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CHILD LAUNDERING AS EXPLOITATION: APPLYING ANTI-TRAFFICKING NORMS TO INTERCOUNTRY ADOPTION UNDER THE COMING HAGUE REGIME

David M. Smolin^{*†}

INTRODUCTION

As the United States government continues its slow and long-delayed march toward ratification and implementation of the Hague Convention on Intercountry Adoption,¹ the goals and rationale of that process remain obscure. The preamble to the Hague Convention indicates that the signatory nations are "convinced of the necessity to take measures to ensure that intercountry adoptions are made in the best interests of the child and with respect for his or her fundamental rights, and to prevent the abduction, the sale of, or traffic in children."²

The substantive provisions of the treaty reaffirm these concerns by stating that the objects of the Convention are:

- (a) to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law;
- (b) to establish a system of co-operation amongst Contracting States to ensure that those safeguards are respected and thereby prevent the abduction, the sale of, or traffic in children;
- (c) to secure the recognition in Contracting States of adoptions made in accordance with the Convention.³

The Hague Convention's concern that adoptions not subvert the best

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1. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1138 [hereinafter Hague Convention].

2. *Id.* at 1139.

3. *Id.*

interests and rights of children through the illicit practices of abducting, selling, and trafficking in children has found much resistance in the United States. The United States Department of State, poised to play the key role under the treaty as the central authority overseeing intercountry adoption, has declared that buying children for adoption is not child trafficking, since children are not “exploited” by such practices.⁴ Prominent advocates of intercountry adoption perceive that buying or abducting children is so rare as to be virtually irrelevant, and hence that regulations aimed at eliminating such practices would needlessly slow adoptions, doing more harm than good.⁵ Although not often stated openly, many in the adoption community perceive little harm in providing economic incentives for birth parents to place children for adoption, based on the viewpoint that the children will be “better off” in a developed Western society.⁶ Thus, on the eve of Hague ratification, the combined voices of the U.S. government, adoptive parents, and adoption agencies remain skeptical of the central premises and purposes of the Convention.

The central matter disputed is whether the evils against which the Hague Convention is aimed are harmful. This question of harm breaks down into two major issues: (1) the incidence of practices such as abduction and child selling in the intercountry adoption system; and (2) whether such practices, even when they occur, are in fact significantly harmful.

This author’s prior article, *Child Laundering*, provided evidence that buying and abducting children for purposes of intercountry adoption was a serious and recurrent problem within the intercountry adoption system.⁷ Further, the article identified “child laundering” as the characteristic form of such illicit behaviors and one in which the intercountry adoption system provided the motivation and means for kidnapping and buying children. Child laundering characteristically involves (1) obtaining children illicitly

4. OFFICE OF THE UNDER SEC’Y FOR GLOBAL AFFAIRS, U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 21 (2005), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter 2005 TRAFFICKING PERSONS REPORT].

5. See, e.g., Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 THE FUTURE OF CHILDREN 89, 96 (1993), available at www.futureofchildren.org/usr_doc/vol3no1art6.pdf (“[P]ublic discourse about international adoption focuses overwhelmingly on its alleged risks.”).

6. Marc Lacey, *Guatemala System Is Scrutinized as Americans Rush in to Adopt*, N.Y. TIMES, Nov. 5, 2006, at A1 (quoting a prominent adoption attorney in Guatemala as stating: “Here, we don’t live—we survive Which would a child prefer, to grow up in misery or to go to the United States, where there is everything?”). The article further asks, if “American couples say that if they are going to pay \$25,000 to \$30,000 for an adopted child . . . shouldn’t the birth mother get something?” *Id.*

7. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practice of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 115–17 (2006) [hereinafter *Child Laundering*].

through purchase or abduction; (2) falsifying the child's paperwork to hide both the illicit conduct and the child's history and origins; and (3) processing the child through the intercountry adoption system as an "orphan" and then adoptee.⁸ *Child Laundering* gathered evidence indicating that a significant percentage of children from some sending countries, and a significant number of children overall, have been impacted by such practices.⁹

Even those who accept the considerable evidence of child laundering within the intercountry adoption system may doubt that such conduct causes substantial harm. Therefore, this Article concentrates on the question of whether abducting, buying, or selling children for purposes of adoption is harmful. The positive perceptions of adoption in the United States, both within and beyond the adoption community, make it difficult for many to accept that adoption could be harmful. The "adoption myth" in which virtuous adoptive parents bond with grateful and loving orphans makes it difficult to imagine that adoption could harm a child. The virtual absence of the voices of birth families, particularly in intercountry adoption, makes it difficult for readers to take seriously harms against the birth family. Therefore, contemplating adoption as potentially harmful requires a re-visioning of adoption, and hence is in part an act of moral imagination. This Article employs narratives to help the reader come to grips with the counter-cultural notion that adoption could harm or exploit children and families. At the same time, the Article also employs more conventional forms of argument on this delicate subject.

This question of whether adoption can be harmful bears upon the legal question of whether the abduction, purchase, or sale of a child for purposes of adoption is a form of child trafficking. Legally speaking, the definition of "child trafficking" sometimes requires exploitation.¹⁰ This Article supports the implicit claim of the Hague Convention, that buying or selling

8. *Id.* at 115–16.

9. *Id.* at 117–24.

10. See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery art. 1(d), Sept. 7, 1956, 18 U.S.T. 3201, 266 U.N.T.S. 3.

[Child Trafficking is defined as] any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.

Id.; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25 art. 3, U.N. GAOR, 55th Sess., Supp. No. 49, U.N. Doc. A/45/49 (Sept. 9, 2003) [hereinafter Trafficking Protocol] (defining "trafficking in persons" and "child" and explaining the use of such terms); see also 2005 TRAFFICKING PERSONS REPORT, *supra* note 4, at 21 ("Trafficking . . . implies exploitation of the victims.").

children for purposes of adoption is a form of child trafficking. This Article therefore seeks to explain how even adoption into a loving family can be a form of “exploitation” where the child’s path into that family involves abduction or sale.

Implementation of the Hague Convention will remain unsuccessful until and unless those involved embrace the fundamental goals of the Convention, particularly the goal of preventing the abduction and sale of children for purposes of adoption. Although few would advocate child abduction or child selling, the purported support for abolishing those practices dissipates as soon as any kind of cost, effort, or sacrifice is involved. Viewing child selling and abduction for adoption as a kind of victimless crime, technical regulatory breach, or mere *malum prohibitum*, undermines support for the Convention. To many, the Hague Convention is a regulatory nuisance that slows the heroic work of rescuing children through adoption. Successful implementation of the Convention will require a shared understanding that the evils it is designed to combat—principally abduction, purchase, and sale of children for adoption—are profoundly exploitative and harmful to children and families.

I. ADOPTION AND THE EXPLOITATION OF THE BIRTH FAMILY

The fundamental ethical premise of this Article is that adoption should be conducted in a manner that respects the human dignity and human rights of all concerned.¹¹ The term “adoption triad” refers to the three affected parties: birth family, child, and adoptive family.¹² The child’s relationships to the birth and adoptive families are in some ways analogous to a child’s relationships to never-married or divorced parents. The child in both instances is a bridge between adults who otherwise may have no interest in maintaining an ongoing relationship. In the context of children of never-married or divorced parents, the child’s relationships to both parents (and sets of grandparents and other relatives) can create the occasion for competitive claims over the child.¹³ In the context of adoption, the potentially conflicting claims of birth and adoptive families to a child make it difficult to sustain an adoption system that respects all involved. Indeed,

11. See 3 MADELYN FREUNDLICH, *The Impact of Adoption on Members of the Triad*, in ADOPTION AND ETHICS 169 (2001) [hereinafter *Triad*] (“In any consideration of ethical issues in adoption, there is no more important area of focus than the impact of adoption on members of the triad.”).

12. *Id.* at ix.

13. See generally *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (considering the constitutionality of a third-party visitation statute in the context of grandparent visitation); IRA MARK ELLMAN ET AL., FAMILY LAW 559–680 (4th ed. 2004) (providing overview of law governing child custody disputes).

law and custom concerning adoption unfortunately have built the legitimacy of the adoptive family relationship largely upon the denigration of the birth family, perhaps because the birth parents are viewed as a threat to the adoptive family.¹⁴

Adoptive parents and adoption workers understandably are advocates for the positive significance, worth, and “reality” of adoptive family relationships. From this perspective, few things are more infuriating than being asked about an adoptive child’s “real parents.” “We are real parents,” is an adoptive parent’s common and automatic response.¹⁵ There is a palpable resentment in the adoption community to a rhetoric that makes biological parents into a child’s “real” parents, with its implicit denigration of adoptive parents to something less than “real” parents.¹⁶

The need of adoptive parents to defend and justify their own relationship to their adoptive children occurs in the shadow of an implicit comparison to the biological parent-child relationship. Adoptive relationships are often implicitly modeled after birth or blood relationships, and hence adoptive relationships may seek legitimacy by seeking to appear as much as possible like a birth relationship.¹⁷ Unfortunately, since adoptive relationships are unlike birth relationships in certain ways,¹⁸ this path to legitimacy causes several problems.

Adoptive parents are unlike birth relationships in the following ways. First, birth parents who have custody of their children are not inherently competitive or comparative with another set of parents. They therefore benefit from a kind of natural exclusivity as parents, at least under current societal conditions, so long as both parents live with one another and their joint children. By comparison, adoptive parents are implicitly viewed as only one of two sets of parents, and therefore lack any natural exclusivity as parents.¹⁹ Second, birth parents have a set of hereditary and genetic links

14. See *Triad*, *supra* note 11, at 13, 124, 163 (noting various perspectives or sources that view birth parents as intrusive on or undermining of adoptive parents).

15. See *id.* at 132, 135, 157, 168 (discussing justification of adoptive relationships and the rhetoric of “realness”).

16. *Id.*; see also JANE JEONG TRENKA, *THE LANGUAGE OF BLOOD* 60 (2003) (recounting an argument where the author insulted her adoptive mother by suggesting she was something less than her real mother).

17. See Barbara Melosh, *Adoption Stories*, in *ADOPTION IN AMERICA* 218, 219 (E. Wayne Carp ed., 2002) (discussing adoption practices that make the “adoptive family indistinguishable from the biological family” such as secrecy, amended birth certificates, and placing children with adoptive parents who are similar in appearance); Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918–1965*, in *ADOPTION IN AMERICA* 160, 162–64 (E. Wayne Carp ed., 2002) (describing the “systematic effort to create adoptive families on the model of the biological family”).

18. See *Triad*, *supra* note 11, at 129–36, 167–68 (explaining the ways in which adoptive relationships are unlike birth relationships); *infra* notes 19–20 and accompanying text.

19. See *Triad*, *supra* note 11, at 118–28, 130–36, 155–68 (describing the issues faced by

with their children, including racial, ethnic, and “familial” continuities that are often obvious merely from observing parents and children together. In contrast, adoptive parents lack hereditary links, which is sometimes obvious simply from observing the family. The two differences between adoptive and birth families are therefore linked. For example, when a white father and white mother are with their Asian child, both the lack of hereditary links and the existence of “missing” birth parents are evident.²⁰

Given these differences between adoptive and birth families and the desire to try to model the adoptive family after the birth family, several tendencies emerge. For this Article, the most significant is the attempt to make adoptive families as exclusivist as birth families. The exclusivism of the adoptive parent is won largely through the denigration and denial of the birth family.²¹ The law has cooperated in this venture through the legal fiction that adoptive children have no relationship to their birth parents.²² This legal fiction is embodied in what might be termed officially falsified documents, such as birth certificates showing adoptive parents as birth parents. Sealed birth records reinforce the law’s determined destruction of any relationship between adopted children and their birth families. The clear message is that adoptees have only one set of parents and one family. Multi-generational genetic inheritance and the contribution of the birth mother in carrying the child and giving birth are rendered meaningless under the law.²³

The legal regimen of domestic adoption developed in the twentieth century has asked birth mothers to give up all interest in the child and to forever remain ignorant as to the name, whereabouts, and fate of the child. For all practical purposes, it was to be as though the mother had never conceived, carried, or given birth to the child. The cruelty of this arrangement for birth mothers was apparently not evident to the social

adoptive families, including their relationships to biological parents and parenthood).

20. See 1 MADELYN FREUNDLICH, *The Role of Race, Culture, and National Origin, in ADOPTION AND ETHICS* 93–98 (2000) (presenting three alternative positions on international adoption in relationship to race and identity issues).

21. See, e.g., *Triad*, *supra* note 11, at 132 (explaining how adoptive parents deemphasize “the importance of the blood tie between parent and child”).

22. Hague Convention, *supra* note 1, at 1142, art. 26. Even “[o]pen adoption means permanently terminating parental rights; having no legal rights to the child . . . ; [and] forever giving up their role as parent to the child.” *Triad*, *supra* note 11, at 122 (quoting LOIS RUSKAI MELINA & SHARON KAPLAN ROSZIA, *THE OPEN ADOPTION EXPERIENCE* 41 (1993)); see also Melosh, *supra* note 17, at 220 (addressing the legal system’s attempt to make adoptive families as secure as blood-related families).

23. See E. WAYNE CARP, *FAMILY MATTERS* 173–77 (1998) (citing a historical preference by adoption agencies and the courts to keep adoption records sealed); *Triad*, *supra* note 11, at 12–13 (describing the practice of sealing birth records from public access); Melosh, *supra* note 17, at 219 (discussing confidential adoption practices).

workers or others involved in creating the closed-record, exclusivist adoption system. The theory was apparently that closed-record adoption was a “good deal” for a woman who would be saved from the shame of single motherhood. Adoption was a way of hiding this shame from the world, of pretending it had never occurred, and allowing the woman to go on to a marriage and “normal” family life.²⁴

There is substantial evidence that many birth mothers in the United States who officially “consented” to relinquish their children for adoption were pressured or coerced into the arrangement. Both published books²⁵ and Internet sites²⁶ contain harrowing stories of pressure, coercion, and inhumanity in procuring consents. Fundamentally, there seems to have been a denial that the single mother and child could represent a valid family. This perspective is represented by the following quotation:

An agency has a responsibility of pointing out to the unmarried mother the extreme difficulty, if not the impossibility, if she remains unmarried, of raising her child successfully in our culture without damage to the child and to herself The concept that the unmarried mother and her child constitute a family is to me unsupportable. There is no family in any real sense of the word.²⁷

From this context, it may have been viewed as the “best thing” to virtually force single women to relinquish their children for adoption. If the mother-and-child unit was not a family, then removing the child was not perceived as the destruction of a family, nor as an interference with a family relationship. The denial of the birth event was apparently seen as necessary to the rehabilitation of both the single mother and the child, rescuing the former from shame and sin and the latter from the stigma of being an “illegitimate” or “bastard” child.²⁸

24. See *Triad*, *supra* note 11, at 12–13, 69 (describing social norms in the 1940s that allowed unmarried Caucasian women to give children up for adoption and return to the marriage “market”); Melosh, *supra* note 17, at 219 (“The unwed mother might recover from the stigma of pregnancy out of wedlock, gaining a second chance for marriage and respectable motherhood.”).

25. See generally ANN FESSLER, *THE GIRLS WHO WENT AWAY* (2006) (recounting stories of American women who gave their children up for adoption between 1945 and 1973).

26. Healing Families Dismembered by Adoption, <http://www.adoptingback.com/index.html> (last visited Oct. 12, 2007); “Birth-” Mothers Exploited by Adoption, Adoption: Mothers in Exile, <http://www.exiledmothers.com> (last visited Nov. 16, 2007).

27. “Birth-” Mothers Exploited by Adoption, Disembabement: How Our Babies Were Taken for Adoption, http://www.exiledmothers.com/babies_taken_for_adoption/index.html (quoting Joseph H. Reid, *Principles, Values, and Assumptions Underlying Adoption Practice*, 1956 NAT’L CON. SOC. WORK).

28. *Triad*, *supra* note 11, at 69.

The cruelty of virtually demanding a permanent severing of the parent-child relationship based on the marital status of the parents has become increasingly apparent. The haunted and pained voices of the mothers who “relinquished” their children under such circumstances are readily available to those willing to listen.²⁹ The adoption communities in the United States, however, have not absorbed the significance of such voices. Further, it is difficult to establish whether the pain and regret that fills these narratives are representative given the self-selected nature of most of these sources. This lack of controlled, empirical verification creates the possibility of denial: maybe the women who complain of coercion and speak of regret are only a small minority; maybe the twentieth century adoption system worked well for most relinquishing birth mothers.³⁰

The impetus to deny any significance to the biological parent-child relationship also has its roots in a fundamental lack of imagination. United States popular and literary culture has great difficulty in portraying (and hence imagining) a child with parental allegiance to two mothers or two fathers. Thus, in the famous *Andy Griffith Show* the young boy Opie almost never refers to his deceased mother. Similarly, the classic show about a blended family, *The Brady Bunch*, portrays a half-dozen children who apparently never think about their respective deceased parents. This tendency is reinforced in many classic portrayals of adoption and adoption-like situations in which children are forgetful of their birth parents and eager for the love of new parents or parental substitutes.

Unfortunately, this lack of imagination has included a lack of moral imagination, particularly by those social conservatives and family traditionalists who view themselves as specialists in family morality. Social conservatives have emphasized the importance of marriage and the two-parent family as providing the best environment for raising children.³¹ From this perspective, adoption perhaps seems like the perfect solution to the problem of single motherhood. The child would be transferred from a sub-standard single-parent home to the normative two-parent family. The mother would be relieved of the negative social consequences of bearing a child out of wedlock, even while the norm of marriage as the sole legitimate locus for sex and procreation would be reinforced. The mother’s sacrifice of her parental rights could perhaps even be seen as a redeeming act of self-

29. FESSLER, *supra* note 25, at 9–13; “Birth-” Mothers Exploited by Adoption, *supra* note 27.

30. *Cf. Triad*, *supra* note 11, at 63–128 (discussing impact of adoption on birth parents).

31. INST. FOR AM. VALUES & INST. FOR MARRIAGE AND PUB. POL’Y, MARRIAGE AND THE LAW: A STATEMENT OF PRINCIPLES 1 (2006), available at <http://www.marriedebate.com/reg/> (must register and login to access document). This author is one of the signatories to the statement, despite disagreeing with a portion of it.

sacrifice. By this act of self-sacrifice, the birth mother would have “saved” all concerned: she saved herself from shame and poverty; her family of origin from embarrassment; her child from stigma and the lack of an involved father; and the adoptive family from childlessness.

Ironically, the socially conservative moral vision undergirding twentieth-century domestic adoption required a denial of what might be called the “natural law” of mother-child relationships. Those who most embraced motherhood failed to understand how “unnatural” and disabling it can be for a woman to bear and birth a child, and then try to pretend that the event never occurred. Indeed, from a traditionalist family perspective the horrific narratives of women who regret losing their children to adoption read like the narratives of women who regret their abortions.³² There is the same sense of being pressured by difficult circumstances, manipulative intimates, and strangers into an irredeemably painful “choice.” There is the same denial of one’s nature as a woman and a mother, and of one’s relationship to a child. The question of whether these anti-abortion ways of narrating and reconstructing the impact of abortion on women are accurate or balanced is beyond the scope of this Article. The present irony, however, is that social traditionalists embrace the motherhood of pregnant women facing the abortion decision, while tending to deny the motherhood of those same women in relation to the adoption decision.

The pressing issue for the future of adoption is whether the legitimacy of adoptive relationships can be maintained without the denigration and denial of birth-family relationships. To accomplish such a shift, it would be necessary to acknowledge that adoptive-family relationships can be positive and legitimate, even though they are different in substantial ways from birth-family relationships. As long as adoptive-family relationships are conceptualized and narrated as a mere copy of birth-family relationships, they will be viewed as a complete replacement for the birth family, with adoption built upon the denial of the birth family.

This reconceptualization has begun in fitful and incomplete ways, through movements toward open adoption and open records.³³ An examination of those movements is beyond the scope of this Article, except

32. See generally LINDA BIRD FRANCKE, *THE AMBIVALENCE OF ABORTION* 5–7 (1978) (recounting the author’s decision to have an abortion); DAVID C. REARDON, *ABORTED WOMEN SILENT NO MORE* 9–12, 30–31 (1987) (describing the circumstances that influence women’s decisions to abort); MARY K. ZIMMERMAN, *PASSAGE THROUGH ABORTION: A SOCIOLOGICAL ANALYSIS* 306–07 (1976) (“Two-thirds of the women studied made statements in which they portrayed themselves as having ‘no choice’ in the matter of abortion, being ‘forced’ to have the abortion . . .”).

33. See generally Child Welfare Information Gateway, *Openness in Adoption* 1–6 (2003), http://www.childwelfare.gov/pubs/f_openadoptbulletin.pdf (describing laws addressing open adoption, research findings, and considerations of the best interests of the child).

to note that their development is thus far inadequate.³⁴ Birth parents who rely on the nascent and vague label of “open adoption” to protect and honor their identity and role as parents are often disappointed to find that they lack enforceable legal rights and remain at the mercy of adoptive parents who may choose to cut them off from their children.³⁵ Thus, even in “open adoption” the birth parent becomes legally a non-parent in relationship to her child.³⁶ The open-records movement has similarly had real, yet limited, success.³⁷ In terms of identifying information the open-records movement usually applies only after the adoptee attains adulthood.³⁸ In domestic adoption, it is still usually the case that a birth parent who relinquishes a child for adoption is legally relinquishing her parental relationship and identity.³⁹ One result is that single, pregnant women in the United States continue to vote against adoption with their actions, as less than two percent of such women choose adoption.⁴⁰

The question of whether an adoption system can be built without denigrating the birth family is closely related to another inquiry critical to this paper: when does adoption constitute an exploitation of the birth family? Exploitation is defined in Webster’s Ninth New Collegiate Dictionary as “an unjust or improper use of another person for one’s own profit or advantage.”⁴¹ Black’s Law Dictionary similarly defines exploitation as “[t]aking unjust advantage of another for one’s own advantage or benefit.”⁴² These definitions can be broken into three elements: (1) unjust or improper; (2) use or advantage of a person; and (3) for the benefit, profit, or advantage of another.

The difficulty with the definition, and indeed with the legal and ethical concept of exploitation, is that it depends on a substantive definition of “unjust” or “improper” to distinguish between exploitative and non-exploitative uses of others. A second difficulty with the definition is that the concept of “using” or “taking advantage” of a person conveys a negative

34. *Id.* at 5.

35. *Id.* at 2.

36. *See Triad, supra* note 11; Child Welfare Information Gateway, *supra* note 33, at 2.

37. Child Welfare Information Gateway, *supra* note 33, at 2 (observing that the response to the open adoption movement has yielded some recent changes in state adoption laws).

38. *Id.* *See generally* Adoption.com, State Adoption Laws, <http://laws.adoption.com/statutes/state-adoption-laws.html> (last visited Nov. 3, 2007) (linking to state adoption laws).

39. *See* Child Welfare Information Gateway, *supra* note 33, at 2 (observing that while “no State prohibits entering into [‘cooperative adoption’] agreements, they are not legally enforceable in most States”).

40. *See Triad, supra* note 11, at 73–74 (“Since the early 1970s, there has been a sharp decline in the likelihood that an unmarried woman will decide to place her child for adoption.”).

41. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 438 (9th ed. 1990).

42. BLACK’S LAW DICTIONARY 519 (5th ed. 1979).

implication—as in the charge that “you were just *using me*”—without clarifying when an interaction constitutes a “use” or “taking advantage” of another in this negative sense. The definition of exploitation is therefore helpful and yet incomplete, requiring supplemental standards of justice, propriety, and relationship. Under these circumstances, comparing adoption to other circumstances commonly considered exploitative may be helpful.

The legal definitions of exploitation relevant to human trafficking clearly include the sale of a human being for purposes of labor or sex.⁴³ Thus, the sale of a human being for labor or sex is considered clearly exploitative even when labor and sex are not considered inherently exploitative. Why? When labor and sex are accompanied by the commodification of the human person, they become unjust uses of a person for the benefit of another. The commodification of the human person involved in the sale of persons therefore transforms work and sexuality (which under other conditions can be expressive and supportive of human dignity) into acts which are demeaning and “exploitative.”⁴⁴

By comparison, within contemporary market economies, the sale of labor or services by a free person is not in itself considered inherently exploitative. The exchange of labor for money is not considered inherently “unjust,” nor a “use” of a person, at least in the negative sense, even when it does confer profit, benefit, or advantage on another. However, where either market conditions or other circumstances induce workers to work for less than necessary for subsistence, or for far less than the labor advantages the “employer” or purchaser of services, then some would attach the term “exploitation” to an exchange of money for labor or services.⁴⁵ Even if market conditions or difficult circumstances induce human beings to sell their labor or services for a pittance, and for a tiny percentage of the

43. See, e.g., Trafficking Protocol, *supra* note 10, art. 3 (defining “trafficking in persons”); 18 U.S.C. § 1589 (2000) (criminalizing providing or obtaining labor or services from a person by threat, with an increased sentence for the attempt or commission of murder, kidnapping, or aggravated sexual assault); Trafficking Victim’s Protection Act, 22 U.S.C. § 7102(8)–(9) (2000) (defining “severe forms of trafficking in persons” as sex or labor trafficking).

44. The subject of commodification has produced an extensive academic discourse. See, e.g., MARGARET JANE RADIN, *CONTESTED COMMODITIES* 1–5, 222 (1996) (critiquing commodification theories and suggesting the incomplete commodification approach); Martha M. Ertman & Joan C. Williams, *Preface* to *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* 2–5 (Martha M. Ertman & Joan C. Williams eds., 2005) (presenting alternative commodification perspectives in addition to the traditional debate).

45. See, e.g., Christine Ahn et al., Inst. for Food Dev. Policy, *Migrant Farmworkers: America’s New Plantation Workers*, 10 *BACKGROUNDERS* 1, 2 (2004), available at <http://www.foodfirst.org/pubs/backgrdrs/2004/sp04v10n2.pdf> (arguing that the low wages and poor working conditions of farm workers in the United States are exploitative).

advantage they convey to the purchaser, the exchange can be exploitative. Thus, mere adult consent and market conditions cannot immunize a transaction from the label of being exploitative. To put the matter another way: market exchanges of money for labor or services can be so unjust as to be exploitative.

The matter of “consensual” sale of adult sexuality is controversial. Some consider adult prostitution inherently exploitative, while others consider it just another form of labor exchange.⁴⁶ The underlying question is whether it is inherently harmful or dehumanizing to exchange sex acts for money in the social and relational context of prostitution.⁴⁷

The question of labor and children is more complex than most realize. Almost all would agree that there are some forms of formal employment for minors that are not exploitative and that there are some which are exploitative. Legally speaking, this is the line between legal employment of minors and illicit child labor. The international community has even created a separate treaty to condemn the most exploitative forms of child labor, the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.⁴⁸ These three categories of legal child work, illegal child labor, and the “Worst Forms of Child Labour” are apparently differentiated based on whether and to what degree the arrangement is harmful to the developing child. Thus, the underlying concept seems to be that labor arrangements harmful to the development and education of the child are exploitative and hence illicit, regardless of whether or not the child or her parents consent.⁴⁹

Under the “child labor” mode of analysis, sexual exploitation of the child in prostitution or pornography is one of the “worst forms of child labor.”⁵⁰ These “uses” of children are viewed as so inherently harmful to children as to be exploitative regardless of any consent or permission that

46. Compare 2005 TRAFFICKING PERSONS REPORT, *supra* note 4, at 8. (“[W]here prostitution flourishes, so does an environment that fuels trafficking in persons. . . . Furthermore, field research from nine countries shows the great harm suffered by people used in prostitution: 89 percent of people being used in prostitution want to escape. Sixty to 75 percent of women in prostitution have been raped, 70 to 95 percent have been physically assaulted, and 68 percent met the clinical criteria for post-traumatic stress disorder.”) with Susan E. Thompson, Note, *Prostitution—A Choice Ignored*, 21 WOMEN’S RTS. L. REP. 217, 217, 247 (2000) (arguing that prostitution should be decriminalized as a means of empowering women and allowing women to exercise personal power, economic freedom, and sexual autonomy).

47. *Id.*

48. International Labour Organization, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, June 17, 1999, 38 I.L.M. 1207 [hereinafter Worst Forms of Child Labour Convention].

49. See generally David M. Smolin, *Strategic Choices in the International Campaign Against Child Labor*, 22 HUM. RTS. Q. 942, 946–56 (2000) (analyzing international norms concerning the worst forms of child labor).

50. Worst Forms of Child Labour Convention, *supra* note 48, art. 3(b).

might be given by the child, parents, or anyone else. In broader terms, adults who engage in sexual acts with children—especially children much younger than the adult—are generally viewed as exploiting the children, even in the absence of any commercial or monetary transaction.⁵¹ Such an act is considered an unjust “use” of a person in the negative sense, because the act is considered inherently harmful to the child and the child is too young to give effective consent. The mere act of sex is considered the “advantage” or “benefit,” even in the absence of money.

This brief comparative review of “exploitation” in the contexts of labor and sexuality illustrates the term’s dependence on complex intuitions regarding market transactions, human dignity, commodification, childhood, and sexuality. The reason it is difficult to consider adoption a form of exploitation is that our intuitions have been conditioned to consider adoption as an inherently good, rather than harmful, act.⁵² Even to consider that *some* adoptions might be “exploitative” seems contradictory, since adoption is considered in its essence a “good” and helpful act. These intuitions, however, are misguided, at least from the perspective of the birth family. To the degree that adoptions are—and they often are—built upon the destruction and denigration of birth family relationships, adoption is not an inherent or essential good, but is at best a tragic good. Once one perceives adoption through the lens of the birth family, and the child as an initial member of a birth family, then adoption comes into focus as a deeply difficult, problematic act inherently steeped in loss.⁵³ From this perspective, the question of when adoption is exploitative naturally follows.

Under what circumstances, then, would taking a child from a birth family for purposes of adoption be considered an exploitation of the birth family? Most obviously, if an individual literally kidnaps a child, taking the child without any consent whatsoever, and then sells the child for profit

51. See, e.g., Patricia Donovan, *Caught Between Teens and the Law: Family Planning Programs and Statutory Rape Reporting*, in GUTTMACHER RPT. ON PUB. POL’Y, June 1998, at 5, available at <http://www.guttmacher.org/pubs/tgr/01/3/gr010305.pdf> (criticizing some statutory rape laws, yet noting that “[f]ew would disagree that minors, especially very young teenagers, who are in sexual relationships with much older adult men are vulnerable to abuse and exploitation”). Instances involving older teenagers and relationships between those with little to no age gap, however, do create disagreements regarding the existence or extent of the “exploitation.” *Id.*

52. Cf. ILL. DEP’T OF CHILDREN AND FAMILY SERVS., CHILD AND FAMILY SERV. CHAFEE 2001–2004 MULTI-YEAR PLAN, 1, 2, 12, 16, available at <http://www.state.il.us/DCFS/docs/chafee.pdf> (“[I]t is inherently a good thing for an older ward to move to adoption, guardianship or reunification.”). The context of this statement is a policy in favor of permanency and families for even older children. I would agree families and permanency are generally good things for children. However, adoption of an older child under current law involves the destruction of the child’s original family relationships. Such an act is a tragic good when it is the best option available, and when unnecessary it is harmful.

53. See *Triad*, *supra* note 11, at 20–28 (noting that many adoption researchers and clinicians view the loss of the birth family as “the experiential basis for adoption”).

to an organization that will place the child for adoption, this constitutes an exploitative adoption.⁵⁴ Such an act would certainly be “unjust” and done for profit, so the only issue is whether it constitutes the “use” of a person. Viewing the birth family members individually, it is clear that the child is being “used” in this situation. If there is, for example, a particular desire of adoptive parents to adopt healthy young girls, and a healthy young girl is then snatched from a family, the child has been used in both the literal and negative sense. Literally speaking, the child’s characteristics as young, female, and “desirable” as an adoptee have been exploited, much as a child’s supposedly “nimble fingers” are exploited in bonded child labor in the carpet industry.⁵⁵ This is also a “use” in the negative sense, in that a child with a family has been treated as though she had none, and hence the child has been “used” in the sense of being harmed: stripped of her identity, history, and initial family ties. Even if one gives the child another family, harm remains because of the profound loss involved in the loss of one’s birth family. Replacing the child’s birth parents with adoptive parents does not remove the fact of loss, an emotional fact fundamental to understanding adoption.⁵⁶

Where a child is kidnapped for adoption, it is obvious that the birth parents have also been deeply harmed. This harm is also a form of exploitation in that a “use” is made of their fertility by others seeking profits. The fertility of the birth parents can be said to be exploited in a manner similar to that of a bonded or enslaved sex worker, in the sense that a deeply personal aspect of their being was used by others without any choice on their own part.⁵⁷

Viewing the question of exploitation and harm from the perspective of the birth family as a family, rather than a mere collection of individuals, is also helpful. When profit-motivated individuals take children from a family and place the child for adoption, they are clearly exploiting the birth family as a unit. The capacity of the birth family to procreate and nurture their young is being exploited. The birth family is treated in effect as breeders, as was done historically with slavery in the United States, when slaves’ capacity to produce and raise more slaves was a part of their value.⁵⁸

54. Such cases have allegedly occurred, among other places, in Tamil Nadu, India. *Child Laundering*, *supra* note 7, at 157–58.

55. See Worst Forms of Child Labour Convention, *supra* note 48, art. 3(a) (labeling bonded child labor as one of “the worst forms of child labour”); KEVIN BALES, DISPOSABLE PEOPLE 19–21 (rev. ed. 2004) (explaining the use of bonded labor as a contemporary form of slavery).

56. See *Triad*, *supra* note 11, at 20–28 (noting that loss is a primary theme in adoption literature).

57. See BALES, *supra* note 55, at 37–41 (describing modern forms of sex slavery).

58. See generally EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES

Suppose, however, that instead of being kidnapped, the child is “purchased” from the birth parents.⁵⁹ Is this a form of exploitation? Is a market transaction for a child exploitative? In the United States this question has been shaped by the famous proposal of Judge Richard Posner to create market mechanisms to facilitate adoptions. Judge Posner argued that pregnant women should be able to sell their parental rights to qualified adoptive parents, thereby creating a market mechanism favoring adoption.⁶⁰ Judge Posner claimed that the woman would be selling her custodial rights, rather than the child, and hence such a transaction would not constitute baby-selling.⁶¹

Neither the American legal system nor most commentators outside of the law and economics movement have been persuaded by Posner’s distinction between selling a child and selling parental rights. That is to say, putting your child up for the highest bidder, even if bidders are required to have qualified as proper adoptive parents, would constitute illicit child selling in the United States. Thus, the explicit sale of parental rights, in the context of adoption, is viewed as the illicit sale of a child in the United States.⁶²

Is a child sold in such a manner exploited? Some would argue that if such a sale places a child in a “good home,” the child has been sold but not exploited. However, it seems more plausible to view the sold child, like the kidnapped child, as having been exploited. In both instances the child’s characteristics as young and “adoptable” have been “used,” and in both cases the child has been harmed through the loss of her original family. The harm of inducing parents to sell their child adds an additional harm to the child. It is bad enough for a human being to be commodified or treated as an article of commerce, but to have one’s own parents do so can be particularly painful. To induce parents to sell their child is to induce a kind of betrayal which can be painful to the one betrayed.⁶³

MADE 497 (1974) (noting that birth rates among slaves were high).

59. The role of child purchases in intercountry adoption and how purchase interacts with other illicit ways of obtaining children are discussed in *Child Laundering*. *Child Laundering*, *supra* note 7, at 117–24.

60. See Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324 (1978) (outlining how adoption would function in a free-market environment); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60, 71–72 (1987) (advocating for a deregulation of the adoption system).

61. RICHARD A. POSNER, *SEX AND REASON* 409–17 (1992).

62. See MADELYN FREUNDLICH, *The Market Forces in Adoption*, in *ADOPTION AND ETHICS* 9, 9–15 (2000) (explaining that although each state has varying laws pertaining to the fees one can charge for an adoption, the outright sale of a child is illegal throughout the United States).

63. See *infra* text accompanying notes 164–66 (telling the story of a child who witnessed her adoptive mother pay her birth mother, and her subsequent emotionally troubled behavior).

In at least some circumstances, purchasing children from birth parents would also be an exploitation of the birth parents. Selling one's own children is in some ways worse than selling one's own sexuality. Therefore, those who view buying sexual services from even a "consenting" prostitute as exploitative should tend to view buying children from even "consenting" parents as even more exploitative. In order to be fully applicable, however, such comparisons should include the extreme poverty that envelopes many birth families in developing nations. In countries like Cambodia, Guatemala, India, and Vietnam, many birth parents live under or barely above the international standard of poverty of one dollar per day.⁶⁴ Many such families lack or struggle to obtain the bare necessities of food, clean water, adequate sanitation, and housing, and become burdened with debts beyond their means when they face illness, crop failure, or periods of unemployment.⁶⁵ If someone of ample means told a hungry, impoverished woman with malnourished children that he would not help her or her children, but he would pay her for engaging in sexual relations, who could fail to see this as a form of exploitation regardless of whether the woman "consented"? Yet, when a comparable bargain is struck with birth families to obtain children for adoption, many adoptive parents and agencies perceive the act as laudable rather than exploitative. Thus, when deeply impoverished women in developing countries are offered financial assistance conditioned on relinquishing their children for adoption, but not one penny if they keep their children, most in the adoption community fail to even perceive this as a sale, let alone an exploitative sale. When adoptive parents spend \$30,000 to bring a child to the United States for adoption,⁶⁶ where perhaps \$50 would have been enough to keep the birth family intact, the law smiles on the transaction as a good deed. It is only when the adoption intermediaries make clear that they are systematically in the business of purchasing babies that the adoption community becomes squeamish, but even then there is a tendency to perceive the transaction as a mere technical violation of the rules, rather than an exploitative act.⁶⁷

It would be helpful for the reader at this point in the Article to imagine herself in a situation of such deep poverty, struggling to provide for herself

64. See JEFFREY D. SACHS, *THE END OF POVERTY* 21 (2005) ("The overwhelming share of the world's extreme poor . . . live in three regions: East Asia, South Asia, and sub-Saharan Africa.").

65. *Id.* at 20–21 (describing "absolute" or "extreme" poverty).

66. See DEBORA L. SPAR, *THE BABY BUSINESS* 184 (2006) (documenting high intercountry adoption costs and fees).

67. See *Child Laundering*, *supra* note 7, at 135–46, 191 (describing the role of sisters Lauryn Galindo and Lynn Devin in the Cambodian adoption scandal); Thomas Fields-Meyer et al., *Whose Kids Are They?*, *PEOPLE*, Jan. 19, 2004, at 74, 76 (identifying adoptive parents who defended and praised Galindo and Devin even after Devin pled guilty and Galindo faced federal charges).

and her children, but, due to a crisis, temporarily short of the bare means of subsistence. If someone of ample means came to you, refusing to provide even the pittance it would take to help you keep your child (under \$50)—but willing to buy your child from you—would you consider this an act of mercy or an act of exploitation?

The expectation in the United States has been that such birth parents should be so overwhelmed with gratitude to the individual for giving the child a “better life” that they would indeed feel gratitude rather than resentment. It may be that some birth parents in such situations do feel and express these sentiments. The concern for the child, the hope that the child will have greater opportunities than the parent, and the crushing sense of hopelessness that such poverty can bring may indeed come into play. Victims of exploitation sometimes are so oppressed that they feel grateful even to those who exploit them. Objectively speaking, however, the decision to intervene in such situations by spending \$30,000 for a Guatemalan adoption, rather than \$50 for a one-time humanitarian project—or \$240 per year, per family for a long term economic development project—is clearly driven primarily by the desire of the adoptive parents for children and the intermediaries for profits. In a very real sense, the combined poverty and fecundity of the birth family are being exploited for the benefit of others, to the harm of the birth family. The fact that the birth family makes a “choice” in some such situations is overshadowed by the choice of interventions made by those who select a much more expensive adoption over a much less expensive intervention that would have kept the birth family intact.

In the real world contexts of “child laundering” as practiced in sending countries, the line between kidnapping and buying children is fluid and sometimes difficult to discern. Buyers or scouts, scouring for children, go out among the poor and vulnerable and use various combinations of kidnapping, false promises, and financial inducement to obtain children. Birth parents accept a little food and cash, but are told some kind of inducing lie. Perhaps they are told that the child is only going to the orphanage for temporary care and can be retrieved at will; perhaps they are told about the adoption, but are also told that the entire family will be able to relocate to the United States when the child is grown.⁶⁸ Whatever combination of force, fraud, and funds are employed, the coordinated resources of those seeking children (first-world would-be parents, U.S. placement agencies, and educated intermediaries operating in developing

68. See generally *Child Laundering*, *supra* note 7, at 115–70 (analyzing and describing child laundering methodologies).

countries), often overwhelm the very limited resources and circumstances of poor and illiterate families. It takes blinders not to see such systematic and lucrative efforts to obtain the children of the poor and vulnerable for adoption as an act of exploitation. Those blinders have existed thus far in the deeply held moral intuition that adoption is an overriding good; such blinders can be removed only by an act of moral imagination that perceives the birth family as a unit of worth and dignity and the child as a part of that family.

II. ADOPTION AS CHILD EXPLOITATION

A. The Masha Allen Case: Adoption as Child Laundering, Child Trafficking, and Child Exploitation

Adoption rhetorically centers on the child, and virtually everyone concerned with adoption claims to be doing it “for the children.” This rhetoric is so ubiquitous that even those who make illicit profits by systematically purchasing children for adoption claim to be doing it “for the children.”⁶⁹ The understanding of adoption as an inherent good is so ingrained that many in the adoption community have defended as virtual saints those who face government sanction for obtaining children illegally for adoption.⁷⁰ Prospective adoptive parents are understandably upset about adoption scams in which criminals take the money and run, without making any real efforts to place children, for in these instances no adoption occurs. Adoptive parents, however, seem to have great difficulty in viewing anyone who actually places children for adoption as harming children, no matter how much they profiteer, break the law, or place trafficked children.⁷¹

The concept of adoption as a form of “child exploitation” is therefore counter-intuitive to many. In order to explore this topic, it may be helpful to begin with an instance where adoption was clearly a form of child exploitation. Although the case in question is clearly not typical of adoptions, it nonetheless will serve as a starting point for exploring the topic of when adoption becomes a form of child exploitation.

The case in question is the painful saga of Masha, a child from Russia adopted by a pedophile for purposes of sexual exploitation, including nearly five years of nightly rapes and the creation and dissemination of large

69. *Id.* at 191 (noting convicted felon Galindo’s claim that “[M]y motivation was pure in helping these children”).

70. Fields-Meyer et al., *supra* note 67, at 76.

71. *Id.*

numbers of pornographic images.⁷² Before recounting Masha's traumatic history, it is important to place Masha's case in the broader context of this Article—that of child laundering and exploitation. The classic and apparently more common form of child laundering involves illegal conduct in obtaining children from birth families. In this form of child laundering, children are obtained by kidnapping, purchase, and/or fraud from birth parents and then with the use of falsified documents are “laundered” through the adoption system as orphans and then adoptees. The motive for this activity is usually the large fees and donations available in intercountry adoption, although ideological motivations may also come into play.⁷³ In most of these instances, the children are placed into reasonably good homes. Later in this Part we will ask whether such laundered children have been “exploited.”

Masha, however, was laundered in a different way. In her case, the fraud occurred in the United States, in the paperwork describing the character, intentions, behavior, and background of Matthew Mancuso, her “adoptive father.”⁷⁴ To understand the fraudulent nature of this paperwork, it is important to understand that Masha's case is not simply an instance of an adoptive parent who abused his child. Matthew Mancuso never intended what would be considered a normal parent-child relationship when he obtained Masha. Rather, Matthew Mancuso clearly intended to use the intercountry adoption system to obtain the equivalent of a child sex slave. Thus, the judge who presided over his criminal trial stated at Mancuso's sentencing: “You chose to adopt this girl only so you could sexually abuse her.”⁷⁵ The underlying concept of “laundering” applies because Mancuso obtained and hid an entirely illicit result (transporting and obtaining a child

72. The Masha Allen case has been extensively documented and publicized, including two Congressional hearings and broad press coverage. *Sexual Exploitation of Children over the Internet: Follow-Up Issues to the Masha Allen Adoption: Hearing Before the Subcomm. on Oversight and Investigations of the Comm. on Energy and Commerce*, 109th Cong. 1, 3–5 (2006) [hereinafter *Masha Allen Adoption Hearing*] (statement of Hon. Ed Whitfield, Chairman, Subcomm. on Oversight and Investigations), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:31471.pdf; ABC News, *Heroic Young Girl Tells of Her Child Porn Ordeal* (2005), <http://abcnews.go.com/Primetime/LegalCenter/story?id=1364110> (last visited Sept. 27, 2007) [hereinafter ABC News].

73. See generally *Child Laundering*, *supra* note 7, 117–70 (documenting the incidence of child laundering within intercountry adoption systems).

74. Home Study—Matthew Alan Mancuso, (Nov. 20, 1997), in *Masha Allen Adoption Hearing*, *supra* note 72, at 106–13 [hereinafter Mancuso Home Study]. The home study documented Mancuso's intentional misrepresentations. *Id.* at 106–13. One of the post-placement reports, and perhaps some of the recommendations, appear to have been fabricated documents. *Masha Allen Adoption Hearing*, *supra* note 72, at 5.

75. David Conti, *Child Abuse 'Monster' Gets 35–70 Years*, PITTSBURGH TRIB. REV., Nov. 18, 2005, at C1, available at http://www.pittsburghlive.com/x/pittsburghtrib/s_395759.html.

sex slave across international borders) under the guise of a lawful transaction, the adoption of a child.⁷⁶ The fact that Mancuso “succeeded” in this brazen and horrific act of child laundering speaks volumes about the vulnerability of the intercountry adoption system to illicit conduct.

Mancuso’s act of child laundering was also a form of child trafficking. If Mancuso had gone to Russia, obtained a child by force, fraud, or purchase, and then brought the child into the United States for purposes of sexual exploitation, his acts would have met applicable definitions of child trafficking.⁷⁷ When Mancuso obtained Masha by child laundering through the creation of fraudulent adoption documents and the payment of adoption fees, he was obtaining her by fraud for purposes of exploitation, and hence he was engaging in a form of child trafficking. In addition, Mancuso threatened Masha in order to silence and control her, indicating that force was used to maintain his exploitation and control over her.⁷⁸ Masha was a trafficked child, as that term is generally used, although Mancuso’s use of the adoption system has obscured that point for many.

Both the exploitation of Masha and the involvement of the adoption system in that exploitation become clearer in light of a detailed summary of her tragic history. Masha was born as Maria Nikolaevna Yashenkova on August 25, 1992, in Novochakhtinsk, a small town in Southern Russia. When Masha was four years old, she was placed in a Russian orphanage, where she lived for over a year. Masha was eventually made eligible for international adoption.⁷⁹ Matthew Mancuso went through a largely conventional intercountry adoption process to obtain Masha. The agency personnel involved in Masha’s adoption included social workers and agency workers with many years of experience in intercountry adoption, some of whom have continued to practice in the field of adoption.⁸⁰

76. Cf. AMY O’NEILL RICHARD, CTR. FOR THE STUDY OF INTELLIGENCE, AN INTELLIGENCE MONOGRAPH: INTERNATIONAL TRAFFICKING IN WOMEN TO THE UNITED STATES: A CONTEMPORARY MANIFESTATION OF SLAVERY AND ORGANIZED CRIME 7–8, (1999), <https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/books-and-monographs/trafficking.pdf> (describing “illegal use of legitimate travel documents” as a method by which women are trafficked into the United States).

77. See *supra* note 43.

78. *Sexual Exploitation of Children over the Internet: What Parents, Kids and Congress Need to Know About Child Predators: Hearing Before the Subcomm. on Oversight and Investigations of the H. Energy and Commerce Comm.*, 109th Cong. 2 (2006) (testimony submitted by Masha Allen) [hereinafter *Masha Allen Testimony*]; ABC News, *supra* note 72.

79. *Masha Allen Testimony*, *supra* note 78, at 1; *Masha Allen Adoption Hearing*, *supra* note 72, at 131 (containing certification “Reaching Out thru International Adoption, Inc. is happy to present to Matthew A. Mancuso, Masha Yashenkova, Born August 25, 1992”); James R. Marsh, Esq., Representing Child Crime Victims, <http://www.marshlaw.net/> (last visited Nov 9, 2007).

80. *Masha Allen Adoption Hearing*, *supra* note 72, at 1; Focus on Adoption, Who We Are: Jeannene Smith, Treasurer, <http://www.focusonadoption.com/about.shtml#c> (last visited Oct. 3, 2007) (indicating the past association of Jeannene Smith with Joint Council on International Children’s

According to this process, it is the task of a United States adoption agency to connect prospective adoptive parents with children in Russia eligible for adoption. United States agencies playing this role of “placement agency” have contacts, themselves or through facilitators or intermediaries, with Russian orphanages that place children internationally. Several of the individuals/agencies involved in the placement-agency role in Masha’s case appear to have been mainstream and experienced participants in the field of intercountry adoption, as represented by their involvement in the Joint Council on International Children’s Services (JCICS), a provider organization which describes itself as “one of the oldest and largest child welfare organizations,” and “the lead voice on intercountry children’s services.”⁸¹ JCICS “promotes ethical child welfare practices [and] strengthens professional standards.”⁸² JCICS member agencies serve “approximately 80% of all international adoptions in the United States.”⁸³

Matthew Mancuso was approximately 39 years old and divorced when he initiated the adoption process.⁸⁴ He specifically requested a “girl between the ages of five and six of the Caucasian race.”⁸⁵ The placement agency sent Mancuso videos of various children, and he chose Masha.⁸⁶ (Masha herself later complained that “[i]n some of the pictures they showed him of me from the orphanage I was naked.”)⁸⁷

Mancuso was legally required to be approved for adoption through a home-study process. Since the placement agencies involved were located outside of Pennsylvania, a Pittsburgh, Pennsylvania agency conducted the home study.⁸⁸ The home study was conducted by an experienced social worker who noted that she had a “Master’s degree in Social Work and over fourteen years experience doing adoptions.”⁸⁹ The home-study document favorably recommended Mancuso to adopt “through a very thorough home-

Services (JCICS)).

81. *Masha Allen Adoption Hearing*, *supra* note 72, at 77–78 (statement of Jared Rolsky, Board Member, JCICS.); *see also id.* at III, 1 (listing persons and agencies involved in placement of Masha Allen and discussing Jeannene Smith’s role in Masha’s adoption); *Focus on Adoption*, *supra* note 80 (discussing Jeannene Smith’s background).

82. *Masha Allen Adoption Hearing*, *supra* note 72, at 78 (statement of Jared Rolsky, Board Member, JCICS).

83. *Id.*; Joint Council on Int’l Children’s Servs., Membership Directory, http://www.jcics.org/Membership_Directory.htm (last visited Oct. 16, 2007).

84. *Masha Allen Adoption Hearing*, *supra* note 72, at 89–90.

85. Mancuso Home Study, *supra* note 74, at 109; *Masha Allen Adoption Hearing*, *supra* note 72, at 89–90 (showing Mancuso’s request for a five-year-old female in his Application for Adoption).

86. ABC News, *supra* note 72.

87. *Masha Allen Testimony*, *supra* note 78, at 2.

88. Mancuso Home Study, *supra* note 74, at 106.

89. *Id.* at 105.

study process.”⁹⁰ The process included “a written application, a medical statement from his physician, child abuse and criminal record checks, three reference letters, financial and income tax statements and intensive interviews with Mr. Mancuso.”⁹¹

The home study described Mancuso’s loss of his relationship with his birth daughter, Rachelle, as a primary motivation to adopt. The home study states:

Mr. Mancuso has very strong memories about being a father to Rachelle and enjoyed his role He and Rachelle appreciated the rural setting [of the family home] while Mrs. Mancuso did not participate in the various adventures they would take such as walking in the woods behind their home or visiting the neighbor’s horses.⁹²

Mancuso and his wife were divorced in the same month that Rachelle turned ten. The home study described a gradual process in which “weekend visits” with Rachelle became “fewer and fewer,” leading to a “lack of relationship.”⁹³ Thus, “Mancuso wants to adopt a child as he strongly misses the parenting role that he had with his daughter.”⁹⁴

Neither Rachelle, who was twenty at the time, nor Mancuso’s ex-wife was contacted for the home study.⁹⁵ After Masha’s case was publicized, Rachelle revealed that Mancuso had sexually abused her over an extended period of her childhood.⁹⁶ Mancuso’s wish to replicate his supposedly close parental relationship with his daughter was actually a desire to have a sexual relationship with a pre-pubescent child. Rachelle may have provided information sufficient to block the adoption if she had been interviewed as a part of the home study—particularly if she had been told that her father was adopting a girl.⁹⁷ Given the central role of the prior father-daughter

90. *Id.*

91. *Id.* at 106.

92. *Id.* at 108.

93. *Id.* at 109.

94. *Id.*

95. *Masha Allen Adoption Hearing*, *supra* note 72, at 28, 41 (documenting that the President and CEO of the home-study agency confirmed that neither the ex-wife nor the daughter were contacted as a part of the Mancuso application process).

96. ABC News, *supra* note 72.

97. Mancuso provided a letter of recommendation from his daughter, apparently after being asked for additional recommendations. *Masha Allen Adoption Hearing*, *supra* note 72, at 115, 120. It is unclear from the public record whether this letter was forged by Mancuso or genuine. *Id.* Even if the letter was genuine, press reports indicate that Mancuso’s daughter believed for years that her father had adopted a boy, and only much later became aware that her father had adopted a girl. Interview by Oprah Winfrey with Rachelle, daughter of Matthew Mancuso, Chicago, Ill. (Jan. 17, 2006),

relationship in the home study, and the sensitivity of placing a young girl with a single male, the failure to contact the adult daughter is a glaring oversight—although an oversight defended by some as standard practice in the field.⁹⁸

The home-study summary combined the “missing daughter” motivation with a glowing recommendation of Mancuso. “He is a caring, loving man who misses the parenting role that he had with his daughter. He is a highly moral individual and will provide not just a financially stable home but the ability to parent a child with values.”⁹⁹ Mancuso completed the adoption in Russia and returned to the United States with Masha in July 1998.¹⁰⁰ Although Mancuso had promised to fix up a bedroom in his home “with appropriate furnishings for a young girl,”¹⁰¹ Mancuso never gave Masha her own bed, let alone bedroom. Instead, Masha was required from day one to sleep with Mancuso. Mancuso immediately commenced his planned sexual exploitation of Masha.¹⁰²

Although multiple post-placement reports were required under Russian law,¹⁰³ and the home-study agency agreed to “provide post-placement reports for a period of three (3) years,”¹⁰⁴ not a single post-placement visit occurred. No one associated with the adoption came to check on Masha. Two post-placement reports were translated and submitted to the Russian government. The first report is apparently fraudulent, as the entity and individual purporting to perform it apparently never existed.¹⁰⁵ The second post-placement report was based on a telephone interview conducted by the placement agency, which was located in a different state from the one where Mancuso and Masha resided.¹⁰⁶ Neither the placement agency nor Mancuso informed the home-study agency that Masha had been adopted

http://www2.oprah.com/tows/slide/200601/20060117/slide_20060117_284_206.jhtml (last visited Nov. 17, 2007).

98. *Masha Allen Adoption Hearing*, *supra* note 72, at 28 (statement of Richard Baird, Jr., President and CEO, Adagio Health, Inc.).

99. Mancuso Home Study, *supra* note 74, at 113.

100. See *Masha Allen Adoption Hearing*, *supra* note 72, at 136 (indicating from Mancuso’s travel schedule that he traveled from Moscow to John F. Kennedy Airport on July 11, 1998); *Masha Allen Testimony*, *supra* note 78, at 1 (testifying that Mancuso took Allen to Pittsburgh from Russia).

101. Mancuso Home Study, *supra* note 74, at 112.

102. *Masha Allen Testimony*, *supra* note 78, at 1 (“The abuse started the night I got there. Matthew didn’t have a bedroom for me. He made me sleep in his bed from the very beginning.”); ABC News, *supra* note 72.

103. *Masha Allen Adoption Hearing*, *supra* note 72, at 28–29 (statement of Richard Baird, Jr., President and CEO, Adagio Health, Inc.).

104. Mancuso Home Study, *supra* note 74, at 105.

105. *Id.* at 38–39.

106. *Id.* at 39–40.

and was living with Mancuso.¹⁰⁷

By the time Masha started school, Mancuso had terrorized her into keeping his sexual exploitation of her secret. As time went on, Mancuso severely restricted her diet, apparently for the purpose of slowing her growth and stopping her from entering puberty.¹⁰⁸

Mancuso did not stop at exploiting Masha through his constant rapes, but expanded into pornographic exploitation. He started by taking photographs of Masha dressed, transitioned into photographs of her naked, and then finally took photographs of her engaging in sex acts. Mancuso distributed these photographs on the Internet. Law enforcement tracking child pornography became very concerned with Masha as they watched her grow up on the Internet, subject to a constant stream of photographed sexual exploitation.¹⁰⁹ In order to find her, law enforcement removed Masha's image from photographs and publicized some of them, hoping that someone would be able to identify her location through the background.¹¹⁰ She became known as the Disney World girl, after a hotel room there was identified from one of the photographs.¹¹¹

Mancuso's images of Masha pervaded the Internet child pornography milieu; half of those involved in child pornography were found to possess an image of Masha. Law enforcement eventually tracked Mancuso through his Internet trading in child pornography. When the FBI agents arrived to execute a search warrant for child pornography, they were surprised to find a child with Mancuso. When the agents interviewed Masha separately from Mancuso (who was shouting at her to say nothing), she revealed her exploitation.¹¹²

Masha Allen indicated in her congressional testimony that she was

107. See *Masha Allen Testimony*, *supra* note 78, at 2 ("While I lived with Matthew no one from any of the adoption agencies ever came to check on me even though the Russian government requires it."); *Masha Allen Adoption Hearing*, *supra* note 72, at 28–29, 37–40 (investigating the reasons why no post-placement visits were conducted). The President and CEO of the home-study agency stated that Pennsylvania law requires "post-placement supervisory visits be conducted by a social worker in the home." *Id.* at 40. The submission to the Russian government of a fraudulent document and a document based merely on an out-of-state telephone interview obviously do not constitute compliance with Russia's requirements for post-placement supervision.

108. *Masha Allen Testimony*, *supra* note 78, at 2 ("Because he didn't want me to grow up, he only let me eat a little bit of food When I was rescued I was 10 years old but I only wore a size 6X."); ABC News, *supra* note 72.

109. *Masha Allen Testimony*, *supra* note 78, at 2–3; ABC News, *supra* note 72; CBS News, 'Disney World Girl' Found, Safe, <http://www.cbsnews.com/stories/2005/05/16/earlyshow/main695342.shtml> (last visited Oct. 16, 2007) [hereinafter CBS News].

110. CBS News, *supra* note 109.

111. *Id.*

112. *Masha Allen Testimony*, *supra* note 78, at 2–3; ABC News, *supra* note 72; CBS News, *supra* note 109.

“more upset about the pictures on the Internet than I am about what Matthew did to me physically.”¹¹³ Indeed, from Masha’s perspective her exploitation did not end with her rescue:

I got much more upset when I found out about the pictures of me that he put on the Internet. I had no idea he had done that. When I found out about it I asked our lawyer to get them back. He told me we couldn’t do that. Then I found out that they would be there forever. That’s when I got mad and decided to go public with my story.

Usually, when a kid is hurt and the abuser goes to prison, the abuse is over. But because Matthew put my pictures on the Internet the abuse is still going on. Anyone can see them. People are still downloading them”¹¹⁴

The reaction of the adoption community to Masha’s case has been typically defensive. As Masha’s congressional testimony notes: “When I told my story in public for the first time all the adoption agencies, not just Matthew’s, tried to cover up my story.”¹¹⁵ Adoption-oriented websites contained pleas for the adoption community to complain about the negative tone of press coverage of Masha’s case and the potential negative impact on international adoption.¹¹⁶

The defensive attitude of the adoption community to the Masha Allen case has been accompanied by an unwillingness to learn lessons from the event. The general response has been to focus on Mancuso as someone who defrauded the adoption system, rather than inquiring how the adoption system can be safeguarded against such fraud.¹¹⁷ This defensiveness has two roots: first, the need of adoptive parents and agencies to justify their own roles in adoption through maintenance of a positive view of adoption; and second, a broader cultural mindset which identifies adoption as an essential and inherent good. According to this mindset, adoption by

113. *Masha Allen Testimony*, *supra* note 78, at 4.

114. *Id.* at 3.

115. *Id.* at 2.

116. See, e.g., The Daily Bastardette, *Masha Speaks—The Adoption Industry Bunkers In: “Disney World Girl” and the Shame of Complicity*, http://bastardette.blogspot.com/2005_11_01_archive.html (Nov. 29, 2005) (“From the beginning, Masha and her new adoptive mother . . . refused to roll over. They did the unspeakable: broke out of the politically correct warm and fuzzy adoption cocoon, courageously telling Masha’s story to the press and public.”).

117. See Conti, *supra* note 75, at C6 (quoting the views of both an adoption agency president who said Mancuso “figured out how to beat the system” and the President of the National Council for Adoption who said, “[o]ne perspective is that there’s no fail-safe way to prevent child abuse”).

definition is a saving and good act; hence, the concept of an exploitative adoption is seen as self-contradictory.¹¹⁸ In Masha's case, this defensiveness is illustrated by a tendency to mentally separate Masha's exploitation from her adoption.

This refusal to connect Masha's exploitation to adoption is an impediment to needed reforms of the adoption system. While Masha's case is certainly unusual, it is not unique. According to her congressional testimony two other children are known to have been internationally adopted by pedophiles.¹¹⁹ Moreover, the harms to Russian adoptees from poorly arranged adoptions are much more extensive than the unusual circumstance of pedophiles adopting. Approximately fourteen Russian adoptees have been killed by their adoptive parents.¹²⁰ A significant number of Russian adoptees have had serious enough problems to require extensive psychiatric or psychological treatment, sometimes to the point of causing adoptive parents to consider either disrupting the adoption or some form of specialized residential situation.¹²¹ These difficulties are usually linked to the poor conditions in some Russian orphanages.¹²² The intercountry adoption system commonly fails to identify, diagnose, and describe the special needs of post-institutionalized children, thereby failing to match those children with adoptive parents capable and prepared to

118. See *Masha Allen Adoption Hearing*, *supra* note 72, at 6 (statement of Ranking Member Bart Stupak) (noting that adoption workers perceive adoption as saving children from poverty and other ills).

What we will hear is that international adoption is a very loosely controlled international business based on the premise that poor children from poor countries are better off in the United States with adoptive families than they are growing up in poverty or bleak institutions or on the streets of their own countries. The people who work for adoption agencies believe that they are saving these thousands of children.

Id.; see *supra* notes 5, 60 and accompanying text.

119. *Masha Allen Testimony*, *supra* note 78, at 2.

120. *Id.*; BBC News, *New Adoption Death Alarms Russia*, BBC NEWS, July 12, 2005, <http://news.bbc.co.uk/2/hi/europe/4676513.stm>.

121. See Martin T. Stein et al., *International Adoption: A 4-Year-Old-Child with Unusual Behaviors Adopted at 6 Months of Age*, 114 PEDIATRICS 1425, 1425 (2004) ("Medical, developmental, and behavioral conditions occur in [adopted children from Eastern European, Russian, and Asian orphanages] with a higher frequency and greater severity compared with most children born in the United States."); Ranch for Kids, <http://www.ranchforkids.org/> (last visited Oct. 5, 2007) (offering a respite-care solution for at-risk Russian adoptees).

122. See, e.g., Stein et al., *supra* note 121, at 1425 (presenting a case study of an adopted Russian orphan child suffering from developmental and behavioral conditions). See generally RONALD S. FEDERICI, *HELP FOR THE HOPELESS CHILD: A GUIDE FOR FAMILIES* 68–72 (1998) (illuminating the effects on children institutionalized in Eastern European and former Soviet orphanages); Ronald S. Federici, *Raising the Post-Institutionalized Child Risks, Challenges and Innovative Treatment*, http://www.drfederici.com/raising_child.htm (last visited Oct. 4, 2007) (describing the effects of institutionalization on children and subsequent effects on adoptive families).

handle their needs. The results of placing special-needs children in adoptive homes that are unprepared to parent them has sometimes been lethal, more often been tragic, and certainly cannot be defended as facilitating the best interests of such children. Masha's case, therefore, is symptomatic of an intercountry adoption system that frequently fails to facilitate the best interests of children precisely because it believes so strongly in the inherent goodness of adoption.

Indeed, the perception of adoption as an inherent and essential good that always saves and never harms actually harms children. This mindset considers careful and accurate assessments of children and prospective adoptive homes far less important than getting as many children as possible adopted. This mindset is comfortable with cutting all kinds of legal and ethical corners in pursuit of the higher good of placing children in adoptive homes. This mindset is hostile to adoption regulations, since regulations slow adoptions and adoption is equated with a kind of salvation. It is this mindset within the adoption world that leads to children being placed with pedophiles or in homes ill-equipped to provide for their needs.

The truth is that Masha's exploitation by Mancuso does have special relevance to the adoption process. Mancuso is not simply an adoptive parent who abused, but rather he is a pedophile who deliberately employed the intercountry adoption system to launder, traffic, and exploit a child.¹²³ The vulnerability of the adoption system to child laundering, child trafficking, and child exploitation is highly significant to adoption.

A rough analogy to the history of the juvenile delinquency system in the United States may be useful. During much of the nineteenth and twentieth centuries, interventions in the lives of children occurred without any substantial constitutional or procedural protections for either children's liberty interests or parents' custodial rights. The prevailing theory was that children did not need the protection of lawyers or rights. Providing children with formal procedural protections was seen as detrimental, since it interfered with laudable efforts to "save" children. Based on this "child-saving" premise, various persons and institutions intervened to help children in a broad range of situations, including juveniles who commit crimes, runaways, truants, street children, children of poor or indigent parents, and children viewed as victims of abuse or neglect. Children were separated from their parents, sent out of state, placed in homes, and institutionalized, all in the name of saving them.¹²⁴

123. See *supra* note 75.

124. See *In re Gault*, 387 U.S. 1, 14–20 (1967) (describing the history of the juvenile court system). Academic treatments include: ANTHONY PLATT, *THE CHILDSAVERS* 3–4 (2d ed. 1977) (studying the relationship between the "child-saving" movement and changes in the criminal justice

The Supreme Court's 1966 decision *In re Gault* took a dim view of this historical approach, at least as applied to juvenile delinquents who had committed criminal acts. The Supreme Court was not willing to presume that the interventions provided for juvenile delinquents in the juvenile courts were inherently and essentially good. Instead, the Court presumed that the juvenile system was capable of harming, as well as helping, children.¹²⁵ The Court therefore mandated that juvenile delinquents be provided many of the protections, rights, and formal procedures provided to adult criminal defendants. The Court apparently believed that providing such protections to children in the juvenile system could improve outcomes for children.¹²⁶

Intercountry adoption is currently analogous to the pre-*Gault* regimen, although in a somewhat paradoxical way. The paradox consists of the gap between a system that appears highly regulated and weighed down with endless paperwork, yet simultaneously appears to lack substantive regulations, safeguards, and protections. The reality is that the endless paperwork and multiple levels of government involved in intercountry adoption currently do little to protect birth families, children, or adoptive families against corruption, fraud, child laundering, child trafficking, and incompetence. The system thrives on what a student would call "busywork"—the meaningless filling out of forms. Child study forms, relinquishment documents, and death certificates in many sending countries are frequently grossly inaccurate or fraudulent, and home studies provided by U.S. adoption agencies are often as meaningless and vacuous as Mancuso's (although fortunately there usually are not such horrors to hide). Under these circumstances both those who claim the system is over-regulated and those who view it as under-regulated can make a plausible case. Yet, the overriding truth is that the system lacks appropriate and meaningful regulation, making intercountry adoption open season for a broad range of misconduct. One reason for this failure to appropriately regulate is the cultural tendency to equate adoption with saving children.

system); ELLEN RYERSON, *THE BEST-LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT* 14–15 (1978) (examining the creation of the American juvenile court system and subsequent reform efforts); Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1192–93 (1970) (describing the intervention of government in the lives of poor and neglected children, based on the belief that they might become a "community crime problem"); J. Lawrence Schulz, *The Cycle of Juvenile Court History*, 19 CRIME & DELINQ. 457, 457–76 (1973) (analyzing and responding to Platt's and Fox's critique of the 1899 Juvenile Court Act).

125. See *In re Gault*, 387 U.S. at 17–30 (requiring due process for juvenile courts because otherwise children can be harmed by the arbitrary functioning of the system).

126. See *id.* at 30–57 (providing various constitutional protections to juvenile delinquents under the due process clause, such as notice of charges, counsel, confrontation, and right against self-incrimination).

So long as adoption is viewed as an essential and inherent good, rather than a sensitive intervention that can (like back or brain surgery) do either good or harm, then rules, procedures, and forms will be viewed as meaningless exercises and commonly evaded. The various rules broken in Masha Allen's adoption—such as the lack of post-placement report visits—are symptomatic of a system uncommitted to rules it views as largely meaningless hindrances to an essentially good act. Only when we understand that the intervention of adoption can exploit a child will we regulate it as we should.

B. Kidnapped, Stolen, and Purchased Children as Exploited Children

Thousands of children have been stolen, kidnapped, or purchased for purposes of intercountry adoption.¹²⁷ Yet some do not perceive the incidence of such acts as much more than a transient or insubstantial harm. Almost inevitably, one hears that such children are “better off,” sometimes with a subtext that the acts of stealing, kidnapping, and purchasing them were therefore either justified or only insubstantial wrongs.

The State Department, while not considering baby selling for adoption justified or legal, makes a sharp differentiation between baby selling for adoption and human trafficking, as indicated in the following excerpt from their 2005 Trafficking in Persons Report:

Illegal Adoption, Baby Selling, and Human Trafficking

Legitimate intercountry adoption provides a permanent family placement for a child unable to find one in his or her country of origin, absent any irregularities by the adoptive parents, the birth parents, or any parties involved in facilitating the relationship. Appropriate and legitimate intercountry adoption does not imply baby selling or human trafficking. Unless adoption occurs for the purpose of commercial sexual exploitation or forced labor, adoption does not fall under the scope of the Trafficking Victims Protection Act.

Baby selling, which is sometimes used as a means to circumvent legal adoption requirements, involves coerced or

127. No comprehensive study of the numbers of children stolen, kidnapped, or purchased for intercountry adoption has ever been done. My prior research, which reflects only a small part of a larger picture, found that estimating the number in the thousands is quite defensible. *See generally Child Laundering*, *supra* note 7, at 135–70 (presenting evidence of significant child laundering activity in Cambodia, India, and Guatemala).

induced removal of a child, or situations where deception or undue compensation is used to induce relinquishment of a child. Baby selling is not an acceptable route to adoption and can include many attributes in common with human trafficking. Though baby selling is illegal, it would not necessarily constitute human trafficking where it occurs for adoption, based on the Trafficking Victims Protection Act, the UN Protocols on Trafficking in Persons and the Sale of Children, the 1993 Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, and definitions of adoption established by U.S. jurisdictions.

The purposes of baby selling and human trafficking are not necessarily the same. Some individuals assume that baby selling for adoption is a form of human trafficking because trafficking and baby selling both involve making a profit by selling another person. However, illegally selling a child for adoption would not constitute trafficking where the child itself is not to be exploited. Baby selling generally results in a situation that is nonexploitative with respect to the child. Trafficking, on the other hand, implies exploitation of the victims. If an adopted child is subjected to coerced labor or sexual exploitation, then it constitutes a case of human trafficking.¹²⁸

The fundamental premise of the State Department analysis of United States and international law pertaining to trafficking is that illegally obtaining a child for adoption does not constitute human trafficking, because the “situation . . . is nonexploitative with respect to the child.”¹²⁹ From this premise a host of results follow, including the non-applicability of national and international laws pertaining to trafficking.

The State Department is likely correct that currently applicable federal criminal laws concerning human and child trafficking do not cover most cases of illegally obtaining children for purposes of adoption. Federal laws concerning human trafficking generally apply only to labor or sexual exploitation, and thus are inapplicable to any other forms of exploitation.¹³⁰ Thus, when the federal government prosecuted Americans operating in Cambodia for systematically obtaining babies for adoption through

128. 2005 TRAFFICKING PERSONS REPORT, *supra* note 4, at 21.

129. *Id.*

130. See Trafficking Victims Protection Act 22 U.S.C. §§ 7101–7102 (2006) (defining “severe forms of trafficking in persons” as sex or labor trafficking, while leaving trafficking in persons undefined); 18 U.S.C. § 1589 (2006) (criminalizing providing or obtaining labor or services from a person by threat).

purchase and fraud, prosecutors had to rely on statutes criminalizing visa fraud and money laundering.¹³¹ While the prosecutions in the Cambodian adoption scandal secured convictions, the inability to charge the defendants for any form of human trafficking allowed the principal defendant, Lauryn Galindo, to characterize her actions as mere regulatory or technical violations.¹³² Galindo specifically denied that she had trafficked children, despite ample evidence that she had systematically sent out paid agents to buy children and had pocketed millions of dollars from this scheme, including diverting orphanage donations to her personal benefit.¹³³ It was only after a fuller version of what happened in Cambodia became available to the public that the adoption community began to consider that large-scale trafficking had occurred—a realization that the lack of a human-trafficking conviction hinders to this day.¹³⁴

The State Department's view that, under international law, baby selling for adoption is not human trafficking is highly questionable. Instead, current international law exists in essentially three postures: (1) providing no clear distinction between child selling and child trafficking; (2) considering child buying/selling for adoption as one of several aggravated forms of child selling/trafficking, based on the premise that such child buying is exploitative and harmful; or (3) leaving open-ended the question of whether child buying/selling for purposes of adoption is sufficiently exploitative to constitute "trafficking" or an aggravated form of child selling.

The first approach is illustrated by both the Convention on the Rights of the Child (CRC) and the Hague Convention on Intercountry Adoption, which name both the sale of children and child trafficking as rights deprivations without providing any clear definitions or differentiating between them.¹³⁵ It is particularly notable that the Hague Convention on Intercountry Adoption, the principal convention on intercountry adoption, has a primary object of preventing "the abduction, the sale of, or traffic in

131. *Child Laundering*, *supra* note 7, at 137–38.

132. Government's Sentencing Memorandum at 33, *United States v. Lauryn Galindo*, No. CR03-187Z (W.D. Wash. Nov. 14, 2004) [hereinafter *Galindo Sentencing Memorandum*] (arguing that the court reject Galindo's characterization of her crime as a visa fraud infraction and not the trafficking of children who did not fall under the statutory definition of "orphan").

133. *Id.* at 2–3 ("Rather than the victim she portrays herself as being, she was, in reality, fully in charge of events and activities [and] the recipient of the bulk of the funds.").

134. *Id.* at 191; *see also* Fields-Meyer et al., *supra* note 67, at 75 (reporting that U.S. Immigration Service investigators became particularly concerned that birth parents were being coerced to sell their children).

135. Convention on the Rights of the Child, G.A. Res. 44/25, art. 35, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989) [hereinafter *Convention on the Rights of the Child*]; Hague Convention, *supra* note 1, at 1139.

children,”¹³⁶ and that this seriatim naming of the three wrongs comes directly from the Convention on the Rights of the Child.¹³⁷ Understanding the Hague Convention on Intercountry Adoption as an anti-trafficking treaty implementing the CRC’s anti-trafficking concerns is hardly compatible with the State Department’s posture.

The Optional Protocol to the CRC on the Sale of Children illustrates the second approach, in which buying/selling children for purposes of adoption is considered an aggravated form of child selling.¹³⁸ The Protocol lists those sales of children that must be prohibited under penal law to include “sexual exploitation,” “transfer of organs of the child for profit,” “forced labour,” child prostitution, child pornography, and buying children from birth parents.¹³⁹ Under this approach, buying children for purposes of adoption is included among the acts which are typically deemed exploitative, such as sexual and labor exploitation.

The 2001 UN Trafficking Protocol represents the third approach, which requires some form of “exploitation” in its definition of “trafficking in persons,” but leaves the definition of such exploitation open.¹⁴⁰ The Protocol states that “[e]xploitation shall include, at a minimum,” sexual exploitation, exploitation of the prostitution of others, forced labor, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴¹ This list is open-ended, and would permit the addition of other unnamed forms of exploitation, such as purchasing babies for purpose of adoption.

Thus, the State Department has erroneously presumed that international law definitions of human trafficking and exploitation do not apply to “coerced or induced removal of a child, or situations where deception or undue compensation is used to induce relinquishment of a child,” so long as the child is not subject to labor or sex exploitation in her adoptive home.¹⁴²

136. Hague Convention, *supra* note 1, at 1139.

137. Convention on the Rights of the Child, *supra* note 135, art. 35.

138. Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, G.A. Res. 54/263, art. 3, U.N. Doc. A/Res/54/263 (Mar. 16, 2001).

139. See *id.* art. 3(1) (setting out the acts that State Parties should forbid under their respective criminal and penal laws). The exact language pertaining to adoption forbids “[i]mproperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption.” *Id.* art. 3(1)(a)(ii). The term “applicable international legal instruments on adoption” is understood to include the Hague Convention. See Michael J. Dennis, *Newly Adopted Protocols to the Convention on the Rights of the Child*, 94 AM. J. INT’L L. 789, 793–94 (2000) (noting that Japan and the United States recognize “applicable international legal instruments on adoption” to mean the Hague Convention). The Hague Convention requires that “consents have not been induced by payment or compensation of any kind.” Hague Convention, *supra* note 1, at 1140.

140. Trafficking Protocol, *supra* note 10, art. 3.

141. *Id.* art. 3(a).

142. 2005 TRAFFICKING PERSONS REPORT, *supra* note 4, at 21.

This approach reflects a lack of understanding of the exploitative nature of such adoptions.¹⁴³

Part One of this Article argued that such adoptions are exploitative in relationship to the birth family. When a birth family's child is lost to the family through coercion, deception, or undue compensation, the family's capacity to produce and nurture a child has been unjustly exploited for the benefit of others. Both those who gain financially from the adoption and the adoptive family who has its desire for a child fulfilled benefit from the birth family's exploitation. Further, the birth family includes the child, who is initially a part of that family. Hence the exploitation of the birth family includes exploitation of the child in her role as a member of the birth family.¹⁴⁴

Viewing the matter from the perspective of a child who has been separated from the birth family, any act that exploits the birth parents and birth family also exploits the child as an individual. One of the fundamental emotional truths of adoption is that the adoptee's tie to her birth parents and family is not severed by adoption. This is true even in infant adoption, where the child has no knowledge or contact with the birth family. Even in infant adoptions, it is common for adoptees, as they grow into teenagers and adults, to be seriously concerned with questions about their birth family. Many such adoptees eventually wish to obtain information about or have contact with their birth family, and they can be deeply affected by what they discover in such "birth searches."¹⁴⁵ The permanent link between adoptees and their birth families should not surprise us, given the significance of origin, history, and heredity to fundamental human issues of identity, family, and community.¹⁴⁶ Once this permanent connection between adoptees and birth families is understood, the principle that harming the birth family also harms the adoptee is a simple application of the broader principle that harming an individual also harms those to whom they are intimately connected, whether spouses, children, parents, siblings, extended family, or even friends.

When the exploitation of the birth family specifically involves the illicit removal of the child from the family, the harm to the child is particularly poignant. In such instances, the exploitation of the birth family

143. As is apparent from this article, I have changed my mind regarding whether a claim that adoptions can be exploitative—even of the child—can be sustained. See David M. Smolin, *Intercountry Adoption as Child Trafficking*, 39 VAL. U. L. REV. 281, 295 (2005) ("[I]t would be difficult to sustain the claim that adoption itself is a form of exploitation.").

144. See *supra* notes 10–63 and accompanying text.

145. See *Triad*, *supra* note 11, at 35–67.

146. See *id.* at 35–36.

is directly tied to one of the fundamental questions adoptees ask: why didn't my family keep me?¹⁴⁷ An adoptee, learning that the answer to this question is that he was taken from his family illegally, may justifiably experience a sense of grievance, even if he was loved and well cared for by the adoptive family. This sense of grievance is connected to another fundamental emotional truth of adoption: adoption involves loss, not only for the birth family, but also for the adoptee.¹⁴⁸ This loss can be extremely painful, even when it was necessary, justified, or unavoidable. When the loss of the birth family was unjustified or avoidable, however, then it is appropriate for the adoptee to demand an accounting for those who unjustifiably caused this pain. Further, when the adoptee's loss of her birth family was illicit, unnecessary, and unjustified, and occurred to benefit others financially or emotionally, then the loss becomes a form of exploitation. What could be more exploitative than to harm a child through unnecessarily ripping her from her birth family for purposes of financial or emotional gain for others?

This point may become clearer by reference to well-known scenarios in child laundering scandals. In countries like Cambodia and India, such scandals have usually involved individuals who intentionally profited from obtaining children from birth families by kidnapping or buying the children.¹⁴⁹ In India, for example, an orphanage director named Sanjeeva Rao would systematically obtain children from scouts, intermediaries who were paid for each child they brought to the orphanage. The scouts would obtain the children through a combination of fraud, force, and financial inducement.¹⁵⁰ In Cambodia, Lauryn Galindo systematically sent out intermediaries to obtain children from poor, struggling birth parents, again through a combination of fraud, force, and financial inducement.¹⁵¹ Rao

147. See *id.* at 25–26 (“Rejection also may play a powerful role in adoptees’ lives, whether the decision regarding their adoptive placements was voluntary on the part of their birth parents or the result of the involuntary termination of the birth parents’ parental rights.”).

148. See *id.* at 21 (observing that adoption researchers and clinicians understood adoptees to experience significant loss).

149. See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 435–36, 450–74 (2005) [hereinafter *Indian Adoption Scandals*] (discussing the Indian Supreme Court’s concerns with money and adoption and describing the adoption scandals in Andhra Pradesh, India); *Child Laundering*, *supra* note 7, at 135–63 (describing Cambodian and Indian adoption scandals).

150. *Indian Adoption Scandals*, *supra* note 149, at 456–62 (citing substantial press reports concerning Sanjeeva Rao’s role in the Andhra Pradesh adoption scandals). I have personally investigated certain aspects of the Andhra Pradesh adoption scandals, as my own adoptive daughters lived for a time in Rao’s orphanage. Rao has denied the charges against him, and he was not criminally convicted. He did repeatedly lose his central government license (CARA license) to place children in intercountry adoption.

151. *Child Laundering*, *supra* note 7, at 135–46.

and Galindo profited handsomely from these transactions, as the adoption fees and donations they received for each adoption dwarfed the costs and expenses involved in paying the intermediaries, caring for the children, and facilitating the adoptions. The intermediaries profited more modestly, but apparently enough to make the task worth their while. Rao and Galindo were clearly exploiting the characteristics of the children that made them particularly adoptable, such as their age, health, gender, and physical attractiveness, for purposes of financial profit.¹⁵²

Rao and Galindo would no doubt argue that they did not exploit children, since in their views, the children involved were far better off with middle-class families in the United States than growing up impoverished in a developing nation.¹⁵³ Their argument is also embraced by many in the adoption community who cannot understand how it can be child exploitation to take children from poor families in the developing world so they can be adopted by middle-class families in a rich country.¹⁵⁴

Answering this question requires reasoning by analogy, because otherwise it is impossible to overcome the grip that the adoption myth has on our thinking. Consider a situation where a wealthy and childless U.S. couple traveling in India comes across a mother, father, and baby drowning in a river. The couple is traveling in a dependable boat and could easily ask their guides to rescue the entire family. The couple, however, considers this their opportunity to finally have a “child of our own;” they instruct their guides to rescue the infant but leave the parents to drown. The couple adopts the “orphan” and returns to the United States, where the child is loved and given all of the opportunities that wealth, family, and education can provide. When the child grows up, however, she visits her native country, finds those involved in her adoption, and learns the truth about her origins. The adoptee then returns to the United States to confront her adoptive parents. What do you think this adoptee would say to her adoptive parents? Would it be enough for the parents to argue that her birth parents were poor and her life would have been worse if they had rescued the entire family? Would the argument that this child is “better off” because of her

152. See *Indian Adoption Scandals*, *supra* note 149, at 449, 457 (explaining that Indian adoption agencies received between \$2000 and \$7000 per intercountry adoption and that scouts or intermediaries received substantially more money from orphanages than the amount they spent purchasing the babies); *Child Laundering*, *supra* note 7, at 139–41 (indicating that recruiters were given a \$50 commission for each child and that conspirators received approximately \$8,000,000 from adoptive parents in the U.S.).

153. *Child Laundering*, *supra* note 7, at 191 (indicating that Galindo believed she was not involved in child trafficking, but had only committed paperwork errors in order to further her motivation to help children).

154. *Masha Allen Adoption Hearing*, *supra* note 72, at 6 (statement of Ranking Member Bart Stupak).

adoption be sufficient to assuage the horror, grief, and anger of this adoptee? Moreover, could not this adoptee consider that her adoptive parents had exploited her, using her very infancy and capacity to bond and love to fulfill their own desires for a child? Could she not argue that this was an unjust use of her and her birth parents, for the benefit of her adoptive parents? Could not the adoptee protest: "You took advantage of my need to have someone love and care for me. You made me an orphan and then exploited my need for a family. You put me in a position where I could not help but love you, when I really should have hated you as people who murdered my parents. You made me betray my own flesh and blood."

The argument that it becomes permissible, or an insubstantial harm, to rip children from their parents merely because they would be better off in a different home and "better" cultural and economic milieu, has a painful history. This "better off" theory was the basis for the removal of aboriginal children from their families in Australia and of Native American children from their families in the United States. This policy has since been repudiated in both Australia and the United States in relationship to native or aboriginal peoples.¹⁵⁵ It is ironic that this way of thinking nevertheless lives on in the realm of intercountry adoption. To the degree that this "non-exploitation" or "better off" viewpoint continues, it is a sign that intercountry adoption remains rooted in a kind of neo-colonialist mindset.

The viewpoint that it is permissible to take children from their original families and give them to new families, so long as the children are "better off" in some cultural, economic, or educational sense, has enormous breadth and is counter to the law.¹⁵⁶ Such arguments could be used to

155. See Indian Child Welfare Act, 25 U.S.C. § 1902 (2006) (declaring the policy of Congress as "promot[ing] the stability and security of Indian tribes and families by . . . establish[ing] . . . minimum Federal standards for the removal of Indian children from their families"); *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 51 (1989) (stating that "removal of Indian children from their cultural setting . . . has [a] damaging social and psychological impact on many individual Indian children"); AUSTL. HUMAN RIGHTS & EQUAL OPPORTUNITY COMM'N, BRINGING THEM HOME, REPORT OF THE NATIONAL INQUIRY INTO THE SEPARATION OF ABORIGINAL AND TORRES STRAIT ISLANDER CHILDREN FROM THEIR FAMILIES (Apr. 1997), available at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/> (recommending oversight for compensation procedures of indigenous children who were removed from their families).

156. In a Chambers Opinion, United States Supreme Court Justice Stevens rejected this broad premise, even in a circumstance where the child lived for several years with non-related persons. *Deboer v. Deboer*, 509 U.S. 1301, 1302 (1993) (Stevens, Circuit Justice).

Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found unfit simply because they may be better able to provide for her future and her education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from parents simply by deciding another home offers more advantages."

Id. (citing *In re B.G.C.*, 496 N.W. 2d 239, 241 (1992)).

justify taking virtually any child from a family, so long as a family who could offer the child “better” opportunities wanted the child. For example, under this theory a wealthy European could feel justified in taking any child from an unemployed American couple because the child would be raised in a more cultured environment and receive a superior education. Under this theory the children of the poor are essentially open-season-for-taking by anyone with the means to do so and the position to claim that the child is thereby “better off.” Indeed, this theory could be distorted to the point of justifying genocide, whereby the children of a disfavored group were systematically removed in order to destroy the group, in whole or in part.¹⁵⁷

It should not be presumed that adoptees will never ask the kinds of hard questions raised in this Part. Indeed, such questions are already evident in some cases of intercountry adoption. For example, consider the story of Camryn. Camryn’s parents were dead, but she was living with her married sister and family, all of whom lived within a broader, extended-family setting.¹⁵⁸ Camryn describes her own story as follows:

Just over 5 years ago, I was a 9 year old girl named Song Kea living in a small house at Slorgram Commune, in Siem Reap, Cambodia, with my older sister Le and her husband Sayha who was a chef at a big restaurant, and their baby son, Vitbol. Our older brother Muot also lived with us.

A short walk from our house lived my aunts—all of them were my mother’s sisters. They lived with their husband & children. We were all close. I loved to play with all of my cousins.

Everyday I went to school—my family were very proud of me because I was such a good student. I also used to go to Cambodian dance lessons at the dance center.

On the weekend, I used to take care of Vitbol, while my sister cooked food to sell at the market. I also used to help with the farm that we had where we grew vegetables & rice.

We did not have much money, but we all helped each other. We always had food & clothes. We were happy and loved each other.

157. See Convention on the Prevention and Punishment of the Crime of Genocide art. 2, Dec. 9, 1948, 78 U.N.T.S. 277 (defining genocide to include the forcible transfer of children “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”).

158. Galindo Sentencing Memorandum, *supra* note 132, at 10–11; Fields-Meyer et al., *supra* note 67, at 78.

One day, a man stopped me, and told me to go and ask my family if I could live in America

Suddenly they told me I would go to Phnom Penh that day and meet my new mother. I didn't say goodbye to my sister, or anyone else. Did my sister know where to find me? When would I see them again? I was scared.

I met my new mom—she was pretty. I told her that I wanted to go back to Siem Reap, but she did not understand Khmer. I asked the lady who worked in the hotel to ask her.

The day we . . . went to Siem Reap—maybe my mom DID understand Khmer! I was very excited, and told the taxi driver the directions to my house. We arrived there and my sister came down the steps smiling & crying. My new mom was very confused and went to find someone who could speak Khmer & English. We spent the next two days with my sister, and then we said goodbye. My mom made sure Le had had our address, paper, envelopes, & stamps. When we left my sister was very sad & cried a lot. But at least we got the chance to say goodbye.

In America for the first few months I would cry a lot, especially at bedtime. I tried to be brave for my new family, but I missed my Cambodian family so much. I missed my country, my friends, the smell at night of the fire and the food. I missed my sister singing Vitbol to sleep. I used to think a lot about when I was a flower girl for my sister when my sister got married. My new mom used to hold me and stroke my head—she used to cry too. One night, she asked me if I would like to go back to Cambodia to live, as I seemed so unhappy. I was very mixed up. My mom promised to take me for a visit to Cambodia.

As the months & years passed, I still missed Cambodia, but it didn't hurt so much. I have my Cambodian family in my heart, and will always love them. I hardly speak any Khmer any more. My sister gave birth to another baby boy—I would like to meet him. I used to be Vitbol's favorite person—now he would not even remember me, which makes me very sad. I still remember him so well, but he is a big boy now.

I may not have had a fancy house in Cambodia, but I did have a home.

I may not have a big soft bed in Cambodia, but [I] had a place where I slept safely & peacefully each night.

I may not have had a big car in Cambodia, but I had an ox & cart.

I may not have had parents in Cambodia who could give me all the fine things in life, but I had a family who loved me.

I may not have had private education in Cambodia, but I went to school and studied very hard.¹⁵⁹

Camryn's adoption was facilitated by Lauryn Galindo, the U.S. citizen at the center of the Cambodian adoption scandal.¹⁶⁰ Her adoption took a different turn from most instances of child laundering because she was old enough to communicate her desire to see her Cambodian family, and her adoptive mother responded positively.¹⁶¹ Her adoptive mother was able to reduce the trauma of the situation by giving young Song Kea a choice regarding the adoption and by allowing her continued contact with her Cambodian family.¹⁶² In addition, although Song Kea did have a loving extended family raising her, the fact that her parents were dead perhaps lessened the potential loyalty conflict involved in adapting to adoptive parents.¹⁶³ Most child laundering situations, however, involve babies and infants who, through false paperwork, are taken from living parents and forever stripped of the truth of their origins. Even where older children are involved, few are given a real choice or are able to maintain continued contact with their birth families. Thus, however difficult the loss and pain experienced by Song Kea, the loss and pain involved in many instances of child laundering are much greater.

The exploitative nature of child laundering is made even clearer in another Cambodian adoption facilitated by Lauryn Galindo, where an older

159. U.S. Immigration and Customs Enforcement, Victim Impact Statement (Nov. 19, 2004) [hereinafter Camryn Victim Impact Statement] (on file with Vermont Law Review) (quoting the letter written by Camryn recounting her story); see also Galindo Sentencing Memorandum, *supra* note 132, at 10–11 (including sections from Camryn's letter).

160. U.S. Immigration and Customs Enforcement, News Releases: Woman Sentenced to 18 Months in Prison for Visa Fraud and Money Laundering in Connection with Cambodian Adoption Scam (Nov. 19, 2004), <http://www.ice.gov/pi/news/newsreleases/articles/adoption scam111904.htm> (discussing sentencing of Lauryn Galindo for the adoption scam); Galindo Sentencing Memorandum, *supra* note 132, at 9–10.

161. Camryn Victim Impact Statement, *supra* note 159, at 2.

162. *Id.* at 1–2.

163. ABC News, *U.S. Families Learn Truth About Adopted Cambodian Children* (2005), <http://abcnews.go.com/2020/International/Story?id=611826&page=3>.

child of approximately six or seven years of age was literally torn, screaming and crying, from her birth mother's arms. As Martha Jacobus (the adoptive mother) explains, the result has been a severely disturbed adopted child:

We first met our child as she screamed and desperately clung to her "nanny." With the driver acting as the interpreter, we learned that the "nanny" was in fact her birthmother. When asked by the American adoption professional why she was there, the birthmother replied, "I was just walking by and stopped in," when asked what she wanted she replied, "Some money for me and my family." Instructed by the adoption professional, we gave her the \$50 customarily given to a nanny as a thank you gift. . . .

. . . .

The adoption professional followed us and told us that yes, we could walk away, "but if you don't adopt her, someone else will," and "if you don't adopt her, she'll probably end up in the sex industry." Not feeling like we had another choice, but not feeling comfortable with our decision either, we took our daughter with us

[O]ur daughter states that she never lived at the Orphan Center or spent any time there at all, rather [she] lived with her birthmother and 5 siblings at home until the day she met us. This was confirmed in a letter from her birthmother. Our daughter also told us that she never knew anything about what was going to happen to her until she saw us arrive at the Orphan Center that day.

In May of 1999, almost a year after the adoption, we received an unsolicited letter from our daughter's birthmother and have corresponded with her since. We have learned that she was approached by . . . Americans . . . to have her daughter and also a niece adopted. She was offered money and enticed by promises of ongoing support and money from the adoptive family.

She has also said that she was told to lie about our daughter's age to make her seem younger

Our family has had a very difficult adjustment period. We were all severely traumatized and still experience symptoms of Post

Traumatic Stress Disorder. For the first 1 ½ to 2 years we were in a sort of desperate survival mode, just making it through the day intact was a great achievement. Our child was hyperactive, angry, anxious, abusive, controlling, unhappy to the core of her being about being here and spent every waking moment letting us—particularly me—know it

However I want to state very clearly that we have a child with an Attachment Disorder, significant and persistent anxiety and underlying anger. Attachment Disorders do not go away

Sometimes, at the end of a long day when our daughter has spent all of her energy trying to get out of the intimacy of our family and has created so much chaos and unpleasantness that we are exhausted, every nerve is raw and our hearts are twisted inside out, there is sadness, regret and guilt¹⁶⁴

An interview with Ms. Jacobus “elaborated on the emotional trauma suffered by her daughter”:¹⁶⁵

According to Ms. Jacobus, her daughter went mute, pulled her hair out of her head, spit and bit, fought physically, and had meltdowns every day. Only at night when Ms. Jacobus put her daughter to bed would her daughter speak to her. When she spoke, it was in Cambodian. By using a Cambodian dictionary, Ms. Jacobus figured out that her daughter was telling her the names of her brothers and sisters and of a friend in Cambodia.¹⁶⁶

Unlike Camryn, who was emotionally whole enough to articulate her own loss in a way accessible to the legal system, Ms. Jacobus’s daughter’s loss comes to us only through the descriptions of her understandably distraught adoptive mother. This is one difficulty with truly accessing the exploitation of laundered children: the more traumatized they are, the less accessible their perspective is to us. Moreover, the manner in which the adoption community and adult world express and interpret the trauma of laundered children can be subject to question. For example, consider Ms. Jacobus’s description of her adoptive daughter as suffering from an attachment disorder. From the adoptive parent’s perspective the term appears apt, as her adoptive child is clearly resisting bonding and

164. Galindo Sentencing Memorandum, *supra* note 132, at 12–14 (emphasis omitted).

165. *Id.* at 14.

166. *Id.*

attachment to her adoptive mother. Moreover, professionals the mother may have consulted or information she may have gleaned from her own research presumably informed the mother of the existence of reactive attachment disorder (RAD).¹⁶⁷ Viewed from the adoptee's perspective, however, labeling the child as having an attachment "disorder" seems absurd. There is arguably nothing wrong with the child and everything wrong with the child's situation. How should we expect a six- or seven-year-old child, normally attached and bonded to her family, to react to a situation where she is suddenly and unexpectedly torn from her mother's arms and sold to a stranger who purports to be her mother? Moreover, this "mother" looks and smells completely different from everyone in her family and community, does not speak her language, and takes her halfway around the world to a community where almost nobody speaks her language. Would we expect a normally bonded and attached child to envelop with love and affection a stranger who in her presence bought her from her mother? Would it not be a sign of sanity and normal psychology to resist, with every fiber of her being, this new arrangement? And how should such a child, overwhelmed emotionally, feeling betrayed by the mother who sold her, in culture-shock, and unable to communicate in words to those around her due to a language barrier, express her feelings?

To understand the reactions of Ms. Jacobus's adoptive daughter, therefore, we have to realize that from her perspective she is a trafficked child and that it is natural for a trafficked child aware of her situation to resist it. It is absurd to buy children from their mothers and then expect the children to react to those who bought them as though they were beloved family members. To label the child with a "disorder" is to fail to diagnose the disorder in the child's situation.

Technically speaking, RAD is applicable where a child, due to significant abuse or neglect ("grossly pathological care") in the first few years of life, is unable to bond normally with non-abusive caregivers or parents. The problem is often seen in children whose first years were spent in poor institutional care, as well as situations where children suffered severe neglect or abuse in their first home.¹⁶⁸ Beyond the strict official definition of RAD, there is a broader, sometimes controversial world of attachment experts and therapists. Such experts associate various kinds of attachment disorders with dangerous or erratic behaviors, such as sadistic treatment of animals and children, fire-starting, stealing, head-banging, etc. In addition, some attachment-disordered children are described as

167. See generally AM. PSYCHIATRIC ASS'N, DSM-IV-TR: DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 127-30 (4th ed. 2000) (describing Reactive Attachment Disorder).

168. *Id.* at 128.

superficially charming and manipulative and as exhibiting their most severe behaviors only within their adoptive or foster homes.¹⁶⁹ Both the official definition of RAD and the broader body of concerns over attachment disorders and attachment share common roots in the work of John Bowlby and Mary Ainsworth regarding the significance of attachment relationships in infancy and childhood to human development.¹⁷⁰ It is deeply ironic to label Ms. Jacobus's adoptive daughter with any form of RAD or attachment disorder, as she displayed precisely the kind of bond to her family of origin that attachment theory posits as foundational to normal human development. Ms. Jacobus's adoptive daughter most likely had precisely the opposite problems of RAD, or attachment-disordered, children. Her problem was not an inability to trust due to neglect or abuse in early childhood, but rather that she was in fact quite strongly attached and bonded to a family that had, when subject to severe poverty, false promises, and financial inducement, sold her. While it is true that this child did not easily attach to her adoptive mother, this refusal to attach to an adoptive family was most likely based on a pre-existing and developmentally appropriate attachment to her family of origin.

Scattered cases from several countries indicate that older children aware of having been bought or stolen from their birth families frequently react in ways similar to that of Ms. Jacobus's daughter.¹⁷¹ Yet these children typically are treated as though they were somehow at fault or sick, due to their failure to easily adjust and adapt to their adoptive homes. It is, once again, the failure to recognize that adoption can be harmful and exploitative that has led these cases to be mislabeled and hence mishandled. Once we label these children clearly as trafficked and laundered children, it may be possible to help them. So long as we hide their reality, even from ourselves, then even efforts to help them can be harmful. Moreover, it is not enough for adoptive parents alone to come to a clear realization of the situation, for adoptive parents necessarily rely on others for advice and assistance. When adoption agencies, adoption workers, mental health

169. See Nancy Thomas, What is Attachment Disorder/Reactive Attachment Disorder (RAD)?, <http://www.attachment.org/rad.htm> (last visited Aug. 28, 2007) (explaining Reactive Attachment Disorder and its symptoms); Attachment Disorder Site, <http://www.attachmentdisorder.net/Treatment.htm> (last visited Sept. 5, 2007) (providing links to works of attachment disorder experts and therapists).

170. See, e.g., MARY AINSWORTH, *INFANCY IN UGANDA* 331–85, 429–58 (1967) (detailing the development of infant attachment through a study of Ugandan infants); 2 JOHN BOWLBY, *ATTACHMENT AND LOSS: SEPARATION, ANXIETY, AND ANGER*, 245–57 (1973) (discussing the prominent role that anger plays in responding to separation); ROBERT KAREN, *BECOMING ATTACHED* 24–47, 91–121, 131–65, 426–40 (1994) (chronicling Bowlby's and Ainsworth's attachment theory work).

171. See, e.g., Galindo Sentencing Memorandum, *supra* note 132, at 14–15 (including an interview with an adoptive mother describing the emotional trauma suffered by her adopted Cambodian daughter).

professionals, and even government officials fail to acknowledge the phenomenon of child laundering and child trafficking within the adoption system, they make it difficult for even the best-intentioned adoptive parents to assist these children.¹⁷²

Most laundered and trafficked adoptees were removed from their birth families as infants, and their development is therefore different. These children may lack conscious memories of their birth families and generally lack any awareness of the reasons or manner in which they were removed. Most of these children will have bonded normally with their adoptive families. For these adoptees, their initial set of issues will commonly include questions of identity, race, and origins. As such adoptees become teenagers and then young adults, some percentage, particularly in cross-racial adoptions, will become intensely concerned with such issues.¹⁷³ Even then, however, unless there is some information suggesting that they had been trafficked or laundered, they may never even consider the possibility. Most laundered or trafficked children presumably never discover this fact, given the difficulty of uncovering such hidden truths, and the fact that their interest in information and birth searches usually does not occur until more than a decade after their adoption. If information suggesting that they were illicitly obtained for adoption were to arise, such adoptees might have some of the same reasons for reacting defensively as their adoptive parents. Given their bonding to their adoptive parents, it would be difficult for such adoptees to contemplate that their adoption had been fundamentally illicit. Such a truth would be like learning as a teenager or young adult that one was conceived through rape. Unless the exact facts can be accurately obtained—a daunting task—excruciating questions may remain, as the adoptee struggles to discern the degree of fault or complicity of various

172. Early reports from the Samoan child-laundering scandal suggest that the government officials involved are giving some credence to the claims of birth parents to the children, rather than assuming, as in past scandals, that laundered children inevitably belong to the adoptive families. It is possible that the resistance of some older Samoan children to their placements may be playing some role in this. See, e.g., Geoffrey Fattah, *Utahns Ran Baby Scam, Feds Say*, DESERET MORNING NEWS, Mar. 2, 2007, at A1 (reporting that child agency workers misled adoptive parents into believing their adopted children had been abandoned or orphaned); *Wellsville Couple Accused of Operating Baby Selling Ring* (KTVX ABC 4 Salt Lake City television broadcast Mar. 1, 2007), available at <http://clipsyndicate.com/publish/index/209248> (reporting about a Utah couple who fraudulently purchased children from Samoan families and sold them in the United States, claiming they were orphans); *Feds: UT Company Orchestrated Fraudulent Adoptions* (KUTV CBS 2 News television broadcast Mar. 1, 2007), available at http://kutv.com/topstories_local_story-060181853.html (reporting on the fraudulent adoptions of Samoan children in Utah).

173. See generally *Triad*, *supra* note 11, at 19–61 (considering the role of origins in adoptees' identity formation process); 1 MADELYN FREUNDLICH, *ADOPTION AND ETHICS: THE ROLE OF RACE, CULTURE, AND NATIONAL ORIGIN IN ADOPTION* 89–123 (2000) (discussing roles of race, culture and national origin in international adoption).

birth family and adoptive family members in wrongful acts. Did their first parents sell them, or were they tricked? Did their adoptive family know they were stolen? It is understandable if a bonded adoptee does not want to explore this quagmire, particularly given the lack of context in which to place these concerns and the extraordinary difficulties in discovering the truth.

One can ask whether a laundered or trafficked infant who never learns of these facts and is placed into a loving adoptive family has been exploited or harmed. Certainly that would be the perspective of the Convention on the Rights of the Child, which states that the child has the right “to preserve his or her identity, including nationality, name and family relations.”¹⁷⁴ Further, the child has the “right to know and be cared for by his or her parents.”¹⁷⁵ These are objective rights, and the fact that an individual is unaware that she have been deprived of such rights does not alter the fundamental wrong involved. Hypothetically, if an adult were kidnapped from her family, home, and nation, and replanted in a new family, home, and nation, and if somehow all knowledge of this change was removed from her, would not the wrong remain?

It is important to remember that there is a fundamental human drive or desire to reproduce and nurture. These drives are related to fundamental human needs to love and be loved; have loving, personal care in old age; and see one’s own values and ways of life reproduced. Of course these human drives, desires, and needs are normally good and necessary to the tasks of human and cultural reproduction which are fundamental to human survival. Adoption is often used, particularly by the infertile, as a means for satisfying these fundamental human drives.¹⁷⁶ Adoption becomes exploitative, however, when the children are not orphans and are taken illicitly from their birth families. In those circumstances, the adoptive parents have no right to satisfy their needs to love, be loved, and pass on their values and ways of life *with someone else’s children*. One might term this a kind of parental adultery—parenting someone else’s children in violation of the rights of both the children and original parents. The fact that the child receives nurture does not justify such a wrong, for the child is being *nurtured and shaped by the wrong people*. In such an instance, the very capacity and need of the infant for nurture is exploited for the gain of others.

174. Convention on the Rights of the Child, *supra* note 135, art. 8.

175. *Id.* art. 7.

176. See generally *Triad*, *supra* note 11, at 129–68 (evaluating the impact of adoption on adoptive parents, including the role infertility plays for some prospective adoptive parents).

CONCLUSION: APPLYING ANTI-TRAFFICKING NORMS TO INTERCOUNTRY
ADOPTION UNDER THE COMING HAGUE REGIME

The Hague Convention, it turns out, is correct: abducting or selling children for purposes of adoption is a form of child trafficking.¹⁷⁷ These acts exploit families and children, and create harms serious enough to be subsumed within the term “child trafficking.”

Therefore, the State Department is wrong to exclude selling children for purposes of adoption from the definition of child trafficking. To the degree that the State Department is depending on an interpretation of international law, the State Department is mistaken: the Hague Convention on Intercountry Adoption itself implies that selling children for purposes of adoption is a form of child trafficking.¹⁷⁸ In addition, once the exploitative nature of such acts is understood, most anti-trafficking international law norms become applicable. Abducting, buying, or selling a child for purposes of adoption is an illicit form of child trafficking under international law because such acts are deeply exploitative.¹⁷⁹

Currently, the State Department’s approaches to the issues of intercountry adoption, child trafficking, and parental abduction are strangely contradictory. In 1994, the Bureau of Consular Affairs created the Office of Children’s Issues “to handle international parental child abductions and intercountry adoptions.”¹⁸⁰ The Office of Children’s Issues therefore plays a special role on behalf of the State Department in implementing the Hague Convention on Intercountry Adoption, which is explicitly an anti-trafficking treaty designed to “prevent the abduction, the sale of, or traffic in children.”¹⁸¹ Despite the Treaty’s presupposition that abducting or selling children for purposes of adoption is a form of trafficking, the Office of Children’s Issues pays only sporadic or episodic attention to child-trafficking or child-laundering issues.¹⁸² The primary concerns of the federal government in relationship to intercountry adoption have apparently been that of assisting U.S. citizens who wish to adopt foreign children, leading to the corollary task of facilitating the work of

177. Hague Convention, *supra* note 1, at 1139.

178. *Id.*

179. See *supra* notes 128–76 and accompanying text.

180. U.S. GEN. ACCOUNTABILITY OFFICE, AGENCIES HAVE IMPROVED THE INTERCOUNTRY ADOPTION PROCESS, BUT FURTHER ENHANCEMENTS ARE NEEDED 49 (2005) [hereinafter GAO ADOPTION REPORT].

181. Hague Convention, *supra* note 1, at 1139.

182. Cf. GAO ADOPTION REPORT, *supra* note 180, at 27–28 (describing how a lack of formal documentation of trafficking by U.S. Citizenship and Immigration Services (USCIS) leads to sporadic review).

U.S. adoption agencies, which makes such adoptions possible. The risks of child trafficking appear to be relegated to a secondary concern. There is little evidence that the Office of Children's Issues has engaged in a systematic analysis of the incidence, causes, or risk factors for child trafficking or "child laundering" within the intercountry adoption system.¹⁸³ This lack of systematic analysis has led to inadequate and merely reactionary efforts to reduce the incidence of child trafficking in the intercountry adoption system. Similarly, Congress seems to have done little or nothing to investigate these problems, and its implementing Act—the Intercountry Adoption Act—largely ignores the Hague Convention's emphasis on preventing trafficking in the intercountry adoption system.¹⁸⁴ Both Congress and the State Department are implementing an anti-trafficking treaty without systematically addressing the problem of trafficking.

Ironically, the Office of Children's Issues also has chief responsibility for international parental kidnapping.¹⁸⁵ The key treaty in this respect is the Hague Convention on the Civil Aspects of International Child Abduction.¹⁸⁶ For purposes of this Convention, the United States Government seeks to assist birth and adoptive parents whose children are abducted and taken overseas.¹⁸⁷ This charge of the Office of Children's Issues to assist parents whose children have been abducted apparently has not been applied to birth parents in sending countries, whose children have been abducted and then laundered through the intercountry adoption system, first as "orphans" and then as adoptees. While international child laundering and international parental abduction may be technically distinct issues, the irony is palpable. Despite the existence of an entire program devoted to assisting parents whose children have been lost to international child abduction, the Office of Children's Issues has no coordinated approach to assisting birth parents in cases where the U.S. government has itself facilitated the loss of the children by issuing orphan visas to abducted and purchased children.¹⁸⁸

183. See *id.* (stating that the USCIS fails to systematically document problematic cases, which hinders systemic analysis).

184. See Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954 (2000).

185. GAO ADOPTION REPORT, *supra* note 180, at 49.

186. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 19 I.L.M. 1501.

187. See U.S. Dep't of State, Bureau of Consular Affairs, International Child Abduction, http://travel.state.gov/family/abduction/abduction_580.html (last visited Sept. 5, 2007) ("The Department of State's Office of Children's Issues . . . is designated to provide assistance to the left-behind parents of international parental child abduction.").

188. So far as I can determine, no one has ever attempted to apply the Hague Convention on the Civil Aspects of International Child Abduction to a case of child laundering within the intercountry adoption system, nor has the State Department ever considered whether that treaty might be applicable

The contradictions within the State Department concerning child trafficking is made even clearer by the State Department's official response to trafficking in persons, which occurs in a different division of the State Department: the Office to Monitor and Combat Trafficking in Persons, under the Office of the Under Secretary for Democracy and Global Affairs.¹⁸⁹ Indicating the administration's emphasis on anti-trafficking efforts, in 2004 President Bush appointed the then-Director, John R. Miller, to the rank of Ambassador at Large.¹⁹⁰ The extensive activities of this office include the annual Trafficking in Persons Report and Interim Reports, which involve the ranking of countries based on their conformity to standards for combating trafficking. The Office to Monitor and Combat Trafficking in Persons engages in extensive analysis of the incidence, causes, and risk factors of trafficking; demands enactment and enforcement of strong criminal laws against trafficking; and provides encouragement and funding for programs to assist the victims of trafficking.¹⁹¹ Congress mandated these efforts through the Trafficking Victims Protection Act of 2000,¹⁹² the Trafficking Victims Protection Reauthorization Act of 2003,¹⁹³ and the Trafficking Victims Protection Reauthorization Act of 2005.¹⁹⁴

It is, unfortunately, the Office to Monitor and Combat Trafficking in Persons that declared, in its 2005 Trafficking in Persons report, that the sale of children for purposes of adoption was not exploitation and hence was not a form of trafficking.¹⁹⁵ This office also fails to list the Hague Convention on Intercountry Adoption among its listing of anti-trafficking treaties.¹⁹⁶

to such cases.

189. U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, <http://www.state.gov/g/tip/> (last visited Nov. 17, 2007).

190. See Transcript Remarks to the Press by John R. Miller, Dir., U.S. State Dep't Office to Monitor and Combat Trafficking in Persons (Dec. 6, 2005) <http://manila.usembassy.gov/wwwwhr685.html> ("I have been appointed by the President of the United States to represent the United States abroad and at home on the issue of what we call Trafficking in Persons . . .").

191. U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, <http://www.state.gov/g/tip/> (last visited Sept. 5, 2007); OFFICE OF THE UNDER SEC'Y FOR GLOBAL AFFAIRS, U.S. DEP'T OF STATE, 2006 TRAFFICKING IN PERSONS REPORT 1, *available at* <http://www.state.gov/g/tip/rls/tiprpt/2006> [hereinafter 2006 TRAFFICKING IN PERSONS REPORT] (containing maps with law enforcement statistics, tier placements for countries, and efforts to aid victims of child trafficking).

192. Trafficking Victims Protection Act of 2000, § 1 Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended at 22 U.S.C. § 7101 (2000)).

193. Trafficking Victims Protection Reauthorization Act of 2003, § 1 Pub. L. No. 108-193, 117 Stat. 2875 (codified as amended at 22 U.S.C. § 7101 (2003)).

194. Trafficking Victims Protection Reauthorization Act of 2005, § 1 Pub. L. No. 109-164, 119 Stat. 3558 (2005) (to be codified at 22 U.S.C. § 7101).

195. 2005 TRAFFICKING IN PERSONS REPORT, *supra* note 4.

196. See 2006 TRAFFICKING IN PERSONS REPORT, *supra* note 191, at 286 (omitting the Hague Convention on Intercountry Adoption).

While this exclusion of adoption from the definition of trafficking is not mandated by Congress, the legislation underlying the Office to Monitor and Combat Trafficking in Persons does encourage this neglect of adoption issues. The trilogy of Trafficking Victims Protection Acts fails to provide any definition of trafficking in persons, but creates a definition of “severe forms of trafficking in persons” limited to trafficking for purposes of labor or sex.¹⁹⁷ The legislation then focuses its mandated activities on this limited definition of “severe” forms of trafficking.¹⁹⁸ Thus, while Congress does not mandate the conclusion that the sale of children for adoption purposes is not a form of trafficking, Congress has largely limited the activities of the Office to Monitor and Combat Trafficking in Persons to sexual and labor exploitation, thereby excluding the vast majority of adoptions from the Office’s mandate.

I would concede that sex and labor trafficking are bigger problems, in numbers and severity of harm, than trafficking in persons for purposes of adoption. The determination of Congress to focus on sex and labor trafficking, in combating trafficking in persons, can be seen as an effort to prioritize efforts toward the most important and worst forms of the problem.

However, such prioritization judgments cannot excuse the failure of the United States to fulfill its obligations to address the problem of trafficking within the intercountry adoption system. These obligations stem from both international and national law, as follows:

- (1) Both the Hague Convention and other anti-trafficking international instruments to which the United States is a party apply to abducting, buying, or selling children for purposes of adoption. Thus, the United States has international obligations to address trafficking within the adoption system as a part of its anti-trafficking efforts.¹⁹⁹

197. 22 U.S.C. § 7102 (8).

The term “severe forms of trafficking in persons” means:

(A) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or

(B) the recruitment, harboring, transportation, provision or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.

Id.

198. See *supra* notes 192–94 (authorizing activities to combat child trafficking).

199. *Id.*; *Child Laundering*, *supra* note 7, at 187–90.

- (2) The U.S. government has particular obligations, under both international and national law, not act as a facilitator of trafficking. Child laundering, the characteristic form of child trafficking within the intercountry adoption system, makes the governments of both sending and receiving countries into witting or unwitting facilitators and enablers of child trafficking. The U.S. government has in fact facilitated the trafficking of at least hundreds of children into the United States, as it has allowed its consular and immigration offices to be used to “launder” abducted and purchased children into the United States as “orphans” and adoptees.²⁰⁰ Any rational prioritization of anti-trafficking efforts must include ensuring that the U.S. government not provide the mechanisms and channels through which children are systematically trafficked.
- (3) The role of the U.S. government as a facilitator of child trafficking undermines its role as an international leader in anti-trafficking efforts. The United States has appointed itself monitor and judge of the anti-trafficking efforts of the rest of the world.²⁰¹ While this role is based on idealism, it puts the United States in the position of judging other countries based on whether they have sufficiently prioritized the task of combating trafficking. This monitoring role leads the U.S. government to evaluate other countries’ decisions that are in large measure the sovereign prerogative of these other countries: the allocation of limited prosecutorial, governmental, legal, and financial resources and the resolution of competing political and policy considerations. Yet in the area of trafficking and adoption, it appears that the U.S. government has, over many years, given an exceedingly low priority to combating trafficking within the intercountry adoption system. Therefore, the United States has allowed itself, as the primary recipient country for intercountry adoption, to create an often unfulfilled demand for child trafficking rather than for legitimate adoptions. The United States has,

200. See *Child Laundering*, *supra* note 7, at 135–170 (providing case studies of child trafficking into the United States); *supra* note 172 (listing media sources for Samoan adoption indictments).

201. See 2006 TRAFFICKING IN PERSONS REPORT, *supra* note 191, at 54–265 (evaluating anti-trafficking efforts of other countries).

for internal political reasons, as well as ideological and policy reasons, prioritized other goals over anti-trafficking efforts in relationship to adoption. The United States has, like so many countries it criticizes, chosen to minimize and deny its own trafficking problems, particularly in relationship to its own role in facilitating the trafficking of children through the intercountry adoption system. This minimization and denial has become particularly evident as the United States has moved toward ratification and implementation of the Hague Convention on Intercountry Adoption while largely ignoring the anti-trafficking concerns of the Convention.

It is clearly unproductive to have one part of the U.S. government actively engaged in combating trafficking on a global scale while another part of the government provides the mechanisms and channels by which large numbers of children are trafficked into the United States. Combating child trafficking in one part of the State Department while another part of the State Department facilitates the laundering of abducted and purchased children as orphans and adoptees is absurd. Prioritizing efforts against sex and labor trafficking is not an adequate reason for the State Department to fail in its obligations to safeguard the intercountry adoption system against child trafficking.

There are several different ways in which the U.S. government, including the State Department, can overcome its contradictory approach to child trafficking. Congress can extend the mandate of the Office to Monitor and Combat Trafficking beyond labor and sex trafficking, including providing a mandate to combat trafficking for purposes of adoption. Even if the Office to Monitor and Combat Trafficking does not have its mandate extended, it should refrain from counter-productive efforts to claim that buying children for purposes of adoption is not a form of trafficking. At a minimum, Congress and the Office of Children's Issues within the State Department must implement the Hague Convention according to its fundamental purpose as an anti-trafficking treaty. This will require the United States government to rigorously analyze the incidences and causes of child trafficking within the intercountry adoption system. Based on this analysis, the government should provide the regulatory safeguards necessary to prevent the U.S. consular and immigration processes from being used as child laundering mechanisms. This will also require the U.S. government to provide for comprehensive criminal and civil prohibitions and remedies for various forms of child trafficking and child laundering

within the intercountry adoption system.²⁰² Finally, the U.S. government should, as it does in other areas of trafficking, concern itself with the aftermath of such trafficking, in terms of services to members of the adoption triad victimized by such conduct.

Thus, both Congress and the State Department should, in their respective roles implementing the Hague Convention on Intercountry Adoption, create procedures which minimize the risks of child laundering and child trafficking. Currently, both Congress and the State Department have systematically created intercountry adoption procedures that leave the system vulnerable to child laundering and child trafficking.²⁰³ These vulnerabilities stem in part from the tendency of Congress and the State Department to defer to the pre-existing practices and standards of adoption agencies.²⁰⁴ Unfortunately, adoption agencies have consistently acted in ways that not only make the adoption system vulnerable to child trafficking but indeed create incentives for such illicit conduct. Thus, U.S. adoption agencies often engage in the following practices:

- (1) Charging adoptive parents unreasonably high foreign fees and “donations” which are channeled to individuals and organizations in sending countries, creating incentives for persons in sending countries to illicitly obtain children with high-demand characteristics and to improperly favor intercountry over in-country adoption;
- (2) Entering into bidding wars with other U.S. agencies, in which U.S. agencies try to outbid one another in their efforts to guarantee access to children. These bidding wars contribute to the unreasonably high fees and “donations” mentioned above;
- (3) Entrusting most of the critical functions of foreign programs to persons of dubious backgrounds or ethics or

202. I have previously made proposals on the kinds of steps which would make Hague implementation more effective against child laundering. *Child Laundering*, *supra* note 7, at 171–200.

203. See generally *Child Laundering*, *supra* note 7, at 171–200 (describing weaknesses in the current child trafficking policy and suggesting possibly solutions).

204. See *Intercountry Adoption Act of 2000: Hearings on H.R. 2909 Before the H. Comm. on Int'l Relations*, 106th Cong. (1999) (statements of Rep. William Delahunt); Accreditation of Agencies and Approval of Persons under the Intercountry Adoption Act of 2000 Final Rule, 71 Fed. Reg. 8064, 8065 (Feb. 15, 2006) (to be codified at 22 C.F.R. pt. 96) (stating in the background to the final rule that “we have also sought to reflect current norms in adoption practice, as made known to us during the development of the rule”).

both, making the agency a kind of legitimating cover for the often illicit methods of unscrupulous intermediaries and facilitators;

- (4) Violating the laws of sending nations as to limitations on fees and donations, the exchange of high fees and donations in exchange for receiving guaranteed access to children, or the practice of operating without a license in sending countries under the cover of other agencies with licenses (umbrella practices);
- (5) Networking with orphanages in sending countries that fail to provide any services or assistance to birth families in keeping their children, or which provide assistance and services only to those who agree to relinquish their children;
- (6) Networking with orphanages whose primary purpose is to supply children for intercountry adoption, and which are not organically involved with, or connected to, broader child welfare efforts. Such orphanages are focused primarily on intercountry adoption and dependent financially on intercountry adoption, and hence have incentives to make international placements even when other interventions would be more appropriate;
- (7) Networking with orphanages that source children illegally through fraud, force, and financial inducement, while maintaining an attitude of willful blindness to evidence of such illicit activities. Even when adoption shutdowns or criminal convictions ensue, agencies commonly refuse to assist their clients with the aftermath and consequences of having adopted through channels tainted by child trafficking and child laundering;
- (8) Operating programs in sending countries despite a lack of agency personnel with cultural and language expertise relevant to the sending country. Under these circumstances, the agency necessarily is overly dependent on foreign partner orphanages and/or independent facilitators and intermediaries, and lacks the capacity to

properly oversee the work of those upon whom they are reliant; and

- (9) Structuring adoption programs in which most critical functions are performed by partner agencies in sending countries or independent facilitators and intermediaries, and then disclaiming legal and ethical responsibility when those critical functions are performed in an illegal, unethical, or incompetent fashion.²⁰⁵

Given the above practices, which officially or unofficially have been common among mainstream adoption agencies, it can hardly be surprising that the intercountry adoption system has been vulnerable to child laundering. Thus, so long as the implementation of the Hague Convention is based principally on pre-existing standards of practice, then child laundering will continue to find a safe haven within the intercountry adoption system.

Indeed, in some ways a Hague-based intercountry adoption system could be even more vulnerable to child laundering schemes than the pre-Hague system. The Hague regime can appear to allocate the tasks of ensuring that children are truly orphans eligible for adoption to the sending country, despite the fact that many sending countries have significant problems with corruption, large-scale document fraud, and inadequate legal, administrative, or governmental processes.²⁰⁶ If receiving countries thereby loosen their own mechanisms for reviewing the validity of a child's claimed status as an orphan eligible for adoption and immigration, but instead give automatic, unreviewed credence to such determinations within sending countries, the Hague regime can actually lessen the safeguards against child laundering and child trafficking. Thus, there is a significant danger that the Hague regime, despite its purpose as an anti-trafficking effort, could itself facilitate child laundering, providing in effect an easier target for those who seek to use the intercountry adoption system as a channel for trafficking children. The United States, as the largest recipient nation, is particularly responsible to approach the Hague Convention according to its fundamental purpose as an anti-trafficking Convention. Thus, while granting proper respect to the determinations of sending countries, the United States under its Hague implementation must increase, rather than reduce, its vigilance in reviewing whether children have been obtained properly and are

205. It is these kinds of practices that have led to the child laundering scandals documented in *Child Laundering*, *supra* note 7, at 135–71, as well as those in Vietnam, Samoa, and other countries.

206. Ethan B. Kapstein, *The Baby Trade*, FOREIGN AFFAIRS, Nov./Dec. 2003, at 123–24.

legitimately eligible for intercountry adoption. The combined responsibility of the U.S. government to implement the Hague Convention according to its fundamental anti-trafficking purposes and the government's responsibilities to ensure that its own consular and immigration laws and processes are not turned into channels for fraud and child trafficking are compelling reasons for increased, rather than relaxed, vigilance.

Ultimately, the required vigilance by the U.S. government will require the combined efforts of many parts of the federal government. Congress must alter its approaches to intercountry adoption and trafficking in persons by requiring the Hague Convention on Intercountry Adoption to be implemented according to its fundamental purpose as an anti-trafficking convention. It should also incorporate trafficking children for purposes of adoption into the State Department's anti-trafficking mandates. The State Department has multiple roles to play: (1) As the Central Authority of the United States for Hague Convention purposes, the State Department has significant regulatory, oversight, and enforcement roles; (2) In its Consular role, the State Department has a significant role to play as it issues visas to children and participates in investigations of whether such children are truly eligible for intercountry adoption; and (3) In its multiple roles in relationship to Trafficking in Persons, the State Department should eventually expand its overall anti-trafficking efforts to encompass child trafficking within the intercountry adoption system. The Department of Homeland Security, which has absorbed both immigration and related investigative functions, shares regulatory, enforcement, and investigative functions in determining whether children in sending countries are eligible for adoption by U.S. citizens. A complete examination of all the governmental roles and processes involved, and how they can be made less vulnerable to child laundering and child trafficking, is beyond the scope of this Article. However, the initial and thus far elusive step is for the national government, beginning with Congress and including all relevant parts of the government, to recognize abducting, buying, or selling children for purposes of adoption as exploitative and harmful forms of child trafficking against which constant vigilance is required.

