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2012

## The Debate

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**THE DEBATE**

**Elizabeth Bartholet and David Smolin**

**FROM: INTERCOUNTRY ADOPTION: Policies, Practices, and Outcomes (edited by**

**Judith L. Gibbons and Karen Smith Rotabi, Ashgate LTD forthcoming June 2012)**

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## Chapter 18

## The Debate

*Elizabeth Bartholet and David Smolin*

### **Part I: Bartholet's Position**

I welcome this opportunity to address issues central to the debate over international adoption. Given space limitations, I rely on my prior publications for documentation of claims made here (see <http://www.law.harvard.edu/faculty/bartholet/>), citing more specifically as necessary. I will respond to the three prescribed questions and then finally respond directly to Professor Smolin's position.

*1. From a worldwide perspective, identify basic human rights, core human needs, and best interests of unparented children, those living without family care including those in institutionalized care.*

There are many millions of unparented children worldwide living in dire circumstances—some 143 million orphans, 8-10 million children in orphanages, and hundreds of millions on the streets. A more limited number are in foster care or group homes.

Children's most basic needs include the need to be nurtured from infancy on by permanent, loving parents. Children have related needs to be protected against the conditions that characterize life in orphanages, on the streets, and in most foster care. Decades of social science and developmental psychology demonstrate that children need parents to develop normally in emotional, intellectual, and physical terms, and demonstrate as well the devastating damage children suffer when denied nurturing parental care, particularly in their early years (see Chapters 13, 14). Studies show that even the best institutions fail to provide what children need, and most unparented children are living in terrible institutions that provide almost no human interaction, and often fail even to keep them alive.

Long-term solutions to the problem require preventing the poverty, disease, wars, and other disasters that produce so many unparented children. Ideally, parents should be able to raise the children they produce. But today we have hundreds of millions of unparented children, as we will have for decades, if not millennia, to come.

We should do what we can to get as many of these children as possible into nurturing homes. This means we should make efforts to support birth families so that some of these children can return home. But we know that limited numbers will or should return home. Resources to support family reunification will be limited. Many children were removed from their homes because of maltreatment, and family reunification under such circumstances puts children at significant risk of ongoing maltreatment, even when family support services are provided.

Adoption serves children's needs essentially as well as biologically-linked parenting, and far better than foster or institutional care. And adoptive homes will be found in significant numbers only through international adoption. The conditions that produce so many unparented children in poor countries also limit the number of prospective adoptive parents. Bias against adoption or against the racial minority groups from which many unparented children come often makes it hard to find in-country adoptive homes. Accordingly, international adoption should be embraced as one of the best available options for unparented children.

International adoption demands no resources from resource-starved countries. Indeed it more than pays for itself, since adoptive parents pay the costs of placing and supporting children. Adoption also brings new resources into poor countries through adoption fees and adoption-related humanitarian work and charitable contributions.

However, policy makers have failed to date to embrace international adoption. Instead they have surrounded it with restrictions, often citing "subsidiarity" principles and adoption "abuses."

*2. How should we understand the subsidiarity principle of the Hague Convention and how do the expressions of that principle in the CRC and the Convention aid or hinder the best interests of the child?*

The subsidiarity principle is generally understood to mean, in the context of international adoption, a preference for keeping children in their country of origin over placing them abroad. Many argue that this principle means children should be placed in international adoption only as a last resort, after exploring all in-country options.

These ideas are a corruption of the original understanding of subsidiarity, according to human rights scholar, and former Chair of the Inter-American Commission on Human Rights, Paolo Carozza. He says subsidiarity was designed to serve individual human rights, not state sovereignty, and the core idea was that children be brought up in a family—ideally their family of origin, but if not then a substitute family that can provide the same sense of intimate community (Carrozza, 2003).

The Convention on the Rights of the Child (CRC) and the Hague Convention on Intercountry Adoption (Hague Convention or HCIA) both defer to state sovereignty, leaving nation states free to ban international adoption altogether regardless of whether they can provide children with nurturing homes in the absence of such adoption. Both provide that if countries choose to allow international adoption, they should exercise a preference for placing children in-country. The CRC requires a more powerful in-country preference, mandating that in-country foster care and other “suitable” care be chosen over out-of-country adoption, and that “due regard ... be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background” (Bartholet, 2011). The HCIA requires “due consideration” of in-country placement before out-of-country, but prioritizes international adoption over any in-country placement except adoption and other “family” care (Bartholet, 2011).

Many powerful organizations like the U.N. Committee on the Rights of the Child (UNCRC), United Nations Children's Fund (UNICEF), and Save the Children have used subsidiarity claims in their efforts to restrict international adoption. They focus on the CRC rather than the Hague Convention, even though the HCIA was clearly designed to take a step beyond the CRC in the direction of validating international adoption and limiting the in-country preference. Since the Hague Convention is more recent and far more specific to international adoption, it should govern under accepted international law principles, but these organizations tend either to ignore its subsidiarity provisions, or to claim that they are no different than those in the CRC. They regularly promote in-country foster care over out-of-country adoption.

Although these organizations often say that they accept international adoption at least as a last resort, they often treat it as a non-option. They publish reports on solutions for unparented children that make no mention of international adoption, but recommend consideration of virtually all in-country options including group homes, sibling-headed households, and new improved institutional care. They recommend the creation of foster care and other in-country solutions that do not now exist, effectively condemning to ongoing institutionalization children who might have found international adoptive homes.

These treaties and these organizations have a powerful influence on nation states. All countries except the United States and Somalia have ratified the CRC, and almost all countries that engage in international adoption, including the United States, have ratified the Hague Convention.

Countries with many unparented children in need of adoptive homes may oppose international adoption for additional reasons. National pride often makes them reluctant to admit they cannot care for "their" children. Resentment against past colonialist domination and current disparities in wealth and power often makes them eager to attack international adoption as an exploitative move.

Accordingly, many countries ban international adoption altogether, or simply fail ever to make it an option. Many institute holding periods, requiring that institutionalized children not be placed abroad for periods ranging from six months to two or three years, while supposedly in-country options are pursued. Since there will be no good in-country options for the overwhelming majority of children, these holding periods generally mean simply delaying the possibility of adoptive placement abroad, or denying it altogether because as children age their possibilities for placement diminish. Holding periods also condemn even those children lucky enough to eventually be placed in adoption, to the harm caused by additional time in institutional care.

Many countries cut back on the number of children sent abroad for adoption, claiming they can take care of their children in-country. China made such an announcement a few years ago, although there was no evidence it had enough permanent nurturing homes in-country to serve all those baby girls stacked up in orphanages.

The form of subsidiarity written into the CRC, promoted by organizations like the UNCRC, UNICEF, and Save the Children, and adopted by many countries is contrary to children's best interests. Some important court decisions have recognized the conflict between extreme versions of subsidiarity and the principle that children's best interests should govern. They have ruled that when there is such a conflict, children's best interests trump according to fundamental human rights principles and, indeed, according to the CRC itself. They have found that children have a right to international adoption if the alternative is institutionalization.<sup>1</sup>

I believe there should be no preference whatsoever for placing children in-country, whether in institutions, foster care, or even adoption, if children's best interests are the driving consideration, as the CRC, the Hague Convention, and most participants in the international adoption debate say they should be. Instead the goal should be to place unparented children as early in life as possible, so as to maximize their opportunities to overcome damage suffered during the

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<sup>1</sup> See discussion of decisions by courts in India, South Africa, and Malawi in Bartholet (2010a).

prenatal period, in the original biological home, or in institutional care, and provide them the best chance for healthy development.

For most unparented children the real alternative to international adoption is life, or death, in institutions or on the streets. Obviously children's interests are better served by placement in adoptive homes, as the above-noted courts recognized, and even organizations like UNICEF generally admit when pressed.

Preferences for foster care are also inconsistent with children's best interests. Typically there is no foster care available, and such preferences simply relegate children to continued institutionalization. Moreover, strong social science evidence indicates that even where foster care exists and is supported by significant resources (as in the United States), it serves children's needs much less well than adoption. There is no reason to think foster care will work better in desperately poor countries. Indeed there is evidence that in many countries the phrase "foster care" is used to describe something that bears no resemblance to the family care it is supposed to emulate. Often it is simply a euphemism for child slavery, as has been documented in Haiti.

Although many criticize preferences for in-country foster and institutional care over out-of-country adoption, most believe that there should be a preference for in-country adoption. However I see no evidence and no common sense reason to support such a preference, looking at the issue from a child's rights perspective. Any preference means, almost inevitably, delay in adoptive placement, which often leads to denial of placement. This was the experience in the United States during the 1970s through the early 1990s, when preferences for placing children within the same racial group resulted in delaying and denying adoptive placement for significant numbers of black children. Moreover, the extensive body of social science accumulated on transracial and international adoption reveals no evidence that children suffer any harm from placement across racial, national, or other lines of difference. These studies demonstrate instead that the key factor in determining children's well being is how early in life they are placed in adoptive homes.



Arguments can be made that countries and groups that have suffered oppression in the past should have some right to hold onto children as a form of reparations or means of empowerment. But we don't think of countries as having the right to hold onto adult members of their populations, although various totalitarian regimes have often tried to wall in their populations. If we truly respect children's human rights we shouldn't treat children as reparations or affirmative action chits.

Nor is there reason to believe that holding onto unparented children is a winning strategy for national empowerment. Children growing up in institutions or on the streets represent significant costs, although they are often called "precious resources" by those engaging in debate over international adoption. Even grossly inadequate institutions are costly to support. Significant resources would be required to improve these institutions, or build foster care. And children graduating from even improved institutions or foster care will end up costing their countries dearly as the graduates move on in disproportionate numbers to unemployment, substance abuse, homelessness, crime, and incarceration.

Some argue that current law may limit policy makers' options. The CRC should be no problem, since the Hague Convention should govern. But the HCIA mandates a preference for in-country adoption over out-of-country adoption.

The Hague Convention should, however, be read in light of the overriding mandate in both the CRC and the HCIA that children's best interests trump other considerations. Any preference for in-country adoption over out-of-country should be implemented through a concurrent planning strategy, mandating development of pools of domestic and international adoptive parents simultaneously, and placement of children in international adoption if there is no domestic adoptive home immediately available.<sup>2</sup>

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<sup>2</sup> See the International Adoption Policy Statement (Child Advocacy Program, 2008), endorsed by numerous human rights and child rights organizations and experts.

*3. How should the law (and the governments of sending and receiving nations) respond to concerns with child trafficking, corruption, and adoption fraud in the intercountry adoption system?*

Abuses exist in international adoption in the form of violations of the laws against paying parents to surrender parental rights, fraud against birth parents in connection with surrender, and kidnapping. But there is no persuasive evidence that such abuses are widespread; instead, they seem a very small part of the total international adoption picture, with the overwhelming majority of adoptions taking place in compliance with the law. Moreover, the evidence shows that international adoption serves children extremely well, with the children placed early in life doing essentially as well as children raised in untroubled biological homes, and those placed later helped enormously in overcoming damage suffered prior to adoption (see Chapter 13).

The serious, systemic abuses to children occur when unparented children are denied the nurturing homes that international adoption provides. Institutional care subjects the millions of children kept in institutions to horrible forms of neglect and often to active abuse as well. Institutional care often kills children, and it systematically destroys the life potential of those who live. Children who graduate from institutions or grow up on the streets are the ones who are at serious risk of abuses in the form of child trafficking for sex and other slavery, and exploitation as child soldiers. There is no evidence that international adoption serves as a front for any of these forms of serious exploitation.

The common response to law violations in the international adoption area is to shut down such adoption through temporary or permanent moratoria, and to impose increasingly severe restrictions that effectively if not officially shut down such adoption. For example, alleged baby selling was used to shut down Guatemala's international adoption program entirely for two years, and to help justify the strict new law that Guatemala boasts will limit such adoption to some two hundred children annually, as compared to the several thousand previously placed annually.

Alleged abuses have helped justify bans on private intermediaries throughout Central and South America. Since these intermediaries served as the lifeblood of such adoption, these bans have effectively shut it down.

This response makes no sense as a way of addressing adoption law violations. It punishes unparented children by locking them into institutions and denying them the nurturing adoptive homes they need. It puts children at far greater risk of true trafficking and exploitation.

The response to adoption abuses should be the same as in other areas of law violation — enforce existing law, strengthen that law as appropriate, and punish those violating the law. Biological parents often violate the laws against abuse and neglect of children. Society does not respond by telling parents they can no longer take their newborns home from the hospital because henceforth all children are to be raised in institutions to protect against parental misconduct. Instead society enforces and sometimes strengthens the laws against parental misconduct.

Some say that it is hard for poor countries with limited infrastructure to enforce laws prohibiting baby selling and other adoption abuses. This may be. But it is also hard, indeed impossible, for these countries to guarantee nurturing parental homes for all their children. Even if adoption law violations occur, the harm such violations cause children and birth parents is minimal compared to the harm caused by shutting down or severely restricting international adoption.

### **Part I: Smolin's Position**

I appreciate the opportunity to participate in this exchange of views with Professor Elizabeth Bartholet, and hope that this dialogue will help illuminate some of the conflicting perspectives concerning intercountry adoption. Given space limitations, these essays do not include footnotes. Extensive citations of sources can be found in my adoption-related writings, many of which are available at my website ([http://works.bepress.com/david\\_smolin/](http://works.bepress.com/david_smolin/)). I too will respond to the three prescribed questions and then finally respond directly to Professor Bartholet's position.

*1. From a worldwide perspective, identify basic human rights, core human needs, and best interests of unparented children, those living without family care including those in institutionalized care.*

Human rights documents throughout the modern era make clear that the family is the fundamental group unit of society, and the child is a part of his/her family as a matter of both basic human need and fundamental human right. These fundamental human rights include the right of a child to remain with the family to which she was born, and the corollary right of parents to the care and custody of each child born to them. Thus, the family that the child belongs with, as a matter of the rights of the child and of her parents, is clearly the family into which the child is born. Further, the child is born not only to a father and mother, but also into a broader set of relationships, including siblings, grandparents, aunts and uncles, cousins, and so on. Thus, as a matter of widespread cultural practice, human need, and fundamental rights, the family into which the child is born extends beyond the parents, and beyond the nuclear family, to include an inter-generational and extensive family group.

The phrase “unparented children, those living without family care including institutionalized care,” contains multiple ambiguities. Do “unparented children” include children residing separately from their living parents? Do “unparented children” include those living with extended family members (grandparents, uncles and aunts, etc.), but whose parents are dead? Is a child living in a long term foster care situation “unparented?” Does the phrase “those living without family care including those in institutionalized care” include all children living in “orphanages,” boarding schools, group homes, and hostels? What counts as an institution? These ambiguities are similar to those which have developed over the more common term, “orphan.” In the context of adoption, both domestic and intercountry, the question of when a child needs a new (adoptive) family is deeply controversial.

Beginning a discourse on adoption with the image of a child alone, without family ties, is inherently misleading. Children do not fall from the sky; they come into this world amidst a web of relationships. When a child is found alone, the first question that must be asked, therefore, is how the separation of child from parents and family occurred. The first relevant image is not of the child already alone, but of the child with her original family; the next relevant image is that of the event which tragically separated the child from her parents.

Put another way, there is, in one sense, no such thing as an “unparented” child. No one comes into this world without having parents. The phrase “unparented child” suggests a child who really, in fact, has no parent. Such a person has never existed.

A better term, then, might be a “separated child.” A child separated from her parents and family is, as the CRC makes clear, highly vulnerable. The first right and need of such a child is a determined effort to reunify her with her family: first her parents, and if not her parents, then other family members. This effort should normally include an effort to determine the circumstances under which the separation occurred, and whether some kind of assistance might make a successful reunion possible.

Sometimes the most determined efforts to reunify a child with her family are unsuccessful. It may be impossible to identify the family of an abandoned child. The parents and extended family may be unwilling to raise their child. The parents may pose a severe threat to the safety of the child, and no relatives may be available to raise the child. Depending on the circumstances and age of the child, it may be necessary to provide such a separated child with another family who can love and provide for the child. This new family may be an adoptive family, although there are a variety of family settings that could accomplish the same end of providing a family environment for a child.

Some forms of institutional care are so profoundly destructive of children that they constitute an emergency situation, which should be remedied as quickly as possible. The profound

developmental, emotional, and physical damage caused by poor quality institutional care, particularly of infants and young children, and sometimes of older children, has been well documented. Other forms of care which might be called institutional, such as some SOS Children's Village, or hostels/orphanages which provide an education, room, and board to impoverished children, are positive interventions which can provide better opportunities for some children than would remaining full-time in the family home. Thus, some forms of "institutional care" provide a family-like environment, and some are, in effect, boarding schools for the poor, providing children with opportunities for education and adequate nutrition not available at home. Sometimes the decision to place a child in what could be called "institutional care" reflects parental decision-making and responsible care, rather than parental abandonment. Thus, it would be wrong to assume that all children living without their parents in what could be considered an "institutional setting" are in need of adoption, or are "unparented."

Sometimes, the adjustments and adaptations that a particular adoptive placement would require are so extreme as to negate the benefits of placing an older child in an adoptive family. For example, transferring an emotionally-troubled American teenage "orphan" with behavioral, cognitive, and/or educational issues from a group or foster home, to an adoptive home in China with Chinese adoptive parents who speak no English, would be inappropriate. Assuming such teenager had no cultural or language affinities with China, the resulting demands for cultural and language adjustment would overwhelm the child. Although not always recognized, the reverse situation—moving a Chinese speaking teenager from a Chinese orphanage into an English-speaking American family—can be just as disastrous. Much-older children should not be placed into societies for which they lack the language, educational and cultural skills necessary for success, and are too old to attain these necessary skills prior to adulthood. The gain of a family, for a much older child, cannot make up for the wrong of transferring them into a world which requires adjustments of which they may be incapable.

*2. How should we understand the subsidiarity principle of the Hague Convention and how do the expressions of that principle in the CRC and the Convention aid or hinder the best interests of the child?*

The subsidiarity principle of the Hague Convention and CRC prioritizes interventions on behalf of a child separated from her parents and/or family, or facing a possible future separation. First, efforts should be made to reunify the child with her family, or to avoid a future separation of the child from her parents. The first priority is thus family preservation. If family preservation efforts are unsuccessful, then interventions on behalf of the child within the child's own nation have priority over international adoption. Thus, both the CRC and the Hague Convention clearly favor domestic adoption over intercountry adoption. The status of placements other than adoption, from foster care to various kinds of institutional care, is more controversial. Some would stress the temporary, insecure, and potentially damaging nature of such non-adoptive placements, and argue that intercountry adoption should have priority over all domestic placements short of full adoption. Others argue that even institutional care should have priority over intercountry adoption, and that nations are required to develop child welfare systems that provide adequate options for their children within the nation of origin. One middle position would divide between domestic foster care and institutional care, so that domestic foster care would be viewed as a family-like environment having priority over intercountry adoption, while intercountry adoption would have priority over institutional care. I would prefer a middle position that evaluates domestic options short of adoption individually, taking account of the quality and nature of the placement, as well as the age and capacities of the child. As indicated under question one, a placement that moves a much older child to a new country, language, and culture may be more destructive to the child than high quality foster or institutional care within her own nation, despite the advantages of receiving a permanent adoptive family. In addition, in some instances high quality foster or institutional care may serve as a relatively secure and positive care setting, particularly for older children; from this

perspective, the negative label of “institutional care,” while sometimes quite accurate, is too conclusory and imprecise a term to form the basis of a legal rule. The wide variety of placements short of full adoption, and the significant differences among children in regard to their needs, history, capacity, age, and situation, counsel against an absolute rule.

The subsidiarity principle implements the best interests of the child by safeguarding the child’s relationships to her original parents and family. This conclusion follows from the fundamental principle, described in question one, that children and their families have corollary rights to preserve their familial relationships. These family ties represent a multi-generational heritage and set of connections which ground the child, as a human person, in a specific set of identities. Stripping a child of her identity and familial, community, and cultural heritage is a severe deprivation of rights, as the child generally has no choice in the matter and has her fundamental orientation to herself and the world altered without her consent.

The subsidiarity principle also preserves the child’s right to maintain continuity with her culture, language, community, and nation, even when she cannot remain with her original family. Some dismiss the connection of children to the nation, community, or culture of their original family as merely nationalist or group ownership of children in derogation of children’s rights. Such a dismissal of subsidiarity ignores the connection of human beings not only to their families, but also to the broader cultural, language, and societal groups to which they and their families belong. The well-recognized fact that many adoptees find it meaningful to return to their nation of origin even when they do not locate their original family, indicates the strength of the larger ties protected by subsidiarity. Adoption involves not only the loss of the original family, but also the loss of the original culture, community, and nation into which the child was born. The subsidiarity principle safeguards the best interests of the child by recognizing the losses inherent to adoption, and those specific to intercountry adoption; the subsidiarity principle favors interventions and placements that



will avoid or minimize these losses to the degree compatible with the child's needs for permanency and day-to-day love and care.

The subsidiarity principle further safeguards the best interests of the child by protecting the child against powerful market forces that would commodify the child as an international asset to be sold to the highest bidder. While children are not and should not be viewed as commodities, market pressures have distorted the practice of intercountry adoption. There is a great unmet desire for children in developed nations: particularly children with qualities such as youth (i.e., infants), good health, a preferred gender, or a particular race. This unmet desire has created a huge demand-side pressure, which causes intercountry adoption to be practiced as a means of locating children for prospective adoptive parents in rich countries. The supply of legally available children in developing nations meeting these desired characteristics of youth and health is much smaller than the demand. The subsidiarity principle, properly implemented, prevents adoption agencies and facilitators from exploiting the poverty and powerlessness of poor families in developing nations to extract the kinds of children in greatest demand. Under the subsidiarity principle, the first obligation is to provide assistance that will allow families to keep their children, rather than exploiting imbalances of wealth and power to extract children for intercountry adoption.

Most children truly in need of adoption, in both the United States and other nations, are older children and children with special needs (including children with serious physical, cognitive, emotional, and educational disabilities or difficulties.) Absent the subsidiarity principle, those children are often ignored or passed over by a demand-driven adoption system seeking to extract children with the more desirable characteristics of youth and health. The subsidiarity principle is a necessary corrective that requires interventions to be chosen according to the rights and needs of the child and original family, rather than according to the desire of adults for healthy infants and adoption agencies and facilitators for monetary compensation.

*3. How should the law (and the governments of sending and receiving nations) respond to concerns with child trafficking, corruption, and adoption fraud in the intercountry adoption system?*

Significant segments of the adoption community are in deep denial about the prevalence and seriousness of abusive practices in intercountry adoption. This denial, and the subsequent failure to adequately respond to these abuses, constitutes the greatest threat to the future of intercountry adoption.

The historical and legal record indicates that “the abduction, the sale of, or traffic in children,” as the CRC and Hague Convention describe it, is the most significant category of abusive practices. My work has termed these practices child laundering (although I did not invent the term). Typically, child laundering consists of obtaining children illicitly through force, funds, or fraud, providing false paperwork that indicates that the children are abandoned or relinquished “orphans,” and then processing these “orphans” through the official intercountry adoption system. The preparatory materials of the Hague Convention, created between 1988 and 1993, name this kind of “trafficking” as the most significant abusive practice of the time, and indicate it was particularly prevalent in Latin American nations. The 1993 Hague Convention states that the creation of safeguards to prevent “the abduction, the sale of, or traffic in children” is one of the purposes of the Convention.

Unfortunately, in the years since the Convention was finalized, significant child laundering practices have arisen in many nations, including Cambodia, Chad, China, Guatemala, Ethiopia, Haiti, India, Liberia, Nepal, Samoa, and Vietnam. While the Hague Convention has some flaws, the principal reasons for these continued abuses have been the failure to ratify and properly implement the Convention. The United States, statistically the most significant receiving nation, did not effectively ratify the Convention until 2008. Even to the present day, the United States implementation of the Convention has fundamental flaws. These include a failure to limit the amounts of money that are sent to intermediaries (facilitators, attorneys, orphanages, and others) in

countries of origin; a failure to make United States adoption agencies legally responsible for the illicit actions of foreign intermediaries or partners; a failure to require Hague accreditation or apply Hague standards to agencies placing children from non-Hague Convention nations; and a failure to provide for adequate investigation and prosecution of child laundering and other abusive practices.

The most fundamental problem is money. Guatemala is the most obvious example (see Chapter 7). Between 2002 and 2008, 24,778 Guatemalan children came to the United States for intercountry adoption, with the typical fee paid to Guatemalan attorneys in the range of 15,000 to 20,000 USD per child: a total of 371 to 495 million dollars over seven years. In a country with poor governmental capacity, chronic corruption, endemic violence against women, the scars of a 36 year civil war, and a significant percentage of the population living in extreme poverty, these unaccounted-for funds incentivized systematic child laundering. The United States government instituted single DNA, and then double DNA, testing, but it was eventually proven that even the system of double DNA testing had been violated (see Chapter 5). Fundamentally, no amount of regulation can overcome the incentives for abuse when such large amounts of money are introduced into vulnerable developing nations.

Despite a constant stream of substantial evidence of severe abusive practices, as documented by the Hague Conference on Private International Law, International Social Service, Terre des Hommes, the United States government, journalists such as E. J. Graff of the Schuster Institute for Investigative Journalism, my own work, and that of many others (see Chapters 2, 3, 4, 5, 7, 10), some adoption proponents have minimized the extent and significance of these practices. Reports of abusive practices have been interpreted as a conspiratorial attack motivated by ideological opposition to intercountry adoption. The result is tragic. Significant components of the adoption community react to serious wrongdoing by defending status quo practices that incentivize child laundering. Instead of demanding positive reforms that could safeguard intercountry adoption against such wrongdoing, much of the adoption community resists the necessary reforms in the

areas of money and agency accountability. Some adoption “advocates” vainly hope that prosecutions of a few “bad” actors will be enough to safeguard the intercountry adoption system, in a developing nation context where those actors have been provided more than enough cash to buy their way out of trouble, and where the primary cause of the abuse is financial incentives for child laundering provided by over-generous fees and unregulated donations.

Some individuals are ideologically opposed to intercountry adoption, but I, and many others seeking to document abuses and safeguard the system from them, are not among them. In the end, the truest enemies of intercountry adoption are those who refuse to acknowledge the very real abuses, and resist the only reforms capable of safeguarding the system from those abuses.

### **Bartholet and Smolin Respond**

Each author responds to the assertions made by the other in questions 1-3 in this section below.

#### *Bartholet Responds to Smolin*

On the first question, Smolin argues that the phrase “unparented children” is ambiguous, and its definition overly broad in including “those living without family care including those in institutionalized care.” He says institutional care is really not so bad, and often better than what biological parents can provide. But experts in child welfare are united in their belief, based on brain science, social science, and developmental psychology, that institutions, even the better ones, are almost always terrible for children, brutally unloving in the short term, and seriously harmful to their life prospects in the long term. The USA Congressional Coalition on Adoption Institute (CCAI) recently initiated the Way Forward project based on this widespread consensus, with the goal of helping African leaders move children out of institutional care into families.<sup>3</sup>

On the second question, Smolin argues that the subsidiarity principle, as generally interpreted, serves children’s best interests. He supports the classic positions argued by opponents of international adoption, promoting in-country solutions like foster and even institutional care over

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<sup>3</sup> I am one of the group of U.S. and African child welfare experts named as members of this Way Forward project.

out-of-country adoption. He separates himself from such opponents by his claim that he would evaluate such in-country options individually rather than by a general preference rule. But his reasoning indicates that he too believes that in-country options are *generally* preferable because they serve children's interests in cultural continuity. He indulges in the classic false romanticism about the value of "cultural heritage" to children growing up deprived of the basic human right to the heritage of parental love. He ignores the horrible realities characterizing most unparented children's lives.

In my view subsidiarity, as generally interpreted to favor almost all in-country options over out-of-country adoption, has operated *contrary* to children's best interests. It has been used to justify locking children into institutions rather than placing them in available international adoptive homes. It is now being used to justify placing children in paid foster care in-country in preference to international adoption, although foster care has never worked as well for children as adoption. Paid foster care presents particular risks to children in poor countries, where desperation will motivate many to offer to "parent" for the stipend alone.

Some justify subsidiarity as serving the interests of in-country parents, both the original biological parents, and those interested in becoming foster or adoptive parents. Others justify it as serving the interests of sovereign nations. Neither are worthy goals, if children's rights to grow up in nurturing homes are at issue. Parents and sovereign nations should be guided by the best interests of children, not their own interests in holding onto children they cannot care for, or in getting paid to foster. Nor will keeping children in-country enrich or strengthen impoverished nations. Subsidiarity does serve, of course, to enrich and empower organizations like UNICEF that work in-country.

On the third question, having to do with adoption abuses, Smolin says supporters of international adoption are in "denial." "Denial" is a favored claim by those who do not like the facts others put forth. Smolin has no evidence that serious abuses are extensive -- abuses such as

kidnapping, fraud on birth mothers inducing non-consensual relinquishments, and payments to birth mothers inducing relinquishment decisions they would not have made otherwise. A recent law review article by Richard Carlson gives the lie to Smolin's claims, addressing his arguments in detail. I summarize that article in my introduction to the issue, as follows:

Richard Carlson's article ... systematically tak[es] on all the important arguments made by critics of international adoption, analyzing them carefully and rationally in light of the actual facts....[He] find[s] no reason to believe that corruption, trafficking, fraud, or other serious abuses are prevalent. He argues... that there is no persuasive proof that significant adoption abuse is widespread, and that while some illegalities exist in this area, as in all areas of human endeavor, they are far outweighed by the positive impact of international adoption on children as well as their families and countries of origin (Bartholet, 2010-2011, pp. 690, 695-696).<sup>4</sup>

Critics like Smolin never weigh the costs of adoption abuses against the costs of human rights violations to children when they are denied adoption. The truth is that institutionalization is responsible for the systematic violation of the fundamental rights of millions of children on a daily basis. The closing down of international adoption that Smolin and other critics encourage denies many thousands of children per year the opportunity to escape.

I want to address such serious adoption abuse as actually exists. But I want to do so by penalizing those perpetrating such abuse, and not penalizing innocent children as we now do by shutting down international adoption or restricting it in ways that deny institutionalized children the opportunity to find adoptive homes.

Smolin's claim that adoption abuses are common relies on use of the vague "laundering" term, merged with complaints that international adoption fees and donations are so large that they create the risk of corruption. But there is no reason to equate all funds connected to international adoption with corruption, while assuming that all other funds flowing to poor countries represent an unmitigated good.

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<sup>4</sup> See also Carlson (2011).

International adoption results in very significant funding for services for poor children and families in-country, and related humanitarian work. One measure of only a small part of this funding is the study conducted by the Joint Council on International Children's Services, an umbrella organization for agencies involved in international adoption. Its January 2011 newsletter reports that in just one country, Ethiopia, Joint Council partner-organizations contributed in just one year, 2010, \$14 million in services, primarily in community development, including medical care, family empowerment and preservation, education, and foster and kinship care, serving over 1.6 million children and families, with less than 0.1 percent of them served through international adoption. Smolin characterizes this kind of funding as corruption, arguing that it encourages international adoption. But why not recognize that *both* this kind of funding for in-country services *and* international adoption help children?

UNICEF is involved in different kinds of funding deals. Together with the USA Government it pressured Ethiopia to reduce by 90 percent its international adoption program, based on alleged adoption illegalities. When the CCAI's Way Forward project met in Ethiopia a few months later, officials announced a USA grant of \$100 million, with 10 percent channeled through UNICEF, for in-country services work. Those I consulted with, who had decades of experience on the ground there and reason to know what was going on, thought the quid pro quo clear -- shut down international adoption and we'll give you \$100 million USD. Why isn't this kind of apparent deal characterized as corruption? Why isn't it condemned as harmful to children, shutting off the international adoptive homes that represent for many their best option? Why isn't Smolin interested in investigating any corruption or other misuse of funds given to organizations like UNICEF for in-country work?

Smolin's characterization of international adoption as "exploiting imbalances of wealth and power to extract children" reflects a classic claim that such adoption is simply a modern manifestation of the evils of colonialism. Colonialist exploitation was an evil. But the modern

phenomenon of international adoption involves individual parents taking into their homes and hearts children in need for whom there is no other good option. A significant percentage of these parents are devoting their lives to trying to help children horribly damaged by pre-adoptive lives in institutional care recover and thrive. Sensible and caring policy makers should be able to recognize that this is not colonialism, and to regulate in a way that protects children's rights to nurturing homes

### **Smolin Responds to Bartholet**

Professor Bartholet eloquently describes a prevalent adoption fantasy, in which the creation of a large-scale adoption system employing highly-paid private intermediaries can be operated ethically and with little collateral damage in nations where corruption, document fraud, bribery, poverty, deep inequality, and human trafficking are prevalent. According to this fantasy, all the law need do is prosecute the few wrongdoers and otherwise keep regulation to a minimum, allowing the system to match an endless number of vulnerable orphans with eager adoptive parents in the West. Unfortunately, without adequate monetary controls and regulation such adoption systems soon reflect the societies in which they operate, becoming themselves rife with corruption, fraud, bribery, exploitation of the poor and powerless, and human trafficking. Indeed, the infusion of millions of dollars from the United States into poor and transition economies creates new incentives for corruption, fraud, and human trafficking, effectively creating a market in children. Invoking the desperate situations of many children in developing nations and the human desire to protect and nurture, Professor Bartholet fails to account for how systems created to alleviate human ills can sometimes cause more harm than good.

Within Professor Bartholet's adoption fantasy, adoption is an inherent, rather than relative, good; she therefore dismisses or minimizes harms related to adoption that are generally considered serious issues in the broader adoption community.



For example, Professor Bartholet says there is “no evidence that children suffer any harm from placement across racial, national, or other lines of difference.” This “no harm” assessment is consistent with her position that there should be no preference for domestic over intercountry adoption.

Similarly, Professor Bartholet appears to perceive very little loss or harm to children in regard to adoption generally, saying that “[a]doption serves children’s needs essentially as well as biologically-linked parenting...”

There is little in Professor Bartholet’s answers, and in her articles, that acknowledges one of the central themes of modern adoption literature: loss. It is one thing to say (as I would) that the gains of an adoption, domestic or intercountry, can be enough to outweigh the losses involved, making it the best option for a child under certain (generally tragic) circumstances. It is another thing to approach adoption (as Professor Bartholet appears to do) from a perspective that minimizes and dismisses the substantial losses involved in adoption.

Adoption involves the loss of relationship and connection to one’s original parents, sibling, and extended family. Any perspective on adoption that does not, at the outset, understand this is as a significant loss and harm to both child and original family is, I believe, dangerous and deficient. This danger is particularly great in a culture like that of the United States, which practices a system of closed-record, secret adoption in which the law pretends that the child was born to the adoptive parents. It is not healthy to feed the legal and cultural pretense that adoptive children have no connection to the multi-generational family group that conceived and birthed them. In a world in which we (outside the context of adoption) acknowledge that both nature (genetics) and nurture matter, pretending that genetic inheritance and nine months of nurture in the womb mean nothing makes no sense. Such a pretense makes even less sense given the large numbers of older child adoptions in which children have spent a significant part of their childhood with their original family.

It also makes no sense to ignore the additional losses of culture, language, and nationality involved in intercountry adoption. Professor Bartholet ignores studies and adoptee accounts which amply illustrate the psychological difficulties and complexities created by these losses. For example, one recent survey of Korean adoptees by the Evan B. Donaldson Institute found that 78 percent of Korean adoptees during childhood considered themselves to be, or wanted to be, White. Surely it is a harm to feel psychologically driven to deny a significant aspect of one's body, identity, and genetic inheritance. Acknowledging that these very real losses and harms can be outweighed, in a given case, with the gains involved in an intercountry adoption, is very different from minimizing or denying the losses and harms involved in the first place.

Professor Bartholet's response to the harms caused by illicitly obtaining children through kidnapping, fraud, and child-buying is equally dismissive, saying there is "no persuasive evidence that such abuses are widespread." She further states that "the overwhelming majority of adoptions [are] taking place in compliance with the law." In doing so, Professor Bartholet brushes aside widespread evidence from a broad variety of sources documenting serious, systemic misconduct in many nations, including Cambodia, Ethiopia, Guatemala, India, Nepal, and Vietnam. While it is possible to bury one's head and issue "see no evil" pronouncements, such is hardly a sound basis for public policy.

Professor Bartholet similarly dismisses other difficulties by silence and inattention, saying little in these essays, as well as her articles, about the central problem of money in the intercountry adoption system. Instead of calling for limitations on the amounts of money that can be sent to intermediaries in developing nations, she specifically defends the role of "private intermediaries," calling them the "lifeblood" of adoptions from Central and South America. Lifeblood indeed!! A system that pays "private intermediaries" thousands of dollars to obtain children from vulnerable families living in extreme poverty in developing nations is inviting child laundering. How can the

rights of children and poor and vulnerable families be protected in a system that so obviously incentivizes the illicit sourcing of children?

Professor Bartholet may be unconcerned about illicit sourcing of children because she assumes that with so many children in obvious need of intercountry adoption, it is not much of an issue. This picture of virtually endless numbers of children in need of intercountry adoption is misleading. For example, Professor Bartholet uses the estimate of 143 million orphans (presumably from UNICEF), while ignoring the clarification from UNICEF that their various estimates of “orphans” include those who have lost only one parent. Hence, about 90 percent of such “orphans” are still living with a parent, and thus are not relevant to discussions of the need for intercountry adoption. Similarly misleading is Professor Bartholet’s presumption that Chinese orphanages still are overwhelmed with large numbers of baby girls, despite strong evidence that the numbers of healthy infants in Chinese orphanages has been sharply reduced, in part through (illegal but prevalent) sex selective abortion. Similarly, Professor Bartholet ignores extensive evidence that there are increasing numbers of domestic adoptions—and waiting lists for domestic adoption of healthy babies of both genders—in nations such as China and India. There are, I would argue, relatively few healthy babies or toddlers truly in need of intercountry adoption.

Lumping all “orphans,” street children, institutionalized children, etc., together to demonstrate a need for intercountry adoption ignores important differences between such children, as well as the highly differential number of available, qualified adoptive parents. There are millions of Americans, many with fertility issues, yearning to adopt a healthy infant or toddler. There are, however, relatively few who can or should attempt a high-risk adoption of a much older, highly traumatized child—indeed, we don’t even have enough adoptive parents for such children within the United States, given the many much older children waiting for adoption from our foster care system. In addition, many much older street and institutionalized children may be incapable of adapting to conventional family life, let alone making the huge adaptations of language and culture

expected of intercountry adoptees. Thus, despite the existence of many older, special needs and disabled children both in the United States and globally who are separated from their families, there are very few of the kinds of children the vast majority of prospective adoptive parents seek: healthy young infants or toddlers. Hence, the existence of millions of institutionalized and street children does not prevent the illicit sourcing of the kinds of children most sought by prospective adoptive parents.

Professor Bartholet unfortunately ignores the capacity of monetary incentives for intercountry adoption to draw children unnecessarily into institutional care, creating the very kind of harm (the institutionalization of children) which she most decries. As the very “private intermediaries” she praises seek out the kind of children for which they will be paid, children are pulled, through various illicit means, out of families and into orphanages; while some of those children are eventually adopted (despite not being true orphans), others die or live out their childhood in these damaging institutions.

Professor Bartholet also over-states the influence of the Hague Convention, whether for good or ill, when she states that “almost all countries that engage in international adoption...have ratified” the Convention. In fact, a number of significant sending nations, such as Ethiopia, Russia, South Korea, Ukraine, and Vietnam, have not ratified the Convention, leading to a situation where a significant proportion of adoptions to the United States are non-Hague Convention adoptions. (The United States does not apply Hague Convention rules to adoption from non-Hague Countries.) Since the United States ratification of the Hague Convention was not effective until April 2008, and adoptions to the United States constitute approximately half of all intercountry adoptions, much of the development of the contemporary system has, until very recently, occurred outside the rubric of the Convention. Overall, the tendency of Professor Bartholet to scapegoat the Hague Convention, the CRC, and various human rights organizations for the ills of the system is unfortunate. While these documents and organizations certainly have their flaws, those pale in

comparison to the poor practice standards endemic among the private adoption agencies that dominate intercountry adoption practice in the United States. It is those agencies that have created virtual bidding wars for adoptable children in nation after nation, while linking to intermediaries and partners who practice in a context of widespread falsification of documents, bribery, corruption, and child laundering. In this kind of context, it is very difficult to sort out ethical from unethical adoptions, and to engage in the kind of accuracy in documents and social work practice which would provide the best chance of success for high-risk adoptions of older and special needs children.

The intercountry adoption system is in trouble. Advocates for the system, such as Professor Bartholet, seek to blame an ever-widening circle of supposed “enemies” of adoption; instead, they would do better to change course and make common cause with those, like myself, who see serious reform as the only possible solution.

### **Editors’ Note**

The editors, Judith Gibbons and Karen Rotabi, would like to thank Professors Bartholet and Smolin for bringing the differences in opinion about intercountry into sharp focus and for elucidating the complexity of the issues involved.