

ESSAY

How Misconceptions About International Adoption Lead to a Violation of Human Rights Against Unparented Children

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The Children in Families First Act (CHIFF), now before both the United States Senate and the House of Representatives,¹ lays the

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Throughout years of public service, Senator Landrieu has been led by the vision that every child deserves a family to call their own. Through legislation and her work as a founding Cochair of the Congressional Coalition on Adoption and the Senate Caucus on Foster Youth, Senator Landrieu has strived to promote responsible policies for the long-term care and support of children and families, both domestically and internationally.

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Ms. Reitz has worked on humanitarian immigration and assistance issues at United States Citizenship and Immigration Services (USCIS) and the State Department for over twenty-three years. At USCIS, Ms. Reitz helped design and lead the USCIS Special Humanitarian Program for Haitian Orphans in 2010, which united nearly 1200 Haitian orphans with their U.S. families after the tragic earthquake. From 1995 until 2006, Ms. Reitz worked on refugee assistance, migration, and resettlement issues. She revived a moribund African refugee resettlement program, taking it from 5000 to over 12,000 placements in one year. She negotiated with the U.N. refugee agency to establish a method of identifying large groups of refugees in need of resettlement and then led the way in launching a program to resettle nearly 100,000 Burmese refugees in Thailand.

For over twenty years, Ms. Reitz has dedicated her career to humanitarian issues, with an emphasis on immigration, working extensively on intercountry adoption, refugee admissions and assistance, international migration, and temporary protected status.

groundwork for a new U.S. government approach to international child welfare, integrating the priority of permanent families for all children through family preservation, family reunification, or family creation through kinship, domestic, or international adoption.² The importance of family does not feature prominently enough in the United States' current foreign policy approach to children facing adversity, and this gap leads to a violation of the human rights of children living without parental care.³ CHIFF rests on the fundamental premise that when society is called upon to make custodial decisions on behalf of children, a child's right to a family and the developmental needs that only a permanent parent-child bond can satisfy must be given top priority, alongside a child's physical health and protection from abuse and exploitation.⁴ Each child—regardless of citizenship, nationality, ethnicity, race, or gender—has a set of basic needs for growth into a healthy, productive adult and an inalienable right to have those needs fulfilled.⁵ At the center of these needs lies the need for a family—for a parent or parents (whether biological or otherwise) who maintain a permanent and nurturing bond with the child. And yet, in the international arena, governments (including the U.S. government) and international organizations involved in assisting children consistently fail to make the need for a permanent family a core element of interventions on behalf of children.⁶ This failure must change if we, as a global society, hope to meet the needs of the ever-growing number of double orphans and children otherwise living

1. CHIFF was originally introduced in the Senate as S. 1530, 113th Cong. (2013), on September 19, 2013, by Senators Mary Landrieu of Louisiana and Roy Blunt of Missouri and originally introduced in the House of Representatives as H.R. 3323, 113th Cong. (2013), on October 23, 2013, by Representatives Kay Granger of Texas and Karen Bass of California.

2. S. 1530. See also *CHIFF One Pager*, CHILDREN IN FAMILIES FIRST, <http://childreninfamiliesfirst.org/wp-content/uploads/2013/10/ChildreninFamiliesFirst1-pager2013-10-09v3.pdf> (last visited Apr. 14, 2014), for a brief summary of the proposed legislation.

3. Notably, the *United States Government Action Plan on Children in Adversity—A Framework for International Assistance: 2012-2017*, U.S. GOV'T INT'L ASSISTANCE FOR CHILDREN IN ADVERSITY (Dec. 2012), <http://www.usaid.gov/sites/default/files/documents/1860/United%20States%20Action%20Plan%20on%20Children%20in%20Adversity.pdf>, attempts to describe the needed course correction. While a critical step forward, the policy document has yet to be implemented because it lacks the necessary statutory support of funding. CHIFF addresses these gaps as well. See S. 1530.

4. The *United States Government Action Plan on Children in Adversity*, *supra* note 3, at 2, has three main objectives to assist vulnerable children: promoting early childhood survival and development, putting family care first, and protecting children from abuse and exploitation.

5. See *FACT SHEET: A Summary of the Rights Under the Convention on the Rights of the Child*, UNICEF, http://www.unicef.org/crc/files/Rights_overview.pdf (last visited Apr. 14, 2014).

6. For example, see the Convention on the Rights of a Child, *adopted* Nov. 20, 1989, 1577 U.N.T.S. 3, which fails to include this basic right.

without families.⁷ CHIFF is an effort to make this change within the structures of the U.S. government, so that the United States can lead the way.

While many people understand and recognize a child's need for family instinctively, or as a matter of common sense, or as a basic tenet of their faith, a debate rages in the field of international child welfare on the subject, and the role of international adoption serves as a particular flash point.⁸ At the core of this debate is the question of whether children can effectively be raised in institutions, in community-based care settings, in foster care, or by older siblings and whether these, or similar, options should take precedence over the permanence of an international adoptive family.⁹ This Article presents the argument that international adoption, viewed through the lens of the best interests of the child, must be seen as a powerful and available tool for protecting the rights and meeting the needs of children living outside of family care. International adoption stands with the other tools of protection and permanence for children living without family care or in danger of losing it. These tools include family preservation, family reunification, kinship adoption, and domestic adoption, which are all based on the notion that a permanent solution that either maintains or creates a parent-child relationship is essential to the best interests of the child. Any interim solution that does not create this type of permanent bond is less desirable and not in the child's *best* interests.

Unfortunately, the analytical framework and rhetoric currently surrounding international adoption paints it not as a tool of protection, but as something else entirely. International adoption is generally viewed as serving the needs of families wishing to adopt children—a view that assumes that the families' demand is what creates the concomitant supply of children available for international adoption.¹⁰ Detractors often refer to the “international adoption industry,” decrying the illicit sums that people pay to essentially purchase children and portraying a rapacious business that invites evildoers to steal children in underdeveloped

7. UNICEF *Data on Orphans by Region to 2010 [Chart]*, CHILDREN & YOUTH IN HISTORY, <http://chnm.gmu.edu/cyh/primary-sources/293> (last visited Apr. 16, 2014).

8. See the debate between Elizabeth Bartholet and David Smolin in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 233-51 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

9. See *id.*

10. See E.J. Graff, *The Lie We Love*, FOREIGN POL'Y (Nov. 1, 2008), <http://www.foreignpolicy.com/node/60166>.

countries and sell them to rich, first-world families.¹¹ Given the declining number of international adoptions to the United States¹² and other receiving countries¹³ and the ever-growing number of children living outside of family care across the globe, the supply and demand model is clearly erroneous. The extreme negativity in the rhetoric around international adoption, including the industry concept, stems from an exaggerated focus on the instances where something goes wrong in international adoption, without reference to the enormous good that results in the vast majority of cases.

If we as a global society truly intend to protect the rights of children living without families and to provide assistance in the best interests of the child when necessary, then we must begin to overcome the biases and inaccuracies that have led some to view international adoption as generally harmful to children and often as tantamount to child trafficking.¹⁴

Still, at a global level, the question becomes, “When do governments at large need to intervene to ensure that the best interests of a child are prioritized?” Generally, the answer is when families are in danger of breaking apart or have already broken apart, leaving children without someone who is willing and able to play a permanent parental role in their lives. In terms of intervention, most everyone agrees that the first preference is for family preservation: assistance that will preserve and strengthen existing families.¹⁵ Failing that, the second preference is for family reunification: assistance that will help families to rebuild and be able to stay together.¹⁶ When neither of these options is available to a child, then governments are called upon to step in and make decisions in the best interests of that child.¹⁷

This is the critical moment and the point at which the debate rages. What is best for a child living outside of family care? What factors take

11. *The Truth About the Adoption Industry*, MUSINGS OF THE LAME, <http://www.adoptionbirthmothers.com/adoption-truth/adoption-industry/> (last visited Apr. 14, 2014).

12. U.S. Dep’t of State, *Statistics*, INTERCOUNTRY ADOPTION, http://www.adoption.state.gov/about_us/statistics.php (last visited Apr. 14, 2014).

13. Peter Selman, *Global Trends in Intercountry Adoption: 2001-2010*, ADOPTION ADVOC. 2 (Feb. 2012), http://www.adoptioncouncil.org/images/stories/documents/NCF_ADOPTION_ADVOCATE_NO44.pdf.

14. Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking?*, CNN (Sept. 18, 2013, 2:41 PM), <http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/>.

15. See Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption pmbl., *concluded* May 29, 1993, 1870 U.N.T.S. 167 [hereinafter Hague Intercountry Adoption Convention].

16. See *id.*

17. See *id.*

precedence when making decisions on behalf of the child? There is no standardized and widely accepted definition of “the best interests of the child” in this context. In U.S. law, different states take different approaches to this term.¹⁸ In the international sphere, international organizations also note the lack of a specific definition.¹⁹ We propose that the factors generally at issue in a “best interests of the child” determination should include:

- (1) mental and physical health;
- (2) developmental and educational needs;
- (3) any known special needs, physical or psycho-social;
- (4) safety and security considerations;
- (5) sense of security, familiarity, and attachments;
- (6) the child’s wishes or preferences; and
- (7) family unity and the potential effect of separating the child from siblings and other members of the child’s extended biological family.

Each of these factors go directly to the health and welfare of the child. When considering the best interests of a child, it is important not to fold in the interests of other parties, such as parents or guardians whose rights have been terminated or the biases of governments or other organizations about whether children need to remain in their country of origin. At this decision-making moment, when a child is left without the protection of a family, the question is not who “owns” the child or whether the country of origin wants the child to leave that country to be raised elsewhere, but rather, the question is what intervention will create circumstances for the child that provide the best possibility of growing into a healthy, productive adult.

Once the considerations are limited to factors that are directly related to the child’s best interests, we can then focus on how to prioritize the factors and on what solutions are best for addressing them. This is where the metaphorical rubber meets the road. This is where we assert, without reservation, that the best way to provide safe, nurturing, and permanent protection for a child without family care is through the creation of a permanent family—whether through kinship, domestic, or international adoption. Depending on the situation, such permanent

18. See Children’s Bureau, *Determining the Best Interests of the Child*, CHILD WELFARE INFO. GATEWAY (Nov. 2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

19. See UNHCR *Guidelines on Determining the Best Interests of the Child*, U.N. HIGH COMM’R FOR REFUGEES 2-6 (May 2008), <http://www.unhcr.org/4566b16b2.html>.

family creation may be possible through formalized legal processes,²⁰ or it may occur in a more ad hoc way.²¹ In general, the creation of a legal parent-child relationship will provide the best protection and the best likelihood of a nurturing home for the child. Within this framework, international adoption can and should occupy a significant place in the complement of tools available.

However, many entities involved in the decision-making process on behalf of unprotected children are heavily influenced by a number of misconceptions about international adoption in general, about why adoptive parents choose to adopt, and about how it affects the children who are adopted. The misconceptions tragically lead to terrible harm. Many children who might otherwise benefit from the protection of a safe, nurturing, and permanent family through international adoption instead remain in institutions or on the streets—suffering irreparable damage and losing hope with every passing day. It is in this way that these children's human rights are violated. Let us consider several of these misconceptions.

Misconception 1: Children can grow up in institutions without experiencing a parent-child bond and develop without serious detriment, so it is alright to move slowly in finding a solution or even to let them grow up in institutions.

The truth is: Children cannot thrive and grow into healthy, productive adults in institutions or without families. The longer children go without the care and protection of a family, or more specifically, without the essential parent-child bond that a family provides, the more damaged they become. The damage to children living without family care is especially profound in very young children and continues to accrue as they grow up. Children who grow up in institutions and who are then emancipated when they reach the age of adulthood struggle to hold a job or raise a family.²² They become victims of trafficking.²³ They

20. Family creation through a formalized legal process occurs when there is an official determination regarding who has legal custody and under what auspices. Examples include an adoption decree, a custody order, and the appointment of a legal guardian.

21. Ad hoc family creation occurs absent any formalized legal process or official determinations. One example is a nonformalized kinship adoption—a brother who takes in his deceased brother's children and raises them as his own. Another example is seen where a family simply takes in a foundling and raises the child without gaining any legal custody or documentation of the relationship.

22. See Wilhemina A. Leigh et al., *Aging out of the Foster Care System to Adulthood: Findings, Challenges, and Recommendations*, JOINT CTR. FOR POLITICAL & ECON. STUDIES HEALTH POLICY INST. (Dec. 2007), <http://www.jointcenter.org/sites/default/files/upload/research/files/Aging%20Out%20of%20the%20Foster%20Care%20System.pdf>; Dana E. Johnson, *Aging*

become criminals.²⁴ They die young.²⁵ For children in institutions or without families, time is of the essence, and finding a permanent family as quickly as possible is in the child's best interest, above all else.

As Urie Bronfenbrenner, the founder of the Head Start program in the United States, so eloquently stated: "In order to develop normally, a child requires progressively more complex joint activity with one or more adults who have an irrational emotional relationship with the child. Somebody's got to be crazy about that kid. That's number one. First, last, and always."²⁶

Prominent scientists in the field of early childhood development from universities all over the country, including Tulane University,²⁷ have come together to study the harm caused to children by institutionalization, toxic stress, and the lack of parental care.²⁸ From the results of the *Bucharest Early Intervention Project*²⁹ to the newly reported science appearing on Harvard University's Center on the Developing Child's Web site, we see the same findings over and over again: children are irreparably damaged if they do not have the benefit of the parent-child bond that occurs in a family setting.³⁰

Scientists largely agree that a nurturing and stable relationship with a caring adult is an essential element of healthy child development.³¹ Research shows that children who benefit from a secure and loving family are more likely to graduate from high school, stay out of jail,

Out of Foster and Institutional Care: What Are the Outcomes?, FIREFLY, <http://www.fireflykids.org/storage/resource.library.docs/ENG.resource.library/ENG.Kids.in.Fost.Adopt.Care/dj.09.11.aging.out.fc.outcomes.eng.pdf> (last visited Apr. 14, 2014).

23. See Leigh et al., *supra* note 22.

24. See *id.*

25. See *id.*

26. Urie Bronfenbrenner, *Preface* to LYNNAE W. ALLRED, PIGGYBACK RIDES AND SLIPPERY SLIDES: HOW TO HAVE FUN RAISING FIRST-RATE CHILDREN, at vi (2007).

27. See Arthur Nead, *Romania's Abandoned Children*, TUL. U. (Feb. 28, 2014), http://Tulane.edu/news/releases/pr_022814.cfm ("Dr. Charles H. Zeanah [is] Chair of Psychiatry at Tulane and one of the principal investigators of the Bucharest Early Intervention Project.")

28. See, e.g., Nat'l Scientific Council on the Developing Child, *The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain* (Ctr. on the Developing Child, Working Paper No. 12, 2012), http://developingchild.harvard.edu/resources/reports_and_working_papers/working_papers/Wp12/.

29. Charles A. Nelson III et al., *Cognitive Recovery in Socially Deprived Young Children: The Bucharest Early Intervention Project*, 318 SCIENCE 1937, 1938-40 (2007).

30. See *Center on the Developing Child*, HARV. U., <http://developingchild.harvard.edu/> (last visited Apr. 13, 2014).

31. See, e.g., *id.*; Nat'l Scientific Council on the Developing Child, *supra* note 28; Nelson et al., *supra* note 29, at 1938-40.

avoid early pregnancy, and form healthy relationships as adults.³² Studies also show that children without families to nurture and protect them suffer permanent, lifelong consequences, including smaller brain size, reduced IQ, emotional detachment, and physical delays.³³ Simply put, having a safe and loving family is not a luxury, but a necessity for all children.³⁴

The science also reveals that the longer children remain under toxic stress, living in institutions or on the streets without at least one stable parental figure, the more severe and irreversible the damage.³⁵ As prominent scholars in the field of early childhood development have explained, there is a sensitive period during the development of a child's brain that requires a stimulation-response cycle between the child and the parental figure.³⁶ If the child does not receive stimulation during the sensitive period, certain parts of the brain may never develop.³⁷ The sensitive period between birth and two years has dramatic effects on the development of a child's brain, intelligence, motor skills, language abilities, and the ability to form attachments and feel empathy for others later in life.³⁸ Older children continue to lose ground in institutional settings as well, but the most unrecoverable damage occurs during the first two years.³⁹

Misconception 2: International adoption is riddled with horrible problems, and the children are mistreated, neglected, and abused.

The truth is: Public perception of international adoption has been heavily distorted by media coverage that focuses over and over on the sensational and the lurid—stories of tragedy and disaster—without setting such stories into any larger context. Although dreadful things do occur and affect internationally adopted children, they unfortunately also occur every day in the United States and all over the world, in both biological and adoptive families. We should all grieve for the awful

32. See Jack P. Shonkoff et al., *The Lifelong Effects of Early Childhood Adversity and Toxic Stress*, 129 PEDIATRICS e232, e235-38 (2012), <http://pediatrics.aappublications.org/content/129/1/e232>.

33. Charles A. Nelson III et al., *Early Hazards to Brain Development: The Effects of Early Institutionalization on Brain and Behavioral Development*, in EARLY CHILDHOOD DEVELOPMENT AND LATER OUTCOME 148, 148-60 (Sabina M. Pauen ed., 2012).

34. See Shonkoff et al., *supra* note 32, at e240.

35. *Toxic Stress: The Facts*, CTR. ON THE DEVELOPING CHILD, http://developingchild.harvard.edu/topics/science_of_early_childhood/toxic_stress_response/ (last visited Apr. 13, 2014).

36. See Nat'l Scientific Council on the Developing Child, *supra* note 28.

37. *Id.*

38. See Nelson et al., *supra* note 33, at 148-60.

39. *Id.*

things that happen to helpless children and seek ways to address them. But we should not conclude that the oft-repeated stories that make the headlines are representative of what generally happens to a child who is adopted internationally. In fact, the opposite is true; the bad outcomes are the exception and not the rule. Most international adoptions are everyday stories of love and sacrifice, of families raising children, of trials and tribulations, of joy and discord, and of struggle and striving.⁴⁰ They are the stories of generous, loving people doing their best to parent and to help damaged children heal. They are heroic stories, but they rarely make the papers.

Since 1999, nearly one quarter of a million—that is 250,000—children have been adopted from other countries by U.S. families.⁴¹ During that same period, U.S. families adopted 700,000 children domestically.⁴² Adoption is a huge part of U.S. culture, and we suspect that everyone reading this Article can think of several families they know that include adopted children. The United States Department of Health and Human Services (HHS) estimates that 2% of children in the United States are adopted.⁴³ That is one out of every fifty children. Some families created through adoption break apart. Sometimes bad things do happen. But we must remember, some biological families break apart, and bad things happen there too. According to HHS statistics for 2012, biological children in the United States are 134 times more likely to be involved in reports of child abuse than adopted children.⁴⁴ Seen in this context, the perception that international adoption is riddled with problems appears to be far more a phenomenon of what the media chooses to focus on rather than based in fact.

Of course, this does not mean that we should simply look away or ignore bad outcomes. It is incumbent upon all of us who seek to make changes on behalf of vulnerable children to work on all fronts to improve protections, to close gaps, and to develop thoughtful solutions to problems. What we must beware of at any juncture is overreaction based on skewed perceptions. We should not eliminate international or

40. See, e.g., Wynne Elder, *Why Adoption?*, GLORIOUSLY RUINED, <http://www.wynneelder.com/why-adoption> (last visited Apr. 11, 2014); *THE DARK MATTER OF LOVE* (Double Bounce Films 2012).

41. U.S. Dep't of State, *supra* note 12.

42. *Adoption & Foster Care Statistics*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars> (last visited Apr. 11, 2014).

43. *Adopted Children*, CHILD TRENDS 2 (2012), <http://www.childtrends.org/?indicators=adopted-children>.

44. See *Child Maltreatment*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS. 73 (2012), <http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf>.

domestic adoption simply because sometimes these families break apart or bad things happen any more than we should eliminate banks because they are sometimes robbed or eliminate hospitals because patients sometimes die due to doctors' malfeasance or error. Seen in context, the good of international adoption far outweighs the bad. Our job is to build upon the good while also trying to ferret out and prevent the bad.

Misconception 3: Many, if not most, children adopted internationally are bought, stolen, or trafficked.

The truth is: Each individual international adoption case is vetted by two governments through a long series of processes that seek to ensure that nothing improper has happened and that the families and children involved are fully protected.⁴⁵ All international adoption cases involve two intertwined legal processes: the process of adoption in the child's country of origin and the process of immigration to the adoptive parents' country of residence. For international adoptions to the United States, the immigration process involves extensive screening of both the prospective adoptive parents and the adoptive child. In the child's country of origin, the government of that country makes the determination that the child is available for adoption, generally through a legal process that results in an adoption decree naming the adoptive parents as the child's legal parents. About 90% of international adoption cases to the United States are approved, with most denials resulting from ineligibility of the child under U.S. immigration law rather than a finding of fraud or corruption.⁴⁶ Actual evidence of fraud or malfeasance is relatively rare in international adoption cases.

That said, suspicion, reports of corruption, and uncertainty about the origins of some of the children in the international adoption stream are realities. Corruption is an everyday occurrence in many countries in all facets of life, particularly in underdeveloped countries, which are home to many children involved in international adoptions. In some places, nothing happens until palms are greased. Things become particularly murky in the cases of abandoned children found alone and untended. In this type of case, it can be nearly impossible to discern the origins of that child, which leads to questions about who may have been

45. See *Inter-country Adoption from A to Z*, U.S. DEP'T OF STATE, http://adoption.state.gov/content/pdf/Inter-country_Adoption_From_A_to_Z.pdf (last visited Apr. 14, 2014); *Laws Related to Adoption*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.childwelfare.gov/adoption/laws/> (last visited Apr. 14, 2014).

46. This statistic is based on the experience and statistical analyses conducted by Whitney Reitz, coauthor of this Article, who oversaw international adoption processing for the United States Citizenship and Immigration Services for four years, from 2008-2012.

involved and how. But we also know that parents all over the world abandon babies every day, out of desperation, shame, or fear.⁴⁷ They may be single mothers who have no ability to support themselves, much less a baby. They may be very young, may have managed to hide the pregnancy from their families, and are hoping to avoid being branded as mothers of “illegitimate” children. Parents may abandon children because of deformities or apparent disabilities. Sometimes parents die. Further, not all abandoned children are babies. Children are abandoned at all ages. There are a myriad of reasons why children are left behind. In countries where record-keeping systems are virtually nonexistent, where children often do not have birth certificates, and where deaths are not registered, it can be a hopeless task to try to determine the origins of an abandoned child. There are also the allegations that birth mothers sell their children or are coerced or deceived into making decisions to relinquish their children for international adoption.⁴⁸ All of this complexity is indeed part of what society faces in making decisions about the best interests of the child, and unfortunately, there are some known incidences of each of these horrible things happening.

All of this said, let us carefully consider what constitutes fraud with respect to international adoption. In the context of U.S. immigration law, fraud means a purposeful misrepresentation of material facts in order to obtain an immigration benefit.⁴⁹ In plain English, this means that the individual seeking the benefit would not be able to get it without lying. To make a finding of fraud under U.S. law, which would lead automatically to a denial of the immigration petition, the adjudicator must have specific, material evidence that supports that finding.⁵⁰ It cannot be based on intuition, suspicion, or even a sense of an emerging questionable pattern from other similar suspect cases.

47. Recent reports from Guatemala and South Korea show that infant abandonments are on the rise in both countries, even though international adoptions are dwindling or blocked entirely in both countries. See Steven Borowiec, *Change in Korean Adoption Law Followed by More Abandoned Babies*, WALL ST. J. (Oct. 7, 2013, 9:53 AM), <http://online.wsj.com/news/articles/SB10001424052702303442004579121030310275014>; *Helping Hands: 2013*, BAPTIST CHILDREN'S HOMES, http://www.bchfamily.org/support/helping_hands/0/2013 (last updated Dec. 3, 2013).

48. See Kathryn Joyce, *How Ethiopia's Adoption Industry Dupes Families and Bullies Activists*, ATLANTIC (Dec. 21, 2011, 7:19 AM), <http://www.theatlantic.com/international/archive/2011/12/how-ethiopias-adoption-industry-dupes-families-and-bullies-activists/250296/>.

49. RUTH ELLEN WASEM, CONG. RESEARCH SERV., RL34007, IMMIGRATION FRAUD: POLICIES, INVESTIGATIONS, AND ISSUES (2007).

50. See 8 U.S.C. § 1182 (2012).

According to U.S. law, each adoption petition is adjudicated on its own merit and based on a “preponderance of the evidence” standard.⁵¹ Some may debate the merits of applying the preponderance standard over the more demanding “clear and convincing evidence” standard, which would place a higher burden on the applicants,⁵² but we believe, in this instance, that the preponderance standard is appropriate. In many instances, due to the lack of reliable documentation, families would find it virtually impossible to meet the higher clear and convincing standard. The preponderance standard requires a solid degree of due diligence, while balancing the need for as quick and as elastic a decision-making process as possible, which is necessary when the life and well-being of a vulnerable child—who will likely benefit significantly from the adoption—are at issue. Under the preponderance standard, the lack of information does not prevent the possibility of a favorable decision. The adjudicator is able to evaluate the available evidence and make a decision as to whether it is more likely than not that the child meets the applicable definition of an eligible child under U.S. law (whether orphan or Hague child).⁵³

Although there are inaccuracies, fabrications, and inconsistencies in international adoption cases, they often stem from understandable, if frustrating, factors. As previously discussed, in many developing countries, record keeping is sparse or nonexistent. Many children do not have birth certificates, and their births may not be recorded in any way.⁵⁴ Cultural pressures may lead people to tell half-truths in an effort to avoid shame, persecution, or prosecution. Under these conditions, it is important to seek the truth regarding the best interests of that child to the extent possible and then make a decision.

None of this goes to say that we should not make every effort to protect and safeguard both the children and the families involved in international adoption cases. Safeguards are essential, and if we see ways to make the adoption process safer and better, we should enact them. Last year, Congress passed the Intercountry Adoption Universal

51. See *Matter of CHAWATHE*, 25 I. & N. Dec. 369, 375 (A.A.O. 2010).

52. Compare *Preponderance of the Evidence*, CORNELL U.L. SCH., http://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Apr. 14, 2014), with *Clear and Convincing Evidence*, CORNELL U.L. SCH., http://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Apr. 14, 2014).

53. See 8 U.S.C. § 1101(b)(1)(F-G).

54. See *FACTSHEET: Birth Registration*, UNICEF, <http://www.unicef.org/newsline/2003/03fsbirthregistration.htm> (last visited Apr. 14, 2014). This issue becomes more prominent where the population is largely illiterate and does not track birth dates.

Accreditation Act of 2012.⁵⁵ This new law requires all U.S. adoption agencies working on international adoptions to go through the rigorous screening and accreditation process called for by the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption (Hague Intercountry Adoption Convention), regardless of whether the agency handles adoptions under the Convention.⁵⁶ CHIFF includes strengthened protections to help ensure that all U.S. families are trained and screened according to the highest standards under U.S. law and, to the extent possible, that international adoptions only become finalized when both the United States and the child's country of origin have determined that the child meets the necessary eligibility requirements.⁵⁷

Misconception 4: International adoption should only be considered as a last resort after all other options have been exhausted.

The truth is: This "last resort" language is used consistently by opponents of international adoption in an effort to prevent it from happening at all. At what point, and after how many years of living in an institution or on their own, should we arrive at the conclusion that it is time for the "last resort" solution for children outside families? For millions of children today, the de facto answer is "Indefinitely."

This brings us to a discussion of the principle of subsidiarity in international adoption, which is included in the Hague Intercountry Adoption Convention.⁵⁸ The outline of the Convention posted on the Hague Conference on Private International Law's Web site defines this principle as follows:

"Subsidiarity" in the Convention means that Contracting States recognise that a child should be raised by his or her birth family or extended family whenever possible. If that is not possible or practicable, other forms of permanent care in the State of origin should be considered. Only after due consideration has been given to national solutions should intercountry adoption be considered, and then only if it is in the child's best interests. As a general rule, institutional care should be considered as a last resort for a child in need of a family.⁵⁹

As clear as these words might seem, they leave considerable latitude for interpretation. We do not dispute the hierarchy of preference described

55. Pub. L. No. 112-276, 126 Stat. 2466 (to be codified at 42 U.S.C. § 14925).

56. *Id.*

57. *See* S. 1530, 113th Cong. (2013).

58. *See* Hague Intercountry Adoption Convention, *supra* note 15, art. 4.

59. *Outline: Hague Intercountry Adoption Convention*, HAGUE CONF. ON PRIVATE INT'L L. 2 (Jan. 2013), <http://www.hcch.net/upload/outline33e.pdf>.

by the principle of subsidiarity. We are in full agreement that there is subsidiarity among the possible permanent solutions. From our perspective, the problematic sentence is, “Only after due consideration has been given to national solutions should intercountry adoption be considered” First, what constitutes due consideration, and how long can it take? Second, what constitutes national solutions? Are impermanent national solutions—such as paid foster care or a group home—preferable to a permanent family? In our view, when the appropriate authorities seek to evaluate a child’s best interests and devise a permanence strategy, all permanent options should be considered simultaneously—family reunification, kinship adoption, domestic adoption, and international adoption—with preference given to the available solutions in that order. But this decision must be made quickly. For example, it is unacceptable for a child to wait years for the possibility of a domestic adoption if an intercountry adoption is possible immediately. We take the view that “national solutions” refer to solutions that provide a safe, nurturing, and permanent family for the child. National solutions that fail to meet this standard are not in the child’s best interests where a nonnational solution that offers a safe, nurturing, and permanent family is available.

CHIFF addresses the misunderstanding and obfuscation that has colored the debate on the meaning of the subsidiarity principle by clarifying the U.S. position in statutory language according to the above interpretation:

All options for providing appropriate, protective, and permanent family care to children living without families must be considered concurrently and permanent solutions must be put in place as quickly as possible. Solutions include family preservation and reunification, kinship care, guardianship, domestic and intercountry adoption, and other culturally acceptable forms of care that will result in appropriate, protective, and permanent family care. Preference should be given to options that optimize child best interests, which generally means options which provide children with fully protected legal status and parents with full legal status as parents, including full parental rights and responsibilities. The principle of subsidiarity, which gives preference to in-country solutions, should be implemented within the context of a concurrent planning strategy, exploring in- and out-of-country options simultaneously. If an in-country placement serving the child’s best interest and providing appropriate, protective, and permanent care is not quickly available, and such an

international home is available, the child should be placed in that international home without delay.⁶⁰

We must stop pretending that there is broad-based agreement on the use of international adoption as a last resort in the way that these words are currently interpreted. The result is that we turn to international adoption only after exhaustive, time-consuming, and possibly endless efforts to find a domestic option. If we continue to operate this way, we continue to condone needless damage to children who otherwise could have safe, nurturing, and permanent families through international adoption.

Misconception 5: Children should remain in their countries of origin so they are not deprived of their cultural heritage.

The truth is: We must always remain focused on the best interests of the individual child and on best meeting the child's most critical needs. Cultural heritage can play an important role in a person's life, but we argue that it does not rank among the most critical needs of a child. Children are incredibly resilient and able to adapt and will thrive in a safe and nurturing environment.

Some argue that removing internationally adopted children from their countries of origin and placing them in multicultural homes that bear little resemblance to their previous environment results in a sense of displacement and causes irreparable damage. An oft-cited example of this problem is a 2009 Donaldson Adoption Institute study of 179 South Korean adult adoptees who as children were adopted into American or European homes with two Caucasian parents.⁶¹ According to the study, 58% of the group indicated that as children they either considered themselves to be Caucasian, American, or European or wanted to be so.⁶² This data point is often used as a powerful indictment of these adoptions, without regard to the rest of the findings of the study. However, the survey presents a group of highly educated, adult adoptees who reported a wide variety of experiences and responses to their adoptions. The adoptees did not express regret at having been adopted and generally expressed ongoing love and appreciation for their adoptive families. The simplistic notion that because the adoptees wished to look more like their adoptive parents proves they suffered irreparable harm is absurd.

60. S. 1530 § 2(a)(7).

61. Madelyn Freundlich & Joy Kim Lieberthal, *The Gathering of the First Generation of Adult Korean Adoptees: Adoptees' Perceptions of International Adoption*, EVAN B. DONALDSON ADOPTION INST. (June 2000), <http://www.adoptioninstitute.org/old/proed/korfindings.html>.

62. *Id.*

Let us consider if a group of 200 children from all over the United States were surveyed to find out what they felt was problematic in their childhood and upbringing. What percentage would say that at some point they wished that they were something other than what or who they were? What percentage would say they wished that they were thinner, taller, shorter, less shy, or more popular? Would those from an ethnic minority in the area where they grew up wish that they looked more like the majority of people in their neighborhood? What percentage would describe having experienced some form of discrimination? This comparison is not intended to make light of the genuine feelings that the Korean adoptees discussed, but rather to put it into the context of growing up and forming an identity—a process that every child goes through, whether adopted or not. Almost no one describes their childhood as pain-free or claims they never wished to be something different, even briefly. But regardless of how much weight we choose to give to the Korean adult adoptees' sense of displacement or loss as reported in this study, the fact that they remain attached to their adoptive families, that over 70% of them completed college, and that 24% completed graduate school tell a clear story. These adoptees became successful and articulate citizens of the United States, and they had the opportunity to participate in this study and help inform improvements in international adoptions going forward.

Further, international adoption has changed dramatically since these individuals were adopted between 1955 and 1985. Today, it is much more commonplace and accepted to be part of a multicultural family than it was thirty to sixty years ago. There are parts of the country that remain relatively homogeneous in population, but U.S. culture celebrates and welcomes variety today more than ever. Many families of internationally adopted children make extraordinary efforts to keep their children attuned to the cultures from which they came. They travel with the children back to the countries of origin. They remain involved with the orphanages or with other assistance work in the countries. At some point in the past, it may have been the prevailing ideal that internationally adopted children needed to be integrated into American society and forget about their origins, but that ideal appears to be evolving in the direction of inclusiveness, of remaining in touch with birth families or communities, and of celebrating the culture of the child.

Finally, let us look at the cultural-heritage issue from a different vantage point, which more likely underpins the objection to removing children from their country of origin. Many societies, without even thinking about it, view children as the “carriers” of culture who preserve

that culture in perpetuity. Just as a father might yearn for a son to “carry on the family name,” on a broader level, a society needs its children to do the same. Thus, where children are adopted out of one culture and raised in another, the culture of origin is impoverished and could ultimately be endangered by the practice. But this view of children as vessels of culture leads to a decision-making approach that essentially treats children as the property of their country of origin, rather than as individuals with human rights. Cutting-edge academic thinking on this issue challenges the notion that children should be treated as property under any circumstance and instead posits the human-rights-based approach to children, which elevates the rights of the individual child over cultural considerations. Paulo Barrozo, a prominent human rights scholar at Boston University, draws the conclusion with eloquence:

The ubiquity, therefore, of the problem of unparented young and the universality of the human right of the unparented to grow . . . in a good family requires nothing less than a truly cosmopolitan response. Unparented children and prospective parents around the world should meet, regardless of country, race, or culture. Global adoption is the preeminent institutional mechanism for making this happen.⁶³

In conclusion, we return to where we began. All children have the right to, need to, and deserve to grow up in safe, nurturing, and permanent families. The risk of harm to children who lack this support can lead to tragic, horrific, and even life-threatening results. If society chooses to do nothing to remedy the situation, we can anticipate more and more members of society who cannot function, who become criminals, who drain the resources of society rather than contribute to it, who are vulnerable to the worst abuses that humans inflict on each other, and who are ripe for recruitment by terrorists. International adoption can and should play a significant role in providing families for children who otherwise will not have one. We should focus, as Professor Barrozo tells us, on bringing together the “[u]nparented children and prospective parents around the world, regardless of country, race, or culture.”⁶⁴ That we are not doing so today contributes to one of the greatest human rights violations of our time. We violate the human rights of defenseless children whose lives are entrusted to society for protection. If we, as a global society, could begin to make affirmative efforts to protect the human rights of these children, rather than dwelling in the realm of

63. Paulo Barrozo, *Finding Home in the World: A Deontological Theory of the Right to be Adopted*, 55 N.Y. L. SCH. L. REV. 701, 730 (2010/11).

64. *Id.*

exaggerated fearfulness and hyperprevention, we could achieve something very important. International adoption should be a part of the solution, along with other solutions that focus on ensuring that children have the opportunity to grow up in a family—safe, nurtured, loved, and protected under the permanent watchful eyes of at least one person who fills the role of parent.