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INTERNATIONAL ADOPTION: THE CHILD'S STORY

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Introduction

The Challenge of Child Advocacy

Harvard Law School created its new Child Advocacy Program (CAP) in response to a perceived problem. Our conviction is that children's interests are not adequately served by law and policy, despite the regularly repeated mantra that children's best interests should be the guiding principle for law and policy related to children. CAP is designed to educate law students about how best to advocate for children, and to inspire them to take on this challenge.

Advocating for children is a challenge for many reasons. Children are powerless in ways that even other groups we describe as powerless are not. African-Americans, women, the elderly, and persons with disabilities, can all speak, vote, use their purchasing power to wield influence, and get out onto the streets to demonstrate, as children cannot. Very young children cannot even give voice to their feelings – infants and toddlers depend on adults to figure out what they need and want.

One of the central challenges of what we might call "child advocacy" has to do with figuring out how to ensure that children's interests are served when in the end adults will be making the decisions. One favorite legal solution has been to rely on the child's birth parents to make decisions for their child, with the idea that they will be "naturally" motivated to promote their own child's best interests. Another favorite legal solution has been to rely on the state to act as

"parens patriae" to ensure that at least certain basic interests of the country's children are served. In the United States, like other countries, we rely on both solutions in combination. We give parents powerful rights to raise their children without interference by others including the state, while at the same time giving the state the right to intervene in the family to protect children against abuse and neglect by their parents, and to insist on certain basics in terms of education, health, and protection against exploitation in the form of child labor.

People who see themselves as child advocates tend to divide between those who argue for powerful parents' rights, and those who argue for a powerful state. Some also argue for giving children their own legal right to speak and be represented, but this kind of solution has limited applicability: many children are too young to speak, and appointing someone to represent them simply means assigning some other adult to decide for them; in any event, it's simply not practicable to provide paid representatives or individual hearing rights to all children for all of the kinds of issues that matter. In the end we will have to rely for almost all decisions regarding children on their parents, or the state in its *parens patriae* capacity.

The problem is that neither parents nor the state can be entirely trusted to keep children's best interests as the guiding principle. Parents may be self-interested, or simply not especially fit as parents. The state may be helpful in countering parents' selfish interests, but the state is selected and administered by adults, and there is always the risk that it may operate to further various adult group interests at the expense of children's interests.

International Adoption as an example of the Challenge

International adoption involves choices as to what to do with children who cannot be raised by their birth parents. It involves children too young to be making decisions by themselves – ideally from the child's point of view, placement in a permanent nurturing home, whether an international adoptive home or some other, should be made as early in life as possible to maximize the chances for healthy emotional and physical development.

International adoption is characterized by controversy, with all arguing that they speak for the child. Some argue that international adoption generally serves children's interests, and others argue that it generally injures such interests, or at least puts such interests at risk in ways that call for restrictive regulation.

International adoption is heavily regulated by the state, with applicable law typically describing itself as guided by the best interest of the child. Such law includes the domestic law of what are called "sending" and "receiving" countries, and international law like the Convention on the Rights of the Child, and the Hague Convention on Intercountry Adoption. To date all this law has tended to function generally to restrict rather than to facilitate international adoption. The law focuses on the bad things that might happen when a child is transferred from a birth parent to an international adoptive parent, and then purports to try to protect against those things

happening. So there are always rules about not paying or otherwise pressuring birth parents to surrender their children, and rules about screening prospective international adoptive parents for fitness. There are often rules designed to promote placing children in their country of birth if at all possible, whether with kin or in stranger foster care or in-country adoptive homes. There are sometimes rules forbidding international adoption altogether. There are very typically so many restrictions that even when international adoption is officially allowed it is effectively not allowed except for a tiny percentage of all those who in its absence will grow up in institutions or on the streets. And almost never are there any rules that are designed to facilitate international adoption – to ensure that when children cannot be raised by their birth parents they are transferred as quickly as possible to those interested in adopting, most of whom will be available only through international adoption.

As someone who believes that international adoption generally serves children's interests, I think we should restructure the law to focus more on the positive and less on the negative, to make the law more facilitative and less restrictive. I think we should in this area defer more to the wishes of the private parties involved – the birth parents, the adoptive parents, the adoption agencies and other intermediaries who want to make these arrangements happen, and the child at the center of the debate, whose wishes we have to imagine as judges do when they make substituted judgment decisions on behalf of infants or young children incapable of reasoned decision-making.

However many argue that the law governing international adoption should become ever more restrictive in order to truly serve children's interests. And they have been quite successful. Those in charge of the European Parliament's dealings with Romania forced Romania to eliminate international adoption as a condition of being admitted to the European Union – they relied on children's rights arguments grounded in the Convention on the Rights of the Child to argue that international adoption was inherently a violation of children's rights. UNICEF position papers argue that any country releasing significant numbers of children for international adoption should be seen as a problem, and UNICEF has been taking the position recently that governments in sending countries should take monopoly control over the adoption process, eliminating the private intermediaries that tend to facilitate the adoption process. UNICEF and other adoption critics are focusing particular attention now on achieving such "reform" in Guatemala, a country that stands out in today's adoption world for facilitating adoptive placement of children in significant numbers and at young ages, so that they have a decent chance to develop normally. State monopoly power over international adoption has resulted in other countries effectively shutting down international adoption, so that only a small trickle of children get out, and these only after having spent two or three years or more in the kind of institutional care that puts children at high risk for permanent disabilities. NGOs focused on children's human rights regularly argue for more restrictive laws and policies governing international adoption. In the past couple of decades close to one-half of the top sending countries of the international adoption world have effectively closed down international adoption.

International adoption has been increasing at a fairly steady pace since World War II, which is essentially when it started, and this pattern may continue. New countries keep opening up, and at the present time countries in Africa which never used to place any significant numbers of children in international adoption have begun to, in part because of the pressure of the AIDS crisis. But for the first time in a while, the numbers of international adoptees coming to the U.S. dropped in 2006. There is a general pattern of countries opening up with relatively few restrictions on international adoption, and then tightening the regulatory process so that fewer and fewer children are placed. Russia and China provide recent examples of this pattern, with Russia's figures falling in recent years, and China having just announced a restrictive new set of rules, eliminating, for example, single adoptive parents and many others.

The future of international adoption is uncertain. All sides in the debate feel that important issues for children are at stake. It's worth thinking about who is right in claiming that they speak for the child. And we may learn something from thinking about how and why those we conclude get it wrong, do so.

The Child at the Heart of the International Adoption Debate

There are of course many children, in varying situations, at the heart of the debate. But let's imagine one child whose situation is typical of that of myriad others. Let's imagine the infant in a large institution. It could be a boy or girl, although if this is China it will almost certainly be a girl, since girls are being abandoned in large numbers due to the one-child policy. Let's assume this one is a girl. I'm situating the infant in a large institution because that's where most children in the world who can't be raised by their birth parents are living, except for those many millions who are growing up on the streets. It is only in privileged, wealthy countries like the United States that foster family care is used in place of institutions on any significant scale.

If we could have a rational conversation with this infant about her needs and wants, and about the choices she would make among the real-world options she has, what would this conversation sound like? First the infant would presumably want on an immediate basis to be held and fed and comforted and played with and kept in clean, dry clothes. She would want attention when awake, and someone to respond when she cries. As months of infancy went by, she would want someone to connect with, a familiar face to relate to. If we could explain to her about childhood development, the social life that adolescents and adults live outside of institutions, educational systems, and the world of work, she would want to make sure that she got the nurturing and education as a child that would enable her to grow up as the kind of emotionally and physically healthy person who could have good relationships with friends and family, and who could survive and thrive in the world of work.

Would she care about her "birth heritage"? Would she want to make sure that she could grow up in her country of birth? If there was a chance for her to be adopted, would she place an overwhelming priority on being adopted by someone from "her" country? Would she choose to

be kept in the institution in preference to be placed abroad in a loving adoptive family, either because in that way she could at least experience her heritage, or because there might be some very slight hope that she could find an adoptive home in her country, or because she might see her birth parents once a year or so when they visited the institution?

To help the infant make a rational choice among possible future options we should give her some more information. She knows from her daily experience that the institution is a horrible place. Her bottle is propped, with a large hold gouged in the nipple so that the milk pours out – the idea is to give her a better chance to take in some milk since she is too young and weak to suck strongly, but this means she often chokes on the milk flooding into her mouth and throat, and spits the bottle out. When she screams for attention because she's hungry or cold or wet or just alone, nobody comes – people come only every four or six hours and then leave immediately after hurried diaper-changing and bottle-propping events. She would notice if she were capable of understanding that infants around her stop screaming after a while – they learn that screaming doesn't produce any result. We could tell her that those who study child institutions often remark with horror on the silence that characterizes these institutions. We could also tell her what the research shows about the range of institutions which exist for homeless children like her, and the damage they all do to children's future life prospects. The institution she is in is fairly typical. Some are better, providing a little more care, but still little if any opportunity to develop anything resembling a nurturing parent-child relationship. Some are far worse, with infants dying at a high rate, with children whose chronological age is in the teens lying in cribs looking as if they were toddler age, unable to talk or walk because they have been so deprived of what it takes for a human being actually to develop. Photographs of some of the still-living children in some of these institutions look like photographs that could have been taken in the Nazi death camps, except in these institutions it is all children, bone-thin, expressionless, staring back at the camera eye.

We should also give the infant other information. We should tell her that many adults in the world value heritage a lot, and talk about the importance of one's birth heritage and national heritage. We should tell her that if she were to grow up adopted by someone from another country, many people would ask about her "real parents," referring to her birth parents, and many would think of her as in some sense truly "Russian" or "Chinese" or "Guatemalan" Indeed her adoptive parents might well send her to Chinese culture camp in her childhood summers if she had been born in China, and might at some point take her on a "heritage" trip to her country of birth. She might grow up wondering about her racial or national identity – wondering if she were truly "American" or more truly something else. However we should also tell her that many people in her country of birth think it would be great if they could leave to go live in the U.S., especially if they had a decent chance at the kind of upbringing that most adoptive children will get, one that would give them opportunities to participate in what is still seen by many throughout the world as "the American dream." And we should tell her of the research that shows how well adopted children do on all measures that social scientists use to assess human happiness, and that there is no evidence that children placed with same-race or same-nation

parents do any better than those placed across racial or national lines. Finally we should tell her of the research showing how terribly badly children raised for significant periods of time in institutions, or even in relatively privileged foster care of the United States, do on all of those social science measures.

It seems obvious to me what this infant would choose if she could choose. She would choose not to spend another day or hour in the institution if at all possible, and she would choose to go to the first good adoptive home available so that she could get out of this institution and begin living the kind of life infants deserve, and that they need in order to grow up healthy and capable of thriving as adults.

Conflicting Stories About International Adoption

My story starts with the child imagined above. International adoption provides good homes to some 30,000 plus children a year, with roughly two-thirds of those children coming to the U.S. The real-world alternatives for these children are quite horrible. They will grow up in life-destroying conditions in institutions or on the streets. Very very few of the homeless children in the sending countries of the world will find adoptive homes in their countries of birth. Very few will be released from institutions to foster care, and it is extremely unlikely that foster care in the poor countries of the world will work better than it does in the privileged U.S., which means that even for those children lucky enough to be released to foster care they will not be nearly as well off as they would be if adopted. The research shows internationally adopted children doing essentially as well as other adopted children and it shows all adopted children doing essentially as well as children raised in good, nurturing birth families, at least it shows this for adopted children adopted very early in life. For children adopted after months and years of life have gone by, adoption doesn't work as well, quite obviously because the damage done in institutions and other non-ideal circumstances takes its toll. The international adoption story looks very positive from the perspective of the children placed, and would look even more positive if we changed laws and policies to facilitate placement very early in life.

I think the story is also a positive one when we include other key players – the birth parents and the adoptive parents. For adoptive parents international adoption provides the satisfying experience of parenting, and research shows a high level of satisfaction from this particular kind of parenting. For birth parents the picture is more of a bitter-sweet mix, since obviously most birth parents would want to live in circumstances that made it possible to keep the children they get pregnant with and give birth to. But the birth parents whose children end up in institutions and in being placed for adoption don't have that luxury. They have a set of choices that likely feel like bad and worse choices. They can surrender their child for another to parent, they can surrender their child to an institution or to the streets, knowing that the child will likely have a very unhappy life both short and long term, assuming the child lives to the long term, or they can keep their child knowing that this will make it hard or impossible for them to feed themselves and their other children, or hard or impossible to keep the job that enables them to survive.

These are the real-world choices of most of the birth parents of the world who surrender or abandon their children. Given those choices, I think that almost all of them would choose for their child to grow up in an adoptive home, whether domestic or international.

Finally I think the story is a positive one if we think about the much larger picture that includes other and future children, other and future adults. It is true that international adoption only provides concrete help to a tiny percentage of the many millions of homeless children in need, and this would still be true even if we multiplied by a factor of five or ten, as we easily could, the number of children adopted. Nonetheless international adoption, in my view, does at least push us a bit down the road toward solving problems for a larger group of children and adults, rather than pushing us backwards. It creates these new international adoptive families living in the privileged countries of the world, in which both parents and children are likely to have some significant awareness of the conditions of poverty and deprivation characterizing the children's birth countries. Many of these parents and children will want to "give back" in some way, and we know that many of these parents have already done so in the form of ongoing financial contributions to orphanages and other organizations in the children's sending countries. It seems likely that these parents and children will be more likely to support government policies that are generous and friendly, rather than stingy and hostile, toward the children's sending countries. We can't know for sure, but it seems likely that when people form the kind of powerful loving bonds across racial and national lines that they form in international adoptive families, it will affect their feelings in a larger political context about who is "us" and who is "other." In the battle over transracial adoption within the U.S. that preceded the passage of the Multiethnic Placement Act (MEPA) prohibiting any preference for placing children within their racial community, those of us who fought for MEPA placed primary emphasis on the evidence that knocking down racial preferences would help black children by facilitating early adoptive placement. But many of us also believed that state policies promoting same-race families were wrong in terms of the larger picture of race relations in our society – we believed that transracial families were a positive good.[1] International adoptive families seem to me a positive good for similar reasons. The world is regularly torn by conflicts between people of different national, ethnic and religious backgrounds, whose leaders regularly proclaim the importance of their national, ethnic and religious identities. International adoptive families demonstrate the ultimate insignificance of our national, ethnic and religious differences compared to our essential human characteristics.[2]

The story told by many people who claim to speak for the child is quite different. They describe international adoption as exploitative, with the child as the victim-in-chief. For some it is

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[1] See Chen, *Unloving*, CITE LAW REV ARTICLE; Kennedy, RACIAL INTIMACY, CITE BOOK. Also cite Bartholet, DUKE? OR?? PENN, FAM BONDS??

[2] See Sen, IDENTITY AND VIOLENCE: THE ILLUSION OF DESTINY (Norton 2006).

inherently exploitative, as it deprives children of their birth and their national heritage. For some it is exploitative as practiced, since it so often, according to their story, involves illegal payments to birth parents, or the kidnapping of children from birth parents, or lying to birth parents about the consequences of surrendering their parental rights, or giving them to the rich adoptive parent from abroad in preference to the poor but loving adoptive parent in the home country.

But even those like UNICEF who say that they are only against improper forms of international adoption, and that they believe there is a place for some such adoption, don't seem to find much that they approve of. International adoption is regularly equated with child trafficking, apparently based simply on the fact that it does involve the payment of funds by adoptive parents, and that it occasionally involves some illicit payments, without any discussion of or proof related to how often illicit payments occur, or how often they involve payments to birth parents, or how often any such payments to birth payments actually involve payments that induced the parents to surrender children they otherwise would have kept. A recent UNICEF document setting forth guidelines for child trafficking equates "illicit adoption" with forms of trafficking like selling children into prostitution and slavery. When asked to explain whether this means that any adoption involving a small bribe to an official of the kind that is essential to the workings of bureaucracy in many countries regardless of whether adoption or some other government action is at issue, the UNICEF official responsible for the document didn't answer the question, but explained that UNICEF believes that any adoption involving children in institutions with existing birth parents is wrong – those adoptions should be seen as not in the child's interests since the child has parents, and international adoption should be reserved for children without parents. The problem he failed to address is that these children "with" parents are not likely ever to live with those parents or even to see them more than for a very occasional visit, perhaps annually, at best.

Those telling the negative story describe international adoption as victimizing not just the child placed but also all those children not placed, as well as the birth parents. They talk of the $35,000 fees paid by international adoptive parents all for the privilege of removing one child to the U.S., when that money could make it possible for the birth parent to keep and raise the child, or could improve conditions significantly for all the other children left behind in the orphanage.

The negative story appears regularly in the media and popular fiction and films. Newspapers regularly feature adoption scandal stories, involving kidnapping or baby buying, giving the impression that these are regular occurrences. These stories often trigger the closing down of adoption from a particular country, on either a temporary or a permanent basis. Rarely are the papers there to cover what happens to children in the orphanages when adoption is closed down. Popular films in recent years have told the negative story in compelling ways. Media coverage of the recent Madonna adoption of a child from Africa is classic. Madonna is featured as the absurd and selfish rich American, descending from her airplane to swoop up this child and take him away, violating laws in the process. Easy to condemn and virtually all the stories made clear that Madonna was the evil exploitative character, and the child and his birth father the victims. Little

attention was paid to the fact that the law she apparently found her way around was a classically stupid restrictive adoption law that would have meant that the child had to wait an additional 16 months for an adoptive home. And only in the end did the press acknowledge that the birth father felt that surrendering this child for adoption was a good choice for him and for the child. Other examples of the popular appeal of the negative story abound. John Sayles' film "Casa de los Babys" of a few years ago, features an all-star cast, and tells the story of a group of mostly neurotic infertile white women from the U.S. landing in an un-named Latin American country, largely insensitive to the cultural issues surrounding their intended adoptions, and impatiently waiting out the time required before they are allowed to carry off the prized babies to their privileged homes in the U.S., leaving behind the unhappy birth parents and street children to struggle on with their lives. "The Italian," a recent Russian-made film now showing in the U.S., features a winning six-year-old waif in a Russian orphanage, who fights off his impending adoption by an uninteresting and not especially sympathetic Italian couple, against the forces of the system as personified by the evil adoption facilitator in it only for the profit, and triumphs by running away from the orphanage to find his birth mother, with their reunion symbolized by the subtle but beatific light in his eyes at the end when he sees her for the first time since infancy but of course knows her as any good birth child would know his true mother.

Conflicting Positions about "Law Reform" in the International Adoption Area

My view is that we need to reform law and policy to facilitate the good things that happen in international adoption. We need reforms that will enable more children to be placed, and that will enable placement to happen as early in life as possible, so that children can escape the unhappy conditions in which they live prior to adoption and can have the best chance for healthy development into adults who can thrive in their social and work lives.

This means that we need to limit the harm that states are likely to do in regulation governing adoption. We need to recognize that states tend to focus on the negative and not the positive potential inherent in international adoption, and thus we need to limit state regulatory power. In most areas of family law in the U.S. we are deeply suspicious of the state, and trusting of parents, in matters involving children. We need to import some of that attitude into international adoption. Birth parents and potential adoptive parents want for the most part to make arrangements in which children are transferred from those who are not in a position to raise children to those who are. There can't be many birth parents who want their children to suffer and perhaps die in institutional care. We need to liberate the private energy of birth parents and adoptive parents to make these transfers happen by lifting the heavy hand of the state.

MEPA represents one model for this reform direction. MEPA was passed in recognition of the fact that it was state policies throughout the U.S. that insisted that children waiting for homes be placed if at all possible in same-race homes, and in recognition of the delay in and denial of adoptive homes these policies caused. MEPA told state agencies that they could no longer use race as a factor in placement, because the MEPA Congress was committed to facilitating the

adoptive placement of waiting black children.

Private adoption within the U.S. is another model. While public adoption is heavily regulated in the U.S., private is not. Birth parents and adoptive parents who choose to make their own arrangements for the transfer of children can do so, largely free from the heavy hand of state. Certain basic rules of the adoption game apply: birth parents cannot be pressured into surrendering their children with money or other inducements; adoptive parents must be approved by a court as satisfying minimum fitness criteria prior to the adoption decree issuing. But other restrictions characteristic of the public adoption system operated by state child welfare and foster care systems are largely absent. Birth and adoptive parents with the luxury of choice typically choose this system in preference to the public system because in their view it works for them and for the children at issue – children tend to be placed as new-borns, avoiding the damage caused by the stays in institutional care, including foster care, typical of public adoptions. During the negotiations over what shape the Hague Convention on Intercountry Adoption should take, many of us fought to preserve the option of private adoption within the international adoption context, believing it essential if homeless children were to be placed promptly, given the history in many countries in which the government exercised monopoly power over the adoption process. The U.S. delegation fought for the preservation of the private adoption option and in the end the Hague Convention allows such adoption. This does not mean that any international adoption is free of governmental regulation under the Hague – an extensive body of law governs all such adoption, law of the sending country, law of the receiving country, and international law. Preserving the private adoption option does mean though that birth and potential adoptive parents, with intermediary agencies, lawyers, and others, can function to make adoption happen in ways that they cannot when the state in the sending country exercises monopoly power over the adoption process.

A third model is the kind of informal adoption that goes on all the time in sending countries. Birth parents who are unable to parent their children because of poverty, disease, war, or other disaster, regularly transfer their children to family members, friends, and others who seem in a better position to offer parenting. Most of those in the regulatory business seem to think this is a good thing, as they have kept their regulatory hands off. And it does seem to be a good thing. When the state gets involved it has a tendency to prevent parenting transfers from happening, and a tendency to lock children into institutions that are extremely destructive.

So we need in my view to limit the kinds of restrictions that law currently imposes on international adoption. We need to eliminate preferences for keeping children in-country that have the impact of delaying and denying placement, as same-race matching policies did within the U.S. We need to limit the burdens on potential adoptive parents that prevent many from considering this kind of adoption – rules that mean they have to wait for years or spend many weeks or months in the sending country or go through endlessly repetitive screening for parental fitness or spend $30,000 or $40,000 or more satisfying requirements. We need to deny sending countries' governments the kind monopoly power over international adoptions that often means

such adoption is effectively closed down, with at best a small handful of children trickling out, usually after a minimum of two or three years spent in destructive institutions.

We also need in my view to create the kind of facilitative law that focuses on the positive rather than the negative potential in adoption. We need law that requires that children in need of homes be identified, whether they be in institutions or on the streets, and that children whose birth parents are not realistically likely to be in a position to care for them in the immediate future, and who might be able to be adopted, be freed for adoption by having their birth parents' rights terminated. We need law that requires that those in charge of such children act expeditiously to find them true families and homes. We need law that helps sending and receiving countries coordinate their regulatory action so that children's placement in international adoptive homes is not delayed by the need to satisfy meaningless and repetitive regulatory requirements.

The Adoption and Safe Families Act (ASFA) passed by the U.S. Congress in 1997 in the context of domestic adoption represents one model of such facilitative law. It requires that children within the U.S. foster or institutional care system be held for no longer than 15 of the prior 22 months and then be moved to a real home, whether that be the original biological home or an adoptive home. At one point in time many of us hoped that the Hague Convention on Intercountry Adoption would function as facilitative law – there was talk in the early days of negotiating the language of the Convention about the importance of designing the Convention so that it would facilitate the prompt placement of children, by encouraging countries to coordinate their regulatory laws. But critics of international adoption shot down the idea of any such facilitation language or provisions.

Those who tell the negative story about international adoption have a very different idea about the direction for law reform. Some contend that international adoption should be entirely prohibited, as the National Association of Black Social Workers argued in 1972 that transracial adoption should be. The recent Romanian law eliminating all international adoption except by grandparents represents a victory by this camp, and was a victory achieved by people who argued that international adoption was inherently a violation of children's rights – the people who at the time were in charge of the European Parliament's process for admitting Romania into the European Union, and who pressured Romania to pass this law as a condition for gaining entry.

Most of those who tell the negative story about international adoption say that they don't want to entirely prohibit it, but simply to restrict it to last resort status and to eliminate adoption abuses. UNICEF falls into this camp. This position produces a set of law reform positions that tend to be very popular among many groups and individuals who purport to be guided by the best interest of the child principle. Many talk of the appropriate hierarchy of choices for children as meaning that efforts should be made to place homeless children in in-country foster care over out-of-country adoption. All argue for a preference for in-country adoption over out-of-country adoption – indeed virtually all those who tell the positive story about international adoption agree with this preference. Many spell this preference out as meaning that rules for a six-month or

longer in-country search before out-of-country homes can be considered are appropriate. Most are adamantly opposed to private adoption in the international adoption arena, and promote the idea of sending countries establishing monopoly power over such adoption. They use the Hague Convention's requirement that each country create a "Central Authority" as a basis for arguing that that new state agency should exercise total control over international adoption, eliminating any private agencies and intermediaries, even though the Hague Convention clearly allows for the continuation of private adoption under the aegis of the new Central Authority.

Those who tell the negative story tend, not surprisingly, to see adoption abuses as of central importance, and as a guide to law reform. Any given adoption scandal, involving allegations of baby selling or kidnapping, is taken as reason to clamp down further on international adoption, often to create a moratorium, prohibiting all such adoption at least temporarily, and also to create new restrictions designed to reenforce those that already exist everywhere prohibiting such abuses.

The war between these two opposing positions is ongoing. But those pushing for more restrictive regulation are winning many battles. International adoption happens rarely, given the vast numbers of homeless children and of adults who would want to parent them if they could without overcoming huge barriers. Law "reform" efforts tend to produce more in the way of restrictions, and little in the way of facilitation. And yet the positive story about international adoption has a lot of power. If you talk to most regular people, not child welfare professionals but the famous man and woman "on the street," both in sending and receiving countries, you find lots of people who think that what is important is for children who don't have a loving permanent home to get one, and as soon as possible, with whomever can provide that home. Most would probably also think it good if there was a choice to provide the child with a home with parents of the same national and ethnic background, but I doubt that many would think it made any sense to keep a child waiting for that home in the hellish conditions characterizing institutional care. It's worth thinking about the issues central to the thinking of those who call for ever-greater restrictions on international adoption.

Issues at the Heart of the Restrictive Mode of Regulating International Adoption

Those in charge of and influential in regulating international adoption – both inside sending and receiving countries and on the international front – seem to me to have been captured by some powerful ideas, and driven by some powerful frameworks for debating about children's interests, which get in the way of thinking sensibly about how to regulate in a child-friendly way.

Adult Ownership rights in Children

Adults are seen by many has having powerful ownership rights in children. So birth parents are seen as having rights to hold onto their children for parenting purposes so long as there is any possibility that they might be able to provide a modicum of nurturing care. This is why few

question the fact that children growing up in institutions in sending countries should stay there so long as there's any indication that the birth parents might be interested in them, as demonstrated by an annual visit for example, and perhaps even if there is no such indication. Many oppose international adoption for children whose ties with birth parents have not been formally severed, not because they think that there is any likelihood that the children will in fact ever be able to live with those parents, but because they think they might conceivably be, or at least should be in a better society that provided support for poor parents. Nations are seen as owning their children, and many talk of international adoption as robbing sending countries of "their precious resources." National pride appears to be a major reason sending countries often refuse to allow their children to be adopted, with countries embarrassed to be shown up as unable to care for "their own." International law accords total control over children to each nation, and the Convention on the Rights of the Child, as well as the Hague Convention on Intercountry Adoption, pay deference to these ownership rights by leaving it entirely to countries to decide whether to allow their children to placed in other countries for adoption or not.

An important part of why virtually everyone, even including most supporters of international adoption, supports a preference for in-country adoption over out-of-country is that a country's citizens are seen as having ownership rights over the children born in that country in preference to the citizens of other countries. The problem for children is that such preferences will almost always mean that children are delayed in getting adoptive homes or denied such homes altogether. Typically there are very few potential adopters in the child's home country as compared to the large pool of potential adopters abroad. Rules that require an in-country six-month "search" will simply mean at best that most children who could be placed abroad wait six months longer for placement, something that very few children would choose for themselves were they able to choose, given the horrible conditions in most institutions and the damage done by any such six-month period to the child's life prospects. But any such six-month search policy will likely mean not just delay for six months. The message to the bureaucrats such a rule gives is that international adoption should be seen as a failure, so there's a risk that even after the six months such a rule deters placement. Also, as children age, their prospects for placement fade because the pool of potential adopters shrinks, largely because they know that the child's life prospects are so damaged by additional months of institutional life. Our experience here in the U.S. with same-race matching preferences is informative. For decades we had policies that on paper supported only a mild preference for same-race matching – stronger preferences were considered unconstitutional. Yet state agencies nonetheless engaged in stronger preferences, holding black children for years and often their entire childhoods in foster care rather than releasing them for transracial placement. In 1994 Congress passed the first version of the Multiethnic Placement Act, MEPA I, which prohibited any delay or denial of placement based on race, but allowed genuinely mild preferences. Only two years later Congress amended the law to enact MEPA II which prohibited any same-race preference whatsoever, in recognition of the fact that MEPA I had failed to accomplish its purposes, and that the only real way to eliminate significant delays in placement, and denials of placement, was to tell the social workers engaged in placement that they could not use race as a factor in placement at all.

Adult rights over children are often justified as serving children's best interests. But obviously there's a risk that often they don't serve children's interests – they simply serve the adult interests at issue. This is why in the U.S., although we give parents enormous power to determine the fate of their children, we counter that power with the state *parens patriae* role – giving the state the right to intervene to protect children against parental abuse and neglect, for example. Within the U.S. the passage of MEPA constitutes a powerful rejection of the idea that a racial community of adults should have any ownership rights over its children, at least where such rights get in the way of children's interests in finding a nurturing permanent home as soon as possible.

Children's "Essential" Nature as Belonging to the Adult Communities of Origin

This is a directly related idea about how children "belong" in some essential sense to the birth parents and the national and ethnic communities into which they were born. But this idea purports to focus more directly on the child's interests, claiming that children have a right to their heritage which should be honored, claiming that children will be better off in their families and communities of origin because that is where they will truly feel at home. These kinds of essentialist arguments are regularly deployed by those calling for restrictions on or the elimination of international adoption, including of course restrictions of the kind discussed above, giving preferences for in-country placement.

There's little reason in common sense or the existing research to buy into these arguments. Infants are not born with any inborn sense that they are in some essential sense Russian or Kenyan or Peruvian. They will grow up it is true in a world that may see them as identified with the group they look like in terms of skin tone or facial features. It may be useful to them to identify to some degree with that group in a world in which those who see themselves as belonging to other groups may discriminate. But there's actually no evidence supporting the idea that children with a strong sense of racial group identity are any happier or have any better sense of self-esteem than children who think of themselves primarily as belonging to the human race, or as belonging to groups defined in non-racial and non-national ways. And the studies of children adopted across racial and national lines reveal no evidence that growing up separated from one's group of origin has any negative impact whatsoever on the child. What the studies show, what developmental psychologists have long known, what common sense tells all with any experience with parenting, is that what is key to enabling children to grow up with a healthy sense of self-esteem and identity is a loving, permanent home as early in life as is possible.

The State as Ideal Parent and Protector

Those calling for the State to exercise monopoly power over international adoption, eliminating the private intermediaries who enable birth parents and adoptive parents to make adoption arrangements, place their faith in the idea that the State can be trusted to do better than private parties to protect children's interests. This idea seems to have a lot of appeal: there is much talk about the need to curb the "greedy" intermediaries and the selfish prospective parents, and

prevent them from preying upon children by carrying them off into foreign adoptive homes. It has some inherent appeal, since children are at risk of violation by more powerful adults, and this is why within the U.S. we have the *parens patriae* tradition noted above.

But as discussed at the beginning of this essay, the state is chosen by adults and not children, and cannot be entirely trusted to faithfully represent children's interests even when it says it is doing so. In the international adoption area the governments in sending and receiving countries tend to focus on all kinds of issues that have little to do with promoting children's interests, including notions of protecting national pride by not revealing to the world their inability to care adequately for their children. If we care about children we would do better to limit state power and defer significantly to private parties, birth parents and potential adoptive parents, to do the right thing for children, as is our tradition within the U.S. in matters having to do with parents and children.

The Law as Weapon Against Ultimate Evils

Those calling for ever-greater restrictions on international adoption tend to focus single-mindedly on the things that can go wrong in such adoption, as opposed to the things that can go right, and as opposed to the things that can go wrong if such adoption does not take place. The focus is on evils, and then only on particular evils like baby selling and kidnapping and the mistreatment or exploitation of children that might occur in adoption. This focus has enormous appeal for law-makers. Almost all adoption "reform" takes the form of piling on protections against these kinds of evils. Almost no thought is given to the good that comes for children from being placed in adoptive homes, and almost no thought is given to the evils that come from children not being placed – the destruction wrought by days and months and years spent in institutions. Examples abound. Years ago now, when Romania first opened up its institutions to permit the placement of children abroad, after the fall of Ceausescu, thousands of children were released from truly horrendous institutions to be placed in international adoptive homes. Then a baby-buying story broke, with accounts of adoption intermediaries paying birth parents in connection with the surrender of children. Various children's rights groups reacted with horror, and Romania then instituted a moratorium on all such adoptions for several years. Nobody involved in this close-down apparently stopped to count how many birth parents had actually been paid, or to assess whether the payments had actually persuaded parents to surrender children they otherwise would have kept to raise themselves, or to weigh the evil represented by these transactions against the evil of thousands of children per year now being condemned to live and die in the institutions to which they were relegated instead of being released for adoption. In Guatemala now significant numbers of children are being surrendered by birth parents at birth, raised for roughly six months in foster care where they receive infinitely better care than in the typical institutions of the world, and then placed in adoptive homes abroad at ages like six months, all giving these children an excellent prospect for happy and healthy development. The regulatory forces of the international adoption world are now focused on Guatemala, with all righteously condemning the greedy intermediaries and selfish adoptive parents engaged in the buying of children. They are calling for a government monopoly over adoptions so as to cut down on the evils of baby buying and

other alleged adoption abuses, not stopping to weigh the costs and benefits of such action, which would very likely result in effectively closing down adoption out of Guatemala as it has in other South American countries, reducing the number of children placed in adoption from thousands annually to a small trickle, and condemning even those few placed to spending two or three years in poor institutional conditions, thus guaranteeing that even those few are at high risk for permanent damage.

This mindless failure to look at the whole picture, and to balance the costs and benefits of different ways of regulating makes no sense for children. I believe in laws prohibiting the payment to birth parents to induce their surrender of children. But the payments to birth parents, even when they happen, are very rarely the *reason* they surrender children for adoption. Birth parents surrender overwhelmingly because they have no real choice to raise their children – often the mothers had no choice in getting pregnant, as they had no access to birth control. Typically the birth parents are desperately poor, and simply unable to raise these children. Giving them money may be wrong because it will always be hard to know for sure that money given was not the reason for surrender. But giving money to desperately poor birth parents is not the worst evil that such birth parents or their children are faced with. Locking the children into institutions in which they will either die, or suffer on an ongoing basis and fail to thrive in ways essential to growing up able to function in the adult world, is a far more significant evil. And the law makers simply don't let it count in the balance.

Children as Hostages

Many calling for greater restrictions on international adoption talk about the immorality of adoptive parents swooping in to carry off the prized adoptive child, leaving other children to languish in the institutions of the country, and leaving birth parents cut off from their child for no reason other than poverty. They talk as if the funds spent on adoption could simply be transferred instead to the other children or the birth parents, but that is absurd – potential adoptive parents are not going to simply send over checks for $30,000 to $40,000 because someone tells them they cannot adopt but that there are lots of children in need.

Some may believe that if international adoption was not an option, then sending country governments and others would be forced to focus more on other, better solutions for the problem represented by all the homeless children peopling the institutions and the streets in poor countries. Some talk as if this would be the case, arguing that instead of international adoption we should be focused on getting more support for poor birth parents, creating foster care in place of institutional care, and improving conditions in institutions.

I see this as, effectively, a hostage theory, although the critics of international adoption would never concede this is what they are doing. It's actually about the only decent argument I can imagine for the anti-adoption side. But I can understand why nobody will verbalize it, because it flies in the face of the idea that they are guided by the best interest of the child principle, at least

in terms of an identifiable group of children whose ability to find international adoptive homes is being sacrificed. But it has some power if one thinks in terms of the larger group of children – all those who are homeless. We have a group of children who could be released in international adoption, but it is a tiny group compared to all those in need. It also represents a failure in society's obligations to the impoverished people of the world – birth parents surrender because they don't have better options. We should hold these children, refusing to release them, because this will put pressure on all to do the truly right thing – fix the conditions of injustice that mean birth parents surrender, and alleviate the conditions under which the larger group of homeless children are living. Releasing children for adoption will at best help only a very few children, and may reduce the pressure to help solve the larger problem.

If I thought that denying a small group of children homes would actually work to help solve larger problems of injustice, would actually work to improve conditions for a much larger group of children and their birth parents, I would feel we had to choose to help the larger group, at least if I felt pretty sure that I was right about this as a strategy to help the larger group. However in the end I think the hostage theory fails looked at from any child-friendly perspective. This is because there *isn't* any reason to believe that the hostage strategy works. Countries have regularly closed down international adoption at various points over the last few decades, and I don't see these close-downs translating into dramatic improvements in conditions for children or birth parents. I think there is more reason to believe that the existence of international adoption operates to help push down the road of broader social reform, increasing awareness of the problems within sending countries, bringing in at least some new resources to help solve those problems, and creating political support for change.[3] It's hard to know for sure. But we do know that placing those children we can place in adoptive homes dramatically changes those children's lives for the good. There's every reason to believe that this is what their birth parents want for their children, given that the birth parents cannot themselves raise these children. Given this knowledge, and given that there is reason to believe that helping these children pushes us further down the road to larger social reform rather than backwards, policy makers concerned with children's interests should choose to place existing children in need in adoptive homes, including in international adoptive homes.

Children as Sacrificial Pawns

Much of what is likely going on in the debate over international adoption likely has little to do with children at all. They are often simply pawns in a game that is being played involving other issues entirely. But they are useful pawns because, as children, they have powerful symbolic value, ironically for the very reason that we all like to think that we truly care about children and

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[3] See Bartholet, *International Adoption: Some Thoughts on the Human Rights Issues,* forthcoming in Buffalo Human Rights Law Review, where I discuss these issues at greater length.

are guided by their best interests. Political leaders in sending countries often have reason to decry the U.S. Opposition leaders in such countries often have reason to decry those in power in their countries. Talking of how the U.S. is once again exploiting some impoverished country by stealing its precious resources, its children, and accusing those in power of selling the nation's children to the U.S., can be powerful rallying cries. And this is a battle with the U.S. that can be won. On the U.S. side, the government is not particularly concerned with capturing the poorest children from the poorest countries of the world as new "resources." It has been quick to respond in recent decades to any allegations of adoption abuses by calling for a temporary moratorium in the sending country at issue, or by instituting new U.S. requirements designed to counter such abuses. The truth is that the children languishing in institutions are not really seen as precious resources by political leaders on either side. They can be used by the relatively powerless to promote other agendas. They are easy give-aways for the powerful, who are also more interested in other agendas. Again there is a parallel with what happened within the U.S. in the transracial adoption debate. Black leaders interested in promoting black power and racial separatism attacked transracial adoption in 1972 as racial genocide, and called for keeping homeless black children in black foster homes in preference to their being placed in white adoptive homes. There was no reason to think that keeping black children in foster care would empower the black community, and much reason to think it would hurt the black children who otherwise might be adopted. But the racial genocide claim had rhetorical power, linked as it was by political leaders with the historical image of black slave children being sold away from their black birth parents to white slave holders. The white power establishment backed off immediately in the face of the black demand to keep "their" children, with state agencies instituting powerful race-matching policies that lasted until the passage of MEPA in the mid-90's. Tellingly, this concession to black demands for their children was a uniquely positive response by whites to black power demands. There was strong resistance to black progress in taking over jobs and housing and other of the good things in life from privileged whites. There was strong resistance to black demands for decentralization so that they could take control over predominantly black schools and other institutions within the black community. But the black children within foster care were an easy give-away for the white power establishment.

Conclusion

Law generally appears to be moving in more child-friendly directions in today's world. The Convention on the Rights of the Child has been ratified by almost all countries, demonstrating how popular the *idea* of children's rights is throughout the world. South Africa's constitution, which incorporates many progressive trends in the world's legal systems, gives children powerful rights on paper. Within the U.S. there are a series of legal developments in what looks to be a child-friendly direction.[4]

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[4] See Bartholet, Buffalo article cited supra n. – , at ---- (summing up these trends).

However we cannot count on the fact that the law *proclaims* children's rights as central, actually meaning that children's rights *will be* central. The Convention on the Rights of the Child (CRC), for example, is the ultimate expression to date of international support for children's rights, but it constitutes one of the major problems for those of us who believe that international adoption serves children's interests. The CRC leaves countries free to eliminate international adoption as an option, limiting homeless children to such options as foster and institutional care. It provides that even if countries allow international adoption it should constitute only a last resort, putting it lower on the hierarchy than in-country foster care and any other "suitable" in-country care, a phrase which could be interpreted to include institutional care.[5] The CRC talks of the importance, in considering alternatives for homeless children, of paying "due regard... to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."[6] The CRC has been used by those who want to close down international adoption entirely as an argument for the inherent violation of children's rights inherent in taking them away from their home country and culture.[7] The CRC is regularly used by those like UNICEF who press for more restrictions on international adoption, limiting it to extreme last-resort status.

For children's "rights" to mean anything good for children, adults have to get it right when they define, interpret and enforce these rights. This is a challenge. There is no easy way to guarantee that the powerful will speak truthfully or accurately when they purport to speak for the powerless.

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[5] Article 21 of the CRC provides that nations that recognize international adoption "shall ... Recognize that [it] may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."

[6] Article 20 of the CRC.

[7] See Bainham article CITE