truly without a family are older children who are less adoptable and also less able to learn a new language, adjust to a new culture and family, and meet the high educational expectations of developed nations. Thus, while the untrained Western eye may perceive millions of adoptable orphans in such societies, child stealing/kidnaping rings may still develop, as agencies find it most convenient or effective to buy or steal the kinds of infants and children which seem most likely to meet Western specifications. Indeed, even those adopting older children may find, to their dismay, that they were in fact stolen or purchased children, as a child laundering scheme structured primarily around infants sweeps into its orbit some number of older children.

(4) Nations with a large population of those living in or near extreme poverty also tend to have a wide financial, educational, and cultural gap between the population of such poor persons, and the middle and upper

42. See, e.g., *Stealing Babies for Adoption*; *supra* note 30; *China's great baby sell-off*, *supra* note 30.

43. See Smolin, *supra* note 4.

44. See sources cited *supra* note 11.

classes.⁴⁵ Thus, the lower classes will include illiterate or barely literate persons who generally live without the consistent benefit of running water, modern sanitation, electricity, telephones, books, writing instruments, newspapers, or computers.⁴⁶ The middle and upper classes will have a sharply different lifestyle, as they benefit from modern amenities. Western adoption agencies looking for partners within these nations will necessarily find them among middle and upper class persons, who are literate in Western languages and have access to computers and telephones. These intermediaries may, however, have such a negative view of the lives of the poor that they experience little if any pangs of guilt in obtaining children through illicit means for intercountry adoption. From their perspective, they are doing these children a favor by sending them to the United States or Europe, even if they have to obtain children through illicit means. Further, societies subject to these extreme gaps generally lack effective and reliable means for the poor to vindicate their rights against abuse by those of the upper or middle classes.⁴⁷

(5) Countries with a low per capita income and a large proportion of persons living at or near extreme poverty tend to suffer from a much higher incidence of corruption than developed nations. This correlation, while not perfect, is apparently causative in both directions: Corruption tends to both impede the economic development of developing nations, and also to flourish in an environment of overall low GDP.⁴⁸ In societies with a high incidence of corruption, public officials, from petty clerks to police officers to high government officials, become accustomed to demanding and receiving payoffs. Bribes are required simply to obtain legitimate approvals and services, but also can become a means of acquiring illegitimate approvals and services. Under these circumstances, the prospects of creating a “clean” intercountry adoption system are slim.⁴⁹ Generous (by sending nation standards) fees and payments from Western nations provide ample

45. See, e.g., Sachs, *supra* note 5, at 3.

46. See, e.g., *id.*, at 1.

47. See Smolin, *supra* note 4.

48. See, e.g., E. Jane Ellis, *Globalisation, Corruption and Poverty Reduction*, available at <http://www.transparency.org.au/documents/globalisation.html> (last visited Apr. 3, 2006); TRANSPARENCY INTERNATIONAL, *Corruption is Rampant in 60 Countries, and the Public Sector is Plagued by Bribery, Says TI*, available at www.transparency.org (last visited Oct. 2, 2006) (stating that countries with very low levels of perceived corruption are predominately rich countries, but “the poorest countries, most of which are in the bottom half of the index, are in greatest need of support in fighting corruption.”)

49. See Kapstein, *supra* note 8 (stating “If poorly paid officials will take payoffs to fix parking tickets or facilitate foreign direct investment, how can it be assumed that they will not take cuts on child trafficking?” *Id.*).

means for creating an adoption system greased by bribery. Bribed officials may make little or no differentiation between providing proper or improper approvals. Poor birth families who complain about abusive practices affecting them have little chance in a corrupt society, particularly when they are complaining against those well-equipped with ample funds.

(6) Some poor nations have governments which are quite limited in their administrative, welfare, and enforcement capacities. These societies often cannot (or will not) spend the kinds of funds necessary to build strong capacities in these areas.⁵⁰ Limited funds may make it necessary to build effective governmental capacities only in selected areas deemed critical to national welfare. Even in societies which self-consciously build effective governmental capacities in areas helpful to the poor, such as health, education, and social welfare, concentration on building an intercountry adoption apparatus logically would seem a low priority, given the insignificant percentage of vulnerable children and families assisted by intercountry adoption.⁵¹ Societies with millions of poor families and limited resources may not choose to concentrate their limited governmental capacity on an intercountry adoption system that assists only a few thousand children a year. Under these circumstances, even laudable adoption laws and regulations tend to be relatively ineffective, as the government lacks the capacity to vigorously administer and enforce such laws.

(7) Many poor nations also suffer from a high incidence of child trafficking, generally conducted for purposes of sex or labor.⁵² Thus, the commodification of children may already be endemic in some of these societies, making it easier for the adoption system to be utilized for such purposes. Indeed, the commodification of children for purposes of adoption may seem insignificant in such nations, both numerically and in terms of harm. Numerically, the numbers involved in intercountry adoption are comparatively small (generally less than ten thousand annually for most sending nations, usually less than five thousand).⁵³ By comparison, in some of these nations hundreds of thousands of children are being trafficked for

50. See Kapstein, *supra* note 8 (stating "Even in the cleanest of supplier states, there is little money for tracking abuses, funding orphanages, or supporting educational and health care services.").

51. See Selman, *supra* note 34, at 9-14 (describing the demographic significance of intercountry adoption in sending countries).

52. See, e.g., ILO, A FUTURE WITHOUT CHILD LABOUR, 31-36 (2002); U.S. DEP'T. OF STATE, TRAFFICKING IN PERSONS REPORT (June 2005), available at <http://www.state.gov/g/tip/rls/tiprpt/2005/> (last visited Oct. 2, 2006).

53. See STATEDEP'T ADOPTION STATISTICS, *supra* note 37; Selman, *supra* note 34.

purposes of sex or labor.⁵⁴ As to the amount of harm, child trafficking for the sex industry or labor will appear to most as substantially worse than trafficking for purposes of adoption. Under these circumstances, even if the international adoption system from a particular sending country is ridden with purchased, trafficked, and stolen children, the harm will seem insignificant compared to other harms ongoing in the society. Repairing or reforming the adoption system is unlikely to be a high priority within nations which have been unable to prevent the widespread and illicit trafficking of children for sex and labor. Indeed, it seems naïve to expect societies which have succumbed to widespread trafficking in children for other purposes, to successfully resist substantial financial incentives for trafficking children for purposes of adoption.

* * *

Unfortunately, identifying poverty as a strong correlate to child laundering within the adoption system presents difficult choices. Should the group of nations which suffer from significant child laundering difficulties, which largely correlate with the poorest sending nations, be excluded from the intercountry adoption system? Should the intercountry adoption system continue to, in practice, exclude most of the poorest nations of the world, which thus far do not participate in any significant way? Such exclusions would not destroy the intercountry adoption system, as many of the most significant sending nations do not suffer from significant child laundering issues. Currently, South Korea has the highest per capita income among the significant sending nations, and has a reputation as one of the best of the sending nations.⁵⁵ China is the most significant sending nation, and despite recent reporting on child trafficking generally has earned a reputation for running a tightly-controlled international adoption system.⁵⁶ Russia is also a very significant sending nation, and as mentioned above is generally free of child laundering, although not of other forms of corruption.⁵⁷ It would be possible, thus, to significantly reduce child buying, trafficking, and stealing from the intercountry adoption system by limiting sending nations to those with a proven record of avoiding or containing such evils.

Many argue that it is counterproductive to prohibit intercountry adoption from poor nations, even when they experience serious scandals involving child buying or stealing. It can seem cruel to stop legitimate

54. See, e.g., note 52.

55. See, e.g., Selman, *supra* note 34.

56. See *supra* note 30.

57. See *supra* notes 32-33.

orphans from experiencing the benefits of adoption, merely because some are using the adoption system in illegitimate ways. Some perceive a great need for intercountry adoption in such poor nations, while others would argue that intercountry adoption is generally neither a large-scale or efficient solution to the problems of poor children in such societies. Regardless of one's view on this issue, the choice is tragic and difficult, and is a product of the failure of many very poor nations to create a reliable and lawful intercountry adoption system.

We need not as yet face this tragic choice between shutting down nations subject to child laundering or keeping them open despite chronic scandals. The debate over moratoriums and shut-downs, which have proven so divisive within the United States, has been built upon the presumption that there is no way to run a clean intercountry adoption system within certain sending nations. The debate is in large measure a distraction from regulatory failure. Until we attempt to implement the kinds of reforms described in Part III of this article, we cannot know whether it is possible for poor sending nations to be free of child laundering.

C. Cycles of Abuse

If one examines the demographic patterns of adoption over the last fifteen years, it becomes apparent that there are cyclic trends. Rather than being static, the list of top twenty sending nations has undergone significant change over the last fifteen years.⁵⁸ Over forty percent of those significant sending nations have virtually dropped out of the intercountry adoption system, apparently due largely to scandals related to child buying, child trafficking, child stealing, and corruption.⁵⁹ Often, the decision to drop out of the system has been made by the sending nation;⁶⁰ sometimes, recipient nations have imposed moratoriums.⁶¹ Often, a particular sending nation will rise over a few years to unusual significance, only to be followed by scandals which suggest that the nation's rise as a sending nation had been

58. See generally, Selman, *supra* note 37.

59. See *The Statistics Tell the Story!* ETHICA, available at <http://www.ethicanet.org/item.php?recordid=statistics> (last visited Oct. 2, 2006). Ethica's claims can be checked by reviewing the statistics on intercountry adoption provided by the State Department. See U.S. DEP'T. OF STATE, BUREAU OF CONSULAR AFFAIRS, *Immigrant Visas Issued to Orphans Coming to the U.S.*, available at http://travel.state.gov/family/adoption/stats/stats_451.htm (last visited Apr. 3, 2006). [hereinafter STATE DEP'T ADOPTION STATISTICS].

60. *Intercountry Adoption*, *supra* note 3, at 7 (stating "when adoption scandals erupt, it is not unusual for countries of origin to prohibit intercountry adoption entirely").

61. See *infra* notes 69-121 and accompanying text (concerning Cambodia).

accompanied by a significant incidence of child laundering.⁶² Sometimes those scandals will lead to shutdowns; other times, adoptions will continue, although perhaps more due to a reluctance to impose moratoriums than due to any real reforms.

These cycles of abuse have been particularly applicable to Latin American countries. A number of those nations were formerly significant sending nations, but have now become virtually closed to intercountry adoption, or reduced their significance within the intercountry adoption system.⁶³ Most Latin American nations have either forbidden intercountry adoption, limited it to nations which have ratified the Hague Convention, or countered abuses through strict application of procedures, such as requirements that foreign adoptive parents spend a significant period of time in-country. As a result, the numbers of adoptees coming to the United States is extremely modest, and many of the available children are older children.⁶⁴ The predominate approach to international adoption in Latin America is apparently a response to earlier notorious scandals.⁶⁵ Thus, Latin America, which geographically would be the most natural place for United

62. This is the pattern, I would suggest, in Cambodia and Guatemala. *See infra notes* 69-121, 212-246 *and accompanying text*.

63. A review of the State Department statistical summary of the top twenty nations over the last fifteen years finds that Honduras, Peru, El Salvador, Costa Rico, the Dominican Republic, Chile, Bolivia, Brazil, Mexico, and Paraguay during 2005 all placed significantly fewer children for adoption in the United States than they had in previous years. *See* STATE DEP'T ADOPTION STATISTICS, *supra* note 37. *See also* U.S. DEP'T OF STATE, *International Adoption*, available at http://travel.state.gov/family/adoption/country/country_376.html (last visited Oct. 3, 2006) (providing recent statistics and background on adoption from Ecuador). Among these Latin American nations, Colombia, with 287 is the only one to place more than one hundred children for adoption in the United States in 2005. *See* STATE DEP'T ADOPTION STATISTICS, *supra* note 37.

64. *See id.* The State Department website on intercountry adoption has country reports that summarize the rules of adoption for each sending nation. *See* U.S. DEP'T OF STATE, *supra* note 63. Representative comments include the following: Paraguay does not permit international adoption as a matter of policy; Bolivia only permits adoption to other Hague Convention nations (not currently including the United States); adoptive parents generally must stay in Peru for 8 weeks to adopt, and there is a scarcity of infants available; Honduras is "strict in its application of adoption law." *Id.*

65. *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 (1994); Kapstein, *supra* note 8; Fieweger, *supra* note 15 (discussing Ecuador and Latin America); U.S. DEP'T OF STATE, *supra* note 63 (stating that "As a result of negative publicity generated by a case of child smuggling in 1986, Ecuadorian laws regarding adoption by foreigners were changed in an attempt to provide greater protection for the child."); Sara Olkon, *Baby selling is a major business in Guatemala*, MIAMI HERALD, June 4, 2000 (stating that "exacerbating the demand for Guatemalan babies are adoption-reform laws enacted by neighboring Latin countries trying to clean up their own child trafficking scandals.")

States citizens to adopt internationally, has overwhelmingly rejected any significant role in being a sending region for the United States. The exception that proves the rule is Guatemala, which has increased its adoptions to the United States more than sevenfold over the last ten years and now ranks third as a sending nation for the United States.⁶⁶ Guatemala has one of the highest per capita rates of intercountry adoption of any sending nation,⁶⁷ but its large role as a sending nation has been accompanied by notoriety due to publicized concerns with baby-buying and profiteering, causing a number of recipient nations (other than the United States) to close Guatemalan adoptions. Thus, Guatemala seems determined to maintain its place as a significant sending nation despite the abuses and scandals, while other Latin American nations have chosen to close or sharply limit international adoption to avoid the abuses and scandals.

In Southeast Asia, Cambodia and Viet Nam both saw their numbers rise prior to experiencing scandal-related shutdowns, indicating that the cycle of abuse is not limited to Latin America.⁶⁸ It is unfortunate that so often when a nation rises as a sending nation it becomes notorious for abusive baby-buying or kidnaping and becomes subject to closure or rules that virtually eliminate international adoption.

These cycles of abuse do not prove that every sending nation that rises in significance will inevitably suffer from corruption and child laundering. The long-term significance of South Korea has been accompanied by a relative lack of corruption and child laundering. However, for the nations, primarily quite poor, that are subject to difficulties with child laundering, the cycles of abuse tell a story.

The story is one in which the rise of poor sending nations unfortunately seems to invite the unscrupulous into the adoption system. Western adoptive parents generally prefer to adopt healthy infants as quickly and as young as possible; adoption systems which meet these market demands are likely to attract Western business. As a sending nation begins to attract more interest in the adoption system, it becomes clear, within the sending nation, that there is a lot of money to be made for those who can speedily deliver "orphans" with the requisite characteristics. Given the availability of thousands of dollars per child to be spent within the sending country, it

66. See STATE DEP'T ADOPTION STATISTICS, *supra* note 37.

67. See PETER SELMAN, The "Quiet Migration" in the New Millennium: Trends in Intercountry Adoption 1998-2003, Paper presented at the 8th Global Conference, Manila, August 10-12 2005, available at <http://www.adopteesolidarity.org/docs/quietmigration.finalpaper.mht> (last visited Oct. 2, 2006); Smolin, *supra* note 4, at 477 n.333; see also STATE DEP'T ADOPTION STATISTICS, *supra* note 37.

68. See STATE DEP'T ADOPTION STATISTICS, *supra* note 37; regarding Cambodia, see *infra* notes 69-121 and accompanying text; regarding Vietnam, see *supra* note 31.

is not too difficult for the unscrupulous to develop systems that can deliver. Societies in which children can be bought and sold for sex and labor for a few hundred dollars or less, with police and public officials bought off, easily transition into the business of supplying paper-adoptable “orphans.” Credulous Westerners, eager to believe that they are saving children, are easily fooled into accepting laundered children—for there is no fool like the one who wants to be fooled. Within a few years, however, these systems of child laundering become so notorious that scandals usually emerge. At this point, some sending nations simply conclude that international adoption is too corrupting and in effect shut themselves down; sometimes, recipient nations are shamed into imposing moratoriums. Then, interest shifts to another poor nation, and the cycle of abuse begins over again.

These cycles of abuse have been ongoing over several decades now, and yet, they are always treated as some kind of surprise within the media and adoptive parent community. The primary lesson they teach is that poor sending nations often cannot themselves prevent their adoption systems from being corrupted, once significant amounts of Western wealth enter the system. As will be suggested below, only limitations imposed and enforced by the recipient nations themselves, working cooperatively with the authorities in sending nations, would be effective to stop the cycles of abuse.

D. Stories of Abuse: Tracking Child Laundering Within Various Sending Nations

1. Cambodia

The Cambodian adoption scandal is thus far the best documented instance of large-scale child laundering within the intercountry adoption system.⁶⁹ Indeed, the very term “child laundering” used by this article is echoed in descriptions of the scandal. For example, a government investigator described in a recent speech the particular case of “baby laundering,” which was instrumental in producing the December 2001 moratorium on adoptions from Cambodia:

A baby-buyer bought this child. The mother wanted the child back. The mother didn’t get the child back. She was told it was going to an orphanage and she could have him back at any time and

69. Many of the relevant United States government documents concerning the criminal prosecution can be found on the Ethica website. See <http://www.ethicanet.org/item.php?recordid=camdocs&pagestyle=default> (last visited Oct. 2, 2006).

he'd have a better life. . . . [A]fter there was a raid on two stash houses the mother approached a human rights groups and said. . . . "I lost my child can you find him?" The human rights group went looking for this child and unfortunately couldn't find him. So they passed this picture . . . around to all the Western Embassies in Phnom Penh to find out if in fact anybody had this child. Unfortunately, the United States Embassy had a visa application for this child—totally separate identity and background—what we call 'baby laundering.' Once the director of INS—Mr. Ziglar—found out about this he said enough is enough, there will be no more kids coming out of Cambodia.⁷⁰

Similarly, a detailed press account of Cambodian adoptions in the New York Times Magazine Section was titled "Baby Laundering."⁷¹ The article used the term "laundered" to describe how children obtained from birth families through "lies or false promises in addition to cash" were given "phony paperwork . . . for adoption processing" and "moved into an orphanage with no true record of his or her birthplace or parents, rendering the child untraceable."⁷²

Although the Cambodian adoption scandal has been extensively investigated by the government⁷³ and covered by the press,⁷⁴ many of its lessons are still little understood. In order to appreciate those lessons, it is necessary to understand how thoroughly corrupt the international adoption process in Cambodia became. Prior to FY 1997, Cambodia did not make the list of top twenty nations sending children to the United States for adoption. The numbers thereafter are as follows:

70. Richard Cross, Rushton Distinguished Lecture Series - Reforming Intercountry Adoption: Present Realities and Future Prospects, Cumberland School of Law, Samford University (Apr. 15, 2005) (available at http://cumberland.samford.edu/cumberland_programs.asp?ID=630) (last visited Oct. 2, 2006).

71. See Sara Corbett, *Where do babies come from?*, NEW YORK TIMES MAGAZINE, Jun. 16, 2002, at 42.

72. See *id.* at 45.

73. See <http://www.ethicanet.org/item.php?recordid=camdoks&pagestyle=default>, *supra* note 43 (containing a collection of government documents related to the criminal investigation) (last visited Oct. 2, 2006).

74. See, e.g., Corbett, *supra* note 71; Alan B. Goldberg & Deb Apton, *U.S. Families Learn Truth About Adopted Cambodian Children*, Mar. 25, 2005 (web version of 20/20 special), available at <http://abcnews.go.com/2020/print?id=611826> (last visited Oct. 2, 2006); Thomas Fields-Meyer et al., *Whose Kids Are They?*, PEOPLE, Jan. 19, 2004, at 74-78.

FY 97:	66
FY 98:	249
FY 99:	248
FY 2000:	402
FY 2001:	266
FY 2002:	254
FY 2003:	124
FY 2004	(None listed)
Total:	1, 609 (FY = Oct. 1 to Sept. 30) ⁷⁵

Due to the scandal the United States government suspended the processing of adoption petitions from Cambodia on December 21, 2001. However, due to the existence of various categories of pipeline cases approvals are listed as late as FY 2003.⁷⁶

If the official and unofficial characterizations of the scandal by United States investigators are accurate, then a large plurality, and perhaps a majority, of the 1609 adoptees from Cambodia had been obtained from their birth families by illicit child-buying, fraud, and child-stealing. Further, the very rise of Cambodia as a significant sending nation is completely intertwined with the rise of a criminal “child laundering” conspiracy. The number of adoptions rose as a direct result of increasing numbers of purchased and stolen children being placed for adoption.

According to the U.S. government, a child trafficking enterprise operated in Cambodia between January 1997 and December 2001.⁷⁷ In other words, during the entire period from the rise of Cambodia as a sending nation until the suspension of adoptions by the United States government.⁷⁸ Although the plea agreement with the principal defendant provided criminal convictions only for conspiracy to commit visa fraud, conspiracy to commit money laundering, and structuring,⁷⁹ the government states that the criminal conspiracy involved “alien smuggling, visa fraud, wire fraud, mail fraud, tax fraud, money laundering, and violations of the Foreign Corrupt Practices Act.”⁸⁰ Although this was a child trafficking enterprise, no crime related to child trafficking was charged because of the lack of a federal law

75. See STATE. DEP’T ADOPTION STATISTICS, *supra* note 37.

76. See Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 CUMBERLAND LAW REVIEW 619, 621-25 (2005) (discussing processing of pipeline cases).

77. See U.S. Immigration and Customs Enforcement, *Backgrounder, Operation Broken Hearts* (Nov. 19, 2004)[hereinafter *Backgrounder*].

78. See *supra* notes 75-76 and accompanying text.

79. See Plea Agreement, United States of America v. Lauryn Galindo, No. CR03-0187Z (W.D. Wash. Jun. 23, 2004), available at <http://www.ethicanet.org/galindoPLEA.pdf> (last visited Oct. 2, 2006).

80. See *Backgrounder*, *supra* note 50.

criminalizing child trafficking for purposes of adoption.⁸¹

The conspiracy involved some 700 to 800 children,⁸² or almost half of all the children placed for adoption from Cambodia during the relevant period. Although the government procured a guilty plea involving only seventeen to twenty-four cases,⁸³ one of the leading investigators stated his belief that the “vast majority were bogus. My educated guess is that 98% were not orphans as defined by U.S. law. In addition, the children were purchased which is an automatic ground to deny an orphan visa.”⁸⁴ In addition, the government had evidence of over one-hundred “false adoptions” but only obtained convictions on the lesser number of cases as a part of the plea bargain.⁸⁵

The criminal conspiracy described by the government involved the methods of child-buying and child-stealing described earlier in this article.⁸⁶ Baby-recruiters, who were orphanage directors and taxicab drivers, traveled to villages to persuade families to hand over their children. The primary means of persuasion was false statements. Some families were told that their children would receive food, medical care, and an education from a reputable NGO in Cambodia; the birth family would be able to regularly visit their child within Cambodia, and could take their children back at any time.⁸⁷ Alternatively, the family was told that a “rich family will raise your child in the United States; they will send you money and photos of your child for the rest of your life.”⁸⁸ Further, “[w]hen your child becomes an adult, he can petition for you to immigrate to the United States.”⁸⁹ Obtaining children through these false statements constituted a kind of child-stealing and kidnaping, particularly since the intent and practice of the conspiracy was to give the children false identities and histories, identify them as “orphans,” and then send them to the United States as adoptees. Thus, the conspirators intended to permanently sever the relationship between the children and their birth families in a manner wholly

81. See Cross, *supra* note 70.

82. The government’s Backgrounder summary used the 700 figure, but apparently Galindo later admitted to involvement in 800. *Cf. Backgrounder, supra* note 77, and Cross, *supra* note 70.

83. See Government’s Sentencing Memorandum, United States v. Lauryn Galindo, No. CR03-187Z (U.S. District Ct., W.D. Wash. at Seattle), at 3 (stating that the defendant “admits that the visa fraud conspiracy involved up to 24 fraudulent immigrant visas (seventeen of which were charged as Overt Acts in the information to which she has pled guilty”).

84. E-mail from Richard H. Cross to Author, Dec. 28, 2004.

85. See Cross, *supra* note 70.

86. See *supra* notes 4-29 and accompanying text.

87. See *Backgrounder, supra* note 77.

88. *Id.*

89. *Id.*

inconsistent with their promises to the birth families.

Recruiters also employed financial inducements, and thus were engaged in the systematic practice of baby-buying. Financial inducements provided to birth parents included payments ranging from \$20 to \$200, and a fifty kilogram bag of rice. The recruiters were given a fifty dollar commission for each child.⁹⁰

The recruiters initially took children for medical tests; if the child tested positive for AIDS or hepatitis they were returned to their birth families.⁹¹ Thus, the conspirators only were interested in children from whom they could obtain adoption fees and “donations.”⁹²

Although some children were allowed to remain with their families until it was time to travel to the United States, many (probably most) were taken to an “orphanage” or “stash house.” Government investigators were appalled at the conditions in which the criminal enterprise housed the children:

ICE agents visited several of the “orphanages” associated with this criminal enterprise. They observed rusty cribs, hammocks covered in feces, and torn window screens. Some of the babies were . . . at a “stash house” . . . where the conditions were horrendous. The dwelling was hot, stuffy, and smelled of human excrement. The babies were naked and filthy.⁹³

The detail of the torn window screens is significant in the context of Cambodia, where mosquito-borne malaria is a significant problem.

The investigator’s shock arose in part because of their realization of how little it would have cost to improve the conditions of the children. One of the principal investigators described the scene at one “orphanage” stating “I was surprised when I came in because it only cost \$15 a month for a nanny yet this little child was laying in a pool of urine.”⁹⁴ On his second trip to the same orphanage some months later, the investigator stated “[I] was surprised when I went into this area where they had the babies because they knew the Americans were coming that day and I found these babies in these hammocks soaked in urine. You can see that feces had dried on these hammocks.”⁹⁵

The investigator stated that he used the term “stash house” advisedly:

90. *See id.*

91. *See id.*

92. *See id.*

93. *See id.*

94. *See Cross, supra note 70.*

95. *See id.*

As a special agent all I deal with is alien smuggling so I came in contact with a variety of stash houses in the United States and see how bad the living conditions are. This was bad. This was worse than anything I had seen in the United States. There were 16 babies in this place. Many of them were naked. . . . They were covered in filth, covered in feces. . . . If it had been dogs in the United States in a place like this the Humane Society would have been called and people would have been charged with cruelty to animals. . . .⁹⁶

The appalling conditions under which the children were housed made a mockery of the supposedly humanitarian purposes of the adoption system. The conditions are shocking both because of the small amounts of money that would have been required to provide good care, and the large amounts of money acquired by this criminal conspiracy. The adoptive parents were required to bring \$3,500 in cash to Cambodia and give it to the conspirators as an orphanage donation.⁹⁷ Hence, the conspiracy received between \$2.45 million to \$2.8 million in orphanage donations alone.⁹⁸ Given the low cost of labor and materials in Cambodia, it would have taken only a small percentage of the orphanage donations received to repair screens, hire a sufficient number of “nannies,” and generally provide excellent care for these vulnerable infants.

The greed represented by the diversion of orphanage donations away from the care of children is just one reflection of the financial motivation of the enterprise. Combining the orphanage donations with adoption fees, the government estimates that the conspirators “received approximately \$8 million dollars from adoptive parents in the United States, and then used the profits to live lavish lifestyles. . . .”⁹⁹ This estimate was later pushed upward to over \$9 million.¹⁰⁰ Although the government claims that it was never able to trace all of these funds, the criminal prosecution achieved the forfeiture of a \$1.4 million home in Hawaii and the value of a Jaguar automobile.¹⁰¹ Further, the conviction for money laundering was substantiated by evidence of the conspiracy moving large amounts of wealth around in surreptitious

96. *Id.*

97. *See id.*

98. The figures are derived by multiplying the \$3,500 required cash orphanage donation by the 700 to 800 adoptions facilitated by Galindo.

99. *Backgrounder*, *supra* note 77.

100. *See Cross*, *supra* note 70.

101. *See* U.S. DEP’T OF JUSTICE, United States Attorney (W.D. Washington), *Hawaii Resident Sentenced to 18 Months in Prison in Cambodian Adoption Conspiracy* (Nov. 19, 2004); *Cross*, *supra* note 70; *Galindo Plea Agreement*, *supra* note 79, at 11.

ways.¹⁰²

The primary reason the United States government pursued a criminal prosecution in these cases was that the conspiracy was headed by a United States citizen, Lauryn Galindo, who worked with her sister, Lynn Devin (also a United States citizen), largely through their agency, “Seattle International Adoptions.” Galindo led the conspiracy from Cambodia, while Devin primarily remained in the United States, interacting with prospective adoptive families.¹⁰³ Galindo was the key and enigmatic figure in the drama. She had received a humanitarian award from the Cambodian government and was revered by many in the adoption community for her work;¹⁰⁴ yet, according to the United States government she was intentionally trafficking children, sending out baby-recruiters, and bribing Cambodian government officials.¹⁰⁵ Devin ultimately cooperated with the government, pleading guilty to conspiracy to commit visa fraud and providing what the government called “substantial assistance in the investigation and prosecution of co-defendant Lauryn Galindo. . . .”¹⁰⁶ Faced with the evidence and her sister’s assistance to the government, Galindo pled guilty to visa fraud, money laundering, and structuring, and was sentenced to eighteen months in prison, in addition to forfeiture of the Hawaiian home and Jaguar automobile.¹⁰⁷

Galindo appears to have become calloused over time to the harm she was doing to children and families. One adoptive parent describes the manner in which Galindo persuaded her to complete the adoption of a four-and-one-half year old child, even after it became clear that she was being asked to pay off the birth mother and falsify official application forms:

My new daughter Pheary was waiting for me at the orphan center, sitting next to a woman I assumed was her orphanage caretaker. Mr. Visoth said something to Ms. Galindo, whereupon she told me that the woman with my daughter was not a caretaker but was her birth mother. I was numb, in total disbelief. . . . I immediately expressed concern, and told Lauryn [Galindo] that Pheary’s

102. See Cross, *supra* note 70; Government’s Sentencing Memorandum, *supra* note 83.

103. See, e.g., Cross, *supra* note 70; U.S. DEP’T OF JUSTICE, *supra* note 101.

104. See Cross, *supra* note 70; Fields-Meyer et al., *supra* note 74, at 76 (quoting adoptive parents who defended Galindo even after the charges were publicized and her sister pled guilty).

105. See, e.g., *Backgrounder*, *supra* note 77.

106. Substantial Assistance Motion, United States of America v. Lynn Devin, No. CR03-187Z, (W.D. Wash. Dec. 3, 2004), available at http://www.ethicanet.org/Devin_sentencing.pdf (last visited Oct. 2, 2006).

107. See Cross, *supra* note 70; U.S. DEP’T OF JUSTICE, *supra* note 101; Government Sentencing Memorandum, *supra* note 83.

paperwork indicated she was ‘abandoned’ and her parents were ‘unknown.’ How then could her birth mother be here with her at the orphanage? At the orphanage I learned that Pheary’s sisters and brother were also there, along with her father. . . .

Being at that time the mother of a 3-year old daughter, I told Lauryn that I could never remove a child from her family. No matter how much I wanted to build a family of my own, I would never do it at the expense of another mother and child. I was crying. . . . Pheary was crying, Pheary was frightened. I asked Lauryn why was I taking this child when it was obvious that she already had a family? Lauryn was irritated with me. She said that I should take Pheary back to the hotel and we could talk about it later the next day. She said that if I did not take Pheary back to the hotel I might precipitate some negative consequences for Pheary and the adoption program. I was constantly reminded that if my actions caused any of the Cambodian officials to “lose face” I might jeopardize the entire adoption program and cause trouble for many other families. I reluctantly agreed to take Pheary to the hotel. . . .

I also indicated to Lauryn that I did not feel right about giving the financial ‘gift’ to Pheary’s mother. I had been told to bring a \$100 US bill for the ‘nanny’ as a gift. When it turned out that the nanny was really the birth mother, I told Lauryn that it felt like I would be ‘baby buying, or baby selling’ if I were to give money to the birth mother. Lauryn replied that if I was willing to give \$100 to a nanny, then I ought to be even happier to give \$100 to the actual birth mother. Reluctantly I handed over the \$100 to my daughter’s birth mother. . . . By this time Lauryn had told me that if I did not adopt Pheary, she might die or meet a worse fate (implying a brothel). . . .

The next day at the embassy I was required to fill out some official forms in order to obtain a visa for Pheary. One of the questions on the document asked if I knew the whereabouts of any living relative to the child I was adopting. I asked Lauryn what I should do, since I had just met Pheary’s birth family less than twelve hours ago. Lauryn advised me to make a check mark in the box indicating that I had no knowledge of any living blood relatives to my adopted child. I refused to do so, and Lauryn became angry and made the check herself. I ran to the bathroom with my new daughter and

cried. . . .¹⁰⁸

Significantly, Lauryn Galindo did not just arrange adoptions for her own agency, but also served as a facilitator for adoptions for other United States agencies.¹⁰⁹ Thus, United States agencies proved themselves unable to choose law-abiding and ethical facilitators; indeed, they relied on a facilitator who unashamedly manipulated adoptive parents into paying off birth mothers and falsifying visa application forms, while diverting orphanage donations to support her own “lavish lifestyle.”

Unfortunately, the situation in Cambodian adoption is probably much worse than has been revealed by the successful criminal prosecution of Galindo and Devin. Galindo facilitated, in one way or another, approximately half of Cambodian adoptions involving the United States as recipient nation. The other adoptions were facilitated by Cambodian nationals and/or others who were not United States citizens.¹¹⁰ There is credible reason to believe that some of these Cambodian facilitators used the same methods as Galindo to obtain children for adoption. However, because they are Cambodian citizens residing in Cambodia, those facilitators were not subject to criminal prosecution by United States authorities.¹¹¹ (It seems a fair inference that the Cambodian authorities, who were systematically bribed by Galindo,¹¹² have not been in a position to bring their own criminal prosecutions.) Further, neither the United States agencies that used Galindo as a facilitator, nor those that used other apparently corrupt facilitators, have been subject to criminal prosecution by the United States government. United States agencies working with corrupt facilitators who systemically buy and steal children for adoption have not

108. Government’s Sentencing Memorandum, *supra* note 83, at 20-21.

109. *See* Cross, *supra* note 70. A list of the agencies for whom Galindo facilitated Cambodian adoptions can be found at http://www.oggham.com/cambodia/archives/agencies_and_facilitators/000794.html [hereinafter *Cambodian Adoption Agencies/Facilitators*]; this author cannot independently verify the accuracy of this list, but a United States government investigator provided the reference and thus I have reason to believe it is accurate.

110. *See* *Cambodian Adoption Agencies/Facilitators*, *supra* note 109; Cross, *supra* note 70.

111. *See* Cross, *supra* note 70 (indicating that when he was sent to Cambodia there were “two Cambodian facilitators that people believed were involved in buying up babies,” and that he and his partner were sent to Cambodia “to find out if any Americans were also involved in this.”); *see also* Corbett, *supra* note 71, at 1 (discussing allegations regarding Cambodian facilitators). According to Corbett, the United States ambassador to Cambodia stated: “[t]here’s not an entirely reliable facilitator out there. . . . We don’t trust any of them.” *Id.* at 10.

112. *See* Cross, *supra* note 70; Government Plea Agreement, *supra* note 79, at 7-8 (describing involvement of Cambodian public official in criminal conspiracy and use of money to pay other Cambodian government “clerks, employees or officials”).

been subject to any criminal penalty, so long as they themselves did not intentionally or knowingly violate the law. It pays, in other words, for United States agencies to remain credulous and naïve.

In retrospect, it is apparent that the United States government regularly approved orphan visa applications of Cambodian children who had been bought or stolen. Further, the government continued to approve orphan visa applications from Cambodia at the very same time that it conducted a successful criminal prosecution for visa fraud. When the government announced its shutdown of Cambodian adoptions in December 2001, there were over 250 pipeline cases that had been processed to various degrees. The criminal investigation in Cambodia commenced in the spring of 2002 and involved special agents of the Immigration and Customs Enforcement (ICE). Simultaneously, a task force “comprised of members of the Immigration Service, the Department of State, and the Royal Government of Cambodia” began a case-by-case evaluation of the 250 or more pipeline cases; each case was subject to a field investigation, to determine whether to grant an orphan visa for travel to the United States.¹¹³ Over the next eighteen months the two processes ran simultaneously, leading on the criminal side to indictments for visa fraud and other crimes, and on the civil side to the approval of every single pending visa application.¹¹⁴ Under these circumstances, it is impossible to believe that the approvals granted in the pipeline cases represented an accurate appraisal of whether the children in question were truly qualified as orphans under United States immigration law. As a government spokesman stated concerning the approvals issued after the December 2001 moratorium: “We know that something is not right, but because 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.”¹¹⁵

It appears that the orphan visa process is almost incapable of successfully screening out purchased and stolen children, even when the government is on clear notice to focus attention on a particular group of cases. The orphan visa process virtually invites attempts to launder children, because it operates as such a successful child-laundering system. Considering the plausible viewpoint of a government investigator that most of Galindo’s cases involved illicit monetary inducements or fraudulent representations and the indications that some of the other facilitators were involved in the same conduct, it is probable that most of the 1,609 children who came to the United States from Cambodia between 1997 and 2003 were laundered. Thus, the visa orphan process laundered as many as a

113. See Maskew, *supra* note 76, at 627-30.

114. See *id.*

115. See Corbett, *supra* note 71, at 11.

thousand purchased or stolen children from Cambodia between 1997 and 2003.

The reasons why the visa orphan process is currently so unsuccessful in screening out cases of purchased and stolen children will be explored below. The point at present is that Cambodia, far from being a successful case of government intervention, is in fact a clear case of regulatory failure. The government never succeeded in constructing a reliable system for evaluating orphan visa applications in Cambodia, even when they were on notice of widespread fraud. In the end, the only solution found was one of shutting down the system. Some may take the unfortunate lesson from Cambodia that our choices are between a shutdown of all intercountry adoption or accepting a system ridden with child laundering. As I will suggest below, it may be possible to create more attractive choices but only if serious reforms are embraced.

An extensive Cambodian Orphanage Survey conducted during 2005 by Holt International Children's Services, under contract from the U.S. Agency for International Development,¹¹⁶ suggests that the intercountry adoption moratorium does not present a crisis for child welfare in Cambodia. Despite the shutdown of adoptions in late 2001, this 2005 survey shows no build up of infants or toddlers in the orphanages. In a population of 7,697 children in 204 facilities spread throughout Cambodia there are only 329 children three or younger. Indeed, more than 75% of the children are nine or older, and hence too old for intercountry placement under current Cambodian law.¹¹⁷ Most of the children were placed in the orphanages at much older ages.¹¹⁸ Further, most of the children living in orphanages have living relatives outside of the orphanage, often including at least one parent, who would likely be able to care for them if not for poverty.¹¹⁹

The Cambodia Orphanage Survey suggests that most of the children who were adopted internationally from Cambodia were a distinct population of children, separate from Cambodia's orphanage population. Demographically, Cambodian adoptees were predominately female infants and toddlers, while Cambodia's orphanage population is overwhelmingly children nine and older, and predominately male.¹²⁰ The survey confirms the

116. Holt International & US AID, Cambodia Adoption Survey 2005, *available at* <http://www.ccaainstitute.org/CambodiaFinalReport.pdf>.

117. *See id.* at 5.

118. *See id.* at 5, 6. Although there are no specific figures given on the ages of the children when they came into care, a comparison of the ages of the children, *id.* at 5, with the time in care, *id.* at 6, supports the conclusion that most came into care at older ages.

119. *See id.* at 6-8, 12.

120. *See id.* at 5 (4,571 male, 3,126 female). On the preference for adopting girls over boys, and the claim that in Cambodia birth parents were offered higher prices for girls than boys, *see* John Gravois, *Bringing Up Babes*, Jan. 16, 2004, at <http://www.slate.com/>

evidence that most Cambodian adoptees were deliberately obtained directly from birth families for purposes of profit, and likely would have remained with their families if not for the existence of the child laundering scheme which operated within the adoption system. Thus, the intercountry adoption system, even when open, had done little for the kinds of children typically living in Cambodian orphanages.

The Cambodia Orphanage Survey suggests that an effective child welfare program in Cambodia would focus on assistance that prevented or remedied unnecessary separations of children from their immediate and/or extended families, and assistance to improve the quality of life for the mostly older children residing at orphanages.¹²¹ While repair of the intercountry adoption system could be a positive good, the intercountry adoption system appears unlikely to address the pressing needs of most Cambodian children currently subject to separations from their families. Given the failure thus far to create a reliable system of intercountry adoption in Cambodia, it is encouraging to know that the absence of that option is not an insurmountable hindrance to child welfare efforts on behalf of Cambodia's vulnerable children.

2. India

India might seem a prime candidate to send large numbers of children to other countries for adoption, given its enormous population of one billion people,¹²² including hundreds of millions living in extreme poverty.¹²³ From that perspective, India fails to live up to its potential as a sending nation. While India has been consistently among the twenty most significant sending nations for the United States, the numbers are modest. India generally sends 300 to 550 children per year to the United States and 1,000 to 1,600 children per year to all recipient nations combined.¹²⁴ These totals are surprisingly low compared to China and Russia, which each have been sending more than 5,000 children annually to the United States.¹²⁵ Indeed,

id/2093899 (last visited Oct. 2, 2006).

121. See Cambodia Adoption Survey, *supra* note 116, at 11-12.

122. See, e.g., <http://www.censusindia.net/results/resultsmain.html>. [hereinafter India Census] (last visited Oct. 2, 2006).

123. See, e.g., World Bank, India Country Brief, available at <http://www.worldbank.org/in>. (stating India has 260 million to 290 million poor, rising to 390 million if international standard of US \$1 day is used) (last visited Oct. 2, 2006).

124. See STATE DEP'T ADOPTION STATISTICS, *supra* note 37; Indian Adoption Scandals, *supra* note 4, at 473 n. 318; ASAHA BAJPAI, ADOPTION LAW AND JUSTICE TO THE CHILD 177-179 (1996); ASHA BAJPAI, CHILD RIGHTS IN INDIA 41 (2003); Selman, *supra* note 18, at 17; SELMAN, *supra* note 41, at 15, 19.

125. See STATE DEP'T ADOPTION STATISTICS, *supra* note 37. Indeed, in FY 2005 India sent only 323 children to the United States for intercountry adoption, the lowest number in

considering that India has 157 million children under six years of age and more than twenty million births a year,¹²⁶ it seems that an Indian child has a better chance of being hit by lightning than being sent overseas for adoption.¹²⁷

India would seem well-situated to overcome the propensity of developing nations to run adoption systems intertwined with corruption and child trafficking. As the largest democracy in the world, and a growing economic power successfully competing against developed nations in the computer and high-tech sectors,¹²⁸ India appears to possess the capacities necessary to create an effective adoption system. Unfortunately, India's adoption system combines a centralized and complex system of high ideals and multiple safeguards against trafficking and corruption with a high incidence of notorious adoption scandals involving trafficking and corruption.¹²⁹ This unfortunate paradox has continued unabated for more than a decade and shows no sign of diminishing, despite India's ratification of the Hague Convention on Intercountry Adoption.¹³⁰

The limited numbers and high incidence of corruption endemic to Indian adoption appear related. A system which inspires little confidence and attracts charlatans and profiteers in the guise of orphanage directors and facilitators simply is not trusted to move large numbers of children out of the country.¹³¹ The numbers remain small because India's answer to corruption is not efficiency and transparency but rather bureaucracy, and this bureaucracy unfortunately seems to simultaneously slow the adoption system and generate more corruption.¹³²

The following situations illustrate but do not exhaust the difficulties experienced by India as a sending nation:

the last fifteen years. *See id.*

126. *See* India Census, *supra* note 122.

127. *See* Selman, *supra* note 34, at 12-13 (providing data on demographic significance of adoption for various sending nations, including India).

128. On the rise of India, *see* JEFFREY D. SACHS, *THE END OF POVERTY* 170-87 (2005).

129. *See generally* Indian Adoption Scandal, *supra* note 4, at 403.

130. Hague Conference on Private Int'l Law, Status Table 33: Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, available at http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited Oct. 2, 2006).

131. *See generally*, *Indian Adoption Scandals*, *supra* note 4. Of course I am not claiming that all orphanage directors and facilitators in India are charlatans and profiteers, but rather that charlatans and profiteers have been induced to become orphanage directors and facilitators by the opportunities for profits available from intercountry adoption.

132. *See Indian Adoption Scandals*, *supra* note 4, at 445-46 (quoting Asha Bajpai, *Adoption Law and Justice to the Child* 170 (1996)).

a. Andhra Pradesh Adoption Scandals

United States and Indian sources have documented a cyclic series of adoption scandals from the South Indian state of Andhra Pradesh, particularly during the period from 1995 to 2001. Several orphanages in that state systematically sent out scouts to purchase female infants from vulnerable poor families. The identities of the children were systematically altered, and falsified documents created. Credulous adoption agencies from various sending nations partnered with these corrupt Indian orphanages and thus participated in the laundering of numerous stolen children as “orphans” and then adoptees. Therefore, the Andhra Pradesh scandals are a significant instance of the first kind of child-buying scandal, where the intentional criminal conspiracy is headed by citizens of the sending countries and no citizen of the recipient nation intentionally participates in child trafficking.¹³³

There is evidence that Indian agencies also obtained children through the various forms of child-stealing and kidnaping describing above, including misrepresentations to birth parents, taking children placed temporarily for care and education and sending them for adoption, and changing the identities of missing or lost children in order to place them for adoption as orphans.¹³⁴

As in Cambodia, the United States accepted virtually all of the stolen and kidnaped children as “orphans” and granted visas, despite the suspicions of one United States government official working in Madras/Chennai, who slowed the flow of adoptions from Andhra Pradesh temporarily in 1995-96.¹³⁵ Unlike Cambodia, the criminal enforcement arm of immigration (ICE) never investigated the situation in India, perhaps because there is no indication of any intentional or knowing involvement of United States citizens. After an adoption scandal in the spring of 2001 replicated and widened an earlier scandal from 1999, Indian authorities moved to shut-down intercountry adoptions from Andhra Pradesh.¹³⁶ The State government responded to the wrongdoing, not with regulatory reform, but by simply stopping the practice of placing children internationally.¹³⁷

133. For an overview of the Andhra Pradesh scandal, including extensive citation of press coverage and other sources, see Indian Adoption Scandal, *supra* note 4. For a more recent review of the scandal in the Indian Press, see Asha Krishnakumar, *The Adoption Market*, Vol. 22, Issue 11 (May 21 - Jun. 03, 2005); Ravi Sharma, *A Tussle in Andhra Pradesh*, Vol. 22, Issue 11 (May 21 - Jun. 03, 2005), both available at <http://www.frontlineonnet.com/fl2211/index.htm> (last visited Oct. 2, 2006).

134. See *id.*

135. See Indian Adoption Scandal, *supra* note 4, at 456.

136. *Id.* at 459-74.

137. See *id.*; see also Guild of Service, 44th Annual Report (2002-2003), at 9 (noting

The courts in Andhra Pradesh have acted and spoken against abusive intercountry adoption practices, particularly in adoption-related litigation that has come before them. Thus, the judiciary seem persuaded that the intercountry adoption system in Andhra Pradesh has been subject to systematic abuse and that the regulatory authorities have failed to prevent these abuses.¹³⁸

The criminal justice system in Andhra Pradesh has, by comparison, had a mixed record in regard to the scandals, perhaps because of the difficulty of winning criminal convictions in India. Thus, the authorities within Andhra Pradesh often have failed to secure criminal convictions, even against the orphanage directors who are broadly viewed as the ringleaders of criminal conspiracies to procure children illegally and profiteer from intercountry adoption. The pattern has been to bring criminal charges and temporarily imprison orphanage directors or staff only to release them later and either drop criminal charges or fail to win convictions.¹³⁹

This pattern was recently broken when the first major criminal convictions in the Andhra Pradesh adoption scandal were announced in August 2005. The case concerned the coordinator and a number of staff from Tender Loving Care Home (TLCH), an orphanage which was implicated in the 2001 scandal. The coordinator is a well-respected Roman Catholic nun, and the orphanage is on the same grounds as, and associated with, a respected Catholic hospital. The other convicted persons were associated in various ways with the orphanage, hospital, convent or school. The convictions are presumably under appeal.¹⁴⁰

The convictions involving the TLCH orphanage illustrate the manner in which United States adoption agencies have corrupted even respected religious institutions within India. The extensive judgment issued by the

continuing ban on all adoption work in Andhra Pradesh).

138. See, e.g., Indian Adoption Scandals, *supra* note 4, at 465-473; John Clements v. All Concerned (2003), 4 Andhra Law Times 644 (Andhra Pradesh H.C.) (on file with author).

139. See Indian Adoption Scandals, *supra* note 4, at 456 - 473; GITA RAMASWAMY & BHANGYA BHUKYA, THE LAMBADAS: A COMMUNITY BESIEGED 12, 14 (2001) (predicting and explaining failure of criminal cases and determination of agencies to re-commence adoption work); *Ex-Head of NGO plans to sue Shalini Mishra*, THE HINDU, Apr. 29, 2004, available at <http://www.thehindu.com/2005/04/29/stories/2005042917630300.htm> (last visited Oct. 2, 2006); K. Venkateshwarlu, *Move to Relax child adoption norms?*, THE HINDU, Mar. 10, 2005, available at <http://www.thehindu.com/2005/03/10/stories/2005031007660400.htm> (last visited Oct. 2, 2006); Sharma, *supra* note 115.

140. See In the Court of the I Addl Metropolitan Sessions Judge: Hyderabad, Sessions Case No. 39 of 2003, Cr. No. 457/2001 (Aug. 30, 2005) (72 page judgment on file with author) [hereinafter Hyderabad Criminal Judgment]; *10 convicted in child adoption case*, THE HINDU, Aug. 31, 2005, available at <http://www.thehindu.com/2005/08/31/stores/2005083114360500.htm>; *Child Adoption Racket, 6-Month Jail For Sister, Nine Others*, DECCAN CHRONICLE, Aug. 31, 2005.

court found the TLCH coordinator and other staff guilty of multiple violations of Sections 471 and 420 of the Indian Penal Code.¹⁴¹ Section 471 prohibits “using as genuine a forged document.”¹⁴² The court found that various defendants had “fabricated” at least seventy-nine relinquishment documents for the purpose of “processing the child for in and inter-country adoption,” in order “to have a wrongful gain for themselves and wrongful loss to the state and biological parents.”¹⁴³ The monetary gain, according to the court, was intended either for benefit of the “institution or . . . the persons belonging to the TLCH.”¹⁴⁴ Thus, the court found the coordinator of TLCH and multiple other defendants guilty of using the forged relinquishment deeds as though they were genuine in the adoption process. The monetary gain that formed a central part of the violation of section 471 had its source primarily in money arising in the United States. The prosecution noted that the Central Adoption Resource Agency (CARA), which regulates intercountry adoption on behalf of the Indian government, limits intercountry processing fees receivable by Indian agencies to 10,000 rupees [222.USD] per case, plus 100 rupees [2.22 USD] per day maintenance charges.¹⁴⁵ The prosecution claimed, and the court agreed, that TLCH collected from foreign—mostly US—parents an average of 222,318 rupees [4940.40 USD] per case, far in excess of CARA guidelines.¹⁴⁶ The three United States agencies named by the court as involved in adoptions from TLCH are longstanding agencies, and in fact, their practices regarding Indian adoption fees are most likely typical. United States agencies typically charge “India” or foreign program fees ranging from \$4,000 to \$9,000. The use of these fees is often not clearly broken down, but it appears typical that Indian agencies can expect to receive amounts consistent with that named by the court for each adoption.¹⁴⁷ Unfortunately, these fees/donations, which may appear reasonable by Western standards,

141. *See* Hyderabad Criminal Judgment, *supra* note 140.

142. *See* Indian Penal Code, section 471.

143. *See* Hyderabad Criminal Judgment, *supra* note 140, at 14-35, 47, 55, 56.

144. *Id.* at 49.

145. *Id.* at 4. On these monetary limits, *see* Cent. Adoption Res. Agency, Ministry of Social Justice & Empowerment, Inter Country Guidelines, s. 4.38(ii). On the development and significance of these monetary limits, *see* Indian Adoption Scandals, *supra* note 4, at 435-37, 445-50. CARA recently issued a new set of regulations which alters the financial limits once again. *See* Central Adoption Resource Authority, Guidelines for Adoption from India—2006, available at <http://www.adoptionindia.nic.in/carahome.html> (last visited Oct. 2, 2006). The new approach is to limit fees to Indian Placement Agencies to \$3,500 USD per adoption, while banning all donations from foreign prospective adoptive parents, foreign adoptive parents, or foreign agencies. *See id.* at 5.17.

146. *See* Hyderabad Criminal Judgment, *supra* note 140, at 5, 62.

147. *See* Hyderabad Criminal Judgment, *supra* note 140, at 58 (naming US agencies); Indian Adoption Scandals, *supra* note 4, at 449-50.

appear disproportionate and (in the court's words) "huge" by Indian standards.¹⁴⁸

These "huge amounts" played an even more central role in the convictions the court issued under section 420 of the Indian Penal Code, which prohibits "cheating and dishonestly inducing delivery of property."¹⁴⁹ The court specifically found that amounts collected by the "accused" were "beyond the prescribed charges" under CARA guidelines.¹⁵⁰ Thus, as the Court summarized, various defendants "fabricated the relinquishment deed in the name of fictitious biological parents and brought them into existence and submitted them in the family court for the purpose of giving the children to intercountry adoption and collected huge amounts from the international parents. . . ."¹⁵¹

The Indian Supreme Court and Central Adoption Resource Agency had tried to limit corruption and child trafficking in the adoption system by limiting permissible adoption fees and requiring all donations to Indian agencies and orphanages to be voluntary and only paid after the child arrived in the recipient nation.¹⁵² United States agencies continued to ignore and flout these Indian rules, even after it became clear that fees and required orphanage donations were fueling corruption and child trafficking.¹⁵³ While one can fault the Indian government for allowing foreign agencies to continue to participate in their adoption system even as they violate India's rules, it seems clear that the United States agencies are also responsible. The United States agencies apparently operated under the assumption that the good of placing children for intercountry adoption justifies bending and breaking foreign rules limiting adoption fees and donations, and consequently negotiated financial arrangements that provided incentives for baby-buying and child-stealing. Unfortunately, the United States agencies have thus far been able to walk away with little or no liability based on their lack of actual knowledge of such illicit acts.

It is difficult to estimate the number of children illicitly taken from their birth parents during the Andhra Pradesh adoption scandals. Given the lack of a criminal investigation of the kind done in Cambodia, the apparent inability of United States immigration authorities to otherwise detect and prevent baby-buying and child-stealing, and the failure of the Indian

148. *See id.*, at 62.

149. *See* INDIAN PENAL CODE, sec. 420.

150. *See* Hyderabad Criminal Judgment, *supra* note 140, at 62.

151. *See* Hyderabad Criminal Judgment, *supra* note 140, at 62.

152. *See* Indian Adoption Scandals, *supra* note 4, at 435-37.

153. *See id.* at 445-450; *See also* "The final objective is the child's interest," Interview with Dr. Aloma Lobo, Chairperson, CARA, Vol. 22, Issue 11, FRONTLINE (May 21 - June 03, 2005), *available at* <http://www.frontlineonnet.com/fl2211/index.htm> (last visited Oct. 2, 2006).

authorities to implement the high ideals of their system, there has not been any definitive governmental accounting of the wrongs done. As in Cambodia, intercountry adoptions in Andhra Pradesh grew simultaneously with the criminal baby-buying and child-stealing conspiracies. Therefore, intercountry adoptions from Andhra Pradesh numbered only around 40 per year during the period from 1991-93¹⁵⁴ but by the year 2000 numbered over 200.¹⁵⁵ Perhaps as many as a thousand children were placed out of Andhra Pradesh for intercountry adoption during a time when one or more criminal conspiracies were developing their networks for the illegal procurement of children. How many were purchased, stolen, or kidnaped children?

Any attempt to measure the number of children who were purchased, stolen, or kidnaped by the Andhra Pradesh agencies must take account the diverse fates and sources of the children. The Andhra Pradesh agencies impacted far more children than the estimated one-thousand they placed for international adoption. The agencies apparently also sometimes shipped excess children out of the state to other parts of India (as well as obtaining some children from outside of Andhra Pradesh).¹⁵⁶ The agencies placed some children domestically.¹⁵⁷ Some of the affected agencies provided an education or care to children placed there in a temporary boarding situation. Finally, it appears that a significant number of infants died in the orphanages.¹⁵⁸ It seems most likely that at least two thousand infants and children came under the care of Andhra Pradesh agencies implicated in the scandals. These agencies appear to have created paperwork at will, depending on the respective fate they chose for each child. Thus, the TLCH judgment attributed almost eighty forged relinquishment documents to that single institution.¹⁵⁹ Further, the prosecution claimed that the TLCH defendants had purchased 436 babies for international placement.¹⁶⁰ Given

154. See BAJPAI, ADOPTION LAW AND JUSTICE TO THE CHILD, *supra* note 124, at 178-79 (1996).

155. See BAJPAI, CHILD RIGHTS, *supra* note 124, at 42.

156. See The Lambadas, *supra* note 139, at 8 ("Where there have been more than ample supply of babies it is reported that these are shipped to Kerala, Tamil Nadu or Mumbai where their papers for intercountry adoption are processed."); *infra* note 183 and accompanying text (evidence suggesting agency in Maharashtra sources children from outside that state); Indian Adoption Scandals, *supra* note 4, at 459-60 (A.P. agencies sourcing children from neighboring state of Karnataka).

157. See, e.g., The Lambadas, *supra* note 139, at 13.

158. See, e.g., *infra* notes 161-66 and accompanying text.

159. See Hyderabad Criminal Judgment, *supra* note 140, at 14-35, 47, 55, 56.

160. See *id.* at 9. One charge claimed that the defendants "sold 300 babies," while another charge claimed that the "accused bought and gave them [into] intercountry adoption . . . 436 babies." *Id.* The underlying charges related to these claims failed because the laws involved required a purpose to prostitute the children, which the court understandably found not to exist given the context of adoption. See *id.* at 13-14. The charges presumably arose because of the lack of a law criminalizing the purchase or sale of children in the context of

the large number of children involved in the TLCH case alone, the existence of multiple affected orphanages over a number of years, and the systematic nature of the systems for illicit sourcing of children, it seems most likely that somewhere between 500 to 800 children were purchased, stolen, or kidnapped from their parents due to the activities of the Andhra Pradesh adoption-related agencies and their networks.

Proponents of intercountry adoption generally perceive it as life-saving and have not focused on the dangers posed by child-laundering schemes, which needlessly transfer infants and children from parental to institutional care. Institutional care of infants has several disadvantages. First, infants fail to receive the benefits of breast milk, including its immunizing effects. Second, institutional care generally lacks individual care and attention. Finally, illness tends to spread quickly through large groups of children concentrated in a small amount of space. Some orphanages may be unwilling to invest much in medical care for the sick, particularly if they view infants as easily replaceable and only adoptable if healthy.¹⁶¹ There is evidence that some orphanages had a ready system for infant deaths; they simply took the (probably false) identity of the dead infant and applied it to another infant, thus ensuring no slow-down of the child-laundering process.¹⁶² Although there has been no accounting of the orphanage death rate in Andhra Pradesh, reports of infant graveyards at an orphanage suggest it was substantial.¹⁶³

The likelihood of substantial numbers of infant deaths in the Andhra Pradesh orphanages is underscored by the publicized deaths of ten infants, which occurred immediately after the Andhra Pradesh government removed 228 children from two of the private orphanages affected by the scandal. It is unclear whether these deaths were due primarily to poor care at the private orphanages, poor care by the government, or both; however, the inability of the government to keep these infants alive, even under the glare of publicity caused by the scandal, is suggestive as to the fate of infants who may have died in obscurity when neither press nor government were watching.¹⁶⁴ Similarly, two years later, when the government again removed children from one of the (re-opened) private orphanages, the government

adoption, leaving the prosecution to attempt to mis-apply laws intended to apply to sex trafficking. This gap in the law is unfortunately widespread and stems in part from weaknesses in the law's conceptual approach to adoption. *See generally* David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281(2005).

161. This reluctance to invest medical care in infants was not universal among orphanages implicated in the scandal. For example, TLCH orphanage, which was associated with a hospital, may have invested substantial funds in the medical care of some children.

162. Indian Adoption Scandals, *supra* note 4, at 460, and sources cited in note 261.

163. *Id.* at 460, and sources cited n.260.

164. *See* Indian Adoption Scandals, *supra* note 4, at 458.

immediately hospitalized one-third of the children.¹⁶⁵ Given the evidence of high orphanage death rates in Andhra Pradesh, it cannot be assumed that the adoption system operated to save lives, even when assuming significant rates of infant and child mortality and female infanticide among poor and tribal families.¹⁶⁶

In India, as in Cambodia, most attempts at child laundering were, from a criminal perspective, successful. The Indian and foreign (i.e., U.S.) systems accepted the purchased or stolen children as legitimate orphans and processed them through the adoption system. In addition, child laundering was quite profitable for the persons at the top of the conspiracy, who gained between \$2000 and \$7000 per intercountry adoption,¹⁶⁷ in a society with a per capita income of less than \$700 where a middle-class person commonly has an income under \$10,000 annually.¹⁶⁸ The vast majority of the children obtained for adoption were too young to have reliable memories of their birth family that could verify or contradict their official paperwork. Thus, in a typical case of child laundering, there is very little likelihood of tracing the true facts, particularly once the child has been placed overseas.

In Andhra Pradesh, as in Cambodia, no effective system for regulating intercountry adoption was ever created. Instead, a cyclic series of scandals every few years, each broader and more serious than the last, finally led to a self-imposed shut-down of intercountry adoption in 2001. As a regulatory matter, the adoption system in Andhra Pradesh never developed the capacity to distinguish accurately between true orphans and children who had been purchased or stolen. Similarly, the adoption system proved unable to consistently deny notorious child-traffickers access to the system; the implicated agencies and persons suffered temporary repercussions but with perseverance were allowed back into the intercountry adoption system.¹⁶⁹ Thus, Andhra Pradesh, like Cambodia, appeared to provide the limited choice of accepting a corrupt system intertwined with child trafficking or shutting down all intercountry adoptions.

b. The Mystery of Maharashtra

The State of Maharashtra in India contains approximately 9% of India's population, and yet commonly accounts for 40% of India's intercountry adoptions. The relatively small city of Pune, within Maharashtra, represents between 2.5% and 3.75% of India's population, but accounts for

165. *See id* at 461.

166. *See* The Lambadas, *supra* note 139, at 20 (listing infant and child mortality rates).

167. *See* Indian Adoption Scandals, *supra* note 4, at 449.

168. *See* World Bank, India Country Brief, *supra* note 123.

169. *See* Indian Adoption Scandals, *supra* note 4, at 458.

approximately 25% of all intercountry adoptions.¹⁷⁰ Indeed, a single orphanage within Pune, Preet Mandir, may account for seven percent of all intercountry adoptions from India.¹⁷¹

The fundamental question regarding Maharashtra is whether it is a model for the rest of India in how to fulfill the nation's promise as a prominent sending nation or whether it merely represents the high-volume sector of a corrupted adoption system. Unlike Andhra Pradesh, there have been no dramatic arrests or shutdowns in Maharashtra. However, the Indian press has begun to focus on accusations against Preet Mandir, the Pune orphanage that accounts for a significant share of India's intercountry adoptions. These charges center on heavy-handed demands for "donations," preferential treatment based on the giving of large "donations," and substandard care of children. These charges suggest that the orphanage is run as a profit center, with high fees and "donations" diverted to a significant degree to personal profit.¹⁷² The director of Preet Mandir points to a visit by the President of India as an indication of his innocence;¹⁷³ whether or not it indicates innocence, such contacts may indeed help insulate Preet Mandir from negative repercussions.

A recent report in the Indian press quoted extensively from letters of complaint sent by "foreign adoptors" to India's Central Adoption Resource Agency (CARA). The letters concerned an agency in Maharashtra, although the article did not specify the agency name. Those complaining included persons from Singapore, Sweden, the United Kingdom, and the United States. The complaints indicated inordinate and insistent demands for fees and "donations."¹⁷⁴ One United States agency indicated that of their first group of six referrals from the agency "three babies died, one was taken back, and two were unhealthy."¹⁷⁵ Although the "director demanded huge amounts in donations. . . [t]he money . . . did not go towards the welfare of the children, who were maintained in unhygienic and filthy condition."¹⁷⁶ Another letter commented that "[a]lmost all babies were covered with scabies and the same uncleaned feeding bottle was used for all babies, who were hardly fed two bottles of watery milk the whole day."¹⁷⁷

170. *See id.* at 474.

171. *See* Dionne Bunsha, *The Adoption Nightmare*, Vol. 22, Issue 11, FRONTLINE (May 21-Jun. 03, 2005), available at <http://www.frontlineonnet.com/fl2211/index.htm> (last visited Oct. 2, 2006).

172. *See The Adoption Nightmare*, *supra* note 171.

173. *See id.*

174. *See Complaints from Foreign Adopters*, Vol. 22, Issue 11, FRONTLINE (May 21 - Jun. 03, 2005), available at <http://www.frontlineonnet.com/fl2211/index.htm> (last visited Oct. 2, 2006).

175. *Id.*

176. *Id.*

177. *Id.*

Three different parents described the respective children they adopted from this Maharashtra orphanage as follows:

The child was covered with scabies from head to foot, had fungal infections, was severely dehydrated and was suffering from septicaemia.”¹⁷⁸ “[S]he was sick with scabies from head to foot, parasites in the stomach and intestinal problems. She was also filthy with sores all over her body. She was developmentally very backward as she could not even hold her head up or roll over. . . .”¹⁷⁹

[S]he was skin and bones with scabies from head to toe and warts and black spots all over her body (Molluscum contagiosum). She was severely malnourished and could not even walk. She had severe laceration marks on her wrist suggesting that she was tied down.¹⁸⁰

Despite these shocking conditions, the orphanage in question was not satisfied with \$2,000 per adoption, and instead sought to charge \$6,000, as well as seeking in-kind gifts ranging from whiskey to a digital camera. The director threatened to “take back the baby if they did not pay more. Several rules were flouted if you paid more.”¹⁸¹ Given the very low cost of hiring nursery workers (ayahs) in India and the modest cost of basic supplies for infant care, it appears that the United States agency observation that the funds were not spent on the care of the children is accurate.

Although the persons complaining did not specifically mention baby-buying or child-stealing, CARA received two complaints that bear on the question of the source of Maharashtra’s many international adoptees. First, the complaint mentioned that children were “referred to the adopters before they were legally free for adoption.”¹⁸² This may suggest that the agency was confident that it could get any child free for adoption at will. Second, the Maharashtra agency allegedly stated in a March 2001 letter that “the Gujarat government has sanctioned 200 children and will be transferring 100 children to our new facility within 4 to 6 weeks.”¹⁸³ This indicates that this Maharashtra agency was sourcing children from another Indian state.

Press reports in India also indicate that despite the large number of children being sent in intercountry adoption from Maharashtra, Indian

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

prospective adoptive parents in that state are frustrated by a lack of orphans to adopt.¹⁸⁴ Under Indian and international law, in-country adoption should be favored over intercountry adoption.¹⁸⁵ Thus, the international adoption system within the state appears to have developed an illegal priority over in-country adoption, presumably based on the much larger fees available from foreign placement.

The complaints against adoption in Maharashtra do not necessarily condemn the entire system there¹⁸⁶ but indicate the inability of that system to guarantee children in care a decent standard of care despite ample funds. The Maharashtra adoption system also seems unable to prevent profiteering and a certain measure of corruption. What is unclear, however, is how widespread the poor care and profiteering extend. Further, it is unclear whether Maharashtra, which borders Andhra Pradesh, has become subject to the kind of illicit sourcing of children which occurred in Andhra Pradesh.

3. Child-Stealing in Tamil Nadu

Press reports from South Asia indicate that intercountry adoption in the South Indian State of Tamil Nadu have become intertwined with the placement of stolen children.¹⁸⁷ As in other adoption scandals, it is difficult to glean precise numbers of affected adoptions. Reports concerning a May 2005 arrest of five persons for kidnaping and selling “about 350 children to an adoption agency in the city”¹⁸⁸ seems to indicate large-scale child-stealing for adoption. The child laundering process is also evident from these reports because the press and police complain about the dilemma of stolen children being placed under a “perfectly legal adoption process.”¹⁸⁹ Further, it appears that some number of these children have been sent to foreign countries for intercountry adoption.¹⁹⁰

184. See Indian Adoption Scandals, *supra* note 4, at 474.

185. See *id.* at 407-17, 427-31.

186. See Families for Children, *infra* note 204, at 645.

187. See Asha Krishnakumar, *Behind the façade* & Asha Krishnakumar, *The Adoption Market*, from Vol. 22, Issue 11, FRONTLINE (May 21 - Jun. 03, 2005), available at <http://www.frontlineonnet.com/fl2211/index.htm>; Ambujam Anantharaman, *Big Racket of Small Babies*, THE RISING NEPAL, Jul. 20, 2005, available at <http://www.gorkhapatra.org.np/pageloader.php?file=2005/07/20/editorial/editorial1>; Press Release, Centre for Child Rights, Campaign Against Child Trafficking, Fact-finding Investigation into the Functioning of Licensed and Recognized/Registered Adoption Placement Agencies and Regulatory Bodies in Tamil Nadu (Aug. 19, 2005).

188. *Behind the Façade*, *supra* note 187.

189. *Id.*

190. See S. Murari, *An Adoption Racket in Chennai Backfires on Parents*, DECCAN HERALD (May 15, 2005); *Parents of Missing Kids Throng CoP Office*, NEWS TODAY, May 6, 2005, available at <http://newstodaynet.com/06may/cr4.htm>.

Methods used in Tamil Nadu appear to include stealing infants from a hospital, placing lost children for adoption, kidnapping children from streets or homes, obtaining children for boarding school arrangements and then placing them for adoption, and creating various kinds of false documents. Agencies are investigated and lose their license, only to somehow regain them. The latest scandal of 2005 has resulted in parents of missing children going to police headquarters to pour over photographs obtained from a local adoption agency, hoping to find their son or daughter. Press reports indicate that at least some of the children have been traced to Europe.¹⁹¹

Press reports suggest that the difficulties in Tamil Nadu go beyond a single corrupt agency, but rather permeate the system.¹⁹² Intercountry adoption in the state appears to have grown and become intertwined with profiteering and illicit methods. As with adoption scandals in other Indian states, the elaborate bureaucratic system for the regulation of intercountry adoption seems to have been ineffective. Each part of the regulatory system seems to blame the other when publicity brings these cases to light.¹⁹³

An investigation into adoption in Tamil Nadu, conducted under the auspices of the Campaign Against Child Trafficking (CACT-TN), found that

Trade and lucrative profit-making business in babies and children given for adoption is flourishing despite Supreme Court directions, court interventions, monitoring by regulatory bodies and legal procedures . . . [I]llegal profit is made . . . from this illegal trade especially through Inter-Country adoption . . . Adoption agencies function in a secretive and non transparent manner . . . Most . . . [of] the adoption agencies are run as family trusts. A high percentage of the decision makers of the Board are family members. Family business for family welfare and profit.¹⁹⁴

The overall picture that emerges from the CACT-TN report is of a compromised regulatory system that was ineffective in preventing large-scale profiteering and trafficking in children under the guise of adoption.

191. See Krishnakumar, *supra* note 187; Murari, *supra* note 190; Anantharaman, *supra* note 187; *Parents of Missing Kids Throng CoP Office*, *supra* note 190.

192. See Krishnakumar, *supra* note 187; Murari, *supra* note 190; Anantharaman, *supra* note 10; *Parents of Missing Kids Throng CoP Office*, *supra* note 151.

193. See Krishnakumar, *supra* note 187; Murari, *supra* note 151; Anantharaman, *supra* note 187; *Parents of Missing Kids Throng CoP Office*, *supra* note 190.

194. See Press Release, Campaign Against Child Trafficking (CACT-TN), Fact-finding Investigation into the Functioning of Licensed and Recognised/Registered Adoption Placement Agencies and Regulatory Bodies in Tamil Nadu, at 7-8 (Aug. 19, 2005).

4. German Cases

A loosely organized group of German adoptive parents and associated persons has publicized some tragic cases involving the adoption of stolen children from India. The human rights organization Terre de hommes has investigated and substantiated these cases. Some of these cases involve self-help remedial actions quite rare in intercountry adoption: the return of stolen children to their birth families.¹⁹⁵

For example, an eight year old child from the North Indian city of Jalandhar in Punjab was handed over temporarily to an orphanage due to family problems.¹⁹⁶ The orphanage, however, processed the child through the Dehli courts as an orphan and granted guardianship to a German couple.¹⁹⁷ The couple took the child to Germany and completed a German adoption.¹⁹⁸ However, after the child learned some German, she informed her adoptive parents that her mother was alive and had not given her up for adoption.¹⁹⁹ Eventually, the adoptive parents found the birth mother in India and returned the child to her.²⁰⁰ The German courts subsequently rescinded the adoption.²⁰¹

This group of German adoptive parents appears to have discovered and publicized approximately five cases; there are apparently a number of others which have not been publicized.²⁰² Several of the children have returned to India to live at some point, sometimes for education, sometimes as a part of returning them to their Indian family. The cases generally involve a religious organization obtaining children for temporary care or schooling and then processing the child through the courts as an orphan and then adoptee. The cases all involve older children who, under these circumstances, often were unable to adjust to their adoptive families and demonstrated behavioral and emotional symptoms of extreme distress. The children were often transferred to a different orphanage from the one where they had been placed for temporary care, as a part of their preparation for adoption. Most of the Indian guardianships were processed in Dehli, as these are North Indian cases. The same German agency was involved in all

195. See TERRE DES HOMMES, CRIME AND OTHER SMALL THINGS, (Osnabrück, Germany September 1999)(available from author). The German-language website www.adoptionsopfer.de provides extensive documentation of the German cases discussed herein.

196. See *id.*

197. See *id.*

198. See *id.*

199. See *id.*

200. See *id.*

201. See *id.*

202. See *id.*

of the cases.²⁰³

The short descriptions available of these cases encapsulate severe suffering by all adoption triad members: birth family members who are tricked out of their children and sometimes seek, against all odds, the return of their child; children who sometimes suffered in their Indian families, suffered in the Indian orphanages, and then were sent under false pretenses to another nation for which they were ill-prepared to cope; adoptive parents seeking to help and love an older child in need of a family who instead were given a stolen child understandably unable to adapt to their new family and culture.

Although the number of publicized cases in this group of cases may be small, there is much about them that suggests they are the visible manifestation of a much larger phenomenon. First, all of the documented cases involved older children who generally resisted their adoptive placements and were able to challenge the false premises and histories of their paperwork. The statements and adjustment difficulties of these older adoptees seem to have provided the impetus to question and investigate the circumstances of the adoptive placement. The vast majority of adoptees, however, are taken from their families at too young of an age to know the circumstances of their placement and the names of their birth family members. Stolen infants tell no tales, even if they may become suspicious later in life of the circumstances of their adoption. Given the small number of older adoptees from India going to Germany, the presence of five documented cases of this kind, along with some number of those discovered by the group but not publicized, suggests that there are a much larger group of stolen Indian infants who were adopted in Germany. Second, the investigation of these cases has revealed that Indian agencies and Indian courts in Dehli accepted paperwork that was either contradictory or uninformative and generic, making it relatively easy to launder stolen children through the courts. The German officials and courts then seem to have simply accepted the view of the Indian institutions that the children were eligible for intercountry adoption. Hence, these cases reveal a set of adoption processes quite open to the laundering of children.

5. The Indian Adoption System: Conclusions

This exploration of significant degrees of illicit and improper conduct in Indian adoptions emanating from many different parts of India, over several decades, suggest that the Indian system has been extensively used for child laundering. Indeed, the author is aware of a number of other similar cases which have not been publicized, and thus which could not be

203. *See id.*

cited herein.

Given the history of adoption in India, and the size and variation of the country, there may be a significant group of lawful and successful adoption programs operating within India.²⁰⁴ It is clear, however, that these legitimate programs operate within a broader adoption system incapable of weeding out corruption, profiteering, and child laundering.²⁰⁵ Further, it is clear that Western adoption agencies frequently are unable to distinguish between Indian orphanages that obtain children in legitimate ways, and those who illicitly source children.²⁰⁶ Prospective adoptive parents, who depend on their agencies to partner with reliable and ethical Indian facilitators, are even less able to ensure that the children they adopt are orphans rather than stolen or purchased children.

The Indian adoption system further illustrates the tendency of intercountry adoption to corrupt. It appears that a number of the Indian orphanages and organizations that became embroiled in child laundering practices were religious organizations.²⁰⁷ While these abuses certainly have not been limited to, nor dominated by, religious organizations, the capacity of a number of different religious organizations to become involved in such conduct is disturbing. To a large degree, United States agencies, which have demanded from adoptive parents foreign fees and “donations” far in excess of Indian law, are responsible for the corruption of the Indian adoption system.²⁰⁸ These excessive fees and donations have created a temptation to Indian individuals and organizations, religious and secular, to buy and steal children, forge documents, and circumvent the law’s preference for domestic adoption. Unfortunately, it may also be the case that child laundering in the context of adoption is a particular temptation for some religious organizations. Thus, a religious organization within a sending nation may see little or no harm in using trickery or financial inducement to obtain the children of destitute parents of another faith, in order to transfer the child to what they view as a superior upbringing in a superior family practicing a superior religion. If you add to this temptation the additional financial

204. Although I am not in a position to verify its claims, a published article by a number of professionals working for Holt International Children’s Services suggests that Holt’s India programs are succeeding in building some of the key capacities of an ethical program: the capacity to promote domestic adoption and place children domestically, and the capacity of “maintaining children in their birth families.” See Carole F. Stiles, Darawan Dhamaraksa, Rosario dela Rosa, Tanya Goldner & Roxana Kalyanvale, *Families for Children: International Strategies to Build In-Country Capacity in the Philippines, Thailand, Romania and India*, 80 Child Welfare 645, 651 (Sep/Oct 2001)(describing Holt India program originally centered in Pune, Maharashtra).

205. See *Indian Adoption Scandals*, *supra* note 4.

206. See, e.g., *id.* at 459, 461.

207. See *id.* at 459, 467-68.

208. See, e.g., *supra* notes 140-53 and accompanying text.

motivation, whether for personal gain, power, or even humanitarian purposes, intercountry adoption can seem like a unique opportunity to “do well by doing good,” to use the clichéd term. Thus, acts which from a legal perspective constitute illicit child-buying or child-stealing can be self-justified as humanitarian acts. Given the fact that adoption scandals in India usually do not produce successful criminal prosecutions,²⁰⁹ and that the scandals themselves are often perceived as political attacks rather than neutral law-enforcement,²¹⁰ it is easy to see how seductive is the religious temptation to child launder. This is not to say that all or even most religious organizations succumb to this temptation. Most religiously orientated organizations working with children and families either do not succumb to these temptations, or else avoid the temptations altogether by avoiding intercountry adoption.²¹¹ Unfortunately, however, a disturbing number apparently do.

This religious temptation, as I have defined it, is really just a subset of a much larger set of temptations which permeate the culture of adoption. It is very easy for adoptive parents, prospective adoptive parents, and adoption professionals and facilitators to understand intercountry adoption as a saving act. In intercountry adoption, it is believed, children are saved from a host of tragedies, including infanticide, poverty, malnutrition, illiteracy, child labor, prostitution, and severe gender discrimination. However, most of this has little or nothing to do with the lack of parents: the perceived harms are understood as the unfortunate fate of the poor of India and other sending nations. Once adoption is justified in such redemptive terms, it would seem to matter little how one obtains children from adoption, for the laundered child and the true orphan were equally saved from a horrible fate.

The key element of the adoption myth is its focus on saving children apart from their parents or community. In mythological or religious terms, we might say that adoption saves the child while damning the parents and community. A method of secular salvation or social work that focuses on saving children apart from their birth families and communities is particularly subject to the temptation to illicitly separate a child from their parents. While the adoption community remains officially opposed to illicit child laundering, it is even more committed to keeping open the saving work of adoption. While United States agencies prefer to work with ethical facilitators and orphanages, in the end many are willing to work with anyone who can obtain children and get them processed through the system. Hence,

209. *See supra* note 139 and accompanying text.

210. *See* Indian Adoption Scandals, *supra* note 4, at 452.

211. It appears that only a very small percentage of the child welfare institutions and organizations in India who work with children and vulnerable families are accredited by CARA for intercountry adoption.

adoption corrupts alike the religious and irreligious, as both too often are willing to tolerate the wrongs of child laundering, profiteering, and corruption for the greater good of saving children from their birth families, communities, and nation.

E. Guatemala

The rise of Guatemala as a sending nation contrasts starkly with the decision of a number of other Latin American countries to sharply limit intercountry adoption due largely to negative experiences with corruption, profiteering, and child laundering. Guatemala at present has one of the highest per capita intercountry adoption rates among sending nations: in fiscal year 2005, Guatemala, with a population of less than fourteen million people, placed 3,783 children for adoption in the United States, ranking third behind China (7,906) and Russia (4,639).²¹² The growth of Guatemala as a sending nation can be seen in the following chart which represents placements to the United States:²¹³

Fiscal Year	Guatemalan Adoptions	Rank among Sending Nations
2005	3,783	3 rd
2004	3,264	3 rd
2003	2,328	3 rd
2002	2,219	3 rd
2001	1,609	4 th
2000	1,518	4 th
1999	1,002	4 th
1998	911	4 th
1997	788	4 th
1996	427	5 th

212. See Peter Selman, *The Quiet Migration in the New Millennium: Trends In Intercountry Adoption 1998-2003* at 15 (unpublished paper presented at the 8th Global Conference, Manila, August 10-12, 2005)(on file with author); see also *Indian Adoption Scandals*, *supra* note 4 at 477 n 333; STATE DEP'T Adoption Statistics, *supra* note 37.

213. STATE DEP'T Adoption Statistics, *supra* note 37.

1995	449	4 th
1994	436	5 th
1993	512	3 rd
1992	418	2 nd
1991	329	7 th
1990	257	8 th

The United States receives the majority of Guatemalan children sent for intercountry adoption.²¹⁴ Thus, the growth of Guatemala as a sending nation is intimately connected to the role of the United States as a recipient nation.

Guatemalans suffered through a thirty-six year civil war which ended in 1996.²¹⁵ A large proportion of Guatemalans live in poverty, including two-thirds of Guatemalan children.²¹⁶ Approximately half of the people belong to various indigenous ethnic groups, primarily of Mayan descent.²¹⁷ The nation suffers from high rates of illiteracy, malnutrition, and infant mortality.²¹⁸ Guatemala suffered from economic stagnation during the period from 1980 to 2000, producing negative economic growth.²¹⁹

Paradoxically, although the widespread poverty of the people is often viewed as creating the need for intercountry adoption, the costs of intercountry adoption from Guatemala are unusually high. International fees for Guatemalan adoptions commonly are in the range of \$18,000-\$19,000, which are apparently paid to Guatemalan attorneys and are separate from the fees paid to United States placement agencies. This pushes the total costs of a Guatemalan adoption, inclusive of travel expenses and necessary governmental fees, close to \$30,000.²²⁰ The capacity of private attorneys to

214. See Latin American Institute for Education and Communication (ILPEC) & UNICEF, *Adoption and the Rights of the Child in Guatemala* 18 (2000), available at <http://www.iss-iss.org> (last visited Oct. 2, 2006) (the web site of the International Reference Centre for the Rights of Children Deprived of Their Family (IRC/ISS), a program "created by the General Secretariat of the International Social Service)[hereinafter *Rights of the Child in Guatemala*]; *Indian Adoption Scandals*, *supra* note 4, at 477 n 333.

215. See BBC News, Country profile: Guatemala, available at http://news.bbc.co.uk/1/hi/world/americas/country_profiles/1215758.stm (last visited Oct. 2, 2006).

216. See *Rights of the Child in Guatemala*, *supra* note 214.

217. See BBC News, Country profile: Guatemala, *supra* note 215.

218. *Id.*

219. See BBC News, Country profile: Guatemala, *supra* note 176; Sachs, *The End of Poverty*, *supra* note 20 at 67-72.

220. See, e.g., *Rights of the Child in Guatemala*, *supra* note 214, at 29-33, 40-42, 48; Deborah L. Spar, *The Baby Business* 184 (2006). As will be noted below, these high costs are for United States citizens adopting from Guatemala; those from other sending nations

charge such large fees stems from their special role in the Guatemalan system. Foreign adoptions in Guatemala are generally conducted through the “notarial system.”²²¹ Adoptive parents provide the attorney with a power of attorney, and the attorney generally represents adoptive parents, birth parents, and the child.²²² The primary review of the case is conducted by the Guatemalan Solicitor General’s office (PGN). This notarial system operates to facilitate the quick adoption of young infants.²²³

Guatemalan adoptions have been under a cloud due to concerns with buying and stealing children for many years.²²⁴ Due to these concerns, Canada has suspended adoptions from Guatemala.²²⁵ A controversial United Nations report of the Special Rapporteur on the sale of children, child prostitution and child pornography concluded in January 2000 that:

13. . . legal adoption appears to be the exception rather than the rule. Since huge profits can be made, the child has become an object of commerce rather than the focus of the law. It would seem that in the majority of cases, international adoption involves a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children, and the housing of babies awaiting private adoptions in homes and nurseries set up for that purpose.

29. . . .It is . . . reported that the lawyers handling adoptions, in collusion with others, also operate houses where children who are stolen or purchased are cared for while awaiting finalization of the intercountry adoption.

31. According to the information received networks of (usually female) recruiters, hired by lawyers, pay rural midwives

apparently have paid much lower costs.

221. See Rights of the Child in Guatemala, *supra* note 214, at 5.

222. *Id.* at 6.

223. For descriptions of the notarial system, see International Adoption, Guatemala, State Department, available at http://travel.state.gov/family/adoption/country/country_389.html (last visited March 31, 2006) [hereinafter State Department Guatemala Summary]; Rights of the Child in Guatemala, *supra* note 214.

224. See, e.g., Edward Hegstrom, E. Kaye Fulton, et al., Adopting from Abroad, available at <http://www.thecanadianencyclopedia.com/index.cfm?PgNm=TCE&Params=M1ARTM0010465> (last visited Oct. 2, 2006); Edward Hegstrom, *Black market in adoptions described in Guatemala*, GLOBE (September 14, 1997); McGirk & Olkon, *Baby-selling is a major business in Guatemala*, Miami Herald, June 5, 2000.

225. See Country Survey Reveals Status of International Adoption, available at <http://www.adoption.ca/news/050730cystatus.htm> (last visited Oct 2, 2006); Martin Jacot, Adoption For Love or Money, available at http://www.unesco.org/courier/1999_02/uk/ethique/txt1.htm (last visited March 31, 2006); Letta Tayler, *Adoptions Under Fire in Guatemala*, NEWSDAY, Oct. 26, 2003.

approximately US \$50 to register the birth of a non-existent child, using a false name for the birth mother. Upon payment of approximately another US \$50, another woman “becomes” the mother and is given a baby—usually stolen—and told to take the baby to Guatemala City to give it up for adoption. The woman signs the notary’s documents giving up “her” child and the baby is placed in a foster environment, preparatory to adoption proceedings.

33. There are notaries and lawyers who buy babies while they are still in the mother’s womb. The purchase is arranged by the lawyers and notaries either personally or through agents and middlemen. Even the birth takes place under the supervision and care of the notary.

35. Another means of procuring babies for international adoption is allegedly by tricking or drugging illiterate birth mothers into putting their thumbprint on blank pieces of legal paper which are subsequently filled in to read as a consent to adoption of the baby. The mothers are then threatened by the lawyers if they attempt to get their babies back. Ignorant of the law, these fearful mothers often painfully give up the fight and assume that nothing can be done to help them because they are poor.

36. In general, recruiters prefer to deal with mothers whose babies have not had their births registered, or have not yet been born. The recruiters use middlemen to seek out pregnant women who, because of poverty or prostitution, might be willing to give up their children or to sell them. The search is conducted in such places as markets, doctors’ offices, and even in the hospitals. . . .

38. When a biological mother cannot be persuaded to give up her child, recruiters often resort to threats or even baby-stealing. . . .the Special Rapporteur was told of the case of a prostitute who was pregnant and was threatened with death by the owner of the bar where she worked if she did not give up her baby for adoption. The bar owner worked in cooperation with a midwife, and the pregnant woman was taken to the house of the midwife and kept there under lock and key with other pregnant prostitutes until she gave birth. She did not see her baby again. . . .

40. One worrying development. . .is the contracting of women to bear a child and . . .then register it, take care of it for three months and then give it up for adoption. . . .The Special Rapporteur was told about one woman who had given birth to six children, all of whom she gave up for adoption. . . .

90. The Special Rapporteur is convinced that trafficking of babies and young children for intercountry adoption exists in

Guatemala on a large scale.²²⁶

Despite this U.N. report, similar press accounts,²²⁷ and the actions of other Western nations in closing off adoptions from Guatemala,²²⁸ the United States government has not closed adoptions from Guatemala. Instead, the United States government instituted DNA testing, a procedure which had been used by Canada before that government closed itself to Guatemalan adoptions.²²⁹ This procedure requires mothers relinquishing children to submit to DNA testing of themselves and the child. DNA testing understandably cannot apply to abandoned children, where the birth family is unavailable.²³⁰ The requirement of DNA testing for relinquishment may have reduced the incidence of placing stolen children, but does little to combat the possibility of mothers being paid to relinquish their child. Moreover, it may be possible to circumvent the procedure by switching children after completion of the DNA test.

The controversy over Guatemalan adoptions has engaged that government at the highest level. Guatemala joined the Hague Convention on Intercountry Adoption by ascension and tried to implement a new adoption system with the Convention's requisite central authority. The Guatemalan Constitutional Court subsequently held that treaty ascension violated the Guatemalan Constitution, which allegedly forbade Guatemala to ratify Conventions in this fashion.²³¹ Guatemala then returned to its notarial system and apparently does not consider itself bound to the Convention. Some apparently believe that under international law Guatemala remains a Party to the Convention. Thus, Guatemala can be viewed as a Hague country in breach or as a non-Hague country. Some within the United States and Guatemala applaud Guatemala's return to the notarial system and complain that adherence to the Hague Convention had brought adoptions to a standstill.²³² Remaining unsettled is the question of whether the Guatemalan

226. *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography* 5-18, U.N. Comm'n on Human Rights, 56th Sess., Provisional Agenda Item 13, U.N. Doc. E/CN.4/2000/73/Add.2 (2000).

227. See sources cited *supra* note 224.

228. See sources cited *supra* note 225.

229. See State Department Guatemala Summary, *supra* note 223; Hegstrom, Fulton, et. al, Adopting from Abroad, *supra* note 224.

230. See sources cited *supra* note 229.

231. See *infra* sources cited note 232.

232. See Hague Conference on Private Int'l Law, Status Table 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption available at <http://hcch.e-vision.nl/index.en.php?act=status.comment&csid=767&disp=resdn> (last visited Oct. 2, 2006); Taylor, *Adoptions Under Fire in Guatemala*, *supra* note 225; State Department Guatemala Summary, *supra* note 223; Important Notice on Guatemalan Adoptions, DEP'T ST. July 14, 2003; Important Notice on Guatemalan Adoptions, DEP'T ST. Oct. 6, 2003; Hannah Wallace,

attorneys who dominate the notarial system should be viewed positively as facilitating quick adoptions of young infants, or viewed negatively as profiteering child traffickers.

Guatemala presents the prospect of a poor nation becoming a baby-farm for the United States. Although the term may be extreme, it is hard to know how else to view reports of babies being booked from the womb, or even worse of women becoming pregnant and bearing babies for the purpose of placing them for intercountry adoption. While it would be possible to view adoption in Guatemala as a humanitarian act, it seems hard to justify a system which pays intermediaries in a developing nation \$15,000 to \$20,000 per adoption to facilitate adoption from poor and vulnerable mothers.²³³ These attorneys appear to possess the political and financial power to create a legal process bent to their wishes, which grants them exorbitant pay for the services they render. Even where the children are properly obtained without being purchased or stolen, the size of these fees makes adoptions from Guatemala ethically questionable. Guatemala has created one of the most commercialized and profiteering system of intercountry adoption yet seen. It is the United States, however, which has enabled (and continues to enable) this commercialized system to flourish. It is interesting, for example, that United States citizens pay far more for Guatemalan adoptions than have citizens of other nations.²³⁴ It is, in other words, the willingness of the United States as a recipient nation to pay these large sums that fuels the commercialization of adoption.

The United States State Department web page on Guatemalan adoptions publicly admits that

In some cases . . . children may have been obtained by illegal means, perhaps even stolen . . . The DHS/ICE office at the U.S. Embassy requires DNA testing in all cases where the child is released by an identifiable birth mother . . . because the use of a false birth mother to release 'her child' is the usual method chosen by unscrupulous operators to create a paper trail for an illegally obtained child.²³⁵

The State Department further notes the difficulties created by "the high incidence of corruption and civil document fraud in Guatemala."²³⁶ The State Department emphasizes their responsibility to prevent the adoption of "stolen

Update: Guatemala (2003), available at <http://www.rainbowkids.com/2003/10/news/guatopens/chtml> (last visited March 31, 2006).

233. See *supra* note 220 and accompanying text.

234. See, e.g., Rights of the Child in Guatemala, *supra* note 214, at 40-42.

235. State Department Guatemala Summary, *supra* note 223.

236. *Id.*

children,”²³⁷ but does not explain how they intend to prevent the adoption of purchased children. Nor does the State Department explore the ethics of paying \$30,000 to receive a child who is relinquished because the parent is “destitute by Guatemalan standards and cannot provide the child with the nourishment and shelter necessary for subsistence.”²³⁸ Indeed, the State Department’s approach seems largely to be one of passing on to adoptive parents the responsibility to evaluate the reliability and ethics of Guatemalan adoptions, as they in bold print warn:

Neither the U.S. Embassy nor the U.S. Department of State can assume any responsibility for the professional ability or personal integrity of Guatemalan attorneys.²³⁹

The State Department instead recommends that United States adoptive parents rely on “referrals from families who have had satisfactory experience working with a specific attorney.”²⁴⁰ The difficulty of such reliance, of course, is that adoptive parents usually measure a “satisfactory” adoption experience by the speed of the adoption and the condition of the child. Parents usually lack any way of determining whether an infant they adopted was purchased or stolen, and thus may give high praise to an attorney who specializes in obtaining children by illicit means. In a similar manner, the State Department washes its hands of any responsibility for the actions of private United States agencies hired by adoptive parents.²⁴¹

It seems likely that the United States government learned from Cambodia that shutdowns are politically unpopular and has determined not to repeat that experience. The result is that the United States government has kept open an adoption process that it knows or reasonably suspects to be highly corrupt. Given the evidence from Cambodia and India that the normal United States visa orphan process generally cannot discern stolen or purchased children, it may be considered helpful that the United States has added the requirement of DNA testing. However, this one additional process cannot alone cleanse the system of child laundering. Mothers paid to give up their children, or even to bear children in order to give them up, can also be paid to go through the DNA testing process, as well as being paid to deny being paid.²⁴² The DNA testing process is thus completely inadequate in

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* (“The Department of State does not assume any responsibility for the quality of services provided by these private adoption agencies or their employees.”).

242. See Rights of the Child in Guatemala, *supra* note 214, at 21:

[I]t is necessary to point out the difficulty in obtaining reliable information about

relation to child-buying, even if it may be somewhat helpful in screening cases of stolen children. The truth is that the United States government has abrogated its responsibility to prevent child laundering of purchased children from Guatemala. In doing so, the United States government has lent its visa orphan process for the use of child traffickers as a part of an efficient system of child laundering.

The future of Guatemala as a sending country is currently in question, due to the progress of the United States toward ratifying the Hague Convention on Intercountry Adoption. The State Department appears to be taking the position that Guatemala is a Hague country in breach of its treaty obligations, and hence that it would be inappropriate to permit adoptions from Guatemala once the United States formally ratifies the Convention, unless Guatemala implements the Convention.²⁴³ It will be instructive to see how this issue is resolved.

It is impossible to know for sure whether the U.N. Special Rapporteur is correct in her conclusion that most international adoptions in Guatemala involve illegalities.²⁴⁴ UNICEF's estimate that "1,000 to 1,500 Guatemalan babies and children are trafficked each year for adoption by couples in North America and Europe"²⁴⁵ seems plausible, and may undercount the extent of the problem. Whatever the exact numbers involved, there is substantial evidence that the Guatemalan adoption process has been used to create systematic criminal conspiracies for the laundering of significant numbers of children: conspiracies which ironically are largely run by attorneys. The profiteering in the Guatemalan process is undeniable, as the high prices charged by Guatemalan attorneys are no secret.²⁴⁶ It is a measure of the tolerance of the United States adoption community for profiteering and corruption that Guatemala in recent years has maintained a stable position as the third most significant sending nation for United States adoptions.

the extent to which the biological mother has received a significant economic benefit for agreeing to surrender her child, precisely since they have been well trained by the lawyers to always provide the same answer: '*No money was received*' or '*The attorney only provided a little practical assistance.*'

243. See STATE DEPARTMENT, Frequently Asked Questions: Inter-country Adoption and the Hague Convention: Guatemala, available at http://travel.state.gov/family/adoption/notices/notices_2859.html (last visited Oct. 2, 2006).

244. STATE DEPARTMENT Guatemala Summary, *supra* note 223.

245. UNICEF, Trafficking and Sexual Exploitation, available at http://www.unicef.org/protection/index_exploitation.html (last visited Oct. 2, 2006).

246. See Rights of the Child in Guatemala, *supra* note 214 at 48 ("INTERPOL has seriously criticized the sector of Guatemalan lawyers that profits from adoptions.").

III. REFORMING INTERCOUNTRY ADOPTION: OVERCOMING THE WEAKNESSES IN THE CURRENT INTERCOUNTRY ADOPTION SYSTEM

Part One of this article documented a substantial degree of child laundering in the intercountry adoption system. Further, that section demonstrates that the current intercountry adoption system incentivizes and legitimates baby-buying and child-stealing, by providing financial incentives and legal processes which make it profitable to launder purchased and stolen children through the adoption system. While it remains technically illegal to purchase and steal children, once such children are laundered through the adoption system and re-labeled as “orphans” and “adoptees,” such illicit acts become in significant part legitimated by the legal system.

The purpose of this section is to propose reforms that could substantially reduce the incidence of child laundering in the intercountry adoption system. Each subsection identifies a weakness in the current intercountry system that contributes to child laundering, and then proposes corresponding reforms that could address that weakness. The weaknesses and reforms discussed pertain primarily to the United States as a recipient nation, in relationship to the kinds of developing nations (such as Cambodia, India, and Guatemala) where child laundering is a significant concern. The reforms proposed could be adapted to other recipient nations.

The reforms proposed below are directed principally at actions which could be taken by the United States government. It is therefore important to indicate the interest of the federal government in reforming intercountry adoption. The United States is the most significant recipient nation in the intercountry adoption system.²⁴⁷ Currently, over 20,000 children annually are entering the United States for the purposes of adoption.²⁴⁸ The United States has a federal interest in ensuring that immigrants who enter the United States through the visa process do so within the limitations and rules established by Congress. Thus, federal law criminalizing acts such as visa fraud, and creating processes for determining the validity of orphan visas, necessarily represent a federal interest in the integrity of the intercountry adoption system. Through its ratification of the Optional Protocol on the Sale of Children, the United States is under a Treaty obligation to combat child trafficking, explicitly including child trafficking conducted within the intercountry adoption system.²⁴⁹ Even though the United States has not yet

247. See UNICEF, *Innocenti Digest*, *supra* note 3 at 3 (reporting in 1998 that the United States is foremost receiving nation, receiving “roughly half of all adoptions”); Ethan B. Kapstein, *supra* note 8 (noting that by 2001, the United States accounted for 19,237 of over 34,000 cross-border adoptions, “over half of the world’s total.”)

248. See STATE DEP’T Adoption Statistics, *supra* note 37.

249. See *Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography*, G.A. Res. 263, U.N. GAOR, 54th

completed the steps necessary to ratify the Hague Convention on Intercountry Adoption, its signature of that document and stated intent to ratify indicates that it supports the Convention's policy aims, in terms of combating child trafficking within the intercountry adoption system.²⁵⁰ Thus, the United States government is under international obligations to prevent the intercountry adoption system from encouraging and facilitating acts of baby-buying and child-stealing. The United States government cannot delegate this responsibility to either state or foreign governments, particularly once it becomes clear that such abuses are occurring. Certainly the United States government cannot delegate to any other entity its responsibility to ensure that its own legal processes are not abused to legitimate acts of baby-buying or child-stealing. The United States government is ultimately responsible to ensure that the orphan visa process is not a child laundering process.

Politically speaking, it is easy to see why intercountry adoption reform would be a low priority for the federal government. There is little political constituency for reform of the intercountry adoption system. Victimized birth families residing in sending nations are not a constituency for United States politicians and are nearly invisible, even within their own nations. Adoptive parents complain when adoptions are slowed or delayed, or moratoriums imposed, but often don't seem interested in reform of the system. Adult adoptees frequently have embraced their adoptive identity or else focus on problems arising from the cross-cultural, cross-racial nature of many intercountry adoptions; most were adopted as infants and lack any information that would cause them to focus on child laundering issues. Intercountry adoption itself is generally a low priority for immigration authorities, as compared to issues related to security and terrorism or large-scale illegal immigration.²⁵¹ Even federal authorities focused on child trafficking and children's rights are directed by federal statute to focus on trafficking for purposes of sex or labor,²⁵² and thus may choose to ignore the

Sess., Supp. No. 49, U.N. Doc. A/Res/54/263 (2000) (entered into force Jan. 18, 2002); Office of the High Commissioner for Human Rights, Status of Ratifications of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, available at <http://www.unhchr.ch/html/menu2/6/crc/treaties/status-opsc.htm> (last visited Oct. 2, 2006); Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AM. J. INT'L L. 789 (2000).

250. See Hague Convention Status Table 33, *supra* note 94; Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat 825 (codified as amended in scattered sections of 8 and 42 U.S.C.).

251. Cf. Ethan B. Kapstein, *supra* note 8 ("our failure to build an effective international adoption regime is unlikely to dominate the foreign policy agenda . . . it threatens neither national security nor economic welfare.")

252. See Trafficking Victim's Protection Act of 2000, 22 U.S.C. § 7102(8) & (9) (2005); see also 18 U.S.C. § 1589 (2005).

issue of child laundering in the intercountry adoption system.

My argument for reform, in terms of federal authorities, is that reform of the system in the longer term will avoid time-consuming and embarrassing situations, as occurred in Cambodia. Rather than operating a visa orphan system that encourages child laundering and then hiding the federal head in the sand, it would be more rational to reform the system in such a way as to avoid future problems. Without reform, the federal authorities will face recurrent child laundering scandals.

My argument for reform, in terms of the adoption community, is that cleansing the intercountry adoption system of child laundering is ultimately pro-adoption. Adoption reform can rescue the adoption system from the draconian choice between moratoriums and child laundering. An adoption system chronically ridden with such abuses necessarily faces a risk of extinction. The tendency of the adoption community to undermine reform, and excuse and minimize child laundering scandals, constitutes one of the greatest long-term threats to intercountry adoption.

Currently, the primary vehicle for federal reform of the intercountry adoption system is contained in the slow-moving effort to ratify the Hague Convention on Intercountry Adoption.²⁵³ This effort has produced the Intercountry Adoption Act of 2000,²⁵⁴ proposed implementing regulations,²⁵⁵ and final implementing regulations,²⁵⁶ which upon ratification would create a federally-regulated regimen for "Convention adoptions:" adoptions where both the recipient nation and the sending nation, or country of origin, had ratified the Hague Convention. The current Hague implementation process for the United States therefore would only apply to adoptions where the sending nation is also a party to the Convention (Hague nation).²⁵⁷

Presently, some of the most significant sending countries have not ratified the Convention. For example, Russia has signed the Convention but has not ratified it, while South Korea has neither signed nor ratified the Convention. China did ratify the Convention effective January 2006, and India ratified the Convention effective October 2003.²⁵⁸ Guatemala, as noted above, joined the Convention, but the Constitutional Court of Guatemala

253. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

254. Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat 825, 42 U.S.C. 14901-14954.

255. Proposed Implementing Regulations, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003)(to be codified at 22 C.F.R. pt. 96)[hereinafter Proposed Hague Regulations].

256. Final Rule, Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons, 22 CFR 96, 97, 98, (Feb. 15th, 2006), published in Fed.Reg. 8064-8164.

257. Intercountry Adoption Act of 2000, *supra* note 254; Proposed Hague Regulations, *supra* note 255; Final Rule, *supra* note 256, at 8064 (summary).

258. See Hague Convention Status Table 33, *supra* note 232.

ruled the accession to be unconstitutional.²⁵⁹ Guatemala then reverted to its pre-ratification system of intercountry adoption and apparently does not consider itself bound by the Convention, though they arguably remain bound as a matter of international law, creating significant ambiguities for its relationship to the United States.²⁶⁰

There seems little point in constructing a new federal apparatus for intercountry adoption which fails to cover a significant percentage of such adoptions. Therefore, Congress should extend most of the new federal role in intercountry adoption to all such adoptions, not merely those coming from sending nations that are parties to the Convention. Congress certainly possesses the authority to regulate and accredit all United States agencies involved in the immigration of children to the United States, given the Constitutional mandate for federal authority over immigration.²⁶¹ The federal interest in combating child laundering is in no way limited to children coming from Hague countries. While the procedural rules which assume that the sending nation will possess a Central Authority or other Hague-mandated institutions or procedures could be waived for non-Hague sending countries, most of the Hague regulations are equally applicable and relevant to both Convention and non-Convention adoptions.

The following proposals therefore build on the proposed Hague regulations, based on the assumption that most of the Hague regulations should be applicable to all intercountry adoptions. In addition, the following proposals expand upon the proposed Hague regulations, seeking to enhance their efficacy and remove some significant loopholes. At the time this article was written only the proposed Hague regulations were available, as the Final Rule had not yet been issued. However, after this article had been substantially completed and was in the process of editorial revision, the State Department issued the Final Rule. Although full analysis of the final Hague regulations will have to await a subsequent article, this article does briefly address the approach of the final Hague regulations to several of the specific issues discussed below. Unfortunately, it appears that the weaknesses in the proposed Hague regulations for the most part remain in the Final Rule,²⁶² and therefore the following analysis remains highly relevant.

259. See Taylor, *Adoptions Under Fire in Guatemala*, *supra* note 232; *supra* notes 232 & 243 and accompanying text.

260. See Hague Convention Status Table 33, *supra* note 232; *see also supra* notes 232-246 and accompanying text on Guatemala.

261. See U.S. CONST., art. I, § 8, cl. 4.

262. For a helpful analysis of the final Hague regulations, *see* Ethica, *Comments on the Final Regulations Implementing the Hague Adoption Convention* (March 2006), available at <http://www.ethicanet.org/HagueRegComments.pdf> [hereinafter cited as Ethica Hague analysis]. The author has been affiliated in various capacities with Ethica, which is an organization concerned with promoting ethical adoption practices.

*A. Money as the Root of All Evil**1. Weaknesses in the Intercountry Adoption System*

Money is the primary motivation in most cases of child laundering in the intercountry adoption system. The transfer of Western wealth into sending nations is the primary vulnerability of the intercountry adoption system. Western funds provide an incentive to engage in child laundering which attracts unscrupulous persons into the system while tempting even charitable child welfare institutions into unscrupulous conduct.²⁶³

The current system lacks transparency and accountability as to the how these funds are spent. This lack of transparency and accountability begins with agencies in recipient nations, such as the United States, which advertise adoption fees without making it clear exactly where or how the money is to be spent. Vague categories such as “foreign fees” or “India fee” obscure rather than clarify. Required “orphanage donations” increase the amount of money spent in the sending nation without fulfilling their implied promise that the funds will be spent on the care of children. This lack of transparency and accountability then travels to sending nations, driven by the availability of Western wealth. Individuals and organizations within sending nations who can provide young, paper-adoptable children and facilitate quick processing through their national systems sell these “services” to the highest bidder. So-called “facilitators” may operate on a pure for-profit basis, paying out necessary sums for everything from child-care to bribery to finders’ fees for those who locate children, while keeping everything left over. Sending nation persons and organizations who receive Western adoption fees and donations often are not required to account in any effective way for the funds they receive.²⁶⁴

This lack of transparency and accountability is illustrated in the child laundering problems experienced in Cambodia, India, and Guatemala. In Cambodia, Lauryn Galindo collected a \$3,500 per adoption cash orphanage donation for some 700-800 adoptions over four years, for a total over \$2 million, while apparently spending little if any of the funds on orphanages.²⁶⁵ The intercountry adoption system itself did nothing to discover or prevent this massive misallocation of funds. It took the rare event of a criminal ICE investigation to discover and document the fraud.²⁶⁶ In India, Western agencies provided corrupt Indian agencies with profits of \$2,000 to \$7,000

263. See *supra* Part II; *Indian Adoption Scandals*, *supra* note 4.

264. See *supra* Part II; *Indian Adoption Scandals*, *supra* note 4; Jeff D. Opdyke, *Adoption’s New Geography*, WALL ST. J., Oct. 14, 2003, at D1.

265. Background, *supra* note 77.

266. See *supra* notes 77-102 and accompanying text.

per adoption, providing the incentive for child laundering enterprises.²⁶⁷ Official Indian rules requiring donations to be voluntary and only paid after arrival of the child in the recipient nation, as well as Indian rules sharply limiting permissible adoption fees, appear to be routinely violated by even the better United States agencies. Even after recurrent scandals in India, recent published reports indicate that the most significant sending orphanage in the nation is engaged in demanding exorbitant donations and fees while failing to provide proper nutrition and care for children.²⁶⁸ In Guatemala, attorneys who charge \$15,000 to \$20,000 per adoption are not required to account for their expenses or profits; these large fees dwarf those provided in other developing nations and constitute a form of profiteering.²⁶⁹

Abusive profiteering and commodification of children would exist within the intercountry adoption system even if children were obtained properly from their birth parents, given the lax regulation of money within the intercountry adoption system. Once profiteering and commodification of children become normative and permissible in otherwise legitimate adoptions, the next step toward obtaining children illicitly is almost inevitable. Once the profit motive is unleashed in the intercountry adoption system, it becomes very difficult to safeguard children and families from illicit child laundering. Therefore, child laundering can only be eliminated from the intercountry adoption system through limitations, accountability, and transparency of monetary transactions.

2. *Reforms and Money*

The proposed Hague regulations address adoption fees and make a reasonable start toward addressing current abusive practices.²⁷⁰ The proposed regulations require advance disclosure of estimated fees, including written itemization of costs in terms of categories provided in the regulations. Agencies must provide “written receipts to the prospective adoptive parents for fees and expenses paid in the Convention country. . . .”²⁷¹ The regulations prohibit agencies from compensating individuals with “incentive fees for each child placed for adoption or . . . similar contingent fee basis.”²⁷²

The final Hague regulations have been criticized for failing to require sufficient disclosure and transparency for the use of foreign fees, for continuing to allow unreasonably high compensation to employees or agents in sending countries, and for providing only illusory protection against

267. *See Indian Adoption Scandals*, *supra* note 4; *supra* Part II(D)(2).

268. *See id.*

269. *See supra* Part II(D)(3).

270. *See Proposed Hague Regulations*, *supra* note 255, section 96.40, at 54103.

271. *See id.*, section 96.40(f)(3), at 54103-54104.

272. *See id.*, section 96.34(a), at 54100.

contingent fee arrangements..²⁷³ Thus, although the proposed regulations at least initiated some effort at controlling the role of money in the intercountry adoption system, the Final Rule failed to positively build upon those beginnings. Thus, it appears that the current version of the Final Rule fails to provide adequate reforms to control the corruptive role of money in the intercountry adoption system.

The Hague regulations therefore will need to be strengthened in order to adequately control the role of money in intercountry adoption. First, Hague regulations regarding fees²⁷⁴ and compensation²⁷⁵ generally should be applied to all intercountry adoptions, not simply those between Hague nations. In addition, the regulations should be expanded in the following ways, in order to more fully address the corrupting role of money in the current intercountry adoption system. The following proposals would empower adoptive parents, the adoption community, and human rights activists to ensure that adoption fees are reasonable, do not represent illicit profiteering, and minimize incentives for child laundering.

a. Required Fee Disclosure in Standardized Format

United States agencies and facilitators providing placement services should be required to disclose the fees and costs of intercountry adoption in a standardized format to prospective adoptive parents. Since the kinds of donations and fees required vary from sending nation to sending nation, based on the laws, regulations, and customs of those nations, the required format would necessarily vary depending on the sending nation. However, the broad categories should be similar between nations, and there should be a standard format for each significant sending nation. The required disclosure should include all expenses, costs, and required donations, including those made to foreign partners and facilitators in sending nations.

The federal rules governing disclosure of fees should require the fees and costs to be broken down into more substantive and detailed categories than most agencies currently provide. It should no longer be sufficient to charge an all-encompassing foreign program fee. The standard disclosure format should distinguish between expenses necessary to the adoption process, and fees paid for services. Expenses involved in the adoption process should be clearly itemized. The persons and organizations receiving payment for services should be defined, as well as the nature of the services, and the amounts to be paid.²⁷⁶

273. See Ethica Hague Comments, *supra* note 262 ; Final Rule, *supra* note 256 , at sections 96.34 & 96.40.

274. See Proposed Hague Regulations, *supra* note 255, section 96.40, at 54103-54104.

275. See *id.*, section 96.34, at 54100.

276. The categories contained in section 96.40(b) represented a good first effort at

b. Fee and Mandatory Donation Limitations

The United States government should set limits as to permissible adoption fees and mandatory donations. These limits would vary among sending nations. United States limitations could be stricter than that of the sending nation, but should not authorize fees or mandatory donations higher than that permissible under the law of the sending nation.

A primary purpose of setting limits on fees could be to ensure that any persons receiving payments are limited to reasonable payment for services. These limits would be designed to limit illicit profiteering on adoption. The principle that payments made in association with adoption should be limited to reasonable payment for services, and should not involve profiteering, is generally accepted in principle as necessary to prevent adoption from descending into the illicit commodification of children. Illicit profiteering can be defined as payments to persons which are beyond a reasonable charge for services rendered. The standard of reasonableness should be set according to the locale in which it is rendered. Thus, if an individual is engaged in social service tasks in a sending nation, they should only receive amounts consistent with what a social worker within that society would receive outside of the adoption context. The willingness of Western agencies and adoptive parents to pay high rates for adoption work should not be regarded as reasonable market behavior, but rather as a temptation to illicit profiteering. Indeed, these large payments are largely a product of the way the adoption system obscures the real uses of adoption fees behind screens of humanitarian work. Humanitarian work in developing countries should not be performed at premium or profiteering rates, and there is no reason adoption should be an exception.

The determination of the Final Rule that fees, wages, and salaries are reasonable so long as they are within the “norms for compensation within the intercountry adoption community in that country”²⁷⁷ simply ratifies illicit profiteering within the intercountry adoption system, contrary to the intent of the Hague Convention. Thus, under the Final Rule, the unreasonably high fees paid to Guatemalan attorneys become proper so long as they are customary in Guatemalan intercountry adoptions, allowing systemic and wholesale violation of the Convention norm against profiteering in intercountry adoption. It is very unfortunate that the Final Rule does not require intercountry adoption fees to be normed against the reasonable cost of other kinds of social service work.

defining the categories that should be used in such regulations. See Proposed Hague Regulations, *supra* note 255, at 54103. In the longer term, the categories will need to be even more specific, and there should be a separate version adapted to each of the most significant sending countries.

277. Final Rule, *supra* note 256, section 96.34(d).

Limitations on permissible fees should be enforced in several ways. First, the schedule of permissible fees/donations should be provided to prospective adoptive parents during the initial stages of the visa application process. Second, adoptive parents should be required to sign an undertaking to keep any payments within permissible limits. Third, adoption agencies should be required to disclose to the federal government all financial transactions related to each adoption, as a part of the visa processing. Fourth, adoptive parents, in order to obtain the final travel documents for the child, should be required to submit a disclosure of all financial transactions related to the adoption, and to sign an additional undertaking that they have not violated the fee limitations.

The schedule of fee limitations will have to take account of the issue of orphanage donations. The adoption process in some nations include required donations, and adoptive parents frequently have been required to bring significant amounts of cash with them to the sending nation. Where a certain donation is an established part of the adoption process, as in China, such should be defined as a permitted category of charges. The amounts dictated by law or custom in the sending nation should be permitted if they are reasonable, and there are sufficient indications that such donations generally are used to assist children and families within the sending nation. The fee schedule should clearly distinguish between the category of “required” donations, and that of truly elective donations. Where elective orphanage donations are permissible under the law of the sending nation, they should not be subject to the limitations for fees and mandatory donations. However, donations should only be considered to be permissible “voluntary” donations where adoptive parents are not contractually bound to pay them, and where payments and commitments to pay are only made after the child arrives in the United States.²⁷⁸ Obviously, to the degree “elective” donations beyond established limits are permitted before the child arrives in the United States, persons in the sending countries can condition their cooperation upon the giving of such “voluntary” donations, and thus the proposed definition of voluntary donations is designed to avoid such manipulations.

3. Government Disclosure of Agency Fees/Mandatory Donations

The United States government currently maintains a web page with a substantial amount of information concerning intercountry adoption,

278. This is the rule adopted by the Indian Supreme Court, but unfortunately it has not been followed by even mainstream United States agencies. *See* Indian Adoption Scandals, *supra* note 4; at 437, 456-77; *supra* notes 140-153 and accompanying text. The latest rule from the Indian government on voluntary donations appears even stricter, but it remains to be seen how it will be interpreted and enforced. *See supra* note 145.

including information on each sending nation.²⁷⁹ This web site should be expanded to include a data-base on adoption fees. The government could, for example, list the fees/required donations charged by each agency, for each sending nation, for a given year. Of course, the data disclosed would in no way identify members of the adoption triad (birth family, adoptive family, or adoptee). Agencies lack a sufficient interest in keeping their fee schedules confidential given the substantial public interest in ensuring that intercountry adoption does not lead to the commodification of children or child laundering.²⁸⁰ Further, the publication of this information would make transparent the relationship between the advertised and actual fees charged by the agencies and their foreign partners.

B. Ineffective Licensing and Regulation of Adoption Agencies within the United States

1. The Dangers of Weak Licensing and Regulation of Adoption Agencies

Licensing and regulation of adoption agencies and facilitators involved in intercountry adoption is surprisingly lax, at least within the United States. Traditionally, there has been no federal licensing or regulation, leaving licensing and regulation in the hands of the states. The degree of regulation varies widely among the states. In many states virtually anyone, regardless of qualifications, may start an adoption agency involved in intercountry adoption. In addition, in some states it may be possible to arrange or facilitate adoptions without being licensed as an agency. Under the current, decentralized system, persons or agencies losing their licenses in one state may simply move to another jurisdiction. Even in those states that theoretically provide a complaint system, it seems to be rare for any action to be taken against errant agencies. Ironically, under state law there may not be any clear rule prohibiting a United States agency from placing a purchased or stolen child.²⁸¹

The lax licensing and regulation of adoption agencies lends itself to child

279. See International Adoption, Department of State, *available at* http://travel.state.gov/family/adoption/adoption_485.html (last visited Oct. 2, 2006).

280. *Id.*

281. On lax state regulation of those involved in adoption, *see, e.g.*, Kim Clark & Nancy Shute, *The Adoption Maze*, US News & World Report, March 12, 2001, at 60. This article quotes a Maryland state adoption agency licensing coordinator as saying that their response to complaints against adoption agencies regarding money is to “toss ‘em,” since Maryland regulations don’t address such issues. *See also* Madelyn Freundlich, *supra* note 33, at 56 (quoting statement by former President of National Council for Adoption, that state regulation of agencies is “virtually meaningless”).

laundering, because it permits the field of adoption to become inundated, and even dominated, by individuals and organizations engaged in market-based commodification of children. Individuals and organizations whose primary and motivating activity is intercountry adoption easily descend into the commodification of children because they concentrate more on fulfilling the desires of Western adults for children than on meeting the needs of children and families. Such agencies can concentrate on competing for the business of prospective adoptive parents by supplying the “service” of speedy adoption of young, paper-adoptable children. In this race to the bottom, agencies succeed regardless of whether they provide significant social service assistance to birth families or orphans remaining in the sending nation. Indeed, intercountry adoption systems may operate in a manner completely separate from the social service or other humanitarian systems operating within the sending nation. Within this market-based system, it can be normative to take a child from desperate parents who would have kept their children if they had been offered even minimal assistance, leading to the absurdity of “humanitarian” efforts that spend tens of thousands of dollars to divide families that could have been kept intact for a hundred dollars or less.

The step from such exploitation of the poor to actual baby-buying or child stealing is shorter and less dramatic than most imagine. Agencies that stick to the narrow purpose of obtaining young infants quickly for Western adoptive parents may indeed develop successful systems for this purpose. These agencies need do no more than find a facilitator or orphanage within a sending country willing to be their “supplier” of paper-adoptable children. These market-driven agencies may hide their true nature by boasting of their assistance to orphans or other humanitarian work—assistance which will cost them very little given the low cost of legitimate humanitarian work in developing nations. Thus, even the most corrupt intercountry adoption agencies can distract from their real methodologies by throwing a few dollars at humanitarian donations. For example, Galindo and Devin, the convicted conspirators of the Cambodian scandal, probably did do some humanitarian work, although they also pocketed much (probably most) of the funds they collected for humanitarian purposes.²⁸²

Agencies truly focused on assistance to children and families in sending nations, that provide a full range of services to families and children, may be at a disadvantage within the loosely-regulated world of intercountry adoption. Thus, agencies that provide care for significant numbers of children who will not be adopted, provide aid to keep families together, facilitate domestic adoptions within sending nations, and either operate their own orphanages or build effective partnerships with legitimate social service

282. See, e.g., Cross, *supra* note 70; Part II(D)(1), *supra*.

agencies in sending nations, may in fact be at a competitive disadvantage in the intercountry adoption marketplace. There is a real danger in the adoption world of bad agencies winning significant or even dominate market share.²⁸³

Lax regulation of adoption agencies also makes the adoption system vulnerable to child laundering by involving inexperienced and credulous persons ill-equipped to choose reliable partners in sending nations. Unfortunately, child laundering scandals in Cambodia, India, and Guatemala suggests that even experienced and respected recipient nation agencies inadvertently choose partners who source children through baby-buying and child-stealing.²⁸⁴ This problem is made even worse by a system that invites virtually anyone to become a placement agency. The entrepreneurial quality of adoption within the United States invites untrained persons with religious, humanitarian, or financial motivations to start placement agencies; such persons can be easily lured into partnering with a foreign facilitator or orphanage that launders children. Lax licensing and regulation of intercountry adoption thus leads to a system where the naïve and the unscrupulous are free to operate, and families suffer.

Intercountry adoption is, in many respects, a professional field without a profession.²⁸⁵ The subject is quite complex, involving a complex transfer of children across family, nation, and culture. The issues created by intercountry adoption are difficult for physicians, lawyers, psychologists, social workers, and teachers who encounter them, particularly when they involve older children or children harmed by poor care. Even professionals within these various fields may be ill-equipped to deal with the specialized medical, psychological, and educational needs of adoptees and adoptive families. The issue of constructing an ethical system of intercountry adoption would challenge an expert in management or development economics. Yet, there is no profession of intercountry adoption. The professions that seem most relevant, such as social work, generally have little training in the field, and professionals from these fields can be just as naïve as lay persons in relationship to the complexities of intercountry adoption. Unfortunately, this field without a profession is open to the most unprofessional of persons who are no more qualified to place a child for adoption than a barber would be to pilot an airplane.

One of many examples of the problem of lax regulation of adoption agencies and facilitators is the publicized saga of Mai-Ly Latrace, a facilitator who has worked with a variety of adoption agencies over a period

283. See *Ethica Hague Comments*, *supra* note 262, at 1 n. 2 (referring to ethical adoption agencies as “victims” because of the “race to the bottom” that exists when they must compete against unethical agencies in an environment of inadequate regulation.)

284. See *supra* Part II(D).

285. I owe this point to Desiree Smolin, who pointed this out to me in various conversations over the last several years.

of at least ten years.²⁸⁶ For a number of years Latrace facilitated adoptions from Vietnam.²⁸⁷ In 1995, she was “criminally charged with a breach of trust after she was caught stockpiling agency clothing and medication in a personal storage locker,” rather than delivering the items to “orphans in Vietnam.”²⁸⁸ The adoption agency dropped the charges after she agreed to counseling and community service.²⁸⁹ Another adoption agency alleges they gave her \$35,000 to open an orphanage in Vietnam after she and her mother “offered to set up [the] agency’s Vietnam program.”²⁹⁰ The agency claimed the orphanage was never built; Latrace (and her mother) claim any monies paid constituted payment for services.²⁹¹ Several adoptive parents claim Latrace offered a child for adoption to prospective adoptive parents, and solicited funds for the child’s medical care, despite the fact that the child had already been placed for adoption with another family and therefore was no longer in Vietnam.²⁹² Despite these (and other) charges, there are adoptive parents who defend Latrace, due to her successful assistance in their adoptions.²⁹³ However, according to a written document, substantiated by published statements by the press attaché for the Vietnamese embassy, Latrace was “deported [from Vietnam] for child trafficking for money.”²⁹⁴ These charges indicate that “Latrece illegally paid Vietnamese parents or other people to give up children for adoption.”²⁹⁵ (Latrece denies that she was deported, despite the written and verbal confirmation by the Vietnamese government, and a statement by a U.S. Department of Homeland Security official indicating that Latrace was refused entry to Vietnam in February 2004).²⁹⁶

One might hope that a woman who had been deported for child trafficking by a sending nation would not have a future working in intercountry adoption. However, such is not the case. A Florida attorney, who compares Latrace to “Mother Teresa,” has established several adoption agencies over the last two years involving Latrace as a director of the first

286. See Julie Pace, *In Shadow of Adoption*, TAMPA TRIBUNE, August 21, 2005, Nation/World, at 1. See generally Kit R. Roane, *Pitfalls for Parents*, U.S. NEWS, June 6, 2005, at 56. For another such example involving Ireland rather than the United States, see Ann McElhinney & Phelim McAleer, *Adoption chief used Vietnam fraudster as a tour guide*, Irish Independent, July 11, 2006.

287. Pace, *supra* note 286, at 1.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. Pace, *supra* note 286 at 1.

294. *Id.*

295. *Id.*

296. *Id.*

agency and paid “consultant” of the successor entity.²⁹⁷ As Vietnam was closed to United States adoptions for several years due to concerns with “corruption and trafficking,”²⁹⁸ Latrace appears to have been given substantial responsibility for the Guatemala program of this Florida agency.²⁹⁹ The matter has been investigated by Florida officials who required certain background checks to be conducted. However, the investigation (as of August 2005) is closed. The Florida spokesperson noted that “Florida . . . does not regulate international adoption consultants or require them to have licenses.”³⁰⁰ Further, background checks are run only “on the state and national levels,” so the State has no way of “knowing whether there were problems in other countries.”³⁰¹

This story of a deported child trafficker moving her adoption work from Vietnam (which closed itself largely due to corruption and trafficking concerns)³⁰² to Guatemala (the focus of highly publicized international concerns about child laundering)³⁰³, aptly illustrates the gaps in the current regulatory regimen. Despite the many layers of regulation and bureaucracy involved in international adoption, there does not seem to be any state or federal official who is fully responsible to ensure that only agencies and persons with expertise and integrity place children for international adoption.

2. *Reforming the Licensure of Adoption Agencies*

Current proposals for implementation of the Hague Convention on Intercountry Adoption include a federal role for licensing placement agencies involved in Convention adoptions.³⁰⁴ The State Department has been designated as the required “Central Authority” responsible for carrying out Hague obligations. However, under current proposals the State Department would delegate its accrediting responsibilities to private or State accrediting entities. Proposed federal regulations would provide some degree of guidance as to the standards to be applied to adoption agencies. The primary

297. *Id.*

298. *Id.* See also *Vietnam Tightens Adoption Controls*, *supra* note 31 (“About two dozen people, including some government officials, have been jailed in the past two years for soliciting children from unwed mothers and poor families and falsifying documents for hundreds of children sold to brokers for foreign adoption. . . .”).

299. Pace, *supra* note 286 at 1.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. See Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901-54 (2006); Proposed Hague Regulations, *supra* note 255; Final Rule, *supra* note 256; U.S. DEPARTMENT OF STATE, UPDATE: DESIGNATION OF ACCREDITING ENTITIES (May 2006); U.S. Department of State, Department of State Selection of Accrediting Entities Under the Intercountry Adoption Act (March 5, 2005).

accrediting entity is likely to be the Council on Accreditation (COA), and the primary methodology likely to be one of peer accreditation.³⁰⁵

There are reasons to be concerned with the approach to Hague implementation proposed by the federal government. Difficulties begin with a perceived lack of State Department enthusiasm for its assigned role as Central Authority. Intercountry adoption can easily be a kind of orphan within the federal bureaucracy, as it demands special attention and presents intricate difficulties and yet has a lower priority than related federal tasks pertaining to national security, immigration, human rights, and foreign relations. The delegation solution to this dilemma is an understandable response. However, it is difficult to see how private or state government entities can effectively investigate child laundering or other abusive adoption practices, particularly given the need to send experienced criminal investigators into foreign countries. Further, the peer-review methodology adopted is likely to be ineffective if the current standards and practices of the intercountry adoption system are themselves in need of change. Child laundering is not primarily the result of a few bad agencies in the West, but rather is a systemic problem that extends to adoptions arranged by respectable and well-intentioned Western agencies. Under these circumstances, there is a danger that a peer-review method of accreditation and review will simply ratify practices that systematically, if inadvertently, facilitate child laundering.

Despite the weaknesses of current proposals to federalize accreditation of intercountry adoption agencies, the Hague implementation process does point in the right direction. The disparate regulations of state governments are insufficient to protect the federal interests at stake in the intercountry adoption process. Federal accreditation of United States agencies that place children from other countries into homes in the United States is a useful step toward the protection of legitimate federal concerns. In order to render the Hague implementation process effective, however, it will be necessary to extend its principles to all intercountry adoptions.

The principal subjects to be addressed by federal accreditation standards are well represented in the proposed Hague regulations, and include the following: (1) Required liability insurance; (2) Education and training of agency personnel; (3) Complaint Systems; and (4) Record-Keeping and Reporting Systems.³⁰⁶

Full discussion of agency accreditation standards would require an article of its own; it seems useful here to briefly discuss only the insurance

305. *See id.*

306. *See* Proposed Hague Regulations, *supra* note 255, § 96.6.

and complaint issues.

Adoption agencies objected to the proposed Hague regulation standard of a minimum one million dollars in liability insurance.³⁰⁷ Apparently, liability insurance for intercountry adoption agencies is becoming both more expensive and more difficult to secure.³⁰⁸ Intercountry adoption agencies seem to be missing the message of such difficulties. An industry which habitually tolerates incompetence may indeed find its insurability waning. It is likely that the industry's insurance problem is largely due to low standards of competence and performance, and not merely to the litigious nature of our society, nor to the inherent risks in intercountry adoption. Far too many agencies build their intercountry adoption programs in the slipshod method described by one adoption reform advocate. "They go to these countries, and they hire any Tom, Dick or Harry. . . . Whether it's the trash man or a schoolteacher, they hire whoever can get the most babies for them. It's money, money, money."³⁰⁹

A requirement of liability insurance hopefully would require the adoption industry, as a whole, to maintain standards of practice that will render the practice of intercountry adoption an insurable risk.

The problem of an adequate complaint system is highlighted by a *Wall Street Journal* claim that "most of the biggest" agencies "include clauses in their contracts that impose gag orders so that disgruntled parents can't publicize their gripes without facing fines."³¹⁰ Such gag orders should be rendered illegal under federal regulations. In addition, there should be a mechanism for bringing complaints directly to the attention of authorities, and the authorities should respond to credible complaints with appropriate investigation and action. Thus, the federal government should not attempt to delegate its investigative role, as the private "accrediting entities" are not suited to the investigative function, particularly when critical events occur in foreign countries. Complaints and investigations are critical to the

307. Public comments to the proposed regulations, including many from agencies, are available on the State Department web site. See United States Department of State—Adoption, http://travel.state.gov/family/adoption/implementation/implementation_1519.html. [hereinafter Public Comments] (last visited Oct. 2, 2006). Even Holt, which calls itself the "oldest and largest international adoption agency in the country," and which says it maintains liability insurance, objects to the regulation. See *id.*

308. See *id.* For a useful study of intercountry adoption and insurance, see Mary Joan McNamara, Memorandum: Intercountry Adoption Project: Insurance for Adoption Service Providers: Costs and Limits of Liability (2005), available at http://travel.state.gov/pdf/redacted_checked_insurance_report.pdf (last visited Oct. 2, 2006).

309. See Corbett, *supra* note 71, at 5.

310. See Jeff D. Opdyke, *Adoption's New Geography*, WALL ST. J., Oct. 14, 2003, at D1.

adoption system because they provide necessary feedback to a system that too often seeks to censor and repress any “bad news” about adoption.

Both the insurance and complaint issues relate to the need for adoption agencies to meet standards beyond those currently accepted within the adoption community. The need to insure against risk and respond to complaints and investigations provides a reality check much needed in the adoption community, which is enthralled to its own mythology of the purity and overriding goodness of adoption.

The approach of the Final Hague Rule to the insurance and complaint issues is a helpful step toward building accountability into the intercountry adoption system. The Final Rule requires a minimum of \$1,000,000 aggregate professional liability insurance,³¹¹ and establishes a complaint registry open both to parties to an adoption and also to others with relevant information.³¹²

C. Child Laundering As a Crime

1. The Lack of a Child Trafficking or Child Laundering Criminal Prohibition Breaches the Treaty Obligations of the United States and Weakens the Intercountry Adoption System

Currently, child laundering as described in this article is not, as such, a crime under federal law. More particularly, the federal crime of child trafficking is limited to the sale of children for purposes of sex or labor and thus does not include baby-buying for purposes of adoption.³¹³ In the Cambodian adoption scandal, The United States government obtained convictions for visa fraud, money laundering and structuring, and issued a press release indicating that the conspiracy had also involved the crimes of wire fraud, mail fraud, tax fraud, and violations of the Foreign Corrupt Practices Act.³¹⁴ Some may argue that the capacity of the government to criminalize child laundering or child trafficking under other federal crimes indicates that there is no need to define a new federal crime in this area. However, the lack of a federal crime explicitly pertaining to buying or stealing children for purposes of adoption is a significant gap for several reasons.

311. Final Rule, *supra* note 256, section 96.33(h).

312. Final Rule, *supra* note 256, section 96.69.

313. *See supra* notes 70, 77-81, 252 and accompanying text.

314. *See supra* notes 77-81 and accompanying text.

a. The Lack of a Child Trafficking or Child Laundering Criminal Prohibition Breaches the Treaty Obligations of the United States

The United States is obligated under international law, as a Party to the Optional Protocol (Sale of Children),³¹⁵ to enforce a criminal or penal statute pertaining to: “Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.”³¹⁶ Such offenses must be “punishable by appropriate penalties that take into account their grave nature.”³¹⁷ In addition, such provisions should apply to “an attempt to commit . . . these acts and to complicity or participation”³¹⁸

The capacity of the government to punish such acts under crimes such as visa fraud or mail fraud does not meet the international obligations of the United States. Crimes such as visa fraud and money laundering are not designed to punish or deter the kinds of wrongs involved in baby-buying. The fact that child laundering conspiracies commit other crimes or wrongs does not satisfy the obligation of the United States to have crimes that name and punish the essential wrongs involved in child-buying for purposes of adoption.

The primary effort made by the United States government to meet this Treaty Obligation is a provision in the Intercountry Adoption Act of 2000, which is designed to guide the United States toward ratification of the Hague Convention.³¹⁹ This Act provides criminal and civil penalties for any person who:

- (2) makes a false or fraudulent statement, or misrepresentation, with respect to a material fact, or offers, gives, solicits, or accepts inducement by way of compensation, intended to influence or affect in the United States or a foreign country—
 - (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case subject to the Convention.³²⁰

315. Optional Protocol to the Convention on the Right of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 263, U.N. GAOR, 54th Sess., Supp. No. 49, U.N. Doc. A/RES/54/263 (Jan. 18, 2002) [hereinafter OP-CRC].

316. *Id.*, art. 3(1)(ii).

317. *Id.*, art. 3(3).

318. *Id.*, art. 3(2).

319. *See generally* 42 U.S.C. §§ 14901-54.

320. *Id.* at § 14944.

The same penalties apply to any person who “engages another person as an agent, whether in the United States or in a foreign country, who in the course of that agency” takes the prohibited actions.³²¹

This provision would constitute a good-faith effort to meet the treaty obligations of the United States, except for two limitations: (1) The provision will not be effective until and unless the United States ratifies the Hague Convention, leaving it inapplicable for a significant period of time; and (2) even after Hague ratification, the provision only applies to cases where the sending nation was also a Hague country. As noted above, a significant number of adoptees come from nations that have not ratified the Hague Convention.

The United States government may consider itself in conformity to its obligations under the Optional Protocol (Sale of Children), by narrowly reading that Treaty’s obligations to criminalize the sale of children in the context of adoption. The United States government appears to read the Optional Protocol (Sale of Children), as only obligating ratifying states to criminalize and combat child trafficking in those adoptions that are literally within the procedural scope of the Hague Convention on Intercountry Adoption. Under this interpretation, the obligations in the Optional Protocol to criminalize and act against the sale of children in intercountry adoption only attach where both sending and receiving country have ratified the Hague Convention on intercountry adoption.³²² A better way of interpreting the Optional Protocol, however, would be that its invocation of “applicable legal instruments on adoption,” while referring to the Hague Convention, is simply a way of applying the *standards* of the Hague Convention to the

321. *Id.*

322. See *Executive Report of the Committee on Foreign Relations*, S. Re. No. 107-4, at 2 (2002). The Senate’s interpretation of the phrase “applicable international legal instruments” as used in Article 3(1)(c)(ii) and Article 3(5) of the Optional Protocol (Sale of Children) is reflected in its understanding that the phrase refers to the Hague Convention on Intercountry Adoption. See OP-CRC, *supra* note 315, at art. 3(5)(A).

The United States is not a party to the Hague Convention, but expects to become a party. Accordingly, until such time as the United States becomes a party to the Hague Convention, it understands that it is not obligated to criminalize conduct prescribed by Articles 3(1)(a)(ii) of the Protocol or to take all appropriate legal and administrative measures required by Article 3(5) of the Protocol. See *id.* at art. 3(5)(B).

The placement of this limitation of obligation as an understanding, rather than a reservation, its deferral of the obligations until Hague Convention ratification, and then Congress’ implementing provision in the Intercountry Adoption Act, which even after Hague ratification limits the criminal provision to Convention Adoptions, all indicate that the United States government is employing this very limited interpretation of its obligations under the Optional Protocol.

question of birth family consent to adoption, rather than a requirement that the Hague Convention be literally applicable. It seems unnecessarily stingy, in the context of a treaty on child trafficking, to act as though the standards against buying children for adoption are an arbitrary form of positive law that only apply to nations that choose to ratify the Hague Convention on Intercountry Adoption. While nations may legitimately choose not to ratify the Hague Convention on Intercountry Adoption for a variety of reasons, including a distrust of its procedural devices for combating child trafficking and facilitating adoptions, the Hague Convention's fundamental requirement of birth family consent constitute settled international standards applicable regardless of ratification. It is therefore wrong to regard the Optional Protocol's obligations to criminalize child trafficking in adoption as contingent on both sending and receiving nation ratifying the Hague Convention on Intercountry Adoption.³²³

Therefore, the limited criminal prohibition found in the Intercountry Adoption Act will not satisfy the treaty obligations of the United States, even after Hague ratification. The Optional Protocol on Sale of Children is not limited in its concerns to child trafficking in Hague countries, but rather requires that a criminal prohibition exist that is applicable to all sending and recipient nations.³²⁴ Therefore the United States is obligated, under international law, to criminalize the sale of children in all intercountry adoptions, not merely Hague Convention adoptions.

b. The Absence of a Criminal Prohibition of Child Trafficking or Child Laundering Weakens the Intercountry Adoption System

Adoptive parents and agencies have a vested interest in minimizing the significance and extent of adoption scandals. The adoption community tends to perceive adoption as an overriding good that justifies a certain measure of otherwise questionable conduct, including bribery and the submission of inaccurate paperwork. Under these circumstances, when individuals such as Lauryn Galindo, the principal figure in the Cambodian adoption scandal, are prosecuted for wrongs such as visa fraud, it is easy for the adoption

323. I would argue that the obligation of state parties to forbid and combat child trafficking in adoption constitutes a norm of customary international law. Given that the subject is addressed in the CRC, which is ratified by every nation except the United States and Somalia, and that even the United States in its orphan visa regulations forbids such as a regulatory matter, it would seem that the international community, including the United States, has recognized an obligation to prevent adoption from being used as a means of child trafficking.

324. See OP-CRC, *supra* note 315.

community to misunderstand the nature of the wrong. Based on the desire to minimize the significance of scandals and a certain measure of tolerance for otherwise illicit conduct, it is easy for the adoption community to misunderstand events like the Cambodian adoption scandal as overzealous federal prosecution of good people who were sloppy in their paperwork or skirted legal limits to save and help children.

The inability of federal prosecutors to charge Galindo with child trafficking under these circumstances was unfortunate, and significantly delayed the time when many in the adoption community would face the real significance of that scandal. Galindo was not merely someone who falsified paperwork so children could enter the United States; Galindo, according to the government, was someone who organized a criminal conspiracy to systematically buy babies from vulnerable families.³²⁵ However, the lack of an applicable child trafficking crime allowed Galindo, even after her guilty plea, to publicly insist that she “was not involved in trafficking children.”³²⁶ Indeed, Galindo minimized her wrongs to “paperwork errors,” stating that “my motivation was pure in helping these children.”³²⁷ As more information about the government’s case has publicly emerged, it has been harder for the adoption community to defend her actions; however, too many maintained their credulous stand for far too long.

The presence of a federal criminal prohibition of child trafficking for purposes of adoption would send the right message as to the nature of the wrongs involved in child laundering. This message is as much needed by the federal authorities as by the public. The crime of “visa fraud” as applied to child laundering scandals is confusing because it focuses on the wrong of the child entering the United States—a legal wrong that can seem ethically right for those transfixed with the good that can come of the child’s adoption into an American family. The term child trafficking names more directly the harm that has been done, as children have been made into articles of commerce, and bought and sold for profit. A federal prosecutor or government bureaucrat would likely consider it a higher priority to pursue a child trafficking case than a visa fraud case.

Both the federal government and the adoption community would benefit from a certain measure of education as to harms done to all members of the adoption triad (birth family, adoptee, and adoptive family) in child laundering schemes. Those harms are not well described by the crime of “visa fraud,” however applicable that crime might be legally. There is a

325. See Cross, *supra* note 70; Part II(D)(1), *supra*..

326. See U.S. Families Learn Truth About Adopted Cambodian Children, *supra* note

74.

327. *Id.*

certain measure of educational value from calling something by its rightful name.

2. The United States Congress Should Enact a Modified Version of the Criminal Prohibitions of the Intercountry Adoption Act Pertaining to Child-Buying or Child-Stealing

As noted above, the Intercountry Adoption Act has language providing criminal and civil penalties for obtaining children through misrepresentations or monetary inducement, but the Act is not effective until the United States ratifies the Hague Convention on Intercountry Adoption,³²⁸ and even then will only apply to children adopted from Hague countries.³²⁹ The simplest and most logical reform in this area would be for Congress to immediately apply these provisions to all intercountry adoptions. This Congressional action would move the United States toward compliance with the Optional Protocol (Sale of Children), and allow United States prosecutors to bring appropriate charges in any future child laundering scandal.³³⁰

It would be helpful if the language used in the Intercountry Adoption Act were extended, as it presently seems to apply only to obtaining children from relinquishing or consenting family members through fraud or inducement. Thus, if a child laundering conspiracy were to kidnap children from hospitals, homes, or streets, and then sell them to adoption agencies, as has been claimed in Tamil Nadu, India,³³¹ the literal language of the Act might be inapplicable. This weakness in the language of the Act may stem in part from a similar weakness in the language of the Optional Protocol (Sale of Children),³³² but it is not necessary for United States law to follow the flaws of the Treaty. Certainly no one can persuasively argue that the criminal law should fail to punish kidnaping children from their families for purposes of profiting from adoptive placements.

D. See No Evil, Hear No Evil: The Problem of United States Agency Irresponsibility

1. United States Agencies: Incentivizing Irresponsibility

United States adoption agencies play a pivotal role in the intercountry

328. See 42 U.S.C. §§ 14944; *supra* notes 319-21 and accompanying text.

329. *Id.*

330. See OP-CRC, *supra* note 315.

331. See *supra* notes 187-94 and accompanying text.

332. See OP-CRC, *supra* note 315.

adoption system, as they establish the crucial connection between prospective adoptive parents in the United States and orphanages and facilitators operating in foreign countries. Prospective adoptive parents rely on United States placement agencies to partner with foreign orphanages and facilitators who are reliable and ethical. It is the role of United States placement agencies, working with their foreign partners, to identify children eligible for adoption and immigration to the United States, and place them in suitable adoptive homes. Prospective adoptive parents also look to their placement agencies to supply them with accurate information about the child, including the child's medical condition, age, psychological condition, and the presence of any disabilities, so they can determine whether to accept a particular placement.

To a remarkable degree, United States placement agencies seek to avoid accountability for their role in intercountry adoption. The most common difficulty noticed by adoptive parents appears to be inaccurate information about the child, as many children appear to have undisclosed medical conditions or handicaps, or are much older than their listed age.³³³ Since most cases of child laundering are never discovered by adoptive parents, this complaint is less common, but the reaction of agencies is the same: they seek to avoid responsibility for their own involvement in the placement of purchased or stolen children.

United States adoption agencies have several means of avoiding legal responsibility or accountability. First, United States agencies view it as the task of their foreign partners to determine the eligibility of children for adoption, and to evaluate and communicate the condition of the children they place. When these critical tasks are intentionally or negligently mishandled, as in the case of child laundering, the United States agencies seek to pass off all responsibility to the foreign partner. The net effect in most cases, of course, is to leave adoptive parents with no recourse, as United States adoptive parents generally are not in a position to hold an orphanage or facilitator living in a sending nation accountable. Thus, United States agencies seem to take the position that they have no legal responsibility for the acts of the agencies, orphanages, facilitators, and persons with whom they partner.³³⁴

333. *See, e.g.*, Testimony of Cindy Freidmutter, Executive Director, Evan B. Donaldson Institute, House Committee on International Relations, May 22, 2002, *available at* <http://www.adoptioninstitute.org/policy/hagueregs.html> (15% of 1600 international adoptive parents surveyed stated their agencies withheld information, or gave inaccurate information, about the child) (last visited Oct. 2, 2006).

334. *See, e.g.*, Opdyke, *supra* note 310, at D1 ("Currently, agencies aren't responsible for their in-country contacts . . .").

Second, United States agencies are known to include broad waivers of liability in their contracts with adoptive parents. Such waivers of liability are designed to allow United States agencies to avoid accountability for their failures. The basic message of these contracts is that intercountry adoption is inherently risky and hence agencies are not responsible when things go wrong; unfortunately, their effect is to excuse chronic negligence and failure of due diligence on the part of adoption agencies.

United States adoption agencies thus send double messages to their clients. On the one hand, the agencies seek to reassure prospective adoptive parents that they can be relied upon to identify suitable children for adoption, choose ethical and reliable foreign partners, and provide accurate and relevant information. On the other hand, United States adoption agencies seek to avoid all accountability by delegating to foreign partners most of the critical tasks of identifying and evaluating children for adoption, disclaiming responsibility for all acts and failures of those foreign partners, and then disclaiming any remaining liability through broad contractual waivers of liability. Coupled with the tendency of United States agencies to be naively (and perhaps sometimes intentionally) trusting and credulous, and minimize or ignore existing evidence of abusive adoption practices, and agencies have developed an effective means of foisting the results of their own irresponsibility on others.

For purposes of this article, the role of United States agency irresponsibility in relationship to child laundering is critical. Currently, the intercountry adoption system provides an incentive for United States agencies to distance themselves from activity and responsibility in relation to the critical roles of ensuring that children placed have been legitimately obtained from birth families. The system financially rewards adoption agencies that partner with those who can quickly obtain and process young infants for adoption, regardless of whether those foreign partners buy or steal those children. In effect, the adoption system rewards adoption agencies for willful ignorance of their role in child laundering. It can hardly be surprising when adoption agencies fail to exercise care and diligence to avoid child laundering when they perceive no legal responsibility.

Given United States agency irresponsibility, child laundering becomes the perfect crime. Foreign nationals working in sending countries often can buy or steal children with relative impunity, given their capacity to escape detection or punishment, due to weak and corruptible regulatory, judicial, and enforcement mechanisms in their nations. The orphan visa process generally has proven incapable of identifying most laundered children.³³⁵

335. See, e.g., *supra* notes 113-14 and accompanying text (discussing failure of orphan

United States agencies are rewarded for maintaining a stance of willful ignorance regarding how their foreign partners obtain and process the children through their national systems, and take no responsibility in the cases that come to light. Adoptive parents are unlikely to discover child laundering cases, and when they do they may value keeping “their child” more highly than reporting the matter to the government. Under these circumstances, child laundering conspiracies can easily embed themselves within the intercountry adoption system.

2. Incentivizing Responsible Action: Regulating Liability Waivers

The proposed Hague regulations do not permit agencies to require “a blanket waiver of liability in connection with the provision of adoption services in Convention cases.”³³⁶ Interestingly, even a premier agency such as Holt, while claiming it does not include blanket waivers in its contracts, supports the capacity of agencies to waive liability for the most significant risks of intercountry adoption.³³⁷ Thus, it is “Holt’s current practice to advise its clients of the many risks inherent in international adoption and require clients to partner with Holt by accepting the known and identified risks.”³³⁸ Holt even argues that “*absent an ability to require prospective adoptive parents to . . . voluntarily accept the known risks, agencies may be precluded from their critical mission of finding homes for children.*”³³⁹

Holt’s public comments do not clearly identify the specific risks which adoptive parents should be required to waive. There are some risks, such as the possibility that a country may close or a particular child die in care, that are intrinsic to intercountry adoption and generally beyond the control of the agencies. On the other hand, it is unreasonable for agencies to waive the risk that the children they offer for adoption may be laundered children who were stolen or purchased from their birth parents. To the degree that Holt or other agencies would argue that child laundering is a “known” risk of intercountry adoption that must be voluntarily accepted by adoptive parents, they would be conceding this article’s argument that child laundering has become a serious problem within the intercountry adoption system. To the degree that agencies argue that child laundering is insignificant and rare, they should not be overly concerned with waiving liability as to such an event. In either case,

visa process in Cambodia, even after disclosure of the scandal to the government).

336. See Proposed Hague Regulations, *supra* note 255, § 96.39(d)

337. See Public Comments, *supra* note 307.

338. *Id.*

339. See *id.* (quoting Howard M. Cooper, *Enforcement of Contractual Release and Hold Harmless Language in Wrongful Adoption Cases*, BOSTON B.J., May 2000 at 43).

it is unethical and unreasonable to ask adoptive parents to accept such a risk as a normal part of adoption. This is particularly the case when the customary practices of United States agencies contribute (even if unintentionally) to the incidence of child laundering. Adoption agencies require legal rules that give them incentives to avoid child laundering, rather than legal rules that create incentives for them to look the other way as their partners in sending countries engage in child trafficking. Certainly adoption agencies are in a better position than prospective adoptive parents to minimize the risks of child laundering, and thus the risk should be left with the agency rather than with the parents.

Thus, the federal ban on blanket waivers in the proposed Hague regulations should have been included in the Final Rule. Indeed, bans on blanket waivers, while helpful, are insufficient; the Hague rules should also identify particular risks that cannot be waived by agency contract. The risks of child laundering, child buying, and child stealing should be among the risks which adoption agencies cannot ask their clients to waive, whether in a blanket or partial waiver of liability.

Unfortunately, the Final Rule eliminated the ban on blanket waivers in the proposed regulations, apparently in response to agency objections. The Final Hague regulations instead require that waivers of liability comply with “applicable State law” and are “limited and specific, based on risks that have been discussed and explained to the client in the adoption services contract.”³⁴⁰ This language is to some degree ambiguous in relationship to the blanket waiver issue, an ambiguity which stems from an underlying ambiguity as to the definition of a blanket waiver. On the one hand, the State Department clearly states: “We concluded that a standard prohibiting blanket waivers is not warranted . . . ,” and notes that the Final Rule “defers to the adoption service provider’s own assessment of risks and benefits in asking a client to sign a waiver.”³⁴¹ On the other hand, the State Department purports to address “the major concerns about extremely broad waivers that exempt all conduct.”³⁴² The implication is that a waiver that is “limited and specific” could not be, in effect, a blanket waiver. Thus, the State Department is seeking to have it both ways, claiming on the one hand not to ban blanket waivers by dropping the proposed prohibition, while claiming on the other hand to have addressed the “major concerns” about overly broad waivers of liability.

It will be interesting to see whether agencies, as a matter of practice, list

340. See Final Rule, *supra* note 256, section 96.39(d). The State Department responses to public comments and explanations are found at 8068 & 8096.

341. See *id.* at 8068.

342. *Id.*

the risks that children have been purchased or stolen in contractual waiver. Under the Final Rule, contractual waiver language that does not specifically address the risk of stolen/purchased/laundered children should be ineffective to waive liability stemming from those wrongs. It will also be interesting to see whether state courts will, as a matter of public policy, permit agencies to waive the risk that children have been illicitly stolen or purchased from their birth families. Whatever happens with this issue, it is unfortunate that the Federal government, charged under the Hague Convention with preventing “the abduction, the sale of, or traffic in children” in the intercountry adoption system,³⁴³ has not taken a firm and specific stand on this question.

3. Incentivizing Responsible Action: United States Agency Liability for the Acts of Their Foreign Partners

The proposed Hague regulations specifically address the critical issue of United States agency legal accountability for the acts of their foreign partners.³⁴⁴ Ironically, these provisions have been broadly misunderstood as providing for a significant broadening of agency responsibility.³⁴⁵ In fact, the proposed regulations are a classic instance of the “exception” swallowing the rule, or taking away with one hand what one has given with the other.

On the one hand, the proposed rules require United States agencies to assume broad liability for “supervised providers in other Convention countries.”³⁴⁶ On the other hand, the proposed rules state that United States placement agencies will not be responsible for the acts of foreign partners who are either governmental bodies, or accredited within the sending country.³⁴⁷ Hence, under the proposed regulations United States agencies will only be liable for their non-governmental, non-accredited foreign partners. The rule is probably directed at the abusive practices of many unaccredited “facilitators” who operated within sending countries. However, the agency practice of hiring unaccredited facilitators would be largely irrelevant to Hague adoptions because the Hague Convention generally requires all significant functions within sending countries to be performed by the government or by government-accredited entities or persons.³⁴⁸ Hence, the

343. Hague Convention, *supra* note 253, at art. 1(b)(listing objects of the Treaty).

344. *See* Proposed Hague Regulations, *supra* note 255, sections 96.14(d), 96.46(b)(9), 96.46(c).

345. *See* Public Comments, *supra* note 307; Opdyke, *supra* note 310, at D1 (suggesting that under proposed regulations consumers benefit from new protection whereby agencies become responsible for “the people they hire” in sending countries).

346. Proposed Hague Regulations, *supra* note 255, § 96.46(b)(9), 96.46(c).

347. *Id.* at section 96.14(d).

348. *See* Hague Convention on Intercountry Adoption, *supra* note 253. There may be

pattern in Hague countries will be for United States agencies to partner with accredited or governmental foreign partners, as the Treaty would forbid unaccredited freelance facilitators from playing any significant role.³⁴⁹ Indeed, the Hague system would likely result in many of these previously unaccredited “facilitators” seeking official recognition within their sending nations as accredited persons or organizations.

Therefore, since United States agencies in Hague adoptions will be partnering with accredited foreign partners, the primary effect of the proposed regulations is to free United States agencies from any accountability for the actions of those foreign partners. Unfortunately, the mere fact that these foreign partners will be accredited is of little help in combating child laundering and corruption. In India, for example, it has been possible for child traffickers to become accredited (and re-accredited) by the State and Central governments.³⁵⁰ Ethan Kapstein in *Foreign Affairs* aptly summarized the fatal flaw of Hague Convention reliance on sending nation regulation:

Despite its contributions, however, the Hague Convention regime does not, and cannot, tackle systemic corruption, which is likely to worsen as the trade in foreign-born children increases. One of the convention’s limitations is precisely the discretion it leave states to regulate their own adoption networks; “home country control” does little to curb the corruption that is endemic in some places.³⁵¹

Although the Hague Convention itself may rely on “home country control,” it does not require the United States government to do so. The United States government is not required to allow its immigration and visa processes to be systematically used for child laundering merely because some child traffickers are able to become “accredited” within some Hague sending nations. Among the tools which the United States can exercise to combat child laundering is the adoption of a legal rule which holds accredited United States agencies responsible for the acts of their foreign partners, whether accredited or not. I have elsewhere suggested at length how

some ambiguity on the critical question of obtaining birth parent consents. One interpretation of the Treaty would permit non-accredited entities to oversee or receive such consents so long as either the Central Authority or accredited entities ensure the validity of those consents. Nonetheless, one would presume that in the ordinary case those regularly entrusted with receiving consents would be accredited entities/persons.

349. *See id.*

350. *See Indian Adoption Scandals, supra* note 4, at 450-62.

351. Kapstein, *supra* note 8, at 116.

the proposed Hague regulations could be modified to hold United States agencies responsible, in variable and reasonable ways, for the acts of their foreign partners.³⁵² The proposed regulations should create liability for the failure of United States agencies to exercise due diligence in their selection of and use of foreign partners, as well as require agencies to report reasonable suspicion of illicit conduct to both the United States government and to affected adoptive and prospective adoptive parents. Although more controversial, it is reasonable to require United States agencies to “assume tort, contract, and other civil liability” for the actions of the foreign accredited or non-accredited partner.³⁵³ These liability rules would create incentives for United States agencies to be far more careful in their use of overseas partners, and elevate the industry’s standards for the use and supervision of foreign partners.

The Final Hague Regulations significantly alter the approach of the proposed regulations to this critical set of issues. The regulations give up the attempt to define the liability of United States agencies for their foreign partners. Thus, the Final Rule leaves such liability questions largely to the States, or at least to whatever other bodies of law are applicable.³⁵⁴ The Final Regulations also eliminate the loophole in the proposed rules under which United States agencies are not responsible to provide supervision for persons accredited in sending countries. The Final Regulations are based on the view that accreditation, whether in foreign countries or the United States, does not guarantee reliability, and hence initially appear to require United States agencies to enter into supervisory responsibility and relationship with their foreign partners in sending countries.³⁵⁵ However, having closed one loophole, the Final Rules open another: where foreign partners engage in certain tasks, including that of obtaining birth parent consents, the United States agency can substitute a verification process for the supervisory relationship.³⁵⁶ Such verification of appropriate birth parent consent is accomplished “through review of the relevant documentation and other appropriate steps.”³⁵⁷ The difficulty with this approach, however, is that in some sending countries it has proven quite easy for those engaged in child laundering to produce fraudulent documents, including birth parent

352. See David M. Smolin, *Comments to regulations implementing the 1993 Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, November 5, 2003, available at http://travel.state.gov/family/adoption/implementation/implementation_1519.html.

353. See *id.*; cf. Proposed Hague Regulations, *supra* note 255.

354. See Final Rule, *supra* note 256, at 8066, 8068.

355. See *id.* at pg. 8067.

356. Final Rule, *supra* note 256, sections 96.14(c)(I), 96.46(c).

357. *Id.* at 96.46(c).

consents.³⁵⁸ It is difficult to see how United States agencies will be able to distinguish between fraudulent and legitimate documents, merely by examining the documents themselves. If “verification” consists primarily of physically examining a document allegedly signed by a birth parent (often illiterate) in a foreign language and land, then the federal regulations may in fact be creating a safe harbor for child trafficking and negligence. The reference to “other appropriate steps” beyond document review therefore is critical, and it is unfortunate that the regulations are silent as to the kinds of additional steps beyond document review that are required.

Only when United States agencies are legally accountable for their failures to select and work with trustworthy persons in sending countries will there be sufficient incentives to avoid child laundering. It is unfortunate that the Final Hague Regulations fail to clearly provide such incentives in this critical area of United States agency responsibility for the misdeeds of their foreign partners.

IV. CONCLUSION

The intercountry adoption system has become infected with a substantial degree of child laundering. This child laundering is not an inevitable feature of the system, but exists because of specific failings of law and practice within the current system. Therefore, there are three alternatives: continue the current system and allow systematic child laundering; shut down the system, or at least those parts so infected; or reform the system. This article has identified reforms that should be effective to sharply reduce the incidence of child laundering, as well as reducing the allied evils of profiteering and corruption within the adoption system. However, there are severe political difficulties with the proposals, as they are unlikely to be popular within the adoption community which dominates discourse on such issues within the United States. Vulnerable families in developing countries have little or no voice, and most stolen children never learn the tragedy of their origins. The adoption community generally resists reform. Thus, although these reforms may be rational, it is not clear that there is a rational reason to hope for their adoption.

358. *See* Part II(D), *supra*.