

IF CHARITY BEGINS AT HOME, WHY DO WE GO SEARCHING  
ABROAD? WHY THE FEDERAL ADOPTION TAX CREDIT  
SHOULD NOT SUBSIDIZE INTERNATIONAL ADOPTIONS

by  
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Charity begins at home, and justice begins next door. ~ Charles Dickens

*Currently, nearly half a million children reside in United States foster care, some “aging out” without ever having been adopted. As incentive for placing children from foster care in permanent homes, Congress passed a series of legislative measures, including a federal adoption tax credit, that were intended to promote adoption from foster care. However, recent years have seen a cultural trend, led by the unlikely pairing of celebrities and evangelical Christians, towards international adoption. Although the federal adoption tax credit was originally intended to benefit domestic orphans, those who adopt internationally are now receiving the same tax benefits as those who adopt from foster care. This Article examines the historical trends of domestic and international adoption, as well as the current international adoption movement. It looks at the issue from an intermediate approach to social distributive justice theories and asks whether American taxpayers should be underwriting international adoptions when more than 100,000 available children await adoption at home. Ultimately, Professor Gossett concludes that the federal adoption tax credit should not be used to subsidize international adoptions while the very ones who were the originally intended beneficiaries of the legislation—those “lost in the system”—remain there.*

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## I. INTRODUCTION

Currently, almost 400,000 children reside in United States foster care,<sup>1</sup> some “aging out” without ever having been adopted. Beginning in the 1980s and carrying through the 1990s, Congress passed a series of legislative measures aimed at helping those children “in the system.” As incentive for placing children in permanent homes, and as part of the Small Business Job Protection Act of 1996, Congress created a tax credit for those who adopted children.<sup>2</sup> Since that time, the federal adoption tax credit has risen to as high as \$13,360 per child, some years as

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<sup>1</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2012 ESTIMATES 1 (July 2013), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> [hereinafter the 2013 AFCARS Report]. The Adoption and Foster Care Analysis and Reporting System (AFCARS) contains the data submitted to the U.S. Children’s Bureau relating to children in foster care.

<sup>2</sup> Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1807, 110 Stat. 1755 (codified at 26 U.S.C. § 23 (2006)). The tax credit was initially introduced as part of the Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. (1996), which was subsumed into the larger Small Business Job Protection Act. Leah Carson Kanoy, Note, *The Effectiveness of the Internal Revenue Code’s Adoption Tax Credit: Fostering the Nation’s Future?*, 21 U. FLA. J.L. & PUB. POL’Y 201, 205 (2010).

refundable and other years as non-refundable.<sup>3</sup> However, without Congressional action, portions of that credit were scheduled to sunset at the end of 2012.<sup>4</sup> On January, 1, 2013, as part of a larger measure to avoid the looming “fiscal cliff,” Congress passed, and President Obama signed into law the next day, the American Taxpayer Relief Act of 2012.<sup>5</sup> This legislation included a permanent, although non-refundable, extension of the adoption tax credit for all adoptions.

In recent years, international adoption has become a new social trend, fueled by celebrity and evangelical circles alike (although arguably for different reasons), even though a large number of children remain in the foster care system. Children from other countries are being imported to form new American families and, with the new legislation, those who adopt internationally are now receiving essentially the same tax benefits as those who adopt from foster care. However, this is counter to the original purpose of the tax credit, which was to help reclaim U.S. children from foster care and to provide a monetary incentive for their adoption. Moreover, even an intermediate position on the social justice theory continuum rejects such an approach when it requires the “serious sacrifice of our own ends,” as there is when American citizens are compelled to underwrite international adoptions when the situation has not improved for foster care adoptions.

This Article begins in Part II by exploring the plight of those in foster care and the legislative attempts to move them to permanent, adoptive homes. Part III turns to a historical overview of adoption and the changing international trend in the adoption market, focusing on the unlikely pairing of celebrity and evangelical circles as those currently driving the demand for foreign-born children. It also explains why

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<sup>3</sup> INTERNAL REVENUE SERV., *Adoption Benefit FAQs* (Aug. 3, 2012), <http://www.irs.gov/Individuals/Adoption-Benefits-FAQs>; Blake Ellis, *The \$13,000 Adoption Tax Credit is Back!*, CNN MONEY (Feb. 13, 2012), [http://money.cnn.com/2012/02/13/pf/adoption\\_tax\\_credit/index.htm](http://money.cnn.com/2012/02/13/pf/adoption_tax_credit/index.htm).

<sup>4</sup> See *infra* notes 293–96 and accompanying text. On June 28, 2012, in a controversial 5-4 opinion, the United States Supreme Court upheld the constitutionality of the Patient Protection and Affordable Care Act healthcare legislation championed by President Obama. Pub. L. No. 111-148, 124 Stat. 119 (2010); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012). A little-known part of that legislation was the extension, expansion, and enhancement of the adoption tax credit provided by the federal government. However, it was not permanent for private domestic and international adoptions and, if allowed to sunset at the end of 2012, the tax credit would have remained only for special needs (foster care) adoptions and would have reverted to the 1996 amount of \$6,000. Petitioners lobbied Congress to renew the tax credit at the increased level for 2013, and legislation was introduced to expand it and make it permanently refundable. See *infra* notes 283–301 and accompanying text.

<sup>5</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013); see Jerald David August, *Congress and President Obama Sign into Law the American Taxpayer Relief Act of 2012*, FED. TAXATION DEV. BLOG (Jan. 3, 2012), <http://fedtaxdevelopments.foxrothschild.com/2013/01/articles/federal-tax-legislation/congress-and-president-obama-sign-into-law-the-american-taxpayer-relief-act-of-2012/>.

opposition to international adoption exists and how critics have worked to curtail the practice. A look at the federal adoption tax credit in Part IV and social distributive justice theories in Part V leads to the conclusion that the federal adoption tax credit should not be used to subsidize international adoptions while the very ones who were the original intended beneficiaries of the legislation—those “lost in the system”—remain there, and are not being helped as the statute originally intended.

## II. THE FOSTER CARE SYSTEM AND LEGISLATIVE ATTEMPTS AT REFORM

Foster care, as a concept, existed long before it was ever regulated. This nation’s history is replete with examples of those who “filled the gap” when parents could not provide care for their biological children.<sup>6</sup> During the last half of the nineteenth century and into the twentieth century, Charles Loring Brace’s Orphan Train Movement placed as many as 150,000 children, ages 2 to 16 with families other than their own.<sup>7</sup> Poor and neglected, although not always orphaned, these children were carried by the Orphan Trains from the slums of New York to new families in the Midwest who permanently cared for, but did not necessarily adopt, them.<sup>8</sup> The Orphan Trains, as controversial as they were innovative, were emulated by other cities with large immigrant populations.<sup>9</sup> Several years later, the harsh conditions created by the Great Depression likewise often made it necessary for extended families to take in and foster children when parents were not able to care for them.<sup>10</sup>

The governmental system of foster care reflected today was not established until 1935 with the passage of the Social Security Act.<sup>11</sup> That legislation authorized the first federal grants for child welfare and served

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<sup>6</sup> A child was most often sent to an orphanage if there was no one to care for him. In 1910, over 1,000 orphanages existed. New York pediatrician Henry Dwight Chapin, founder of the Speedwell Society and husband of the Alice Chapin Nursery founder, declared that “a poor home is often better than a good institution” and advocated for “placing-out children rather than consigning them to orphanages.” Ellen Herman, *The Adoption History Project: Fostering and Foster Care*, UNIV. OF OR. (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/fostering.htm>.

<sup>7</sup> Frances A. DellaCava et al., *Adoption in the U.S.: The Emergence of a Social Movement*, 31 J. SOC. & SOC. WELFARE 141, 143 (2004); see also *History of Firsts*, CHILDREN’S AID SOC’Y, <http://www.childrensaidsociety.org/about/history/history-firsts> (recognizing Brace’s Orphan Train movement as “the beginning of modern foster care in the United States”).

<sup>8</sup> DellaCava et al., *supra* note 7, at 143.

<sup>9</sup> *Id.* The programs encountered opposition from the Catholic Church and other religious organizations. The children “in the various orphan train programs were disproportionately Irish and German Catholic,” while the families to whom they were shipped were generally Protestant. *Id.* at 144.

<sup>10</sup> See, e.g., Neenah Ellis, *Survivors of the Great Depression Tell Their Stories*, NPR (Nov. 27, 2008), <http://www.npr.org/templates/story/story.php?storyId=97468008>.

<sup>11</sup> Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. § 301 et seq.).

as an impetus for states to establish child welfare agencies and to develop local programs to deliver child welfare services.<sup>12</sup> By 1950, the number of children in family foster care outnumbered those in orphanages and institutions for the first time.<sup>13</sup> Over the next several decades, the definition of child welfare services was expanded to include a broader range of services.<sup>14</sup> Federal funding for child welfare services was increased, and states were required to match federal grants with state funds.<sup>15</sup> By the late 1970s, the foster care system burgeoned to include more than 500,000 children, and, according to one governmental source, hit a zenith of 698,000 in 1994.<sup>16</sup> By any measure, foster care was in crisis.

#### A. *Legislative Attempts at Reform*

The first legislative attempt to reduce the amount of children in foster care came about in 1980 with the enactment of the Adoption Assistance and Child Welfare Act.<sup>17</sup> The Act encouraged reunification with birth families where possible<sup>18</sup> and promoted permanent adoptive placements where reunification was not possible.<sup>19</sup> It sought to reduce the number of children in foster care and to limit the time they spent

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<sup>12</sup> The first federal grants, though small, served to encourage states to establish child welfare agencies and to develop local programs aimed at providing child welfare services. Katherine B. Oettinger, *Title V of the Social Security Act: What It Has Meant to Children*, 23 SOC. SEC. BULL. 39, 42 (1960). In 1967, amendments to the Social Security Act moved Title V to Subpart I of Title IV-B, Child Welfare Services. Social Security Amendments of 1967, Pub. L. No. 90-248, §§ 240, 241, 81 Stat. 821, 911-16; accord Toni Naccarato et al., *The Foster Youth Housing Crisis: Literature, Legislation, & Looking Ahead*, 23 ST. JOHN'S J. LEGAL COMMENT. 429, 437 (2008).

<sup>13</sup> Herman, *supra* note 6.

<sup>14</sup> Naccarato et al., *supra* note 12, at 435-42.

<sup>15</sup> *Id.* at 437-42.

<sup>16</sup> Herman, *supra* note 6; U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: A RESPONSE TO THE PRESIDENTIAL ADOPTION DIRECTIVE ISSUED DECEMBER 14, 1996, at 5 (Feb. 1997), available at <http://www.clintonlibrary.gov/assets/storage/Research%20-%20Digital%20Library/Reed-Subject/98/647386-adoption-2.pdf>.

<sup>17</sup> Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in various sections of 42 U.S.C.). This Act also created Title IV-E of the Social Security Act, through which subsidies were established. See *infra* Part IV.A.

<sup>18</sup> Adoption Assistance and Child Welfare Act of 1980 § 471. The Act "clearly favored returning the child to, or keeping the child with, the biological family whenever possible." DellaCava et al., *supra* note 7, at 153. The Act mandated that "reasonable efforts" be taken to prevent the removal of the child from the birth home, while mandating that "reasonable efforts" be made to reunify the parents with the birth parents if placement became necessary. Adoption Assistance and Child Welfare Act of 1980 § 471(a)(15); see also I. Glenn Cohen & Daniel L. Chen, *Trading-Off Reproductive Technology and Adoption: Does Subsidizing IVF Decrease Adoption Rates and Should it Matter?*, 95 MINN. L. REV. 485, 498-99 (2010).

<sup>19</sup> Adoption Assistance and Child Welfare Act of 1980 §§ 470-75. The Act "institutionalized the goal of permanency in child placements." DellaCava et al., *supra* note 7, at 153.

there.<sup>20</sup> Despite its intent to move children out of the system and into permanent homes, whether biological or adoptive, the legislation did not have the desired effect; two decades after its passage, more than 552,000 children remained “in the system,” and foster care adoptions accounted for a mere 17% of all adoptions.<sup>21</sup>

Responding to an increase in highly publicized cases of foster care abuse, Congress passed the Omnibus Budget Reconciliation Act of 1993.<sup>22</sup> This legislation amended Title IV-B of the Social Security Act to enact the federal Family Preservation and Support Services Program, which sought to strengthen and support families and to prevent the placement of children in out-of-home care.<sup>23</sup> More importantly, the Omnibus Budget Reconciliation Act, which provided funding for community-based prevention programs, was an attempt to prevent child abuse and neglect whether it stemmed from the biological family or foster care situation.<sup>24</sup> However, many child advocates felt it did not go far enough.

To improve the safety of children, promote adoption, and support families where the Adoption Assistance and Child Welfare Act could not, Congress passed the Adoption and Safe Families Act of 1997.<sup>25</sup> This legislation culminated from the bipartisan reform efforts of Democrat, and then-First Lady, Hillary Clinton and staunchly conservative Republican Dave Thomas.<sup>26</sup> Founder of the Wendy's fast-food chain, Thomas was himself adopted as a child and due to his own experience,

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<sup>20</sup> See Adoption Assistance and Child Welfare Act of 1980 §§ 470–75.

<sup>21</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002, at 1, 8 (Oct. 2006), [http://archive.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report12.pdf](http://archive.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.pdf) [hereinafter the 2002 AFCARS Report]; see Steven M. Cytryn, Note, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81, 92–94 (2010).

<sup>22</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

<sup>23</sup> *Id.*; see Nilofer Ahsan, *Revisiting the Issues: The Family Preservation and Support Services Program*, THE FUTURE OF CHILDREN, Winter 1996, at 157, available at [http://futureofchildren.org/futureofchildren/publications/docs/06\\_03\\_Revisiting.pdf](http://futureofchildren.org/futureofchildren/publications/docs/06_03_Revisiting.pdf).

<sup>24</sup> See Omnibus Budget Act § 431. The crack cocaine epidemic in the 1990s created a dramatic rise in child abuse referrals and more children entering foster care. “Policy efforts were focused on children who might be endangered were they to be returned from foster care to their biological families.” DellaCava et al., *supra* note 7, at 150.

<sup>25</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.). The Adoption and Safe Families Act of 1997 (H.R. 867) re-authorized the Family Preservation and Support Services Program and renamed it the Promoting Safe and Stable Families Program. *Id.* § 305.

<sup>26</sup> HILLARY RODHAM CLINTON, LIVING HISTORY 433 (2003). Together they worked with “other corporate and foundation leaders to spearhead adoption reform.” *Id.*

believed that “everyone deserves a permanent, loving home.”<sup>27</sup> Through his Dave Thomas Foundation for Adoption, he had “devoted considerable energy and resources to streamlining the foster care system” and finding adoptive families for those without a permanent home.<sup>28</sup> Joining with Hillary Clinton, Thomas lent his high profile to focus attention on adoption from foster care.<sup>29</sup>

This unlikely pairing of child advocates, hoping that new legislation “could speed up the process and remove arbitrary barriers that prevented many caring families from being able to adopt,” worked together, along with Congress and Administration officials, to craft the Adoption and Safe Families Act.<sup>30</sup> The legislation tried to remedy some of the shortfalls of the previous legislation. And in some ways it was successful. According to *The Washington Post*, the legislation represented a “fundamental shift in the philosophy of child welfare, from a presumption that the chief consideration ought to be returning a child to his biological parents, to one in which the health and safety of the child is paramount.”<sup>31</sup> The goal was to move the child towards adoption “rather than being held in foster limbo.”<sup>32</sup> To that end, the Act gave federal incentives to states that increased the number of adoptions.<sup>33</sup> It prioritized the interests of children over the birth parents, and it required the timely adoption of those who could not, for health or safety reasons, be reunited with their biological families.<sup>34</sup> Proponents were hopeful that the “sweeping

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<sup>27</sup> Marlene Cimons, *Comfort Zone*, L.A. TIMES, Feb. 7, 1999, at E1.

<sup>28</sup> CLINTON, *supra* note 26, at 433. Through his foundation program, *Wendy’s Wonderful Kids*, agencies have been able to hire professionals dedicated to helping the hardest-to-place and longest-waiting children in foster care successfully find adoptive families. Currently, over 160 recruiters have helped place more than 3,500 children with adoptive families. *Wendy’s Wonderful Kids*, DAVE THOMAS FOUND. FOR ADOPTION, <http://www.davethomasfoundation.org/what-we-do/wendys-wonderful-kids/>.

<sup>29</sup> Cimons, *supra* note 27, at E4; *see also* CLINTON, *supra* note 26, at 433.

<sup>30</sup> CLINTON, *supra* note 26, at 433–34. One of the more pleasant surprises to Clinton was the unwavering support of Republican Tom DeLay for child welfare reform. DeLay and his wife personally cared for foster children, and he continued to work with Senator Clinton following her White House days. *Id.* at 434.

<sup>31</sup> CLINTON, *supra* note 26, at 434 (quoting Judith Havemann, *Congress Acts to Speed Adoptions; Foster Care Overhaul Shifts Focus From Biological Ties to Health, Safety*, WASH. POST, Nov. 14, 1997, at A17).

<sup>32</sup> Elizabeth Bartholet, *International Adoption: The Child’s Story*, 24 GA. ST. U. L. REV. 333, 359 (2007). Many children found themselves “in limbo,” not able to return home, but not yet free to be adopted. *See* Deb Riechmann, *Child’s Status in Foster Care Limbo Highlights Rising National Dilemma*, L.A. TIMES, May 18, 1997, at A15.

<sup>33</sup> Adoption and Safe Families Act of 1997 § 201.

<sup>34</sup> *Id.* §§ 103, 201, 301–02. The Act renamed and expanded the Family Preservation and Support Services Program and required the states to develop an outcome-based incentive funding system to evaluate performance. It identified cases that did not require the state to employ “reasonable efforts” to return the child to the birth family and mandated that permanency hearings be held within 12 months after placement. *See supra* notes 23 and 25 and accompanying text. The Act “requires that children within the U.S. foster or institutional care system be held for no longer than

changes in federal adoption law would speed up the placement of thousands of foster children . . . into safe and permanent homes” rather than being held on an ongoing basis in the foster care system.<sup>35</sup>

*B. Lost In and “Aging Out” of the System*

Despite the many legislative efforts to provide adoptive families, 552,000 children still languished in foster care by the start of the twenty-first century, with 131,000 awaiting adoption.<sup>36</sup> One-fourth had been there for three years or more.<sup>37</sup> Statistics show that the older a child is when he or she enters foster care, the more likely that child will remain there, as younger children have a better chance of being adopted.<sup>38</sup> Also, racial differences unfortunately account for differences in adoption rates and explain why certain populations of youth linger in foster care longer than others.<sup>39</sup> Twenty-six percent of the 400,000 children in foster care are black.<sup>40</sup> Yet, African American children attract the least interest of adoptive parents, as those seeking to adopt black children are a small minority of adoptive parents.<sup>41</sup> A non-African American baby is at least seven times more likely than an African American to attract the interest of an adoptive parent.<sup>42</sup> The sad reality is that these children “wait longer to be adopted than children of other races.”<sup>43</sup> And African American boys

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fifteen of the prior twenty-two months and then be moved to a real home, whether that be the original biological parents’ home or an adoptive home.” Bartholet, *supra* note 32, at 376 (summarizing Adoption and Safe Families Act of 1997 § 103).

<sup>35</sup> CLINTON, *supra* note 26, at 434.

<sup>36</sup> 2002 AFCARS Report, *supra* note 21, at 1. Before a child in foster care can be made available for adoption, parental rights to the child must be terminated, either by consent or by court order. Cohen & Chen, *supra* note 18, at 494–95.

<sup>37</sup> 2002 AFCARS Report, *supra* note 21, at 10.

<sup>38</sup> See North Am. Council on Adoptable Children, *It’s Time to Make Older Child Adoption a Reality: Because Every Child and Youth Deserves a Family*, 3 (Nov. 2009), available at [www.nacac.org/adoptalk/MakeOlderChildAdoptionReality.pdf](http://www.nacac.org/adoptalk/MakeOlderChildAdoptionReality.pdf).

<sup>39</sup> Evan B. Donaldson Adoption Institute, *Finding Families for African American Children*, 11 (May 2008), available at [www.adoptioninstitute.org/publications/MEPApaper20080527.pdf](http://www.adoptioninstitute.org/publications/MEPApaper20080527.pdf).

<sup>40</sup> The latest Adoption and Foster Care Analysis and Reporting System Report shows that white children made up 42% of the total foster care population in FY 2012. 2013 AFCARS Report, *supra* note 1, at 2.

<sup>41</sup> See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1417 (2006); Catherine Rampell, *Black Babies, Boys Less Likely to Be Adopted*, N.Y. TIMES (Jan. 25, 2010), <http://economix.blogs.nytimes.com/2010/01/25/black-babies-boys-less-likely-to-be-adopted/> (stating “Caucasians and Hispanics are consistently preferred to African-Americans”).

<sup>42</sup> Rampell, *supra* note 41.

<sup>43</sup> Maldonado, *supra* note 41, at 1417.

wait even longer.<sup>44</sup> Many children “age out” of the system and into the adult world never having had a permanent home.<sup>45</sup>

As fewer people seek out children from foster care, more and more children are left to drift from one placement to the next.<sup>46</sup> And each year, more than 20,000 young people age out of the foster care system, many of them as they reach their 18th birthday and before they have even graduated high school.<sup>47</sup> They do so with no safety net of familial support to help them make the transition into adulthood.<sup>48</sup> Recognizing that the “emotional, social and financial support that families often provide”<sup>49</sup> was absent at a critical juncture in their lives, Congress enacted the John Chafee Foster Care Independence Act of 1999 to provide young people aging out of foster care with “financial, housing, counseling, employment, education, and other appropriate support and services.”<sup>50</sup>

But in 2011, a longitudinal study, The Midwest Evaluation of the Adult Functioning of Former Foster Youth (Midwest Study), reported on how youth have fared since the passage of the 1999 Act.<sup>51</sup> The Midwest Study began with a sample of 732 youth that had aged out of the Illinois, Iowa, and Wisconsin foster care systems.<sup>52</sup> They were interviewed in

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<sup>44</sup> *Id.* at 1434.

<sup>45</sup> CLINTON, *supra* note 26, at 434; Kelli Kennedy & David Crary, *Foster Care Population Drops for 6th Straight Year*, CBS NEWS (July 30, 2012), [http://www.cbsnews.com/8301-501363\\_162-57482785/foster-care-population-drops-for-6th-straight-year/](http://www.cbsnews.com/8301-501363_162-57482785/foster-care-population-drops-for-6th-straight-year/).

<sup>46</sup> See *supra* note 38 and accompanying text.

<sup>47</sup> CLINTON, *supra* note 26, at 434. In FY 2012, the number of children exiting foster care by reason of emancipation stood at 23,439. 2013 AFCARS Report, *supra* note 1, at 3. Richard Wexler of the National Coalition for Child Protection Reform called this number “alarmingly high.” Kennedy & Crary, *supra* note 45.

<sup>48</sup> Pam Fessler, *Report: Foster Kids Face Tough Times After Age 18*, NPR (Apr. 7, 2010), <http://www.npr.org/templates/story/story.php?storyId=125594259>.

<sup>49</sup> CLINTON, *supra* note 26, at 434–35.

<sup>50</sup> Foster Care Independence Act of 1999, Pub. L. No. 106-169, § 477, 113 Stat. 1822 (1999). Hillary Clinton again worked bipartisanship with Republican Senator John Chafee of Rhode Island and Democratic Senator Jay Rockefeller of West Virginia on this legislation. CLINTON, *supra* note 26, at 435. The Act doubled the funding previously available under the Independent Living Program that was part of Title IV-E of the Social Security Act. With a budget of \$140 million, states were allowed to grant a broader range of services, including room and board, and given the option of expanding the age range for services, including Medicaid, to age 21. Vouchers for postsecondary education and training were also added to help youth make the transition to adulthood. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*, CHAPIN HALL AT UNIV. OF CHI. 1 (2011), [http://chapinhall.org/sites/default/files/Midwest%20Evaluation\\_Report\\_4\\_10\\_12.pdf](http://chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf).

<sup>51</sup> The comprehensive Midwest Study was a joint collaboration between Chapin Hall at the University of Chicago, the University of Wisconsin Survey Center, and the public child welfare systems in Illinois, Iowa, and Wisconsin. Courtney et al., *supra* note 50, at 3.

<sup>52</sup> *Id.* at 3–4.

“waves,” first at the time they left foster care, then when they were 19, then again at 21, at either 23 or 24, and finally, when they were 25 and 26 years old.<sup>53</sup> The picture that emerged from the study highlighted their negative outcomes. The Midwest Study reported that 12 youths died during the eight-year study period.<sup>54</sup> By age 26, 81.8% of males had been arrested, and 74.2% had been incarcerated at least once.<sup>55</sup> Nearly 80% of the girls had been pregnant at least once.<sup>56</sup> Twenty-seven percent had been pregnant twice or more.<sup>57</sup> Only 45.8% were currently employed.<sup>58</sup> Thirty-one percent had been either homeless or had couch surfed at others’ residences.<sup>59</sup> Nearly one-fourth of those who had been homeless had been so four or more times.<sup>60</sup> Over 35% of those who had couch surfed also had done so four or more times, and nearly 40% had done so for a month or more.<sup>61</sup> Almost one-fourth could not afford food and had either received emergency food from a pantry or put off paying a bill to buy food.<sup>62</sup> And one-fifth still did not have a high school diploma or GED.<sup>63</sup>

Years ago, Hillary Clinton lamented that those who emancipated from the U.S. foster system without having been adopted faced tragic futures.<sup>64</sup> Not much seems to have changed. Within recent years, the federal government has made an effort to provide more support to those aging out of the foster care system and making the transition into adulthood alone. The Fostering Connections to Success and Increasing Adoptions Act of 2008 was enacted to provide additional support services to those former foster youth who stay in school, who are enrolled in a vocational program, who work 80 hours per month, or who have a

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<sup>53</sup> *Id.* at 4.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 92.

<sup>56</sup> *Id.* at 74.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 28.

<sup>59</sup> *Id.* at 12. The study defined homeless as “sleeping in a place where people weren’t meant to sleep, or sleeping in a homeless shelter, or not having a regular residence in which to sleep.” Couch surfing was defined as “moving from one temporary housing arrangement provided by friends, family or strangers to another.” *Id.* at 12 n.7.

<sup>60</sup> *Id.* at 12.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 39.

<sup>63</sup> *Id.* at 20.

<sup>64</sup> Even before the Midwest Study, Clinton noted that studies showed that a disproportionate number of children that aged out of the foster care system became homeless, living without financial support, health insurance or other vital assistance. CLINTON, *supra* note 26, at 434; *see also* Jedd Medefind, *In Defense of the Christian Orphan Care Movement*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 9, 14. Medefind, former head of the White House Office of Faith-Based and Community Initiatives, serves as President of the Christian Alliance for Orphans, a coalition of more than 100 Christian groups. *Id.* at 14.

medical disability that precludes these activities.<sup>65</sup> As long as these conditions are met, support will continue until they turn age 21, providing a much needed safety net for these youth as they make their way into the adult world.<sup>66</sup>

The Midwest Study raised questions about the adequacy of efforts to help youth make the transition, and the hope is that the 2008 Act's response proves to be successful.<sup>67</sup> After all, according to the study's author, "[t]hose children are our children, the children of society, of the state."<sup>68</sup> Meanwhile, the Department of Health and Human Services reported in 2013 that 399,546 children still resided in foster care, with 101,719 available and waiting to be adopted.<sup>69</sup>

### III. ADOPTION – THEN AND NOW

#### A. *From the Beginning, Upward Mobility*

From as early as the nineteenth century,<sup>70</sup> adoption within the United States has been associated with upward mobility, as it in many instances allowed children to change status from poor families and

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<sup>65</sup> Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 201(a), 122 Stat. 3949 (2008) (amending Title IV-E to allow federal reimbursement to states for the costs of foster care support payments for youth up to age 21); *see also* Courtney et al., *supra* note 50, at 1.

<sup>66</sup> *See* Fostering Connections to Success and Increasing Adoptions Act § 201(a); Courtney et al., *supra* note 50, at 1–2.

<sup>67</sup> Bill Baccaglini, *The “Aging Out” Dilemma Plaguing the Foster Care System*, HUFFINGTON POST (Sept. 25, 2011), [http://www.huffingtonpost.com/bill-baccaglini/the-aging-out-dilemma-foster-care\\_b\\_978363.html](http://www.huffingtonpost.com/bill-baccaglini/the-aging-out-dilemma-foster-care_b_978363.html) (proposing extension of support to age 23 and providing additional educational, vocational, social and mental health assistance so that “release from the child welfare system is no [longer] a path toward a homeless shelter or a jail cell”). On August 1, 2012, U.S. Senator Mary L. Landrieu introduced the Uninterrupted Scholars Act (USA) to amend the Family Educational Rights and Privacy Act (FERPA), to “allow access to a student’s educational records by the child welfare agency responsible for his or her placement and care; allow child welfare agencies to use educational records for studies related to educational stability and success for foster youth; and eliminate the need for duplicative notices and time delays in transferring records.” Press Release, Mary Landrieu, U.S. Senator for La., *Landrieu Introduces Bill to Improve Education Outcomes for Foster Youth* (Aug. 1, 2012), [http://www.landrieu.senate.gov/?p=press\\_release&id=2362](http://www.landrieu.senate.gov/?p=press_release&id=2362). The Bill (S. 3472), with bipartisan support, was passed by Congress on January 1, 2013, and signed by President Obama on January 14, 2013. *See* Uninterrupted Scholars Act (USA), Pub. L. No. 112-278 (codified at 20 U.S.C.A. § 1232g (West 2013)).

<sup>68</sup> Fessler, *supra* note 48 (quoting Mark Courtney, formerly of Partners for Our Children, who later authored the Midwest Study).

<sup>69</sup> The 2013 AFCARS Report shows that while 51,229 were adopted from foster care in FY 2012, 399,546 children remained in the foster care system. 2013 AFCARS Report, *supra* note 1, at 1, 3.

<sup>70</sup> Massachusetts passed the first adoption law, the Massachusetts Adoption of Children Act, in 1851. An Act to provide for the Adoption of Children, 1851 Mass. Acts 815.

communities to richer ones.<sup>71</sup> The first adoption agencies in the United States were founded at the beginning of the twentieth century by wealthy philanthropic women who sought babies for their “well-off friends and acquaintances.”<sup>72</sup> Louise Waterman Wise, married to progressive reformist Rabbi Stephen Wise, one of the founders of the NAACP and the American Jewish Congress, founded the Free Synagogue Child Adoption Committee.<sup>73</sup> Alice Chapin, wife of New York pediatrician and Speedwell Society founder Henry Dwight Chapin, founded the Alice Chapin Nursery.<sup>74</sup> Both championed the placement of children in permanent homes, often times at odds with “professionals . . . who stressed the terrible risks of adopting poor people’s children.”<sup>75</sup>

Statistics on twentieth-century adoptions are lacking. National reporting systems captured data from 1945 to 1975, but the information supplied by states was purely voluntary and often incomplete.<sup>76</sup> In 1980, Congress passed the Adoption Assistance and Child Welfare Act, which recommended, but did not require, a national reporting system.<sup>77</sup> States that chose to communicate data often used inconsistent terms for criteria, which skewed results.<sup>78</sup> The Voluntary Cooperative Information System was established “to further encourage uniform data collection.”<sup>79</sup> Still, because states were not required to respond, figures were not always

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<sup>71</sup> In 2000, the United States included “adopted son/daughter” as a census category for the first time. It revealed that those who adopted were significantly better educated and more affluent than families in general, with median incomes of \$56,138 compared with \$42,148 for all U.S. households. DellaCava et al., *supra* note 7, at 152–53; *see also* ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, 1 (Oct. 2003), [www.census.gov/prod/2003pubs/censr-6.pdf](http://www.census.gov/prod/2003pubs/censr-6.pdf). “Often, although certainly not always, it was and continues to be the poor who turn to adoption as a means of ensuring greater opportunities for their children.” DellaCava et al., *supra* note 7, at 144.

<sup>72</sup> Ellen Herman, *The Adoption History Project: First Specialized Adoption Agencies*, UNIV. OF OR. (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/firstspecial.html>.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* Others were involved in the early adoption movements. Florence Walrath founded the Cradle, and Clara Spence founded the Spence Alumni Society. *Id.* The Spence Alumni Society eventually merged with the Alice Chapin Nursery to form the prominent Spence-Chapin adoption service. SPENCE-CHAPIN, *About Spence-Chapin*, <http://www.spence-chapin.org/about-spence-chapin>.

<sup>76</sup> Ellen Herman, *The Adoption History Project: Adoption Statistics*, UNIV. OF OR. (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/adoptionstatistics.htm>. Both the U.S. Children’s Bureau and the National Center for Social Statistics gathered data from states that supplied information. *Id.*

<sup>77</sup> *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 476, 94 Stat. 500 (1997); DellaCava et al., *supra* note 7, at 151.

<sup>78</sup> DellaCava et al., *supra* note 7, at 151.

<sup>79</sup> *Id.*

accurate.<sup>80</sup> Today, domestic adoption statistics are still inexact, as only foster care statistics must be reported.<sup>81</sup>

Even without exact figures, 1970 is generally considered to be the peak of twentieth-century adoptions, with an estimated 175,000 finalized adoptions.<sup>82</sup> Adoptions in the United States have steadily decreased since then, averaging approximately 125,000 adoptions annually.<sup>83</sup> Many cite a correlation in the decrease of domestic adoptions with a decrease in the number of children available for adoption.<sup>84</sup> This decrease has been attributed to a variety of factors, including the increased access to contraceptives to prevent unwanted pregnancies, the legalization of abortion, the declining stigma associated with unwed motherhood, and an increase in the use of artificial reproductive technologies.<sup>85</sup> These

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<sup>80</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? 1–2 (Aug. 2004), [http://www.childwelfare.gov/pubs/s\\_adopted/s\\_adopted.pdf](http://www.childwelfare.gov/pubs/s_adopted/s_adopted.pdf) (explaining why the figures are inexact and how the estimates are figured).

<sup>81</sup> The Department of Health and Human Services collects data on children adopted from state child welfare systems. The U.S. State Department records the number of international adoptions through its immigrant visa reporting system. But private domestic adoptions still do not have to be reported to either state or federal agencies, making a completely accurate statistical picture impossible. CONG. RESEARCH SERV., RL 33633, TAX BENEFITS FOR FAMILIES: ADOPTION I (2007).

<sup>82</sup> Richard R. Bradley, *Making a Mountain Out of a Molehill: A Law and Economics Defense of Same-Sex Foster Care Adoptions*, 45 FAM. CT. REV. 133, 133 (2007) (citing *Overview of Adoption in the United States*, ADOPTION INST., [http://www.adoptioninstitute.org/FactOverview\\_print.html](http://www.adoptioninstitute.org/FactOverview_print.html)).

<sup>83</sup> The National Center for State Courts measured roughly 127,000 domestic and international adoptions in 1992, and nearly 10 years later, that number was still holding steady. Bradley, *supra* note 82, at 133; U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, HOW MANY CHILDREN WERE ADOPTED IN 2000 AND 2001? 1–2 (Aug. 2004), [http://www.childwelfare.gov/pubs/s\\_adopted/s\\_adopted.pdf](http://www.childwelfare.gov/pubs/s_adopted/s_adopted.pdf). *But see supra* notes 76–81 and accompanying text regarding the reliability of adoption statistics.

<sup>84</sup> *See, e.g.*, INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 8 (Howard Altstein & Rita J. Simon eds., 1991); Maldonado, *supra* note 41, at 1431; Paula Span, *Parallel Lives*, WASH. POST MAG., June 18, 2000, at W12, 16.

<sup>85</sup> Sixty-five percent of babies born to single white mothers in 1966 were given up for adoption. Maldonado, *supra* note 41, at 1431 & n.71 (citing Michael S. Serrill, *Going Abroad to Find a Baby*, TIME, Oct. 21, 1991, at 87). By 1995, only 1% of single women relinquished their babies for adoption. *Id.* (citing Span, *supra* note 84, at W12, 15). The popularity of the pill and the legalization of abortion in the 1973 Supreme Court decision of *Roe v. Wade*, 410 U.S. 113, have had a negative impact on birth rates. *See* Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 164 (2007). The 2002 National Survey of Family Growth, sampled 61.6 million American women aged 15 to 44 about their attitudes on adoption, among other things. According to the survey, by their early 40s, 28.9% of women had used some sort of infertility service (including advice), 2.6% had artificial insemination, and 0.7% had used another form of assisted reproductive technology. ANJANI CHANDRA, ET AL., FERTILITY, FAMILY PLANNING AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 5, 17, 30, 136 (2005), [www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_025.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf). *But see* Cohen & Chen, *supra* note 18, at 488, 533 (finding no strong

factors may account for some of the decrease in available infants, but certainly not all available children, as the amount of children in foster care waiting for adoption has remained rather constant throughout this period.<sup>86</sup>

Due to the rising number of adoptable, but unclaimed children in the United States foster care system, the Reagan administration formed the Interagency Task Force on Adoption in 1987 to promote adoption.<sup>87</sup> Nearly a decade later, in 1996, President Clinton promoted his Adoption Initiative with the goal of doubling by 2002 the number of children adopted or placed in permanent homes from foster care.<sup>88</sup> November has been highlighted by presidential proclamation as National Adoption Month,<sup>89</sup> and other organizations have used creative efforts to highlight to the public the number of children within agencies and foster care awaiting adoption.<sup>90</sup> Still, a large number of these children are passed by in favor of children abroad, creating an imbalance between the supply of adoptable children and the demand for these children by U.S. adoptive families.<sup>91</sup> And, despite the surplus of available children waiting to be

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evidence, through statistical data from three different data sets, that increased access to IVF through state-level insurance mandates decreases domestic or international adoptions).

<sup>86</sup> Compare 2002 AFCARS Report, *supra* note 21, at 1, with 2013 AFCARS Report, *supra* note 1, at 1. The number of children in foster care waiting to be adopted has consistently hovered around 100,000 for more than a decade.

<sup>87</sup> DellaCava et al., *supra* note 7, at 150.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 152. Established in 1990, National Adoption Month grew from National Adoption Week, a promotion started by Massachusetts in 1976. *Id.*

<sup>90</sup> For example, to highlight the plight of foster children in its city, the public child welfare agency of Charleston, South Carolina hands out kazoos and adoption materials to everyone attending its local minor league baseball games. *Id.* at 156. And one organization in Arkansas is hosting a 5K Zombie Challenge to benefit CASA's work with foster care children in three countries. *The Zombies are Coming!*, LIVE UNITED BLOG (May 20, 2013 2:22 PM), [www.rivervalleyunitedway.org/blog-entry/20-05-2013/zombies-are-coming](http://www.rivervalleyunitedway.org/blog-entry/20-05-2013/zombies-are-coming).

<sup>91</sup> See Bradley, *supra* note 82, at 133–34 & n.5 (citing N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 63 (2d ed. 2001)) (“[N]oting that where supply and demand intersect in a market signifies the market’s equilibrium. Markets naturally move toward equilibrium unless there are governmental policies that prevent them from doing so. In this market, the quantity of children supplied to the market via foster care exceeds the quantity demanded, thus resulting in a surplus of the good (children).”). Using supply and demand in terms of children seems to reduce them to a mere commodity, yet as early as the 1950s, the adoption of babies was referred to as “a sellers’ market.” See Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 715 (1950). The reality remains that the adoption market has historically placed white children first, other races such as Asian or Latin American second, and African American last. Maldonado, *supra* note 41, at 1425–26. But see Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 215–16 (2003) (criticizing the use of the word “market” for international adoptions and suggesting that its use shows contempt for the process).

adopted from within the system, many turn to international markets to find children to fill the demand.

*B. The International Adoption Trend*<sup>92</sup>

For most of the twentieth century, adoption policies favored racial and cultural homogeneity, with children being “matched” with adoptive parents that had the same physical characteristics and religion.<sup>93</sup> That is not to say that transracial adoptions did not occur, but they made up only a small percentage of U.S. adoptions.<sup>94</sup> Those who did break transracial barriers or who advanced racial pluralism within families were met with strong resistance by both racial and professional groups. For example, in 1972, the National Association of Black Social Workers (NABSW) took a strong stance against the practice of placing black children in white families.<sup>95</sup> The numbers of such transracial adoptions declined by 39% the year following NABSW’s statement.<sup>96</sup> It was not until the end of the twentieth century, with the passage of the Multiethnic Placement Act of 1994 (MEPA), that placement based on a child’s or prospective parent’s race became illegal.<sup>97</sup> And in that 20-year period, while the controversy

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<sup>92</sup> International, inter-country, and intercountry are used interchangeably by various sources, and all involve the transfer of a child from one nation to another for parenting purposes. See, e.g., Bartholet, *supra* note 85, at 152; *UNICEF’s Position on Inter-country Adoption*, UNICEF (May 26, 2012), [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html).

<sup>93</sup> DellaCava et al., *supra* note 7, at 144–45.

<sup>94</sup> *Id.* at 145. This population has never represented an overwhelming percentage of adoptions: approximately 12,000 African-American children were placed in white homes prior to 1975. Ellen Herman, *The Adoption History Project: Transracial Adoptions*, UNIV. OF OR. (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/transracialadoption.htm>.

<sup>95</sup> Maldonado, *supra* note 41, at 1454–55. The NABSW, concerned that black children would not develop a positive racial identity, proclaimed that the adoption of black children by white families was “a form of race and cultural genocide” for fear the children would prefer white culture over the black community. *Id.* at 1455 (citing Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 926–27 (1994)). The group put enough pressure on the Child Welfare League of America that it rewrote its adoption standards in 1973 (they had been revised in 1968 to be more transracial friendly), to “clarify that same-race placements were always better.” Herman, *supra* note 94.

<sup>96</sup> Maldonado, *supra* note 41, at 1455 & n.196 (citing Suzanne Brannen Campbell, Comment, *Taking Race Out of the Equation: Transracial Adoption in 2000*, 53 SMU L. REV. 1599, 1605 (2000)).

<sup>97</sup> Cohen & Chen, *supra* note 18, at 497–98. The Multiethnic Placement Act (MEPA) was signed into law by President Clinton in 1994 as part of the Improving America’s Schools Act and prohibited placements “solely on the basis of race.” Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518 (1994) (repealed 1996). In 1996, Congress amended MEPA to delete the word “solely” from the language of the Act. Small Business Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755 (codified at 42 U.S.C. § 1996b(1)(A) (2006)) (reenacting the pertinent portions of the Multiethnic Placement Act under the Interethnic Adoption Provisions). Now rejecting a placement “on the basis of . . .

surrounding the adoption of American black children into white families swirled, Americans continued to adopt nonwhite children—but from other nations—creating an almost 200% increase in international adoption.<sup>98</sup>

Over the last several decades, a more globalized American family has emerged as more American families have adopted children from other countries such as South Korea, Russia, China, Guatemala, and Ethiopia.<sup>99</sup> The United States is now known as the largest “importer” of foreign-born children, having brought in nearly a quarter of a million children for adoption in just over a decade.<sup>100</sup> The “sender” nations have generally shifted with the political, social, and economic winds of the time, as negative conditions abroad made more children available for adoption.<sup>101</sup>

War often has devastating effects on the plight of children, leaving many displaced, abandoned, or orphaned.<sup>102</sup> Following the Second World War, the United States responded to those caught in the war’s aftermath and passed the Displaced Persons Act in 1948 to help Europeans who had been affected as a result of the war by the Nazi government.<sup>103</sup> The Act opened the doors for almost 3,000 orphan refugees under the age of 16 to be adopted in the United States.<sup>104</sup> In addition to those who were

race,” the Act makes clear that “[p]lacements must be colorblind.” Maldonado, *supra* note 41, at 1457.

<sup>98</sup> Maldonado, *supra* note 41, at 1455–56.

<sup>99</sup> *Id.* at 1418. China, Russia, Guatemala, Ethiopia, and South Korea were the top five foreign countries (although not always in the same order) from which Americans adopted children in 2007–2009. U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, [http://adoption.state.gov/about\\_us/statistics.php](http://adoption.state.gov/about_us/statistics.php). For the years 2010–2011, Ukraine replaced Guatemala on the top senders list. *Id.*

<sup>100</sup> Americans have adopted 242,602 children since 1999. U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99; see also Maldonado, *supra* note 41, at 1418 & n.9 (citing Jeff D. Opdyke, *Adoption’s New Geography*, WALL ST. J., Oct. 14, 2003, at D1 (claiming that “United States citizens adopt more foreign children than all other nations combined”).

<sup>101</sup> DellaCava et al., *supra* note 7, at 151–52 (citing governmental collapse as in Russian, political unrest and rebellion in Central America and Asia, and famine and epidemics such as AIDS in Africa as contributing to the availability of children to adopt).

<sup>102</sup> One only has to trace modern warfare to see the adoption trends in this nation: from Germany in the 1940s, to Korea in the 1950s, and Vietnam in the 60s and 70s, countries sending significant numbers of adoptees for those eras were devastated by war and its aftermath. Irving Schulman, *Adoption: Overview and Major Recommendations*, THE FUTURE OF CHILDREN, Spring 1993, at 4, 9, available at [http://futureofchildren.org/publications/journals/journal\\_details/index.xml?journalid=66](http://futureofchildren.org/publications/journals/journal_details/index.xml?journalid=66); see Ellen Herman, *The Adoption History Project: Adoption History in Brief*, UNIV. OF OR. (Feb. 24, 2012), <http://pages.uoregon.edu/adoption/topics/adoptionhistbrief.htm>; *Author Examines Life After Operation Babylift*, NPR (Apr. 14, 2010), <http://www.npr.org/templates/story/story.php?storyId=125993421>.

<sup>103</sup> Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (1948), amended by Act of June 16, 1950, Pub. L. No. 81-555, 64 Stat. 219.

<sup>104</sup> The Act specifically targeted orphans who were under 16 years of age in Italy; the American, British, or French zones of either Germany or Austria; or the

displaced or orphaned, the Korean War produced thousands of “mixed” Korean children who were not accepted into a patriarchal Korean society that favored pure family bloodlines.<sup>105</sup> Unwanted by their own country, more than 170,000 South Korean children have been adopted, primarily by families in the United States, since the 1950s.<sup>106</sup> The end of the Vietnam War also increased the number of Vietnamese children adopted by American families. After the fall of Saigon in 1975, President Ford authorized Operation Babylift, which brought thousands of Vietnamese children to the U.S. for adoption.<sup>107</sup>

Political and social unrest in countries has also contributed to the number of available children. As Romania’s government fell with the overthrow of communist dictator Nicolae Ceausescu, and subsequent publicity showed the horrifying conditions in Romanian orphanages, thousands flocked to Romania to adopt orphaned and abandoned children.<sup>108</sup> Likewise, the fall of the Soviet Union two years later brought about a tremendous influx of children from Russia, despite known medical risks associated with these children.<sup>109</sup> China, with its

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American, British, or French sectors of either Berlin or Vienna. *Id.* § 2(e). In all, 2,838 orphans were permitted entry under the Displaced Persons Act of 1948. Michael J. Creppy, *Nazi War Criminals in Immigration Law*, 12 GEO. IMMIGR. L.J. 443, 444–46 & n.22 (1998) (citing Refugee Relief Act of 1953 (H.R. Rep. No. 374), Pub. L. No. 83-203, 67 Stat. 400 (1953)).

<sup>105</sup> Many of these mixed children were fathered by American servicemen stationed in Korea. Maldonado, *supra* note 41, at 1446 n.149 (citing Brandi R. Foster, *Evolution of the “Traditional Family”: A Comparative Analysis of United States’ and United Kingdom’s Domestic and International Adoption Law*, 14 IND. INT’L & COMP. L. REV. 315, 319 (2003)). The Confucianism belief system heavily influences the homogenous Korean social system. Confucianism teaches “saving face,” and Koreans place a high value on retaining a respectable social reputation. Children born out of wedlock thus did not fit this expectation and babies were secretly placed in orphanages or given up for adoption. Jang Jea-il, *Adult Korean Adoptees in Search of Roots*, KOREA TIMES (Dec. 11, 1998), available at <http://www.reocities.com/Heartland/Village/5473/articles/11.html>. A recent movement has worked to abolish the phrase “mixed blood” and replace it with “second generation of cross-cultural families.” Acknowledging the discrimination suffered especially to those children born to Korean women and U.S. military men, the movement employs the slogan, “not them, but us” to end such discrimination for the second generation of cross-cultural families. Hye-Kyung Lee, *Migration and Development: Migrant Women in South Korea*, in GLOBAL MIGRATION AND DEVELOPMENT 269, 284 (Ton van Naerssen et al. eds., 2008).

<sup>106</sup> *Foreign Adoptions Plummet*, FOX NEWS LATINO (May 10, 2012), <http://latino.foxnews.com/latino/lifestyle/2012/05/10/foreign-adoptions-plummet/>. Author Pearl S. Buck established Welcome House, the first international adoption agency, to support the adoption of unwanted Amerasian children of American servicemen born to Asian women. The 1953 Refugee Relief Act issued special visas for Korean orphans to be adopted by Americans, and in 1956, Holt International Children’s Services was established to further the adoption of Korean children. DellaCava et al., *supra* note 7, at 146.

<sup>107</sup> *Author Examines Life After Operation Babylift*, *supra* note 102.

<sup>108</sup> Maldonado, *supra* note 41, at 1450; Bartholet, *supra* note 85, at 161.

<sup>109</sup> Maldonado, *supra* note 41, at 1427. Many Americans adopted from the former Soviet bloc countries despite evidence the Russian children had serious health risks.

governmental one-child family policy has been a top sending country, of primarily girls, for more than a decade and was the largest producer of children to the United States for the last four years.<sup>110</sup> Guatemala, stable but poor following its 36-year civil war, became one of the leading sending countries of the world, second only after China in 2006, and the top sending country in 2008.<sup>111</sup> The AIDS epidemic and famine have contributed to making Ethiopia, the second-most populous nation on the African continent, the second-most sender of children to the United States for the last four years.<sup>112</sup> Considered one of the easiest nations from which to adopt because of its relatively low cost and lax oversight, Ethiopia has sent 13,091 children to the United States for adoption since 1999 and has become one of the most preferred sending countries for international adoption.<sup>113</sup>

For nearly six decades, the number of international adoptions in this country steadily increased, reaching its highest figures near the

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“One study found that over 80% of children adopted from former Soviet countries suffered delays in fine motor skills, 70% had delays in gross motor skills, and many others suffered from rickets, anemia, fetal alcohol syndrome, and parasites. They are also significantly more likely . . . to have tuberculosis, hepatitis B or C, or syphilis, and to have birth mothers who abused drugs and/or alcohol while pregnant.” *Id.* at 1436 (citing Lisa H. Albers et al., *Health of Children Adopted from the Former Soviet Union and Eastern Europe: Comparison with Preadoptive Medical Records*, 278 J. AM. MED. ASS’N 922, 924 (1997) (footnotes omitted)).

<sup>110</sup> U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99. China was “the top sending country for U.S. adoptions for the last three years (2004–2006), and one of the top two countries from 1995 through 2006.” Bartholet, *supra* note 32, at 344–45. Americans, fearful that many Chinese girls will be killed or placed in orphanages because of China’s one-child policy, have responded by adopting many Chinese girls. See Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER L. & POL’Y 5, 12 (1995); Bartholet, *supra* note 85, at 184. For an interesting discussion of the ramifications of China’s one-child policy, see Therese Hesketh et al., *The Effect of China’s One-Child Family Policy after 25 Years*, 353 NEW ENG. J. MED. 1171 (2005).

<sup>111</sup> U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99; Bartholet, *supra* note 85, at 157, 190. The civil war left its mark, with violent crime a “serious concern due to endemic poverty, an abundance of weapons, a legacy of societal violence, and weak law enforcement and judicial systems.” TRAVEL.STATE.GOV, *Guatemala: Country Specific Information*, U.S. DEP’T OF STATE (Nov. 13, 2012), [http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1129.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1129.html).

<sup>112</sup> See U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99; Miriam Jordan, *Inside Ethiopia’s Adoption Boom*, WALL STREET J. (Apr. 28, 2012), <http://online.wsj.com/article/SB10001424052702304811304577368243366708110.html>; Matthew D. LaPlante, *A Crackdown on International Adoptions*, CHRISTIANITY TODAY (Feb. 7, 2012), <http://www.christianitytoday.com/ct/2012/january/international-adoption-challenges.html>.

<sup>113</sup> Americans adopted less than 200 children annually from Ethiopia in the years 2001–2003, but the number has risen dramatically since then, with 11,793 children having been adopted just since 2005. See U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99; LaPlante, *supra* note 112. Adoptions in Ethiopia typically cost \$25,000, which is generally more affordable than adoptions from other countries. Jordan, *supra* note 112.

beginning of the twenty-first century.<sup>114</sup> The federal government facilitated the increase in international adoptions, relaxing immigration laws for foreign orphans.<sup>115</sup> The Child Citizenship Act of 2000, signed by President Clinton, granted automatic United States citizenship to foreign-born children adopted by U.S. citizens.<sup>116</sup> As a result of these efforts, international adoptions flourished, culminating in an unprecedented total of nearly 23,000 in 2004.<sup>117</sup> Although those numbers have declined in the last several years, international adoptions still make up a significant percentage of United States adoptions.<sup>118</sup> And, in recent years, an unlikely mix of two demographic groups has primarily taken up the adoption cause, one arguably for personal and humanitarian reasons and the other from a sense of purpose and mission, but both realizing the same result: the importation of internationally adopted children to form a culturally diverse American family.<sup>119</sup>

### 1. *Celebrities as the Face of International Adoption*

Many have come to associate international adoption with a higher degree of philanthropy—somehow, a nobler, more humanitarian act than domestic adoption.<sup>120</sup> Some posit this is because international adoption began as a humanitarian effort, when large numbers of war orphans were brought to this nation for adoption after World War II, the

<sup>114</sup> The amount of orphan visas tripled in just 10 years, rising from 6,472 in 1992 to as high as 22,884 in 2004. TRAVEL.STATE.GOV, *Significant Source Countries of Immigrant Orphans: Fiscal Years 1992–2004*, [http://travel.state.gov/pdf/visa\\_office\\_report\\_table\\_xiii.pdf](http://travel.state.gov/pdf/visa_office_report_table_xiii.pdf). “In contrast to the difficulty tracking domestic adoptions, statistics relevant to international adoptions are readily available. As of the Immigration and Nationality Act of 1961, reference to immigration of orphans to the U.S. for the purpose of adoption became a permanent part of immigration legislation.” DellaCava et al., *supra* note 7, at 151.

<sup>115</sup> DellaCava et al., *supra* note 7, at 151.

<sup>116</sup> Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 320(b), 322(c), 114 Stat. 1631, 1631–32 (2000) (codified as amended at 8 U.S.C. §§ 1431(b), 1433(c) (2006)).

<sup>117</sup> TRAVEL.STATE.GOV, *Significant Source Countries*, *supra* note 114.

<sup>118</sup> Recent figures show a decline of approximately 60%, from 22,991 international adoptions in 2004 to 8,668 international adoptions in 2012. U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99; see also *Foreign Adoptions Plummet*, *supra* note 106; Craig Juntunen, *We Need to Help Orphans Find Families*, HUFFINGTON POST (Mar. 13, 2012), [http://www.huffingtonpost.com/craig-juntunen/international-adoption\\_b\\_1342072.html](http://www.huffingtonpost.com/craig-juntunen/international-adoption_b_1342072.html). Despite the recent decline, international adoptions constitute approximately 16% of all adoptions. Herman, *supra* note 76.

<sup>119</sup> Emily Nussbaum, *The Nuclear Family, Exploded*, NEW YORK MAG. (Aug. 13, 2007), <http://nymag.com/news/features/35817/>.

<sup>120</sup> See Maldonado, *supra* note 41, at 1446–47. Indeed, international adoption affords children socio-economic opportunities to move from a poor nation to a privileged one that they might not otherwise have. See DellaCava et al., *supra* note 7, at 146 (referencing Bruce Porter, *I Met My Daughter at the Wuhan Foundling Hospital*, N.Y. TIMES MAG., Apr. 11, 1993, at 24–26, 31); see, e.g., Jordan, *supra* note 112.

Korean War, and the Vietnam War.<sup>121</sup> And those who have adopted children from such circumstances have surely rescued those children from lives that “would otherwise be profoundly marred by poverty, disease, war, homelessness, or discrimination in their countries of origin.”<sup>122</sup>

For many years, international adoption was cost-prohibitive to most Americans. Celebrities, on the other hand, have been among those who have had the means to make a difference in the life of those children so affected. Legendary actress Julie Andrews from *The Sound of Music* was one of the first celebrities to adopt internationally after she and her husband, Blake Edwards, saw the plight of Vietnamese children while serving as members of the Committee of Responsibility, an organization founded by a group of doctors to aid children who had been cruelly maimed and disfigured in the war.<sup>123</sup> Enchanted by the Vietnamese children she met, and inspired to adopt when her friend, *The King and I* actor Yul Brenner, adopted two Vietnamese children, Andrews and Edwards adopted two little Vietnamese orphan girls in the 1970s.<sup>124</sup> Actress Mia Farrow and her husband Andre Previn also adopted children from Vietnam and Korea during that time period.<sup>125</sup> Farrow eventually adopted many more children, some with disabilities, from poverty-stricken countries across the world.<sup>126</sup>

In recent years, the poster family for international adoption would have to be the ever-increasing Jolie-Pitt brood. In 2001, while filming the motion picture *Lara Croft: Tomb Raider* in Cambodia, Oscar-winning actress Angelina Jolie began visiting refugee camps and became aware of humanitarian crises.<sup>127</sup> Named a United Nations Goodwill Ambassador that year, she made headlines when she adopted a young boy from a Cambodian orphanage.<sup>128</sup> Jolie made headlines again in 2005 when she

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<sup>121</sup> See *supra* Part III.B.; Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80 (2010); Maldonado, *supra* note 41, at 1446–47.

<sup>122</sup> Maldonado, *supra* note 41, at 1447 n.151 (quoting Joan Heifetz Hollinger, *Intercountry Adoption: A Frontier Without Boundaries*, in FAMILIES BY LAW: AN ADOPTION READER 215, 215 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004)).

<sup>123</sup> See Marilyn Beck, *Hollywood Gossip: Julie Andrews Tries Charity Work*, MILWAUKEE J., Aug. 28, 1970, at 6, available at <http://news.google.com/newspapers?nid=1499&dat=19700828&id=IN0jAAAIBAJ&sjid=UCgEAAAIBAJ&pg=7113,4107216>; Stacy Jenel Smith, *'Adoption Fever' Among Celebrities—Good or Bad?* (2013), NETSCAPE, [http://webcenters.netscape.com/celebrity/becksmith.jsp?p=bsf\\_celebadoption](http://webcenters.netscape.com/celebrity/becksmith.jsp?p=bsf_celebadoption).

<sup>124</sup> Smith, *supra* note 123.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* Scandal erupted when her long-time lover, Woody Allen, was discovered having an affair with her adopted 21-year-old daughter, Soon-Yi, whom he later married and with whom he adopted two children. *Id.*

<sup>127</sup> *'Tomb Raider' Star's Heart with Refugees*, CNN.COM (May 19, 2002), [http://articles.cnn.com/2002-05-19/entertainment/thailand.jolie\\_1\\_thai-camps-refugee-camps-unhcr?s=PM:SHOWBIZ](http://articles.cnn.com/2002-05-19/entertainment/thailand.jolie_1_thai-camps-refugee-camps-unhcr?s=PM:SHOWBIZ).

<sup>128</sup> *Id.*

began a romantic relationship with actor Brad Pitt and adopted a little girl from Ethiopia.<sup>129</sup> Together with Pitt, Jolie adopted another son from Vietnam.<sup>130</sup> Their Jolie-Pitt Foundation supports worldwide humanitarian efforts, including international adoption.<sup>131</sup>

Soon after Jolie adopted her first child, Madonna, the “Queen of Pop,” also famously (some might claim infamously) adopted a one-year-old boy from the African country of Malawi.<sup>132</sup> The same year she adopted her son, Madonna also established a charity, Raising Malawi, to fund humanitarian efforts in the country.<sup>133</sup> The adoption received much scrutiny and criticism; critics charged she had used her money to gain influence to secure the adoption.<sup>134</sup> Two years later, amidst renewed controversy, the singer adopted a three-year-old girl after successfully appealing a rejected first effort.<sup>135</sup> Madonna recently announced a

<sup>129</sup> See *The Brangelina Saga: Brad Pitt and Angelina Jolie's Relationship Through the Years*, N.Y. DAILY NEWS (Jan. 25, 2010), <http://www.nydailynews.com/entertainment/gossip/brangelina-saga-gallery-1.78029?pmSlide=0>; *Angelina Jolie Inspires International Adoptions*, ABC NEWS (Oct. 1, 2005), <http://abcnews.go.com/GMA/story?id=1175428&page=1>.

<sup>130</sup> The Pitt-Jolie family now has six children, three biological and three adopted. Richard Simpson, *United Nations of Brangelina: Pitt and Jolie's Rainbow Family Arrives in Japan*, MAIL ONLINE (Jan. 27, 2009), <http://www.dailymail.co.uk/tvshowbiz/article-1129321/United-Nations-Brangelina-Pitt-Jolies-rainbow-family-arrives-Japan.html>.

<sup>131</sup> *Angelina Jolie Fact Sheet*, UNHCR, <http://www.unhcr.org/pages/49db77906.html>. The Jolie-Pitt Foundation donated \$150,000 on National Adoption Day to SOS Children's Villages, an organization that has devoted the last 60 years to providing stable homes to children around the world. *Jolie-Pitt Foundation Supports Nat'l Adoption Day*, EXTRA (Nov. 22, 2010), <http://www.extratv.com/2010/11/22/jolie-pitt-foundation-supports-natl-adoption-day/>.

<sup>132</sup> Smith, *supra* note 123.

<sup>133</sup> Madonna funneled millions through her charity, Raising Malawi, to begin a girls' academy to train future doctors and leaders. However, allegations of mismanagement and an audit that showed \$3.8 million had been mismanaged caused her charity to cancel the project and seek new direction for the project. Adam Nagouny, *Madonna's Charity Fails in Bid to Finance School*, N.Y. TIMES, Mar. 25, 2011, at A13.

<sup>134</sup> Malawi officials granted the star's wishes after she responded to the Human Rights Consultative Committee's challenge with her stated desire to not just expand her family, but to help a child “escape an extreme life of hardship, poverty and in many cases, death . . .” Smith, *supra* note 123.

<sup>135</sup> See *Madonna's Adopted Daughter Said to Have Left Malawi*, ACCESS HOLLYWOOD (June 20, 2009), [http://www.accesshollywood.com/madonnas-adopted-daughter-said-to-have-left-malawi\\_article\\_19503](http://www.accesshollywood.com/madonnas-adopted-daughter-said-to-have-left-malawi_article_19503). Madonna met the girl, Mercy, at the time she adopted her son, David Banda. When she tried to adopt Mercy two years later, she was faced with protest from Mercy's family. A Malawian court ruled against Madonna, but she appealed and the court reversed its ruling, noting that “every child has a right to love.” Many child advocates felt the court granted the adoption because of Madonna's celebrity and her contributions to the country. Indeed, the court noted the singer's commitment to helping disadvantaged children in its opinion. Raphael Tenthani, *MERCY! Malawi Approves Madonna's Adoption*, HUFFINGTON POST (June 12, 2009), [http://www.huffingtonpost.com/2009/06/12/mercy-malawi-approves-mad\\_n\\_214675.html](http://www.huffingtonpost.com/2009/06/12/mercy-malawi-approves-mad_n_214675.html).

fundraising effort through her charity to help train pediatric surgeons to care for the one million orphans and vulnerable children in Malawi.<sup>136</sup>

While celebrity adoptions may be a small percentage of the number of adoptions that take place each year, there is no doubt that celebrity status brings a certain amount of media attention to issues like international adoption.<sup>137</sup> And, although celebrities were certainly not the only Americans adopting overseas, they were arguably the most visible.<sup>138</sup> Thus, it made an impression on the general public and maybe even created a desire to emulate what before had been unattainable.<sup>139</sup> It also changed the cultural dialogue surrounding international adoption. For years, most of mainstream America did not utter phrases like, “we invite culture and diversity into our family,” until celebrities like Jolie banded such terms about while forming increasingly diverse families.<sup>140</sup> Jolie, known for being unconventional, was met with skepticism when she first adopted internationally.<sup>141</sup> And fueled by these celebrity accounts, many critics denigrated those who altruistically adopted as “members of the Angelina Jolie club, in the Mia Farrow tradition,” or as merely following a movement that celebrities made trendy.<sup>142</sup>

But, as public perception shifted and the world watched Jolie transition to motherhood, and as more celebrities embraced the practice,<sup>143</sup> the tide of public opinion changed, and everyday Americans

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<sup>136</sup> *Madonna's Malawi Plan*, THE NEW AGE (July 24, 2012), [http://www.thenewage.co.za/57102-12-53-Madonnas\\_Malawi\\_plan](http://www.thenewage.co.za/57102-12-53-Madonnas_Malawi_plan).

<sup>137</sup> As Bill Blacquiere, President of Bethany Christian Services, noted, “the adoption of a child by a celebrity—whether it’s Madonna, Angelina Jolie, Sandra Bullock, or Charlize Theron—means that adoption will be in the news for weeks to come. Ultimately, this helps raise awareness about adoption, thereby potentially increasing the number of people who will consider opening their hearts and homes to a waiting child.” Bill Blacquiere, *When Celebrities Adopt*, EVERY CHILD BLOG (Aug. 9, 2012), <http://blogs.christianpost.com/every-child/when-celebrities-adopt-11290/>.

<sup>138</sup> *See id.*

<sup>139</sup> *See, e.g.*, ABC News, *supra* note 129 (recounting the story of a couple in Ohio who were inspired to adopt a child from Ethiopia after seeing Jolie with her daughter Zahara on the cover of *People* magazine).

<sup>140</sup> *See, e.g., id.*

<sup>141</sup> Five years before she met actor Brad Pitt, with whom she would go on to adopt several more children, Jolie declared, “I want to create a rainbow family. That’s children of different religions and cultures, from different countries. Actually, I’d love to have seven, a small football team.” Simpson, *supra* note 130.

<sup>142</sup> *E.g.*, Nussbaum, *supra* note 119.

<sup>143</sup> Three years ago, television and movie star Katherine Heigl, with her country singer husband Josh Kelley, adopted a baby girl from South Korea. Susan Dominus, *The Girl Who Changed Katherine Heigl's Life*, REDBOOK MAG. (2013), <http://www.redbookmag.com/fun-contests/celebrity/katherine-heigl-baby>. Heigl’s sister was adopted from Korea, and she knew she wanted to begin her family by adopting internationally. *Id.* Other celebrities have joined the international adoption ranks in recent years. James Caviezel and his wife adopted a three-year-old boy from China; Ewan McGregor and his wife adopted a four-year-old girl from Mongolia; America’s “former sweetheart,” Meg Ryan, adopted a 14-month old little girl from China. Smith,

began expressing the same ideals.<sup>144</sup> Jolie's wish that people would follow in her footsteps apparently increased interest; after Jolie adopted her daughter, U.S. adoption agencies noted that inquiries about Ethiopian babies doubled.<sup>145</sup> Americans have transformed their families through international adoption, and, rightly or wrongly, the growing popularity of international adoption among celebrities has been credited with broadening the general public's definition of, and acceptance of, a culturally diverse family.<sup>146</sup>

## 2. *The Evangelical Christian Adoption and Orphan Care Movement*

In this country, Christianity has been a major influence in the adoption movement since its beginnings. From the start, adoption was promoted as the cure for society's ills, promising to "reduce divorces, banditry, murder, and control births, fill all the churches and do real missionary work at home and abroad, exchanging immigrants for Americans and stopping some of the road leading to war."<sup>147</sup> Behind the humanitarian efforts of Charles Loring Brace's Orphan Train program was a desire to promote Christian values to those who had no former religious training.<sup>148</sup> The growing number of homes for unwed mothers established in the twentieth century was born of an evangelical effort to place children born to single mothers into loving, two-parent, Christian households.<sup>149</sup> As the world became more globalized following World War

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*supra* note 123; Jenny Schafer, *Meg Ryan & Her American Sweetheart*, CELEBRITY BABY SCOOP (Apr. 2, 2009), <http://www.celebritybabyscoop.com/2009/04/02/meg-ryan-her-american-sweetheart>. Mary-Louise Parker adopted a baby girl from Africa. Melanie Monroe Rosen & April Rueb, *Celebrity Moms Who Adopted*, PARENTS (2013), <http://www.parents.com/parenting/adoption/stories/celebrity-moms-who-adopted/?rb=Y#page=18>.

<sup>144</sup> See, e.g., ABC NEWS, *supra* note 129. According to Blacquiere, "celebrity adoptions have also helped create an open dialogue surrounding the topic. Not so long ago, adoption was often discussed in hushed voices, as if it were something to be ashamed of. Today, adoptive parents, adopted children, and birthparents can speak openly and freely about their experiences including the challenges, the joys, the heartaches, and the triumphs." Blacquiere, *supra* note 137.

<sup>145</sup> ABC NEWS, *supra* note 129; Prior to Jolie's adoption of Zahara in 2005, adoptions from Ethiopia to the United States never totaled more than 100–300 children a year, if that. U.S. DEP'T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99. However, U.S. adoptions from Ethiopia nearly doubled the year following Jolie's adoption, and doubled again the next year. *Id.* In all, Americans have adopted 11,793 children from Ethiopia just since 2005. *Id.*

<sup>146</sup> Nussbaum, *supra* note 119; Smith, *supra* note 123.

<sup>147</sup> See Herman, *supra* note 102 (quoting a brochure from the National Home Finding Society circa the late 1910s or 1920s).

<sup>148</sup> JaeRan Kim, *Some Children See Him: A Transracial Adoptee's View of Color-Blind Christianity*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 2, CHRISTIAN LEGAL SOC'Y, <http://www.clsnet.org/document.doc?id=359>; see *supra* notes 7–9 and accompanying text.

<sup>149</sup> *Id.* at 1. "Back in the fifties, adoption was a shameful, secretive experience . . . a couple might quietly sign with an agency, spirit their new baby away from a hospital, and never, never, tell their child the story of the adoption (or at least, treat it as a

II, the Christian community, too, expanded its scope beyond American shores. In 1955, Harry and Bertha Holt, who famously adopted eight Korean children, began their mission of seeking permanent homes for children orphaned by the Korean War.<sup>150</sup> They went on to establish Holt International, existing today as one of the leaders in the modern evangelical international adoption movement, which emphasizes both the physical and spiritual rescue of orphaned, abandoned, and vulnerable children worldwide.<sup>151</sup>

The last few years have seen an unprecedented evangelical movement towards international adoption.<sup>152</sup> Marked by exponential

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taboo and dole out information gingerly.” Nussbaum, *supra* note 119. Many homes, such as Methodist-based Edna Gladney Home (now operating as Gladney Center for Adoption) and Buckner Baptist Benevolences provided a spiritual place of refuge and instruction for unwed mothers until their children could be adopted by two-parent families. Interestingly, the Edna Gladney Home grew out of the Orphan Train Movement, when Reverend Isaac Zachary Taylor Morris, a Confederate Army Veteran and a circuit-riding Methodist minister, and his wife, Belle, began taking the “leftover” children home from one of the lines that ended in Fort Worth and actively sought adoptive families for them. That was the beginning of the Texas Children’s Home and Aid Society, which became the Edna Gladney Home in 1950. *Gladney Fun Facts*, GLADNEY CENTER FOR ADOPTION, <http://adoptionsbygladney.com/125/funfacts>.

<sup>150</sup> Kim, *supra* note 148, at 1–3; see *Who We Are—Holt International*, HOLT INT’L CHILDREN’S SERVS., <http://holtinternational.org/about/>.

<sup>151</sup> *Who We Are—Holt International*, *supra* note 150. Holt’s literature vividly described overseas conditions as a “hell on earth” from which children could be saved, both materially and spiritually, from the “cold and misery and darkness of Korea” through adoption. Kim, *supra* note 148, at 2–3. The modern evangelical Christian movement draws on this “rescue” mentality as a means of addressing the “orphan crisis,” the idea that there are between 143 and 210 million orphaned children in the world . . . in need of adoption.” KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* 44, 47–52 (2013).

<sup>152</sup> Craig Juntunen, founder of the Both Ends Burning Campaign, addressed Christian adoption advocate Dan Cruver, President and Founder of Together for Adoption, a “key coalition” in the evangelical movement, and others about his plans to increase international adoptions with his proposed “clearinghouse model” that will “raise the number of children adopted into US families to more than 50,000 per year.” Dan Cruver, *Video Interview with Craig Juntunen, Executive Producer of the Acclaimed Documentary STUCK*, TOGETHER FOR ADOPTION, <http://www.togetherforadoption.org/?p=16224>; JOYCE, *supra* note 151, at 229–34 (describing Juntunen’s “crusade . . . to create an adoption of culture”); Kathryn Joyce, *The Evangelical Adoption Crusade*, *THE NATION* (Apr. 21, 2011), available at <http://www.thenation.com/article/160096/adoption-commandment#>. Part of Juntunen’s Campaign is The Culture of Adoption Movement, which strives to “make every child’s right to a family an important, relevant, social issue.” *Mission*, BOTH ENDS BURNING (2013), <http://bothendburning.org/about-us/mission/>. As part of his mission, he created the documentary, *STUCK*, to highlight international adoption. Billionaire Foster Friess helped fund the film, exclaiming, “It’s not my money, it’s God’s money.” Napp Nazworth, *New Documentary Highlights Broken International Adoption System*, *THE CHRISTIAN POST* (Aug. 1, 2012), <http://www.christianpost.com/news/new-documentary-highlights-broken-international-adoption-system-79276/>.

growth, the “burgeoning orphan care” and adoption movement has become the poster child of the evangelical community, creating “rainbow congregations” comprised of families whose children come in many different colors from many different nations.<sup>153</sup> Leaders in the evangelical community have engaged in an active campaign to encourage the adoption of orphans worldwide.<sup>154</sup> As part of their efforts to mobilize church families to respond to God’s call to save the estimated 153 million orphans worldwide, Christian adoption groups such as the Christian Alliance for Orphans have hosted national adoption conferences where attendees can hear motivational speakers and get practical advice on adoption.<sup>155</sup> And each year, coinciding with National Adoption Awareness

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<sup>153</sup> Trevin Wax, *Books to Note*, CHRISTIANITY TODAY (July 8, 2011), <http://www.christianitytoday.com/ct/2011/july/quicktakes-jul11.html> (describing the movement in his book review of *Orphanology: Awakening to Gospel-Centered Adoption and Orphan Care*). Highview Baptist Church in Louisville, Kentucky, is one such example; it has welcomed 140 foreign-born children into its church in a five-year period. Joyce, *supra* note 152. Highview Baptist Church is pastored by *Adopted for Life* author Russell Moore. *Id.* See *infra* notes 154–68 and accompanying text for more on Moore and his philosophy.

<sup>154</sup> Russell Moore, *Adopted for Life* author and Dean of the School of Theology at the Southern Baptist Theological Seminary in Louisville, pushed through a Southern Baptist Convention resolution calling on the denomination’s sixteen million members to become involved in adoption or orphan care. One speaker at the 2010 Adopting for Life Conference exhorted, “Get as many people in the church to adopt, and adopt as many kids as you can.” Joyce, *supra* note 152. Moore was one of the speakers at the conference. See Russell Moore, *Reflections on Adopting for Life 2010*, MOORE TO THE POINT BLOG (Mar. 4, 2010 7:10 AM), <http://www.russellmoore.com/2010/03/04/reflections-on-adopting-for-life-2010>.

<sup>155</sup> CHRISTIAN ALLIANCE FOR ORPHANS, *Global Orphans Facts*, <http://www.christianalliancefororphans.org/resources/orphan-facts/orphan-facts-global-orphan-care/>. Heralded as the not-to-be-missed conference of the year, the 2012 Christian Alliance for Orphans’ National Summit was hosted by Saddleback Church, pastored by *The Purpose Driven Life* author Rick Warren. The conference held 80 workshops—“designed to inspire, connect, and equip families and churches to become communities known for adoption, foster care, and global orphan initiatives”—for 2,000 attendees. Ministry Banking Guy, *A Conference Worthwhile—The Christian Alliance for Orphans’ National Summit*, ECCU BLOG (Apr. 24, 2012), <http://blog.eccu.org/2012/04/24/a-conference-worthwhile%e2%80%94the-christian-alliance-for-orphans%e2%80%99-national-summit/>. The 2013 conference, Summit9, touted as the “national hub” of the movement, was held at Brentwood Baptist Church in Nashville, Tennessee, where more than 2,500 participants, from 49 states and 25 countries, heard from national adoption advocates and policy makers, such as Senator Mary Landrieu, Representative Michele Bachmann, and Ambassador Susan Jacobs, alongside Christian movement leaders, including CAFO President Jedd Medefind, Russell Moore, and Dan Cruver. *Summit9*, CHRISTIAN ALLIANCE FOR ORPHANS, <http://www.summit9.org/>. Dan Cruver’s organization held its Together for Adoption National Conference 2012 in Atlanta, Georgia, promising to take 1,000 people “deeper into God’s story of Adoption to give hope and practical tools” for those seeking adoption. *2012 National Conference*, TOGETHER FOR ADOPTION, [http://www.togetherforadoption.org/?page\\_id=11942](http://www.togetherforadoption.org/?page_id=11942). Its 2013 Conference is slated for October 13–14, 2013, at Southern Baptist Theological Seminary, where Russell Moore is Dean, and will focus on “The Story that Changes Everything—for Us and

Month, as many as 1,000 churches participate in national Orphan Sunday.<sup>156</sup> Devoted to rallying the body of Christ for the cause of orphans, the day's events include sermons, concerts, prayer gatherings, luncheons, and youth activities in an effort to "Answer the Cry" to "God's Heart for Adoption."<sup>157</sup> As interest has increased, a new genre emphasizing "orphan theology," or "adoption theology," and defense of the "fatherless" has emerged.<sup>158</sup>

Primarily made up of evangelical Christians, the movement offers a theological basis for adoption and equates the Biblical directive to "look after orphans and widows in their distress" and "defend the cause of the weak and fatherless" as synonymous with adoption. The majority view behind the current Christian international adoption and orphan care movement rests on a foundation that embraces adoption as the primary way of understanding and proclaiming the gospel.<sup>159</sup> Those that adhere to the modern movement see direct correlations between the Christian's adoption into God's family and the adoption of children into Christian families.<sup>160</sup> Viewing horizontal adoption as a symbolic representation of God's vertical adoption of his children and central to the Christian message, the evangelical movement "proclaims a call for virtually all

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the Fatherless." *Together for Adoption National Conference 2013*, TOGETHER FOR ADOPTION, <http://www.togetherforadoption.org/natcon2013/>.

<sup>156</sup> See ORPHAN SUNDAY, <http://orphansunday.org/>. Begun by a pastor in Lusaka, Zambia, Orphan Sunday spread to the United States through the efforts of Every Orphan's Hope and is now an initiative of the Christian Alliance for Orphans. ORPHAN SUNDAY, <http://orphansunday.org/about/>.

<sup>157</sup> Jedd Medefind, *Local Stories as Orphan Sunday Campaign Poised to Launch*, CHRISTIAN ALLIANCE FOR ORPHANS (June 27, 2011), <http://www.christianalliancefororphans.org/2011/06/27/local-stories-as-orphan-sunday-campaign-poised-to-launch/>.

<sup>158</sup> See Joyce, *supra* note 152 (noting that "orphan theology" books teach that adoption mirrors Christian salvation and "is a means of fulfilling the Great Commission, the biblical mandate that Christians spread the gospel"); see *James* 1:27 (New International Version); *Psalms* 82:3. "The Biblical terms 'orphan' and 'fatherless' are understood as synonymous terms referring to infants or children without any active parental care." David M. Smolin, *Of Orphans and Adoption, Parents and the Poor, Exploitation and Rescue: A Scriptural and Theological Critique of the Evangelical Christian Adoption and Orphan Care Movement*, 8 REGENT J. INT'L L. 267, 269 (2012).

<sup>159</sup> Michael P. Schutt, *Dissenting Opinions*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 3, 3. Schutt traces the genesis of the current evangelical movement to a 2004 sermon preached by John Piper on *Ephesians* 1:1–6. *Id.* "Paul, an apostle of Christ Jesus by the will of God, To the saints in Ephesus, the faithful in Christ Jesus: Grace and peace to you from God our Father and the Lord Jesus Christ. . . . Praise be to the God and Father of our Lord Jesus Christ, who has blessed us in the heavenly realms with every spiritual blessing in Christ. For he chose us in him before the creation of the world to be holy and blameless in his sight. In love he predestined us to be adopted as his sons through Jesus Christ, in accordance with this pleasure and will—to the praise of his glorious grace, which he has freely given us in the One he loves." *Ephesians* 1:1–6 (New International Version).

<sup>160</sup> Schutt, *supra* note 159, at 3.

Christians to be involved in adoption. . . . in a way far more central than the typical ‘ministries’ of the church.”<sup>161</sup>

Many proponents of the evangelical orphan movement justify adoption as an opportunity to spread the gospel to other nations in fulfillment of the Great Commission and believe that adopting internationally allows them to respond to that higher calling.<sup>162</sup> As one evangelical adoption proponent declared, “the ultimate purpose of human adoption by Christians, therefore, is not to give orphans parents, as important as that is. It is to place them in a Christian home that they might be positioned to receive the gospel.”<sup>163</sup> Or, as another evangelical phrased it, “Adoption is not just about couples who want children—or who want more children. Adoption is about an entire culture within our churches, a culture that sees adoption as part of our Great Commission mandate and as a sign of the gospel itself.”<sup>164</sup> To that end, many American Christians have focused their adoption efforts overseas, adopting from Russia, Ethiopia, China, Haiti, and other nations, seeing an opportunity to expand Christendom to the nations even as they

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<sup>161</sup> Smolin, *supra* note 158, at 271–72. That includes financial support, as Christians are encouraged to consider giving money to those pursuing adoption. See RUSSELL D. MOORE, *ADOPTED FOR LIFE: THE PRIORITY OF ADOPTION FOR CHRISTIAN FAMILIES AND CHURCHES* 188 (2009) (“Your congregation can encourage and equip the adoption of infants and children. Your church can preach the gospel and care for the vulnerable. You can provide the funds and the encouragement and the prayer support for untold numbers of Great Commission families.”). Once cost-prohibitive to middle- and lower-income families, prospective parents have utilized creative fundraising efforts to finance their international adoptions, including borrowing from family and friends, holding adoption garage sales and auctions, and shopping with programs, such as iGive.com, that dedicate percentages of purchases to adoption accounts. Melissa B. Jacoby, *The Debt Financing of Parenthood*, 72 *LAW & CONTEMP. PROBS.* 147, 157–58, 158 & n.63 (2009). Churches and organizations offer grants and loans that frequently condition the monies on such characteristics as a child’s origin or religious observance, often inquiring into church involvement, views of marriage, and even intended teachings on subjects such as creationism and redemption. *Id.* at 148, 167–68. And some banks, such as Bank of America and JP Morgan Chase, now offer loans, credit cards, and home-equity lines of credit specifically to fund the costs of adoptions. *Id.* at 148, 165–66.

<sup>162</sup> MOORE, *supra* note 161, at 181. “There are Christians, after all, adopting in large numbers. Even so, why isn’t adoption an emphasis as a Great Commission priority for more of our churches? Adoption is, after all, evangelistic to the core. When a Christian family adopts a child, that family is committing to years of gospel proclamation, of seeking to see this child come to faith in Christ.” *Id.*

<sup>163</sup> Kim, *supra* note 148, at 4 (quoting DAN CRUVER, *RECLAIMING ADOPTION: MISSIONAL LIVING THROUGH THE REDISCOVERY OF ABBA FATHER* 15 (2011) (internal quotation marks omitted)).

<sup>164</sup> MOORE, *supra* note 161, at 19. The phrase “Great Commission” is not found in the Bible; rather, it is a term coined by the Christian community to refer to Jesus’s instruction to his followers to “go and make disciples of all nations . . . teaching them to obey everything I have commanded you.” *Matthew* 28:19 (New International Version).

expand their families.<sup>165</sup> Christians are challenged, “What better opportunity for you to model the God who adopts from every tongue, tribe, nation, and language and sets all the children together at the same table with the same inheritance and the same love?”<sup>166</sup>

Many parents adopt overseas because they believe they have a better chance of receiving an infant than if they were to adopt in the United States.<sup>167</sup> And this approach is encouraged by evangelical leaders as better stewardship, offering advice such as, “The younger the child is, the more opportunity you will have to bring up that child in Christian nurture and instruction, to form the character and eternal destiny of this son or daughter.”<sup>168</sup> In other words, parents have a better chance of molding children into better Christians if they are adopted and invested in as infants and toddlers, an opportunity they believe that international adoption affords.

Not all evangelical Christians share these views of adoption. Some Christian leaders have struck hard at both the theology behind and the practice of the evangelical orphan care and adoption movement.<sup>169</sup> Professor David Smolin suggests that “the scriptural and theological analysis undergirding the evangelical adoption and orphan care movement is patently and seriously erroneous.”<sup>170</sup> Discounting the claim that the New Testament “supposedly [urges] horizontal adoption as a fundamental practice of the church,” Smolin advances that argument is

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<sup>165</sup> Evangelical adoption agency Bethany Christian Services, which provides adoption services in over 17 countries, announced last year that its adoption placements had increased 13% since 2009, largely because of church mobilization. Joyce, *supra* note 152; BETHANY CHRISTIAN SERVICES, ANNUAL REPORT 2012 (2012). A growing body of sociology and economics studies on peer effect and reproduction suggests that the number of children people have may depend upon their observation of the number of children others have—a “keeping up with the Joneses” peer effect in the familial context. Cohen & Chen, *supra* note 18, at 534 n.167 (citing Susan Cotts Watkins, *From Local to National Communities: The Transformation of Demographic Regimes in Western Europe, 1870–1960*, 16 POPULATION & DEV. REV. 241, 262 (1990)); Ilyana Kuziemko, *Is Having Babies Contagious? Estimating Fertility Peer Effects Between Siblings* 5–6 (June 2006) (unpublished manuscript), available at [http://www1.gsb.columbia.edu/mygsb/faculty/research/pubfiles/5799/fertility\\_11\\_29\\_06.pdf](http://www1.gsb.columbia.edu/mygsb/faculty/research/pubfiles/5799/fertility_11_29_06.pdf). This view might suggest that the increased culture of adoption that is invading the evangelical churches is not so much a response to a higher call, but a “keeping up with the Joneses” within Christian circles that is being fueled by Christian leaders and proponents of adoption.

<sup>166</sup> MOORE, *supra* note 161, at 107. Referencing former First Lady Hillary Clinton’s popular use of an African proverb in her book *It Takes A Village*, that same evangelical posed, “[a]fter all, it takes more than a village to adopt a child, at least for those of us in Christ. It takes a church.” *Id.* at 187–88.

<sup>167</sup> Historically, more than 70% of the children adopted internationally are age two and under, see U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99, while the majority of the children adopted from foster care are over age two. See 2013 AFCARS Report, *supra* note 1, at 5.

<sup>168</sup> MOORE, *supra* note 161, at 149–50.

<sup>169</sup> See, e.g., Smolin, *supra* note 158.

<sup>170</sup> *Id.* at 268.

“without any Biblical record of anyone actually encouraging Christians to adopt, and without any record of Christians actually adopting orphan children.”<sup>171</sup> Indeed, a careful examination of the gospels reveals no mention of the word “adoption,” nor does any Old Testament or Jewish law authorize adoption.<sup>172</sup> At best, according to Smolin, adoption is “clearly a metaphor” that the apostle Paul, a Roman citizen, borrowed from the pagan practice of the Roman Caesars as an illustration to the Gentiles of the foreign concept of being adopted into God’s house.<sup>173</sup> It had nothing to do, however, with the adoption of vulnerable orphans and was not a mandate for Christians to go into the world and adopt children in the name of Christianity.<sup>174</sup>

Further, Smolin posits these theological errors relied on by Christians do nothing more than produce and further “exploitative practices,” where children are relinquished for payment, where children are illicitly obtained through fraud, kidnapping, or purchase, and where children are unwillingly laundered or trafficked into child slavery.<sup>175</sup> Smolin denounces a movement that both uncritically participates in adoption systems that produce such practices and that tacitly condones efforts to save “paper orphans.”<sup>176</sup> Indeed, undermining the whole

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<sup>171</sup> *Id.* at 295–96.

<sup>172</sup> *Id.* Smolin notes that adoption is absent from all of the gospels and the only direct references to the word or concept of adoption in the New Testament occur in three letters written by Paul: *Romans* 8:15, 8:23, 9:4; *Galatians* 4:5; and *Ephesians* 1:5. *Id.* at 274–96. Not willing to abandon their adoption theology, Christian adoption proponents now refer euphemistically to the acknowledged dearth of adoption references in the Bible as “the recovery of adoption.” This new jargon explains that the theology of adoption is not as developed as it should be because the early church was “primarily concerned with defining and defending the doctrines of Christ and the Trinity” and later, the doctrine of justification. With those battles having been won, the church can now recover the theology of adoption. See TOGETHER FOR ADOPTION, *Why a Conference on the Theology of Adoption?*, [http://www.togetherforadoption.org/?page\\_id=13748](http://www.togetherforadoption.org/?page_id=13748).

<sup>173</sup> *Id.* at 274, 287. Paul’s references to “adoption” or “sonship” were illustrative of the Roman practice of adopting promising young adult males by emperors and nobles to provide a suitable heir for the family. *Id.* at 286–95. This practice was displayed in the movie *Ben-Hur* when Roman consul Quintus Arrius adopted adult Judah Ben-Hur, bestowed him with the family ring, and pronounced him publicly as his son. *BEN-HUR* (Metro-Goldwyn-Mayer 1959).

<sup>174</sup> See Smolin, *supra* note 158. Smolin goes as far to say that the modern American view of adoption, which severs family lines, is inapposite to the Biblical traditions of maintaining biological lineage, even in instances of death, and that adopting a child from a poor, widowed mother “would in fact be a form of exploitation condemned by the Bible.” *Id.* at 308–10.

<sup>175</sup> *Id.* at 269, 311–20; see also Jedd Medefind, *The Adoption Crusade*, CHRISTIANITY TODAY (Apr. 27, 2011), <http://www.christianitytoday.com/ct/2011/aprilweb-only/adoptioncrusade.html> (acknowledging that some of the criticism directed towards the adoption movement is valid and should be heeded by Christians).

<sup>176</sup> Smolin, *supra* note 158, at 323 (arguing the demand for orphans creates inflated supply); see also Medefind, *supra* note 64, at 9 (noting that “only about 10% of [the world’s] children classified as orphans have actually lost both parents”). *But see* CHRISTIAN

rhetoric of the “orphan care” movement that claims to “defend the fatherless” is the very real fact that the numbers of “orphans” are grossly inflated and a great many of these children do, in fact, have parents—poor, uneducated, exploited, and many times misled into relinquishing their children.<sup>177</sup> These troubling practices have caused many people, Christian and secular alike, to reconsider the international adoption trade.

C. *Critics of International Adoption and Efforts to Regulate the Practice*

In just a little over a decade, Americans have adopted more than a quarter of a million foreign children, more than any other single country.<sup>178</sup> However well-meaning those who adopt overseas may be, opposition to international adoption exists. While some view international adoption as an act of humanitarianism or spiritual rescue, others take a more cynical view, seeing international adoption as “neo-colonialist oppression in which rich, white adults use their wealth and power to obtain children from poor and vulnerable families in developing and transition nations.”<sup>179</sup> Critics often pose the question

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ALLIANCE FOR ORPHANS, *Christian Alliance for Orphans' White Paper On Understanding Orphan Statistics*, [http://www.christianalliancefororphans.org/wp-content/uploads/Christian-Alliance-for-Orphans-On-Understanding-Orphan-Statistics\\_.pdf](http://www.christianalliancefororphans.org/wp-content/uploads/Christian-Alliance-for-Orphans-On-Understanding-Orphan-Statistics_.pdf) (recognizing that the number of “double orphans” is a small percentage of the global orphan estimates of 153 million but arguing those statistics should not diminish the high calling to care for vulnerable children).

<sup>177</sup> Smolin, *supra* note 158, at 321. According to Smolin, the church’s appropriation of UNICEF figures, 90% of which includes those children who have lost just one parent, is misleading because UNICEF uses “these large numbers in order to draw attention to children who are vulnerable and potentially in need of some kinds of assistance, as UNICEF as an organization promotes a large range of interventions for children,” whereas, the Christian movement uses them solely as a measure to justify international adoption. *Id.*; Joyce, *supra* note 152. *See also, e.g.*, Jordan, *supra* note 112 (chronicling the story of an “orphan” adopted from Ethiopia and her biological father’s account of her relinquishment).

<sup>178</sup> U.S. DEP’T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99. Between 1999 and 2012, Americans adopted 242,602 children from foreign countries. *Id.* In that time period, U.S. citizens adopted 69,326 children from China, 45,861 from Russia, 29,738 from Guatemala, 19,232 from South Korea, 13,091 from Ethiopia, 9,284 from Ukraine, and 5,578 from Vietnam, in addition to thousands from a host of other sender countries. *Id.*; *see* Jordan, *supra* note 112. U.S. adoptions historically account for half of the world’s international adoptions each year, and statistics estimate that Americans internationally adopt each year as many children as all other countries combined. *Foreign Adoptions Plummet*, *supra* note 106; Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010*, ADOPTION ADVOCATE, Feb. 2012, at 2, Table 1, available at [https://www.adoptioncouncil.org/images/stories/documents/NCFA\\_ADOPTION\\_ADVOCATE\\_NO44.pdf](https://www.adoptioncouncil.org/images/stories/documents/NCFA_ADOPTION_ADVOCATE_NO44.pdf).

<sup>179</sup> David M. Smolin, *Thinking About Adoption*, J. CHRISTIAN LEGAL THOUGHT, Spring 2012, at 4, 5; *see* Estin, *supra* note 121, at 55–56. *Accord* JOYCE, *supra* note 151, at 5 (highlighting a statement released in the aftermath of the Haiti earthquake by the Adoptees of Color Roundtable, an organization of adult adoptees, that characterized the following rush to adopt in Haiti “as a colonialist and racist

whether the abuses that have occurred by some can still justify the end result for others or whether international adoption itself is a form of cultural exploitation that can never be justified.<sup>180</sup>

*1. Aiding or Victimizing International Countries?*

There can be little argument that international adoption is a booming business for developing countries, and for that reason, many countries embrace the practice. International adoption generates revenues for countries that would not have been realized otherwise. For example, Guatemala was, until recently, a leading sender of children to the United States.<sup>181</sup> At the peak of its adoption business, adoptions in Guatemala cost an average of \$30,000 per child.<sup>182</sup> Amounting to an annual \$100 million industry, children became the country's "second-most lucrative export after bananas."<sup>183</sup>

Additionally, monies in the form of "orphanage fees" are paid directly to orphanages.<sup>184</sup> China, for instance, imposes an additional orphanage fee of \$3,000 to \$5,000 for each international adoption to help with the support of children who are not placed and who remain in the orphanage.<sup>185</sup> American families adopted 7,903 children from China in 2005 and 6,492 children in 2006; even using the measure of the lesser \$3,000 fee, Chinese orphanages directly received over \$43 million in orphanage fees in just two years.<sup>186</sup> Considering that Americans have adopted 69,326 children from China just since 1999,<sup>187</sup> this amounts to a conservative estimate of more than \$200 million in revenue to these orphanages during that time period alone.

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movement that disregarded Haitian family structures in favor of Western parents' sense of entitlement to developing nations' children").

<sup>180</sup> Many claim international adoption is a form of "cultural theft that makes these children, their families, and their countries worse off." Cohen & Chen, *supra* note 18, at 527. *But see* Bartholet, *supra* note 85, at 182–85 (advancing that international adoption, even with its flaws, addresses issues of poverty and social injustice at least for a few in the poor and sending countries of the world); Dillon, *supra* note 91, at 209 (finding it frustrating that most writings on the subject of international adoption claim it is an inherently corrupt practice that must be entirely eliminated).

<sup>181</sup> U.S. DEP'T OF STATE, *Intercountry Adoption: Statistics*, *supra* note 99.

<sup>182</sup> Haroldo Martinez & Russell Goldman, *U.S. Adoptions Fueled by Guatemalan Kidnappings*, ABC NEWS (May 13, 2008), <http://abcnews.go.com/print?id=4787761>.

<sup>183</sup> *Id.*

<sup>184</sup> Bartholet, *supra* note 85, at 184–85.

<sup>185</sup> *Id.*; *see also* U.S. DEP'T OF STATE, *Intercountry Adoption: China* (June 2011), [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=china](http://adoption.state.gov/country_information/country_specific_info.php?country-select=china) (noting that the orphanage fee is in place and that the institution where the adopted child was raised may require a \$5,000 donation and fee for caring for the child).

<sup>186</sup> *See* Bartholet, *supra* note 85, at 185; U.S. DEP'T OF STATE, *Intercountry Adoption: China*, *supra* note 185.

<sup>187</sup> U.S. DEP'T OF STATE, *Intercountry Adoption: China*, *supra* note 185.

Many believe the rapid increase of international adoptions, involving such substantial sums of money, has led to a tide of corruption and abusive practices.<sup>188</sup> Proving Lord Acton's dictum that "power tends to corrupt, and absolute power corrupts absolutely,"<sup>189</sup> many governments involved in the "international baby business" have succumbed to corruption.<sup>190</sup> Reports of baby-selling and kidnapping scandals have become widespread, as in the high-profile case where a Guatemalan court ruled that an American family could not keep their seven-year-old adopted daughter because she had been kidnapped from her birth mother when she was two years old.<sup>191</sup> Reports surfaced in India that scouts and adoption agencies paid birth parents, some as little as \$3 to \$10, for their children.<sup>192</sup> Likewise, investigators exposed cases where Ethiopian families were lied to, paid, or otherwise defrauded to obtain their children for adoption.<sup>193</sup> Orphanages often employed middlemen to find adoption candidates in rural villages; these scouts allegedly persuaded parents to relinquish their children in return for the promise of a better life for the child and eventual support back to the family from the child.<sup>194</sup> Many parents did not understand they would never see their child again.<sup>195</sup> These scenarios, played out too often in these countries, are viewed by many as "yet another indication of American imperialism, arrogance and exploitation," where the poor and powerless exist to satisfy the needs of the rich and powerful at any cost.<sup>196</sup>

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<sup>188</sup> Ethiopia provides an illustration of this increase. In 2004, Ethiopia sent 284 children to other countries for adoption. By 2007, the number rose dramatically to 1,254. By 2010, it had increased to 2,511. In a little more than one decade, Americans adopted 13,091 children from Ethiopia. U.S. DEP'T OF STATE, *Intercountry Adoption: Ethiopia* (June 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=ethiopia](http://adoption.state.gov/country_information/country_specific_info.php?country-select=ethiopia).

<sup>189</sup> BARLETT'S FAMILIAR QUOTATIONS 154 (John Bartlett ed., 17th ed. 2002).

<sup>190</sup> See, e.g., *Foreign Adoptions Plummet*, *supra* note 106 (describing Guatemala as an example).

<sup>191</sup> *Id.*

<sup>192</sup> The children were later adopted by parents who paid up to \$22,000 per child. Maldonado, *supra* note 41, at 1451 & n.179.

<sup>193</sup> LaPlante, *supra* note 112.

<sup>194</sup> Jordan, *supra* note 112.

<sup>195</sup> See Muse Tegegne, *Don't Adopt from Ethiopia*, ETHIOPIANIZATION BLOG (May 5, 2012), <http://www.ethiopianization.com/2012/05/dont-adopt-from-ethiopia.html> (explaining that poor nations often live on remittances and in traditional African culture, unlike American, families send their children to live with richer families with the understanding that the relative will send money back to support the rest of the family); see, e.g., Jordan, *supra* note 112.

<sup>196</sup> DellaCava et al., *supra* note 7, at 148. "These countries are ashamed of the fact that they're not able to take care of these children. For me, there's a whiff of cultural imperialism in the transaction. You don't see people from Korea coming here to adopt babies." *Id.* (quoting film director John Sayles). Indeed, Korean adoptions were limited after an American television reporter covering the 1988 Olympics in Seoul commented that the large number of international adoptions might be "embarrassing, perhaps even a national shame" to Koreans. *Id.* John Sayles' 2003 film,

Because stories like these are becoming all too common,<sup>197</sup> many well-respected organizations have taken a more cautious view of international adoptions.<sup>198</sup> UNICEF's official position, consistent with certain NGOs, the U.N. Convention on the Rights of the Child, and the Hague Convention,<sup>199</sup> prefers that children be placed in "a family setting in their country of origin" before consideration of international adoption.<sup>200</sup> UNICEF's policy statement notes that in many countries, "requirements and procedures in place were insufficient to prevent unethical practices," such that "[s]ystemic weaknesses persist and enable the sale and abduction of children, coercion or manipulation of birth parents, falsification of documents, and bribery."<sup>201</sup> Many believe that such systemic abuses in international systems can never justify participation in what is coming to be seen as an illicit trade.

Facing notable pressure, several countries embroiled in scandals have either voluntarily curtailed their own programs or have been effectively shut down by the U.S. and other nations.<sup>202</sup> One of the first was Romania. After the fall of the Ceausescu regime, television reports exposed the rampant neglect that children had endured in Romanian orphanages.<sup>203</sup> The country's "persistent abandonment of children, child abuse and neglect" and "profitable trade in child trafficking" led some to call the country's child care system "corrupt from top to bottom."<sup>204</sup> When Romania attempted to join the European Union, it was warned that it would not be allowed to join without a complete overhaul of its

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*Casa de los Babys*, depicts a group of four wealthy American women who travel to a Latin American country to pick up babies to take back home, leaving behind the unhappy families of the children and the street children who were not so lucky. Bartholet, *supra* note 32, at 354–55. Not wanting to lose their children to wealthier countries, several countries have reduced the amount of children they make available for adoption to encourage domestic adoption. Maldonado, *supra* note 41, at 1464–65.

<sup>197</sup> See, e.g., Maldonado, *supra* note 41, at 1448–50. Mothers in Guatemala were pressured to give up babies for small gifts or payments; some were stolen outright. Romanian nuns forced single mothers to give up their children and then received \$15,000 for each child. Children in Colombia were bought for \$600 and then sold to foreigners for \$10,000. *Id.* at 1449 n.166.

<sup>198</sup> Bartholet, *supra* note 32, at 340.

<sup>199</sup> See *infra* Part III.C.2 regarding international measures such as the U.N. Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.

<sup>200</sup> UNICEF's *Position on Inter-Country Adoption*, UNICEF (May 26, 2012), [http://www.unicef.org/media/media\\_41918.html](http://www.unicef.org/media/media_41918.html); accord Dillon, *supra* note 91, at 254 (suggesting that UNICEF, while claiming to be neutral, actually believes that international adoption is essentially "a vestige of colonialism").

<sup>201</sup> UNICEF's *Position on Inter-Country Adoption*, *supra* note 200.

<sup>202</sup> Dillon, *supra* note 91, at 243; *Foreign Adoptions Plummet*, *supra* note 106.

<sup>203</sup> Dillon, *supra* note 91, at 248–49.

<sup>204</sup> *Romania Implements Law Restricting International Adoptions*, S.E. EUR. TIMES, (Mar. 1, 2005), [http://setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2005/01/04/feature-01](http://setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/01/04/feature-01) (internal quotation marks omitted).

child care system.<sup>205</sup> Bowing to demands by EU officials, Romania banned all further international adoptions of Romanian children.<sup>206</sup>

A decade later, upon reports of baby-selling and child-trafficking, the United States immigration department took the unprecedented step of refusing to grant further visas for adoption from Cambodia, effectively shutting down further U.S. adoptions from that country.<sup>207</sup> Many Americans who wished to give a better life to an orphan from an impoverished country found out that the children they had adopted were in fact purchased, sometimes for the cost of a bag of rice, from vulnerable young women.<sup>208</sup> It was the first time the United States government had cited a country's adoption system as being too corrupt to deal with.<sup>209</sup> Ten years later, the United States is still not partnering with Cambodia.<sup>210</sup>

Currently, due to similar concerns, the United States has pulled the plug on Guatemalan adoptions until that country "has fully revamped its system to root out corruption."<sup>211</sup> As a result, international adoptions from Guatemala to the U.S., which reached a peak of 4,726 in 2007 (the year before the curtailment), trickled to just 32 in 2011.<sup>212</sup> And

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<sup>205</sup> *Id.*

<sup>206</sup> After a three-year moratorium, Romania once again allowed adoptions, but restricts international adoptions to biological grandparents. *Id.*

<sup>207</sup> Dillon, *supra* note 91, at 244–45; see Maldonado, *supra* note 41, at 1445, 1451.

<sup>208</sup> Alan B. Goldberg & Deb Apton, *U.S. Families Learn Truth About Adopted Cambodian Children*, ABC 20/20 (Mar. 25, 2005), <http://abcnews.go.com/2020/International/story?id=611826&page=1>.

<sup>209</sup> Dillon, *supra* note 91, at 244–45.

<sup>210</sup> On March 19, 2012, the U.S. State Department noted that it "continues to support Cambodia's efforts to create a child welfare system and an intercountry adoption process that fulfills its obligations under the Hague Adoption Convention" and noted that the time period for receiving adoption petitions in that country had been delayed until January 1, 2013, to allow the Cambodian government time to establish child welfare structures required by the Hague Convention. U.S. DEP'T OF STATE, *Cambodia Notice: Update of Status of Adoptions in Cambodia*, (Mar. 19, 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=cambodia\\_3](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=cambodia_3). However, on January 2, 2013, the State Department alerted that, because Cambodia still did not have a fully functional Convention process in place, it would not be able to process adoptions from that country. U.S. DEP'T OF STATE, *Cambodia Notice: Update on Status of Intercountry Adoptions between the United States and Cambodia* (Jan. 2, 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=cambodia\\_5](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=cambodia_5).

<sup>211</sup> *Foreign Adoptions Plummet*, *supra* note 106. Alison Dilworth, adoptions division chief at the U.S. Office of Children's Issues, charges the Guatemalan system as having "incredible problems with fraud." *Id.*

<sup>212</sup> U.S. DEP'T OF STATE, *Intercountry Adoption: Guatemala* (Mar. 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=guatemala](http://adoption.state.gov/country_information/country_specific_info.php?country-select=guatemala). The U.S. government, concerned that Guatemala cannot meet its Hague Convention obligations, notes that the "Guatemalan National Adoption Council (CNA) announced in September 2008 that [CNA] would not accept any new adoption cases at that time." *Id.*

responding to reports of corruption in its country, Ethiopia's Ministry of Women's Affairs (MOWA) recently announced a dramatic 90% reduction in the number of adoptions it would process, in addition to tighter regulations, to ensure the legitimacy of those adoptions.<sup>213</sup> The United States has responded to the Ethiopian action by noting that recent media reports "alleging direct recruitment of children from birth parents by adoption service providers or their employees remain a serious concern for the Department of State" and cautioning prospective adoptive parents they should be aware that not all children in orphanages or children's homes are adoptable.<sup>214</sup> Other countries have been shut down in the face of corruption and scandal, most recently in Nepal, Senegal, and the Democratic Republic of the Congo.<sup>215</sup>

## 2. *International Regulations on Intercountry Adoption*

Recognizing that "international adoption often degenerated into little more than the buying and selling of children who were not necessarily orphans,"<sup>216</sup> the international community banded together to establish a set of conventions regarding intercountry adoption.<sup>217</sup> One of

<sup>213</sup> LaPlante, *supra* note 112.

<sup>214</sup> U.S. DEP'T OF STATE, *Intercountry Adoption: Ethiopia*, *supra* note 185. In its latest update, the State Department included a warning that, "[i]n many countries, birth parents place their child(ren) temporarily in an orphanage or children's home due to financial or other hardship, intending that the child return home when this becomes possible. In such cases, the birth parent(s) have rarely relinquished their parental rights or consented to their child(ren)'s adoption." *Id.*

<sup>215</sup> After reports emerged of babies being sold for as little as \$3 to \$10, the Indian government imposed a rule requiring that 50% of adoptions be in-country. Bartholet, *supra* note 85, at 193; Maldonado, *supra* note 41, at 1451. Vietnam shut down its adoptions to the U.S. in 2008, after the U.S. raised concerns about alleged fraud in Vietnam's adoption process. E.J. Graff, *Anatomy of an Adoption Crisis*, FOREIGN POLICY (Sept. 12, 2010), [http://www.foreignpolicy.com/articles/2010/09/07/anatomy\\_of\\_an\\_adoption\\_crisis](http://www.foreignpolicy.com/articles/2010/09/07/anatomy_of_an_adoption_crisis). Nepal was shut down upon charges of child-trafficking, and then again "over State Department suspicions that 90 percent of 'orphans' offered for adoption had been bought and sold." JOYCE, *supra* note 151, at 216; U.S. DEP'T OF STATE, *Notice: U.S. Department of State Continues to Recommend Against Adopting from Nepal* (Dec. 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=nepal\\_5](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=nepal_5). Senegal has joined this list, Juntunen, *supra* note 118, as has the Democratic Republic of the Congo, due to recent concerns about improper adoptions. U.S. DEP'T OF STATE, *Alert: Democratic Republic of the Congo Immigration Authorities Suspend Issuance of Exit Permits to Adoptees* (May 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=alerts&alert\\_notice\\_file=democratic\\_republic\\_of\\_congo\\_1](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=alerts&alert_notice_file=democratic_republic_of_congo_1).

<sup>216</sup> DellaCava et al., *supra* note 7, at 152.

<sup>217</sup> Estin, *supra* note 121, at 50–51. The United States has been a member of the Hague Conference on Private International Law since 1964. *Id.* at 51 n.15. Beginning in 1956, the Hague Conference began adopting a series of conventions which aimed at cooperation between contracting nations on various areas of law. *Id.* (citing Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L.Q. 553, 585–99 (1993)). The United States declined to join many of the conventions until it signed the Convention on Protection of Children and Co-

the first notable, the United Nations Convention on the Rights of the Child (U.N. Convention), mandated that “primary consideration” be given to the “best interests of the child.”<sup>218</sup> Known as a “human rights” measure, the U.N. Convention focused on children’s substantive rights to, among other things, a home and family, education, health and medical care, and protection from abuse and neglect.<sup>219</sup> Although the U.N. Convention, adopted in 1989, was ratified by almost every other country, the United States chose not to ratify it, presumably because its focus on international federalism conflicted with the traditional role of the state in U.S. family law.<sup>220</sup>

Despite the U.N. Convention’s noted commitment to children’s rights, many saw a disconnect between its stated aims and the denial of those same rights in practice. For example, the U.N. Convention sought to preserve “continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.”<sup>221</sup> To accomplish this aim, the U.N. Convention favored suitable in-country placement and treated international adoption only as a last resort.<sup>222</sup> Many interpreted “suitable” to include institutional care and could not reconcile how the U.N. Convention could treat foster and institutional care as a suitable domestic placement over available intercountry adoption.<sup>223</sup> Accordingly, the U.N. Convention received much criticism for promoting nationalism over the stated right of every child to have a family.<sup>224</sup>

Several years later, the 17th session of the Hague Conference drafted and adopted the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention).<sup>225</sup>

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operation in Respect of Intercountry Adoption. *See infra* note 220 and accompanying text.

<sup>218</sup> G.A. Res. 44/25, art. 3, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), [hereinafter Convention on the Rights of the Child].

<sup>219</sup> *Id.* arts. 7, 9, 10, 24, 28; *see* Dillon, *supra* note 91, at 204–05.

<sup>220</sup> Only the United States and Somalia refused to ratify the Convention on the Rights of the Child. Bartholet, *supra* note 85, at 171; *see* Estin, *supra* note 121, at 54 n.41, 66. “The United States’ failure to ratify the [U.N. Convention] may be explained in part by its traditional focus on privacy in the family sphere, strong parental rights, and freedom from state interference, rather than the granting of affirmative rights.” Laura McKinney, *International Adoption and the Hague Convention: Does Implementation of the Convention Protect the Best Interests of Children?*, 6 WHITTIER J. CHILD & FAM. ADVOC. 361, 365 (2007).

<sup>221</sup> Convention on the Rights of the Child, *supra* note 218, art. 20.

<sup>222</sup> Bartholet, *supra* note 32, at 378. Article 21 of the U.N. Convention provides that “inter-country adoption 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.” Convention on the Rights of the Child, *supra* note 218, art. 21(b).

<sup>223</sup> Dillon, *supra* note 91, at 205–06, 223; *see* Bartholet, *supra* note 32, at 378.

<sup>224</sup> Dillon, *supra* note 91, at 206, 208 & n.100.

<sup>225</sup> Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1134–46 (1993). The Hague Convention, as well as the Convention on the Rights of the Child, leave it “entirely to

Completed in 1993, the Hague Convention improved upon the U.N. Convention by providing safeguards in the form of regulations for both sending and receiving countries.<sup>226</sup> U.S. officials signed the Hague Convention in 1994, and it was ratified by the United States in 2000 when President Clinton signed the Intercountry Adoption Act of 2000.<sup>227</sup> It was finally implemented on April 1, 2008, after regulations were promulgated.<sup>228</sup> The Hague Convention depends heavily on the “ongoing cooperation of government authorities in contracting states” and requires countries to set up a central adoption authority for regulation and oversight.<sup>229</sup> The United States designates the Secretary of State as the central authority for administration of the Hague Convention in the United States.<sup>230</sup> Interestingly, that office was held for the last several years by Hillary Clinton, who as First Lady collaborated with national leaders to encourage child welfare reform, including the passage of the Adoption and Safe Families Act.<sup>231</sup>

The Hague Convention has been lauded for enabling international adoptions but also criticized for curtailing them.<sup>232</sup> Praised for being more of a “best interests convention” than the U.N. Convention, the Hague Convention addresses the issues of corruption and profiteering occurring in international adoptions and places the onus on the contracting states to affirmatively eliminate such practices.<sup>233</sup> If countries comply with its requirements, the Hague Convention endorses the practice of intercountry adoption.<sup>234</sup> Still, the language of the Hague

each country to decide whether to allow their children to be placed in other countries for adoption or not.” Bartholet, *supra* note 32, at 358.

<sup>226</sup> 42 U.S.C. §§ 14901–14954 (2006); see Hague Convention, 32 I.L.M. at 1135; Estin, *supra* note 121, at 55, 83–84.

<sup>227</sup> Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (codified at 42 U.S.C. §§ 14901–14954); Estin, *supra* note 121, at 83–84.

<sup>228</sup> Estin, *supra* note 121, at 83–84.

<sup>229</sup> *Id.* at 49; see Hague Convention, 32 I.L.M. at 1140. The Convention governs only those countries which have ratified it. Bartholet, *supra* note 85, at 173.

<sup>230</sup> 42 U.S.C. § 14911 (2006).

<sup>231</sup> See *supra* notes 25–35 and accompanying text.

<sup>232</sup> Bartholet, *supra* note 32, at 339–40. “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, disqualifying many potential adoptive parents including, for example, singles.” *Id.* at 342–43 (footnotes omitted).

<sup>233</sup> Dillon, *supra* note 91, at 208.

<sup>234</sup> *Id.* at 208 n.101 (citing Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L. Q. 53, 54 (1994) (“The overarching importance of the Convention lies in its endorsement of intercountry adoption when there is compliance with its internationally agreed minimum standards.”)). Simplified, the Hague Convention allows international adoptions when (1) the child’s birth country deems the child eligible for adoption, and (2) all efforts have been made to place the child for adoption in the child’s birth country, (3) no

Convention, as with the U.N. Convention, prefers placement in domestic families over international adoption and makes provisions for international adoption only for those who have no domestic placement option.<sup>235</sup> Thus, although the Hague Convention favorably resolved that international adoption was preferable to institutional care (the “suitable” issue in the U.N. Convention), it retained the language that domestic adoption was paramount.<sup>236</sup> This has led to continued criticism by international adoption proponents that say the Hague Convention does not go far enough in placing the needs of the child over national concerns.<sup>237</sup>

Critics accuse that the Hague Convention, because of its strict guidelines, has served only to create a decline in the number of international adoptions.<sup>238</sup> Undisputedly, the number of international adoptions by Americans has declined in recent years to its lowest point since 2004.<sup>239</sup> Some of the decline may arguably be attributed to changes in the policies of sending countries to comply with the Hague Convention.<sup>240</sup> For example, countries are making more concentrated efforts to place children with domestic families as called for by the Hague Convention. South Korea, in a publicized effort to comply with the

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fraud has occurred in the procurement of the child for adoption, and (4) the adoptive parents are suitable. Hague Convention, 32 I.L.M. at 1139–40.

<sup>235</sup> The preamble dictates that every country “should take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or her family of origin” and recognized “that intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.” Hague Convention, 32 I.L.M. at 1139.

<sup>236</sup> *Id.*

<sup>237</sup> See Dillon, *supra* note 91, at 210–15.

<sup>238</sup> See Juntunen, *supra* note 118. Juntunen leads a movement to create a new system of international adoption in place of the Hague Convention, “so that the world’s orphaned and abandoned children can benefit from the support of a permanent family.” *International Adoption Reform*, CARE2PETITIONSITE, <http://www.thepetitionsite.com/1/orphans/>. Some critics say the Hague Convention has also favored the large adoption agencies because of compliance costs, leading to a consolidation in the adoption agency industry. Cf. Joyce, *supra* note 152 (noting that some adoption advocates attribute criticism of the movement, as well as the effects of the Hague Convention, as described in *supra* notes 211–15, to an “institutional bias’ against international adoption”). See JOYCE, *supra* note 151, at 229–34 (detailing Juntunen’s entrepreneurial approach to international adoption).

<sup>239</sup> U.S. international adoptions decreased from 22,991 in 2004 to 8,668 international adoptions in 2012. U.S. DEP’T OF STATE, *Intercountry Adoption Statistics*, *supra* note 99.

<sup>240</sup> See *Foreign Adoptions Plummet*, *supra* note 106; Cohen & Chen, *supra* note 18, at 547 n.208 (citing Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 INT’L SOC. WORK 575, 575–92 (2009)). But see David M. Smolin, *Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption*, 48 U. LOUISVILLE L. REV. 441, 471–80, 493–94 (2010) (detailing the declines in international adoption from China, Russia, and Guatemala and arguing that independent developments within those countries—and not the Hague Convention—contributed to the decline).

convention, has encouraged domestic adoption within Korea through government incentive, while tightening quotas on those allowed to be adopted internationally.<sup>241</sup> Other countries, as in the case of China and Russia, have implemented changes in their adoption policies to favor domestic placements, which also has served to reduce the number of adoptions.<sup>242</sup> While these changes may have a diminishing effect on the amount of international adoptions, it seems unreasonable that a country's actions to promote domestic adoptions within its own country should be a point of contention or called a chilling effect of the Hague Convention. These actions align with the purposes of the Hague Convention, which seeks the intra-country involvement and treats international adoption only as a last resort when a home cannot be found

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<sup>241</sup> *The Careful Deliberation Before Child Adoption and Family Court Permit System is Being Introduced*, S. KOREA MIN. OF HEALTH & WELFARE (Mar. 12, 2012), available at [http://english.mohw.go.kr/front\\_eng/cs/scs0401vw.jsp?PAR\\_MENU\\_ID=1004&MENU\\_ID=100406&page=1&CONT\\_SEQ=267666&SEARCHKEY=TITLE&SEARCHVALUE=adoption](http://english.mohw.go.kr/front_eng/cs/scs0401vw.jsp?PAR_MENU_ID=1004&MENU_ID=100406&page=1&CONT_SEQ=267666&SEARCHKEY=TITLE&SEARCHVALUE=adoption); *Expert Discussion on the Hague Convention on Intercountry Adoption Held*, S. KOREA MINISTRY OF HEALTH & WELFARE, [http://english.mohw.go.kr/front\\_eng/cs/scs0401vw.jsp?PAR\\_MENU\\_ID=1004&MENU\\_ID=100406&page=1&CONT\\_SEQ=260611&SEARCHKEY=TITLE&SEARCHVALUE=adoption](http://english.mohw.go.kr/front_eng/cs/scs0401vw.jsp?PAR_MENU_ID=1004&MENU_ID=100406&page=1&CONT_SEQ=260611&SEARCHKEY=TITLE&SEARCHVALUE=adoption). See generally *Foreign Adoptions Plummet*, *supra* note 106. Korea signed the Hague Convention on May 31, 2013, but there is no set date on when it will sign ratification documents or when the Convention will enter into force. U.S. DEP'T OF STATE, *Adoption Notice: The Republic of Korea Signs the Hague Adoption Convention* (May 2013), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=south\\_korea\\_2](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=south_korea_2). The Ministry of Health and Welfare will serve as the Central Authority. *Id.*

<sup>242</sup> Estin, *supra* note 121, at 86–87 & n.221. China bars adoptions to those who, among other things, are not married (defined as between a man and woman), are over age 50, or have a body mass index (BMI) of over 40. Single women and those over 50 to age 55 may adopt a special needs child. U.S. DEP'T OF STATE, *Intercountry Adoption: China*, *supra* note 185; see also Mary Kane, *Adoption Rules Tighten Abroad*, RH REALITY CHECK (May 12, 2008), <http://rhrealitycheck.org/article/2008/05/12/adoption-rules-tighten-abroad> (noting that Russia's efforts to promote domestic adoptions resulted in more Russian children being adopted domestically rather than internationally for the first time since Russia opened its door to foreign adoptions). Negative publicity surrounding adoptions of Russian children by Americans might have played into Russia's recent decision to ban adoption of its children by American after an existing adoption agreement with the U.S. expires in 2014. Wendy Koch, *Adoption Options Plummet as Russia Closes its Doors*, USA TODAY (Jan. 11, 2013), <http://www.usatoday.com/story/news/nation/2013/01/10/adoption-options-plummet-russia-closes-doors/1820853>. In one highly publicized case, a mother put her adopted son on a plane and sent him back to Russia because she could no longer deal with his severe behavioral issues. *Mom Who Sent Adoptive Child Back to Russia Ordered to Pay Child Support*, CBSNEWS.COM (May 18, 2012), [http://www.cbsnews.com/8301-201\\_162-57437258/mom-who-sent-adoptive-child-back-to-russia-ordered-to-pay-child-support/](http://www.cbsnews.com/8301-201_162-57437258/mom-who-sent-adoptive-child-back-to-russia-ordered-to-pay-child-support/). In another publicized case, Russian officials showed up on American soil and demanded to inspect a ranch where parents sent troubled children who had been adopted from Russia. Kirit Radia & Colleen Curry, *Russian Officials Want Access to Ranch Where They Claim U.S. Parents Reportedly 'Dump Unwanted Kids'*, ABC NEWS (Sept. 22, 2012), <http://abcnews.go.com/International/russian-officials-entry-ranch-claim-us-parents-dump/story?id=17292132>.

within the country.<sup>243</sup> When countries are able and willing to provide that home in the child's current cultural environment, adoption advocates should rejoice—unless international adoption truly exists only to provide children for export.

Critics also charge that the Hague Convention's strict guidelines have been "used by leading adopting nations, including the U.S., as a pretext for freezing adoptions from some countries that are out of compliance."<sup>244</sup> They point to the shutdown of adoptions in Guatemala, which had the highest per-capita number of international adoptions of any sending country in the world but which refused to comply with Hague Convention standards.<sup>245</sup> Accordingly, the State Department warned prospective parents not to adopt from Guatemala for the foreseeable future.<sup>246</sup> They also point to Vietnam, which was closed in 2003 after reports of baby selling emerged.<sup>247</sup> In 2005, the State Department entered into a three-year bilateral adoption agreement with the Vietnam government, in an effort to help it establish a reputable adoption system.<sup>248</sup> However, when the agreement expired in 2008, the United States refused to renew the agreement because conditions in

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<sup>243</sup> See *supra* note 235 and accompanying text.

<sup>244</sup> *Foreign Adoptions Plummet*, *supra* note 106 (focusing primarily on governmental crackdowns in Guatemala and Vietnam). See also Kane, *supra* note 242 (noting how critics such as Tom DeFilipo, president of the Joint Council on International Children's Services, which represents international adoption agencies, contend the State Department is bullying and shutting down Vietnam adoptions when it could be working with the government to fix the abuses while allowing legitimate adoptions to continue).

<sup>245</sup> Smolin, *supra* note 240, at 467–68; see Bartholet, *supra* note 32, at 373; Estin, *supra* note 121, at 87–88. The State Department now identifies Guatemala as a Hague Adoption Convention Country, but not a U.S. Hague Partner. U.S. DEP'T OF STATE, *Guatemala*, *supra* note 212.

<sup>246</sup> Bartholet, *supra* note 32, at 373–74. In May 2012, the State Department noted that efforts were being made to complete the adoptions of a limited number of pending cases "where there is no evidence that the child was taken fraudulently from his or her birth family." U.S. DEP'T OF STATE, *Guatemala Update* (May 14, 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=guatemala\\_9](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=guatemala_9). However, by December 2012, the Guatemalan government informed the State Department that 85 children had been reunited with their biological families or placed for domestic adoption and were no longer available for international adoption. U.S. DEP'T OF STATE, *Notice: Update on Intercountry Adoptions in Guatemala* (Dec. 12, 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=guatemala\\_10](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=guatemala_10).

<sup>247</sup> See Estin, *supra* note 121, at 87. Vietnam shut down in 2003 amidst the allegations of corruption, but reopened when an agreement was brokered with the U.S. in 2005. Kane, *supra* note 242; see Graff, *supra* note 215.

<sup>248</sup> Agreement Regarding Cooperation on the Adoption of Children, U.S.-Vietnam, June 21 2005, STATE DEP'T No. 06-10 (2005), available at [http://travel.state.gov/pdf/vn\\_final\\_agreement.pdf](http://travel.state.gov/pdf/vn_final_agreement.pdf).

Vietnam had not improved.<sup>249</sup> U.S. adoption officials and international agencies such as UNICEF maintain that such actions are necessary to maintain the Convention's purposes "to safeguard orphans and keep profit-driven players from corrupting a system that should be purely about helping children."<sup>250</sup>

The problem, however, is that not all nations have ratified the Hague Convention, and many prospective parents are still adopting from these non-member countries.<sup>251</sup> Only members and those that have ratified or acceded to the Hague Convention must abide by its regulations.<sup>252</sup> What results, then, is effectively a "two-tier system . . . in which agencies are constantly opening up adoptions in non-Hague countries in order to escape increased safeguards."<sup>253</sup> One recent example is Ethiopia, which is not a member of the Hague Convention and where thousands of children have been produced for adoption as a result of fraud and

<sup>249</sup> After U.S. embassy officials in Hanoi issued a report detailing new corruption allegations, both countries stated they would not renew the agreement when it expired in 2008, leading to another shutdown in adoptions. *AP: US Alleges Baby-selling in Vietnam*, USA TODAY (Apr. 24, 2008), [http://usatoday30.usatoday.com/news/world/2008-04-24-vietnam-adoptions\\_N.htm](http://usatoday30.usatoday.com/news/world/2008-04-24-vietnam-adoptions_N.htm); see Kane, *supra* note 242. Vietnam became a member of the Hague Convention last year, making U.S. officials hopeful that adoptions might at some point resume; however, to date, while the State Department now identifies Vietnam as a Hague Adoption Convention Country, it notes that it is still not a U.S. Hague Partner. U.S. DEP'T OF STATE, *Intercountry Adoption: Vietnam* (Mar. 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_info.php?country-select=vietnam](http://adoption.state.gov/country_information/country_specific_info.php?country-select=vietnam); *Foreign Adoptions Plummet*, *supra* note 106. Further, the State Department has issued a notice stating that adoptions will not resume despite Vietnam's adoption of the Hague Convention until a fully Hague-consistent practice is in place. U.S. DEP'T OF STATE, *Notice: U.S. Department of State to Delay Resuming Adoptions in Vietnam* (Feb. 2012), [http://adoption.state.gov/country\\_information/country\\_specific\\_alerts\\_notices.php?alert\\_notice\\_type=notices&alert\\_notice\\_file=vietnam\\_4](http://adoption.state.gov/country_information/country_specific_alerts_notices.php?alert_notice_type=notices&alert_notice_file=vietnam_4).

<sup>250</sup> *Foreign Adoptions Plummet*, *supra* note 106.

<sup>251</sup> Compare U.S. DEP'T OF STATE OFFICE OF CHILDREN'S ISSUES, *FY 2012 Annual Report on Intercountry Adoption*, Table 1 (Jan. 2013), [http://adoption.state.gov/content/pdf/fy2012\\_annual\\_report.pdf](http://adoption.state.gov/content/pdf/fy2012_annual_report.pdf), with U.S. DEP'T OF STATE, *Intercountry Adoption: Convention Countries*, [http://adoption.state.gov/hague\\_convention/countries.php](http://adoption.state.gov/hague_convention/countries.php). Since its enactment in 1993, 88 countries have ratified the Hague Convention. *Id.* The United States, however, currently refuses to process adoptions from these Hague countries: Cambodia, Cape Verde, Fiji, Guatemala, Montenegro, Rwanda, Senegal, and Vietnam. *Id.*

<sup>252</sup> U.S. DEP'T OF STATE, *Intercountry Adoption: Convention Countries*, *supra* note 251. The United States notes that it deals with countries that are not identified as Hague Convention countries as "non-Convention countries" that follow "non-Hague adoption procedures." *Id.*

<sup>253</sup> Smolin, *supra* note 240, at 497 (positing that the "current approach by the United States of only applying increased regulatory safeguards to adoptions from Hague countries seems nonsensical and should be discontinued"); see, e.g., Erik Eckholm, *Eager to Adopt, Evangelicals Find Perils Abroad*, N.Y. TIMES (May 31, 2013), <http://www.nytimes.com/2013/06/01/us/moved-to-adopt-evangelicals-find-children-and-pitfalls-abroad.html> (describing unethical concerns related to non-Hague Congolese adoptions).

exploitation.<sup>254</sup> Lacking infrastructure and personnel to oversee what often takes place in the rural pockets of the country, Ethiopia exemplifies the abuses the Hague Convention sought to prevent; however, as long as the United States continues to deal with non-members of the Hague Convention, this “boom-bust” cycle of international adoption will likely continue, as “[c]orruption skips from one unprepared country to the another—until that country gets wise, changes its laws, and corrupt adoptions shift to the next unprepared nation.”<sup>255</sup>

#### IV. FINANCIAL INCENTIVES FOR ADOPTION

Child welfare, including foster care and adoption, traditionally falls within the realm of state law;<sup>256</sup> however, Congress has exerted substantial fiscal control over the child welfare systems through the exercise of its spending power.<sup>257</sup> Recognizing that the adoption process can be a daunting and costly one, federal legislators have sought to incentivize adoption through the passage of subsidies and tax credits.<sup>258</sup>

##### A. *Creation of Subsidies*

To make foster care adoptions more affordable, the Adoption Assistance and Child Welfare Act of 1980 created the first federal

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<sup>254</sup> See *supra* notes 188–95, 213–14, and accompanying text; see, e.g., Jordan, *supra* note 112; Jane Gross & Will Connors, *Surge in Adoptions Raises Concern in Ethiopia*, N.Y. TIMES (June 4, 2007), <http://www.nytimes.com/2007/06/04/us/04adopt.html> (describing an adopting couple’s removal of a five-year-old boy and his twenty-one-month old sister from their grieving Ethiopian mother who clearly loved them).

<sup>255</sup> JOYCE, *supra* note 151, at 132 (citing E. J. Graff, who claims Americans are ignorant of the corruption because their perception about orphans has been distorted by the “myth of the orphan crisis”); Cf. Bartholet, *supra* note 32, at 342–43 (noting a “general pattern of countries opening up with relatively few restrictions on international adoption, and then tightening the regulatory process”).

<sup>256</sup> E.g., Vivek Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 288 (2007).

<sup>257</sup> David J. Herring, *The Multiethnic Placement Act: Threat to Foster Child Safety and Well-Being?*, 41 U. MICH. J.L. REFORM 89, 90 (2007). By 1929, all of the (then) 48 states had statutes governing adoption, and the federal government instituted adoption policies thereafter. DellaCava et al., *supra* note 7, at 144.

<sup>258</sup> See *infra* Parts IV.A–B. Total expenditures to adopt a child can vary from no cost (for foster care adoption) to tens of thousands of dollars, with international adoptions typically costing more than domestic. Prospective parents must prepare applications, participate in home studies, endure placement requirements such as post-placement observation and counseling, and incur expenses, agency, and attorney’s fees. Those that adopt internationally have the extra burdens of travel costs to and from the country of origin and dealing with dual bureaucracies. See Naomi Cahn & the Evan B. Donaldson Adoption Inst., *Old Lessons for a New World: Applying Adoption Research and Experience to ART*, 24 J. AM. ACAD. MATRIMONIAL LAW 1, 18 (2011); Maldonado, *supra* note 41, at 1417–18.

subsidies program under Title IV-E of the Social Security Act.<sup>259</sup> By providing “adoption assistance,” the Act sought to remove the financial disincentives to adoption so as to encourage the adoption of “special needs” children from the foster care system (as opposed to private domestic and international adoption).<sup>260</sup> The federal government assisted the states in providing ongoing monthly subsidies and medical assistance to families that adopted special needs children, as defined by the states.<sup>261</sup> States broadly defined special needs to include those children that are hard to place or have a barrier to placement, such as older children, minority children, sibling groups, and those who have medical conditions or physical, mental, or emotional disabilities.<sup>262</sup> Later amendments allowed for the reimbursement of nonrecurring expenses incurred in the adoption of a special needs child, so that the entire cost of most adoptions from foster care is typically covered.<sup>263</sup>

### B. *The Federal Adoption Tax Credit*

In addition to creating subsidies, Congress established a federal tax credit through the Small Business Protection Act of 1996 to offset the tax liability of those who adopted.<sup>264</sup> The Act allowed deductions for qualified

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<sup>259</sup> Adoption Assistance and Child Welfare Act of 1980 §§ 101, 470–71 (authorizing the subsidy under Title IV–E of the Social Security Act). *See supra* notes 17–21 and accompanying text.

<sup>260</sup> The Act purposed “[t]o establish a program of adoption assistance, to strengthen the program of foster care assistance for needy and dependent children, to improve the child welfare, social services, and aid to families with dependent children programs, and for other purposes.” Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, pmb., 94 Stat. 500 (1980).

<sup>261</sup> *Id.* §§ 471, 473 (amending 42 U.S.C. § 673).

<sup>262</sup> The federal government allows states to develop their own rate structures and definitions. *Id.* § 473(C)(2). Thus, policies related to payment amounts and definitions of special needs differ, providing varying levels of assistance from state to state. *Foster Parents Paid Less Than Cost of Raising Kid*, NBCNEWS.COM (Oct. 3, 2007), [http://www.msnbc.msn.com/id/21105021/nsn/us\\_news-life/t/foster-parents-paid-less](http://www.msnbc.msn.com/id/21105021/nsn/us_news-life/t/foster-parents-paid-less). For example, in Texas, a child with special needs is defined as a child that has at least one of the following needs or circumstances that may be a barrier to placement or adoption without special assistance: (1) Six years of age or older and less than 18 years of age and was in the managing conservatorship of DFPS; (2) Two years of age or older and less than 18 years of age and a member of a minority group that traditionally creates a barrier to adoption and was in the managing conservatorship of DFPS; (3) Member of a sibling group to be adopted together or adopted to join a sibling and was in the managing conservatorship of DFPS; or (4) “verifiable physical, mental, or emotional handicapping condition, as established by an appropriately qualified professional through a diagnosis that addresses” both “what the condition is,” and “how the condition is handicapping.” 40 TEX. ADMIN. CODE § 700.804 (2013).

<sup>263</sup> Tax Reform Act of 1986, Pub. L. No. 99-514, § 1711, 100 Stat. 2085 (1986); *see Cahn, supra* note 258, at 18.

<sup>264</sup> Small Business Protection Act of 1996, Pub. L. No. 104-188, § 1807, 110 Stat. 1755 (codified at 26 U.S.C. § 23 (2006)). Originally introduced as part of the Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong. (1996), the

adoption expenses, including reasonable and necessary adoption fees, court costs, attorneys' fees, and other expenses directly related to the legal adoption of an eligible child.<sup>265</sup> This credit initially was non-refundable; it subtracted the adoption-related expenses from the adoptive parent's total tax liability.<sup>266</sup> The credit was available for children younger than 18 at the time of the adoption, as long as the child was a citizen or resident of the United States,<sup>267</sup> and the income of the adoptive parents had to fall under certain income limits.<sup>268</sup>

When originally passing the federal adoption tax credit, Congress envisioned the promotion of adoption of children from foster care. Clearly indicating that adoption from foster care was a priority, Rep. Louis Stokes stated on the House floor that the adoption tax credit "may make the difference between a child in foster care becoming part of an adoptive family or remaining in foster care indefinitely."<sup>269</sup> The Senate Report explained the reasoning behind the legislation as follows: "The Committee believes that the financial costs of the adoption process should not be [a] barrier to adoption. In addition, the Committee wishes to encourage further the adoption of special needs children."<sup>270</sup>

The vast majority of children adopted from foster care are considered special needs.<sup>271</sup> The tax code, however, does not define special needs, deferring to the states to set the measure for determining special needs status for the adoption credit.<sup>272</sup> Drawing on their definitions of special needs for receiving monthly subsidies,<sup>273</sup> states again broadly defined special needs to include those children who are hard to place or have a barrier to placement with adoptive families, such as older

tax credit was passed as part of the larger Small Business Job Protection Act. *See supra* note 2.

<sup>265</sup> Small Business Protection Act of 1996, § 1807(a) (amending 26 U.S.C. § 23(d)(1)(A)).

<sup>266</sup> *Id.* § 1807(a) (amending 26 U.S.C. § 23(a)(1)). When non-refundable, the tax credit could be carried forward for up to five years if a portion of the credit was unused. *Id.* (amending 26 U.S.C. § 23(c)(1)). The credit could be carried forward except in the case of those who adopted internationally, as those taxpayers could only claim qualifying expenses for the year the adoption was finalized. *Id.* (amending 26 U.S.C. § 23(e)(1)).

<sup>267</sup> *Id.* (amending 26 U.S.C. §§ 23(d)(2)(A), 23(d)(3)(C)).

<sup>268</sup> At the time of enactment, a full credit could be claimed by those making \$75,000 or less. The credit was partially reduced for higher incomes until it was completely phased out at \$115,000 or more. *Id.* (amending 26 U.S.C. §§ 23(b)(2)(A)–(B)).

<sup>269</sup> 142 CONG. REC. E787-02 (1996), 1996 WL 252177 (statement of Rep. Louis Stokes). Rep. Stokes concluded his remarks with, "[a]lthough the bill is not flawless, I support this effort to facilitate the adoption of children, and to decrease the time that many of our children languish in the foster care system." *Id.*

<sup>270</sup> S. REP. NO. 104-279, at 3 (1996).

<sup>271</sup> Eighty-four percent of the 50,000 children adopted through public agencies in 2011 were considered to have special needs. NAT'L TAXPAYER ADVOCATE, 2012 ANNUAL REPORT TO CONGRESS, EXECUTIVE SUMMARY 44 (2012).

<sup>272</sup> 26 U.S.C. §§ 23(d)(3)(B)–(C) (2006).

<sup>273</sup> *See supra* notes 259–63 and accompanying text.

children, minority children, sibling groups, and those who have medical conditions or physical, mental, or emotional disabilities.<sup>274</sup>

Until the passage of the American Taxpayer Relief Act of 2012,<sup>275</sup> Congress treated adoptions from the foster care system differently than international and even private domestic adoptions. Congress allowed an increased tax credit limit of \$6,000 per child for special needs adoptions while limiting the credit to \$5,000 for other types of adoptions.<sup>276</sup> Congress further exempted the special needs tax credit from the sunset provision, making it a permanent part of the tax code, while the tax credit for other adoptions threatened periodically to sunset unless renewed by Congress.<sup>277</sup>

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), as part of the “Bush era tax cuts,” increased the tax credit to \$10,000 for all adoptions in 2002.<sup>278</sup> Furthering the preference for foster care adoption, however, those who adopted special needs children from foster care could claim a “flat” federal adoption tax credit, meaning the full amount of the credit could be claimed whether or not they had actually accrued that amount in adoption expenses.<sup>279</sup> Other adoptions had to show documented expenses, and those who adopted internationally could only claim credit for any incurred expenses following a finalized adoption.<sup>280</sup> In all, between 1999 and 2004, tax claims for adoptions of children with special needs rose 138% and tax credits received increased by 613%.<sup>281</sup> Still, that only accounted for less than 18% of the tax credit dollars in 2004, with more than 82% of the adoption tax credit dollars being claimed by those who adopted internationally and privately.<sup>282</sup>

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<sup>274</sup> See Small Business Protection Act § 1807(a) (amending 26 U.S.C. §§ 23(d)(3)(A)–(C)) (allowing for such definitions).

<sup>275</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

<sup>276</sup> Small Business Protection Act § 1807(a) (amending 26 U.S.C. § 23(b)(1) (2006)).

<sup>277</sup> See *id.* Private domestic and international adoptions, on the other hand, had time limits and were scheduled to expire in 2001. *Id.*

<sup>278</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 202(a)-(b), 115 Stat. 38 (codified as amended in scattered sections of 26 U.S.C. (2001)). EGTRRA also raised the income levels to \$75,000–\$150,000 for 2002. *Id.* § 202(b)(2) (amending 26 U.S.C. § 23(b)(2)). Both the expense and income limits were indexed for inflation with an annual cost-of-living adjustment for subsequent years. *Id.* § 202(h)(2) (amending 26 U.S.C. § 23(h)).

<sup>279</sup> *Id.* § 202(a)(1)(B) (amending 26 U.S.C. § 23(a)(3)).

<sup>280</sup> *Id.* §§ 202(a)(1)(A), (c) (amending 26 U.S.C. §§ 23(a)(1), 23(e)(1)–(2)).

<sup>281</sup> Rob Geen, *The Adoption Tax Credit: Is It an Effective Approach to Promote Foster Care Adoption?*, CHILD TRENDS 3–4 (Aug. 2007), [http://www.childtrends.org/wp-content/uploads/2007/08/Child\\_Trends-2007\\_08\\_07\\_RB\\_AdoptionTaxCredit.pdf](http://www.childtrends.org/wp-content/uploads/2007/08/Child_Trends-2007_08_07_RB_AdoptionTaxCredit.pdf).

<sup>282</sup> *Id.*

Over the years, the amount of the tax credit rose, reaching its highest level of \$13,360 in 2011.<sup>283</sup> However, the tax credit was always non-refundable, meaning it only offset any taxes owed, and it was scheduled to sunset at the end of 2010 and revert to its pre-EGTRRA provisions.<sup>284</sup> The Patient Protection and Affordable Care Act of 2010,<sup>285</sup> the massive health care legislation recently upheld by the United States Supreme Court,<sup>286</sup> extended the credit through 2011, increased it, and made it refundable for the first time, which allowed the taxpayer to receive the amount of the credit directly rather than it being applied to taxes owed.<sup>287</sup> For the tax years 2010 and 2011, claimants received the credit in the form of a refund check.<sup>288</sup> At the end of 2010, President Obama signed the 2010 Tax Relief Act, a package of income tax, estate tax and unemployment provisions, which extended the adoption tax credit through 2012.<sup>289</sup> It capped the tax credit at \$12,650 but returned it to a non-refundable status.<sup>290</sup> Still maintaining a preference for foster care adoption, the tax credit under the 2010 legislation allowed families who adopted special needs children to claim the full credit whether they had qualified adoption expenses or not.<sup>291</sup> All others were required to have qualified adoption expenses to claim the credit.<sup>292</sup>

While the federal adoption tax credit has been among the most generous of tax credits to individual taxpayers, the majority of its

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<sup>283</sup> See Ellis, *supra* note 3.

<sup>284</sup> Economic Growth and Tax Relief Reconciliation Act of 2001 § 203 (amending former 26 U.S.C. § 23(c)). EGTRRA did not apply to taxable years beginning after December 31, 2010. *Id.* § 901.

<sup>285</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010).

<sup>286</sup> Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012).

<sup>287</sup> Patient Protection and Affordable Care Act §§ 10909(a)–(b)(1). The Act also included an income exclusion, which allowed the exclusion of a parent's employer adoption assistance benefits from total net income. *Id.* § 10909(a)(2) (amending 26 U.S.C. § 137).

<sup>288</sup> Patient Protection and Affordable Care Act § 10909(b). The Act extended the tax credit until December 2011 and also allowed those who had adopted between 2005 and 2009 to carry forward credits. Patient Protection and Affordable Care Act § 10909(c); Ellis, *supra* note 3.

<sup>289</sup> Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, §§ 101(b)(c), 124 Stat. 3296 (2010).

<sup>290</sup> See Federal Taxes Weekly Alert, *RIA Special Study: 2010 Tax Relief Act's Two-Year "Sunset Relief" Protects Key Individual Tax Breaks* (Dec. 23, 2010), [http://www.bus.ucf.edu/faculty/ckelliher/file.axd?file=2011%2F1%2Fsun\\_set\\_relief.pdf](http://www.bus.ucf.edu/faculty/ckelliher/file.axd?file=2011%2F1%2Fsun_set_relief.pdf). Under the 2010 Tax Relief Act, the credit phased out for 2012 taxpayers with incomes above \$185,210, and families with incomes of more than \$225,210 were not eligible for the credit. See Amy Feldman, *Families Race to Adopt Before U.S. Tax Credit Ends*, REUTERS (Apr. 24, 2012), <http://www.reuters.com/article/2012/04/24/us-column-adoption-taxcredit-idUSBRE83NOVV20120424>; Ellis, *supra* note 3.

<sup>291</sup> Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 § 101; Federal Taxes Weekly Alert, *supra* note 290.

<sup>292</sup> *Id.*

provisions were never historically a permanent part of the tax code, and every few years its provisions threatened to sunset unless renewed by Congress.<sup>293</sup> Until the recent legislation, only the adoption credit for special needs remained permanent.<sup>294</sup> Indeed, if Congress had taken no action this year, the provisions for international and private domestic adoptions under the 2010 Tax Relief Act would have sunset, and only those who adopted special needs children from foster care would have been eligible for the tax credit in the future.<sup>295</sup> Even for special needs adoptions, the high dollar amounts were scheduled to revert to a non-refundable, pre-2001 level of \$6,000 for expenses incurred after December 31, 2012.<sup>296</sup>

In light of the impending sunset, many notable adoption and child welfare organizations joined forces to form the Adoption Tax Credit Working Group, a collaborative effort dedicated to saving the adoption tax credit.<sup>297</sup> Congress heeded the call, and Rep. Bruce Braley, an Iowa Democrat, introduced the Making Adoption Affordable Act, which sought to permanently extend the adoption tax credit and make it refundable at the previous \$13,360 level.<sup>298</sup> He referenced the children languishing in foster care as the reason needed for the continuation of the tax credit.<sup>299</sup> Capitalizing on the increasing bipartisan support behind Rep. Braley's measure, Senator Mary Landrieu introduced her own companion bill in the Senate.<sup>300</sup> Both bills died in committee, but Congress took up the issue as part of a larger tax measure.<sup>301</sup>

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<sup>293</sup> See Feldman, *supra* note 290. See also *supra* notes 277, 284, 287, and 289 and accompanying text.

<sup>294</sup> See *supra* notes 277, 284, 287, and 289 and accompanying text.

<sup>295</sup> *Id.*

<sup>296</sup> See *supra* notes 264–77 and accompanying text (detailing pre-EGTRRA provisions of the federal adoption tax credit); MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., R42485, AN OVERVIEW OF TAX PROVISIONS EXPIRING IN 2012, 9 (2012).

<sup>297</sup> The Adoption Tax Credit Working Group, which advocates for a permanent, refundable tax credit for all adoptions, is made up of 139 notable organizations, including Adopt America Network, Christian Alliance for Orphans, Dave Thomas Foundation for Adoption, Evan B. Donaldson Adoption Institute, and the National Council for Adoption. SAVE THE ADOPTION TAX CREDIT, <http://adoptiontaxcredit.org/about/>. It encouraged people to sign the online Economic Justice Petition: Make adoption fully refundable for the 2012–2013 tax year. See Rob Dobberstein, *Support HR 4373 and S 3616: Help Make Adoption Affordable; Keep the Tax Credit and Make it Refundable*, CHANGE.ORG (JAN. 2013), <http://www.change.org/petitions/make-adoption-costs-fully-refundable-in-the-2012-2013-tax-years>.

<sup>298</sup> Making Adoption Affordable Act of 2012, H.R. 4373, 112th Cong. § 2(b) (2012); Press Release, Bruce Braley, U.S. Congressman for Iowa, *On Tax Day, Braley Introduces Bill to Renew & Expand Adoption Tax Credit* (Apr. 17, 2012), <http://braley.house.gov/press-release/tax-day-braley-introduces-bill-renew-expand-adoption-tax-credit>. Rep. Braley's bill had the support of 40 bipartisan sponsors. GOVTRACK.US, H.R. 4373, <http://www.govtrack.us/congress/bills/112/hr4373>.

<sup>299</sup> See *infra* notes 347–51 and accompanying text.

<sup>300</sup> Making Adoption Affordable Act of 2012, S. 3616, 112th Cong. (2012). Sen. Landrieu's S. 3616 had the bipartisan backing of seven other senators. GOVTRACK.US,

To avert the so-called “fiscal cliff” at the end of 2012, President Obama began 2013 by signing into law the American Taxpayer Relief Act of 2012, passed at the eleventh hour by both houses of Congress.<sup>302</sup> The legislation extended the credit as it was at the time of the Bush-era tax cuts, or the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) provisions, allowing a \$10,000 credit, indexed for inflation, for all adoptions after December 31, 2012.<sup>303</sup> Also with that legislation, the federal adoption tax credit became permanent for all adoptions, not distinguishing between special needs and other adoptions.<sup>304</sup> The credit for special needs adoptions remained flat, meaning those who adopted from the foster care system could claim the maximum credit regardless of their expenses.<sup>305</sup> But the legislation also made the credit non-refundable, meaning those who have no tax liability will not receive the credit.<sup>306</sup> The extension of the adoption credit is estimated to cost taxpayers \$5.580 billion over the next ten years.<sup>307</sup>

*C. Who Benefits from the Tax Credit?*

Nearly 100,000 tax returns claimed \$1.2 billion in adoption tax credits for 2010.<sup>308</sup> Some families have received refunds as large as \$24,300 to \$54,000.<sup>309</sup> In originally passing the federal adoption tax credit, Congress expressly sought to provide an incentive for adopting

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S. 3616, <http://www.govtrack.us/congress/bills/112/s3616>. Both bills shared nearly identical language and sought to “amend the Internal Revenue Code of 1986 to make permanent the expansion of tax benefits for adoption enacted in 2001 and to permanently reinstate the expansion of tax benefits for adoption enacted in 2010.” H.R. 4373; S. 3616.

<sup>301</sup> See GOVTRACK.US, H.R. 4373, *supra* note 298; GOVTRACK.US, S. 3616, *supra* note 300. Mark McDermott, a Washington, D.C. adoption attorney who serves as legislative director of the American Academy of Adoption Attorneys, believed that a stand-alone bill would not be successful, but correctly predicted that a credit would be enacted in 2013 as part of a larger tax and finance bill. See Feldman, *supra* note 290.

<sup>302</sup> American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, 126 Stat. 2313 (2013).

<sup>303</sup> American Taxpayer Relief Act of 2012 § 101(a); see Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 202, 115 Stat. 38 (2001). The legislation also provided for a \$10,000 income exclusion for employer-assistance programs as enacted in the EGTRRA. Those with incomes of \$150,000 are eligible for the full credit, with phase-outs for higher incomes. See S. COMM. ON FINANCE, 112TH CONG., SUMMARY OF PROVISIONS IN THE AMERICAN TAXPAYER RELIEF ACT OF 2012, 3–4.

<sup>304</sup> See S. COMM. ON FINANCE, *supra* note 303, at 3.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-12-98, ADOPTION TAX CREDIT: IRS CAN REDUCE AUDITS AND REFUND DELAYS 3–4 (2011). Since its enactment in 1996, American taxpayers have claimed \$4.28 billion in adoption tax credits. *Id.* at 3–4.

<sup>309</sup> Ellis, *supra* note 3.

special needs children, or those from the foster care system.<sup>310</sup> However, statistics indicate that the federal adoption tax credit is not having the desired effect in promoting adoptions from the foster care system as much as it is funding foreign adoptions.<sup>311</sup>

Even before the credit became refundable, questions arose as to the effectiveness of the tax credit in the promotion of adoption of foster children. A 2007 study examined data provided by the U.S. Treasury from an analysis of income tax returns filed between 1999 and 2005 and found that, in the vast majority of cases, the tax credit was being used to support private or foreign adoptions rather than adoptions from foster care.<sup>312</sup> The study also found that the tax credit disproportionately supported higher-income families and those adopting younger children, typically, the profile of parents who adopt internationally.<sup>313</sup> The study's estimation that 82% of the adoption tax credit dollars were being claimed by those who adopted internationally and privately is not out of line with State Department data that indicates that those who adopted internationally accounted for 45% of the claimed tax credit in 2004.<sup>314</sup> With 45% funding international adoptions, 38% subsidizing private domestic adoptions, and less than 18% funding special needs adoptions, the study found that the credit was not effective in fulfilling its original purpose of subsidizing adoptions from the foster care system.<sup>315</sup>

Current statistics also show that lower income families tend to adopt from foster care while higher income families go abroad. In her annual report to Congress, Nina Olson, the National Taxpayer Advocate, observed that nearly half the children adopted from foster care live in households with incomes of no higher than twice the poverty threshold.<sup>316</sup> Olson noted that the express intent of Congress in establishing the tax credit was to target the credit to low- and middle-income families.<sup>317</sup> Those are generally the very households with little to

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<sup>310</sup> See *supra* notes 269–71 and accompanying text.

<sup>311</sup> Cohen & Chen, *supra* note 18, at 526 n.146 (citing DEP'T OF THE TREASURY, REPORT TO THE CONGRESS ON TAX BENEFITS FOR ADOPTION 3–5 (2000)); Kanoy, *supra* note 2, at 211.

<sup>312</sup> Geen, *supra* note 281, at 1. The Child Trends Research Brief reviewed “data provided from the U.S. Treasury from an analysis of income tax returns filed between 1999 and 2005.” *Id.* at 1 & n.4.

<sup>313</sup> *Id.* at 1. Those making over \$75,000 received two-thirds of the tax credit dollars, and more than 70% of the tax credit dollars were spent on children age five and younger. Only about 10% of higher-income families (those making over \$100,000 annually) adopted from foster care, and very few adopted older children. *Id.* at 1–2.

<sup>314</sup> *Id.* at 2. Taxpayers in 2004 claimed adoption tax credit benefits for 23,296 foreign children. *Id.* at 4.

<sup>315</sup> *Id.* at 2, 4; see *supra* notes 281–82 and accompanying text.

<sup>316</sup> NAT'L TAXPAYER ADVOCATE, *supra* note 271, at 10. The latest poverty guidelines set the poverty line at \$23,550 last year for a family of four. Annual Update on the HHS Poverty Guidelines, 78 Fed. Reg. 5182-83 (Jan. 24, 2013).

<sup>317</sup> NAT'L TAXPAYER ADVOCATE, *supra* note 271, at 10.

no tax liability for the credit to offset. If any change should have been made with the recent legislation, it should have been to make the special needs credit permanently refundable so that lower-income families adopting from foster care could benefit from it—not to make the credit permanent but non-refundable for all types of adoptions.

#### V. THE FEDERAL ADOPTION TAX CREDIT: DOES IT PROMOTE OR THWART SOCIAL JUSTICE?

International adoption involves the formation of families beyond the bounds of national borders and is marked by a common characteristic—the typical adoptive parents are “relatively privileged white people from one of the richer countries of the world, and typically they will be adopting a child born to a desperately poor birth mother belonging to one of the less privileged racial and ethnic groups in one of the poorer countries of the world.”<sup>318</sup> Opponents point out that international adoption is at best a “band-aid operation” that helps only a few select children overseas, while ignoring the needs of children at home.<sup>319</sup> Proponents of international adoption advance that the greater human need transcends political boundaries. They see a world without boundaries that does not delineate between children born in the U.S. and children who, by the accident of birth, are born into developing nations.

Many proponents of international adoption, such as Harvard Law School Professor Elizabeth Bartholet, adhere to a cosmopolitan view of social justice, seeing the global needs of children.<sup>320</sup> Under this view, advanced by scholars Martha Nussbaum and Charles Beitz, individual interests trump nationalistic concerns.<sup>321</sup> Viewing national borders as having no fundamental moral significance, cosmopolitan theorists recognize “the increasing interdependence of today’s world erodes the case for limiting redistributive duties to within the nation-states.”<sup>322</sup> As

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<sup>318</sup> Bartholet, *supra* note 85, at 152–53.

<sup>319</sup> Elizabeth Bartholet, *International Adoption, in CHILDREN AND YOUTH IN ADOPTION, ORPHANAGES, AND FOSTER CARE* 63, 71 (Lori Askeland ed., 2006).

<sup>320</sup> Prof. Bartholet sits as one of the Board of Directors for Both Ends Burning, Juntunen’s organization that seeks to create a new system of international adoption in place of the Hague Convention. Craig Juntunen, *Courage in the Adoption Waiting Game*, HUFFINGTON POST (May 1, 2012), [http://www.huffingtonpost.com/craig-juntunen/courage-in-the-adoption-w\\_b\\_1464366.html](http://www.huffingtonpost.com/craig-juntunen/courage-in-the-adoption-w_b_1464366.html); *see supra* note 152 (describing the organization).

<sup>321</sup> Cohen & Chen, *supra* note 18, at 528. For years, scholars have debated the correct approach to international involvement. Much scholarship has been produced far beyond the scope of this paper regarding the very complex distributive justice theories. What is offered here is an extremely simplified view of these theories to provide a small lens through which the differing views of the current international adoption trend can be viewed and understood.

<sup>322</sup> *Id.* (citing CHARLES R. BEITZ, *POLITICAL THEORY AND INTERNATIONAL RELATIONS* 151 (1979); THOMAS W. POGGE, *REALIZING RAWLS* 247 (1989) (arguing

such, it does not matter if a child is born within the United States or in Ethiopia; aid should not be dependent upon whether the child is a “member[] of the nation-state or outside of its borders.”<sup>323</sup> And as citizens of the world and a nation that is capable of providing help to these children, she and others work towards a worldview that responds to the needs of all children.

The problem with the cosmopolitan theory is that Americans, theoretically, do not pay taxes to other nations. Americans pay taxes to fund child welfare in this country, and American tax dollars are presently being given to those who seek out children from other nations, rather than helping their own. Thus, on the other end of the spectrum, opponents of international adoption point to a statist view of international justice, held by scholars like John Rawls and Thomas Nagel, where nationalistic concerns override prevailing global concerns.<sup>324</sup> Under this distributive justice theory, the interests of those outside of national boundaries do not amount to those within a shared common boundary.<sup>325</sup> That is because those who adhere to a statist theory seek mutual advantage, “a scheme of social cooperation that involves reciprocal benefits and burdens and mutual coercion,” a structure that is “present among nation-states [but] absent in the international order.”<sup>326</sup>

In between the two points on the distributive justice theory continuum, and where this paper lies, are those that recognize some duty of concern for interests outside of the coercive structure of the nation-state, but also relegate that concern as secondary to the interests of those within shared borders.<sup>327</sup> Scholars such as Joshua Cohen, Charles Sable, and Norman Daniels have called these the duties of “inclusion.”<sup>328</sup> Proponents of this position concede the primacy of the statist position, but they also posit that conditions might trigger a nation to expand its commitment to lesser duties of inclusion.<sup>329</sup> They focus on a middle

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that the country into which one is born is like race, gender, and social class, and that denial of primary goods based on any of these characteristics would be morally arbitrary)).

<sup>323</sup> *Id.* (citing BEITZ, *supra* note 322, at 143–53; MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 291, 313–20 (2006) (presenting a Capabilities/Functioning approach to the cosmopolitan theory); Charles R. Beitz, *Justice and International Relations*, 4 *PHIL. & PUB. AFF.* 360, 373–83 (1975) (presenting a Rawlsian cosmopolitan view)).

<sup>324</sup> Cohen & Chen, *supra* note 18, at 528–29 (citing JOHN RAWLS, *THE LAW OF PEOPLES* 30–64, 93 n.6, 107–20 (1999); Thomas Nagel, *The Problem of Global Justice*, 33 *PHIL. & PUB. AFF.* 113, 118, 127–30 (2005)).

<sup>325</sup> *Id.* at 529.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* at 531.

<sup>328</sup> *Id.*

<sup>329</sup> *Id.* & n.159 (quoting NORMAN DANIELS, *JUST HEALTH: MEETING HEALTH NEEDS FAIRLY* 346 (2008) (“proposing an approach that ‘focus[es] on a middle ground between strongly statist claims that egalitarian requirements of social justice are solely the domain of the nation-state and its well-defined basic structure and

ground between the regards of the statist solely for the nation-state and the global justice concerns of the cosmopolitans, calling for “some form of humane assistance” to burdened states and those human beings who face extreme threats and obstacles, as long as it is “without serious sacrifice of our own ends.”<sup>330</sup>

The problem with the cosmopolitan theory in regard to the federal adoption tax credit for international adoption is that there is no way of getting around the “serious sacrifice of our own ends” against which the middle ground cautions. Even if one were to agree that the greater needs of those around the world call for inclusion, such inclusion under the balanced intermediate approach would be warranted only when there is no detriment. Here, there is a detriment, as there is no justification for compelling American citizens to bear the burden to underwrite international adoptions, especially when the situation has not improved for foster care adoptions. As one commentator recognized, U.S. taxpayers already “collectively bear some of the burden of adoption through the tax system[, as] the tax credits for adoption-related expenses reduce the general revenue raised through the taxes we all pay,”<sup>331</sup> and it is not at all clear that the American public should be called upon to further subsidize international adoptions.

Proponents of international adoption cite to the injustices suffered by those who are relegated to orphanages or worse, to the streets, in foreign countries. They argue that nothing “could be more humane . . . than to remove seemingly unwanted, even discarded, children from what appear to be lives of misery.”<sup>332</sup> But they forget that American foster children are doubly discarded—first by their parents, then by their

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strong cosmopolitan claims that principles of justice apply to individuals globally, regardless of the relations in which they stand or the institutional structures through which they interact”) (alterations in original).

<sup>330</sup> *Id.* at 529–30 n.156 (quoting Nagel, *supra* note 324, at 118, 131). Even statist theorist Nagel will concede this intermediate position. See Nagel, *supra* note 324, at 118, 131. In a similar vein, some scholars submit there are circumstances, such as famine, extreme poverty, and caste systems that do not enable people “to live as rationally autonomous agents, capable of selecting and pursuing plans of life in accordance with individual conceptions of the good,” so that aid should be given irrespective of citizenship. Michael Blake, *Distributive Justice, State Coercion, and Autonomy*, 30 PHIL. & PUB. AFF. 257, 271 (2001). But other scholars have warned, “[w]e ought to be cautious in specifying the level of deprivation needed to trigger these humanitarian duties since the resulting duties are not adoption-specific; that is, if we decide a particular kind of deprivation is enough to trigger our duty to rescue these children waiting for adoption, we will bear a comparable duty to all citizens of that foreign country in comparable conditions. Too expansive a conception of the humanitarian duty will result in few meaningful differences between obligations of humanitarian and distributive justice and may have significant implications for issues like our general immigration policy that Nagel (and others) have sought to avoid.” Cohen & Chen, *supra* note 18, at 530 n.158.

<sup>331</sup> Cohen & Chen, *supra* note 18, at 526.

<sup>332</sup> Maldonado, *supra* note 41, at 1453 (quoting INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE, *supra* note 84, at 2) (alterations in original).

nation—in favor of children abroad. International adoption overlooks the United States' discarded children, and the tax code actually reinforces that practice by subsidizing the foreign adoptions.

In other words, though Professor Bartlett and others currently advocate tipping the scales towards a cosmopolitan view of distributive justice regarding international adoptions, to do so requires the “serious sacrifice of our own ends”—the favoring of children abroad over our own—that statist theorists and even those who take a middle approach cannot condone, especially with taxpayer dollars. And as recent scholars have bluntly noted, “To put the point forcefully, while it is evident why the U.S. government should care about the welfare of *American* children waiting for adoption, it is less clear whether it should care about negative effects on the life prospects of those waiting for adoption internationally.”<sup>333</sup>

Bartholet points out that many children, homeless or in orphanages, live in such destitute conditions worldwide, “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 world.”<sup>334</sup> But the reality, even as Bartholet recognizes, is that international adoption “only provides concrete help to a tiny percentage of the many millions of homeless children in need” and, due to governmental restrictions in many sender nations, “only a relative few get out.”<sup>335</sup> And to focus on international adoption, to the neglect of children in foster care in this country, ignores the fact that this nation's children may also be so damaged by their childhood experience and deprived of essential childhood opportunities that they, too, might “fail to thrive” and enter American society unable “to function in the world.”<sup>336</sup> Indeed, 20 years ago, Prof. Bartholet declared, “Recent problems in the foster-care system provide additional evidence of two well-known facts: 1) foster care is no place for children to grow up; and 2) large and increasing numbers of children are doomed to grow up there.”<sup>337</sup> Recent statistics on children aging out of the foster care system, as shown in the Midwest Study, bear this out.<sup>338</sup>

Bartholet further advances, “Moreover, even if sacrificing some identifiable children to benefit a larger group could be morally justified, it seems this should only ever be acceptable if one was very sure that the strategy would work.”<sup>339</sup> That is what international adoption does. It sacrifices identifiable children—those in American foster care—to benefit children from abroad. Even if the imported children become

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<sup>333</sup> Cohen & Chen, *supra* note 18, at 528.

<sup>334</sup> Bartholet, *supra* note 32, at 375.

<sup>335</sup> *Id.* at 342, 350.

<sup>336</sup> *Id.* at 375.

<sup>337</sup> Elizabeth Bartholet, *In Foster-Care Limbo*, BOSTON GLOBE, Mar. 17, 1992, at 17, available at <http://www.law.harvard.edu/faculty/bartholet/pdfs/limbo.pdf>.

<sup>338</sup> See *supra* Part II.B.

<sup>339</sup> Bartholet, *supra* note 32, at 366 (emphasis omitted).

happy, productive, American citizens, how can that be morally justified, using Bartholet's own argument, when our own children languish in a system that many times leaves them unable to function in American society as adults? Further, why should the American taxpayers be compelled to support such a practice? As one editorialist in *The Columbus Dispatch* declared, "The tax credit was meant to be a tool to encourage and enable public adoptions, not an entitlement to anyone who adopts."<sup>340</sup>

The question that arises then is what role should the United States government play in helping families adopt from other countries? Should the government take a cosmopolitan view and encourage international adoptions? The answer, even under an intermediate distributive justice position, has to be "no." Instead of encouraging, through subsidization, international adoptions to "get a few of those out" of other countries, the government should focus its efforts—and tax dollars—on those children lost in the American foster care system. By curtailing the tax credit for international adoptions, and allowing it to be claimed only for public domestic adoptions, resources might focus on efforts to reclaim children from foster care at an earlier age.

Last year, U.S. Senator Mary L. Landrieu, a member of the Senate Appropriations Committee and a strong child advocate, questioned Secretary of State Clinton about international adoption during Clinton's testimony on a State Department budget request.<sup>341</sup> In response, Secretary Clinton emphasized that the goal of the State Department in helping vulnerable children in other countries is to employ a multi-pronged strategy that focuses on broad-based acceptance of the Hague Convention, improvement of adoption systems, and out-of-home care for vulnerable children.<sup>342</sup> While Clinton acknowledged there had been over 9,000 intercountry adoptions in the previous year, she stressed that, in line with the Hague Convention's objectives, the number one goal was not to get children out of other countries (and into our own), but to "work with other nations to do more themselves to take care of their vulnerable children. . . . to just get them to focus on their own children."<sup>343</sup> Thus, the United States' stated approach is more akin to an intermediate view of international justice obligations. It does not rest on a statist position where interests are contained within national boundaries; it recognizes that the welfare of children might transcend national boundaries. But, it does not swing all the way to a cosmopolitan

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<sup>340</sup> Editorial, *Adjust Course: Tax Credit Meant to Help Foster Children Has Gone Off Track*, COLUMBUS DISPATCH, (Aug. 22, 2007), available at [http://www.dispatch.com/content/stories/editorials/2007/08/22/adopt.ART\\_ART\\_08-22-07\\_AS\\_8E7M80U.html](http://www.dispatch.com/content/stories/editorials/2007/08/22/adopt.ART_ART_08-22-07_AS_8E7M80U.html).

<sup>341</sup> *State, Foreign Operations, and Related Programs Appropriates for Fiscal Year 2013: Hearing on H.R. 5857/S.3241 Before the S. Subcomm. on State, Foreign Operations, and Related Programs*, 112th Cong. 33 (2012) (statement of Sen. Mary Landrieu).

<sup>342</sup> *Id.* at 34 (statement of Sec. Hillary Clinton).

<sup>343</sup> *Id.*

view, because the interests of the nation-state count more than competing interests abroad. In other words, as a matter of political philosophy, international adoption is allowed, but only when a foreign country cannot take care of its own, and when it is not detrimental or does not involve “serious sacrifice” to our own—i.e., to those in foster care.

The federal adoption tax credit, however, currently subsidizes all adoptions. In other words, the tax credit is very cosmopolitan in nature, providing funding for foster care adoptions, private domestic adoptions, and international adoptions—and nations around the world are helped because of it. International adoption helps sending countries, as they receive thousands of dollars in adoption fees and are further relieved of the financial burden of supporting their nation’s children.<sup>344</sup> The United States, as a leading receiving country, takes on not only the burden of support of each of those children, but it also underwrites those adoptions through the current tax code. The intent of Congress in allowing the federal adoption tax credit was to alleviate the tax burden by offering a tax credit to encourage adoption from foster care, thus reducing the taxpayer’s annual burden as more children found permanent homes.<sup>345</sup> However, under the current system, not only do American tax dollars fund the foster care system, taxpayers are required to fund the personal choices of those who choose to adopt internationally—to the taxpayers’ economic disadvantage and, most importantly, to the detriment of those in foster care.

## VI. CONCLUSION

The federal adoption tax credit has been one of the most generous individual tax credits in the U.S. tax code.<sup>346</sup> But the reality is that Americans are funding the adoption of foreign children to the detriment of those whom the statute was originally intended to help. When promoting his Making Adoption Affordable legislation, Rep. Braley announced on his website that he supported a permanent, refundable, tax credit for adoption because adoption not only creates homes for children, but it also costs taxpayers less money.<sup>347</sup> According to statistics gathered by his office, as of 2010, “foster care costs to taxpayers averaged \$47,000 per child, per year.”<sup>348</sup> With roughly 400,000 children in foster care, that means taxpayers are paying approximately \$18.8 billion

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<sup>344</sup> Bartholet, *supra* note 85, at 184–85.

<sup>345</sup> See Kanoy, *supra* note 2, at 209. “Because an increase in the number of children adopted from foster care has the potential to decrease the amount of foster care funding, the credit may help offset the cost of foster care, making it well worth the expense.” *Id.*

<sup>346</sup> See Feldman, *supra* note 290.

<sup>347</sup> See Press Release, Bruce Braley, U.S. Congressman, *supra* note 298.

<sup>348</sup> *Id.*

annually in foster care costs. On top of that, the United States government is providing \$1.2 billion to individuals in claimed adoption tax credits<sup>349</sup>—in all, a \$20 billion burden shared by American taxpayers. It is hard to argue with Rep. Braley's rationale: "It's a small investment that provides a big return: getting more children into loving homes and out of the costly foster care system. When a policy puts more kids in loving homes and also saves taxpayers millions of dollars in the process, expanding it should be a bipartisan no-brainer."<sup>350</sup>

Indeed, tax credits paid for adoptions from the foster care system further the initial intent of Congress, providing permanent adoptive homes to those in foster care while alleviating a \$47,000 burden on American taxpayers for each child adopted.<sup>351</sup> What is less clear is why the American people are being asked to fund the same tax credit for those who adopt internationally. Using taxpayer money to fund adoption of children from other countries, and granting the same tax credit for it, does nothing to alleviate the number of children still left in the American foster care system. And it does nothing to alleviate the taxpayers' burden—rather, it adds to it.

The problem is that international adoption has become idealized and even a bit glamorized. And when the American public sees celebrities and others seeking out children from foreign countries to adopt, the message that is lost is that it is no less humanitarian (perhaps it is even more so, as it does not carry the attached glamour or high call) to adopt one of the hundred thousand children waiting in the United States foster care system.<sup>352</sup> If humanitarian or missional reasons truly are the driving force behind many of the international adoptions, then somehow there has been a disconnect, as those standing right in front and most in need of adoption are being consistently overlooked by the ones most able to adopt.<sup>353</sup> Interestingly, in the last ten years or so, more

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<sup>349</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 308, at 3–4.

<sup>350</sup> Press Release, Bruce Braley, U.S. Congressman, *supra* note 298. Sen. Landrieu sets foster care expenditure at \$25 billion. Senator Landrieu, TWITTER (May 21, 2013 8:47 AM), <https://twitter.com/SenLandrieu>.

<sup>351</sup> See *supra* notes 348–50 and accompanying text.

<sup>352</sup> See *Domestic vs. International Adoption: Are Celebrities Overlooking American Children?*, FOXNEWS.COM (Apr. 3, 2009), <http://www.foxnews.com/entertainment/2009/04/03/domestic-vs-international-adoption-celebrities-overlooking-american-children/>. Currently, 101,719 children within the foster care system await adoption. 2013 AFCARS Report, *supra* note 1, at 1.

<sup>353</sup> See *Domestic vs. International Adoption*, *supra* note 352. Many celebrities, including Sandra Bullock, Charlize Theron, Sheryl Crow, Viola Davis, Kristen Davis, Diane Keaton, Tom Cruise, Nicole Kidman, Calista Flockhart, Mariska Hargitay, Michelle Pfeiffer, Jamie Lee Curtis, Edie Falco, Rosie O'Donnell, Kirk Cameron, and George Lucas, among others, have adopted domestically, though not necessarily through the foster care system. Rosen & Rueb, *supra* note 143; Smith, *supra* note 123; Britni Danielle, *Why Charlize Theron's Adoption of a Black Baby is a Good Thing*, CLUTCH (Mar. 16, 2012), <http://www.clutchmagonline.com/2012/03/why-charlize-therons-adoption-of-a-black-baby-is-a-good-thing/>. Katherine Heigl and Josh Kelley also

than 200,000 children have aged out of the United States foster care system, roughly the same number of children that have been internationally adopted.<sup>354</sup>

Some celebrities do advocate adoption through the foster care system. Noted director Steven Spielberg and his wife Kate Capshaw adopted two African American children from the Los Angeles child welfare system.<sup>355</sup> Together they established the Children's Action Network, a non-profit organization dedicated to improving the lives of all foster care children and to finding permanent homes for the children in foster care waiting for adoption.<sup>356</sup> And Nia Vardolos, of *My Big Fat Greek Wedding* fame, also adopted through the U.S. foster care system and has become the spokesperson for National Adoption Day.<sup>357</sup>

Even some leaders within the evangelical Christian community are beginning to adhere to the concept that the orphan care movement should first be concerned with the primacy of family preservation before taking a child outside of her local community. The African Child Policy Forum admonishes that "every effort should be made to ensure that the whole system is about finding a family for a child, as opposed to finding a child for a family."<sup>358</sup> Bill Blacquiere, President of Bethany Christian Services, which works in Africa, has embraced this position, stating that every effort should be made by adoption and family preservation agencies, in tandem with national governments, to provide services that allow children to stay "in their home country with loving families who can properly care for them."<sup>359</sup> And not all evangelicals are blind to the needs

recently added to their family through a domestic adoption. Megan Pacella, *Josh Kelley, Katherine Heigl Reveal Details About New Adopted Daughter*, TASTE OF COUNTRY (May 16, 2012), <http://tasteofcountry.com/josh-kelley-katherine-heigl-baby-adoption-details/>; Jill Smolowe, *The Baby Chase*, PEOPLE (Mar. 5, 2001), <http://www.people.com/people/archive/article/0,,20133782,00.html>.

<sup>354</sup> See ADOPT U.S. KIDS, *Meet the Children*, <http://www.adoptuskids.org/meet-the-children> (more than 20,000 children age out of foster care every year); *supra* note 178 and accompanying text.

<sup>355</sup> Smith, *supra* note 123.

<sup>356</sup> *Id.*; CHILDREN'S ACTION NETWORK, <http://www.childsactionnetwork.org/index.htm>; *Steven Spielberg & Kate Capshaw*, PEOPLE (2013) [http://www.people.com/people/package/gallery/0,,20364464\\_20364484\\_20776972,00.html](http://www.people.com/people/package/gallery/0,,20364464_20364484_20776972,00.html).

<sup>357</sup> *Celebrity Domestic Adoptions*, ADOPTION STAR (June 22, 2011), <http://www.adoptionstar.com/celebrity-domestic-adoptions/>. Actress and singer Jennifer Lopez recently signed on as producer of *Meet the Fosters*, an ABC Family drama highlighting a multicultural foster home, which foster advocates have found "completely compelling." Neda Ulaby, *Foster Families Take Center Stage*, NPR (June 3, 2013), <http://www.npr.org/blogs/monkeysee/2013/06/03/188326453/foster-families-take-center-stage>.

<sup>358</sup> AFRICAN CHILD POLICY FORUM, AFRICA: THE NEW FRONTIER FOR INTERCOUNTRY ADOPTION vii, (2012), <https://www.box.com/s/c10712fae8e637f72a04>.

<sup>359</sup> Bill Blacquiere, *Keeping Children in Africa*, EVERY CHILD BLOG (June. 8, 2012), <http://blogs.christianpost.com/every-child/keeping-children-in-africa-10282/>. Blacquiere posits that the shift from adoption to family preservation does not mean that such a view is anti-adoption, noting that organizations that focus on family preservation

of those in foster care, recognizing that adopting domestically, and particularly from foster care, “carries with it extraordinary missional possibilities.”<sup>360</sup>

The fact remains, however, that many children in the foster care system are being overlooked in favor of adopting infants and toddlers abroad—at taxpayer expense.<sup>361</sup> And that not only makes a statement, it furthers a trend—one that negatively impacts children in the U.S. foster care system. The American Taxpayer Relief Act of 2012, which permanently extends the federal tax credit to all adoptions, reflects the current social trend towards international adoption.<sup>362</sup> But in elevating private domestic<sup>363</sup> and international adoptions to the same permanent status as special needs adoptions, the current legislation ignores almost two decades of Congressional predilection for special needs adoptions. And it does so at the expense of those in foster care, whom the tax credit initially sought to benefit.

More than 100,000 children are currently waiting to be adopted from the U.S. foster care system.<sup>364</sup> And the federal adoption tax credit

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“have come to understand that more children can be helped when we focus on intercountry *services*, rather than intercountry *adoptions*.” *Id.* Christian Alliance for Orphans’ Jedd Medefind admits the movement “misstepped in emphasizing adoption over other forms of orphan care” and has “hired a new staffer to promote adoption within developing nations rather than international adoption.” JOYCE, *supra* note 151, at 234.

<sup>360</sup> MOORE, *supra* note 161, at 117. Indeed, Colorado-based Focus on the Family has devoted a considerable amount of its resources to a new initiative, Wait No More, to partner with six different state governments to reduce the number of children in foster care. In Colorado alone, the group successfully moved 500 of the 800 kids in foster care into permanent homes in less than two years. Naomi S. Riley, *Adoption Season for Evangelicals*, WALL ST. J. (Sept. 24, 2010), <http://online.wsj.com/article/SB10001424052748703743504575494263102089970.html>. Rick Warren, author of *The Purpose Driven Life* and pastor of Saddleback Church, tweeted that OrphanCare is one of his church’s “signature issues.” Rick Warren, TWITTER (JULY 23, 2009, 1:59 PM), <http://twitter.com/RickWarren/statuses/2805509794>. One attendee of the Summit national adoption conference recounted, “Rick Warren challenged us with the fact that if one person in one out of every four churches in the US adopted out of foster care, foster care would no longer exist in the United States.” Jenni Ramsey, *Reflections on the Orphan Summit*, ALL BLESSINGS INTL. ADOPTIONS–ORPHAN OUTREACH TRIPS BLOG (May 22, 2012), <http://allblessingswest.blogspot.com/2012/05/reflections-on-orphan-summit.html>.

<sup>361</sup> Paul Myhill, president of the evangelical orphan ministry World Orphans, also adheres to Blacquiere’s position and notes that his organization is considered a “black sheep” for its “prioritization of in-country orphan care over adoption.” Joyce, *supra* note 152.

<sup>362</sup> Pub. L. No. 112-240, § 101, 126 Stat. 2313 (2013).

<sup>363</sup> One rationale for retaining the federal tax credit for private U.S. domestic adoptions (not from foster care) is that, by allowing the tax credit for these adoptions, parents will adopt unwanted children within the United States, ensuring they do not increase the foster care population and add another \$47,000 a year tax burden to society. The same cannot be said for international adoptions.

<sup>364</sup> 2013 AFCARS Report, *supra* note 1, at 1.

needs to be fulfilling its primary goal—that of promoting adoption from foster care. In other words, if the government is the legal parent of children in United States foster care, and the aim is to find permanent homes for those children, the question that must be answered is whether the government should then be thwarting that purpose by subsidizing adoptions from other countries.<sup>365</sup> And the answer to that question must be that, consistent with Congress’s original intent, the tax credit should be restricted to those who adopt children from the foster care system. Just as Americans choose to have a biological child or not, American citizens should be allowed to adopt internationally if they so choose—just not at taxpayer expense. The federal adoption tax credit should not be used to subsidize a personal choice that does nothing to help the plight of those for whom the statute was originally intended to aid, but have since been overlooked in favor of those abroad.

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<sup>365</sup> On May 23, 2013, Senator Bob Casey and Sen. Landrieu introduced the Adoption Tax Credit Refundability Act of 2013, S. 1056, to make the federal adoption tax credit fully refundable for all types of adoptions. Press Release, Robert B. Casey, Jr., *Casey Introduces Legislation to Make Adoption Tax Credit Refundable* (May 23, 2013), <http://www.casey.senate.gov/newsroom/press/release/?id=d7316c74-956b-4363-a450-026e00a791e5>. Both cited foster care adoption as a major impetus for refundability. Sen. Casey noted that a “refundable adoption tax credit plays a significant role in lower-income families’ ability to adopt and support a child from foster care.” *Id.* Sen. Landrieu added, “This change will especially help families that want to adopt foster youth, finally providing them with a permanent and loving family and ensuring foster care is only temporary.” Press Release, Mary Landrieu, *Casey, Landrieu and Braley Introduce Legislation to Make Adoption Tax Credit Refundable* (May 23, 2013), [http://www.landrieu.senate.gov/?p=press\\_release&id=3770](http://www.landrieu.senate.gov/?p=press_release&id=3770). Both the senate bill and Congressman Bruce Braley’s companion legislation in the House have been referred to committee. GOVTRACK.US, S. 1056, <http://www.govtrack.us/congress/bills/113/s1056>; GOVTRACK.US, H.R. 2144, <http://www.govtrack.us/congress/bills/113/hr2144>. However, statistics indicate that the federal adoption tax credit has not had the desired effect in promoting adoption from the foster care system as much as it is funding international adoptions. *See supra* notes 308–17 and accompanying text.