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Adoption Ouroboros: Repeating the Cycle of Adoption as Rescue

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Adoption Ouroboros: Repeating the Cycle of Adoption as Rescue

Malinda L. Seymore*

Abstract

Ouroboros—the circular symbol of the snake eating its tail; an endless cycle. As the U.S. recently withdrew from Afghanistan in chaos and Russia invaded Ukraine, the attention of Americans turned, as it frequently has in times of international conflict, to the plight of children in need of rescue. For many Americans, rescue is synonymous with adoption. The history of international adoption began with rescues following America's wars in Europe and Asia and continues today through other violent upheavals. International adoption is an ouroboros, repeating the pattern of adoption as a response to humanitarian crises. But as human and charitable as the impulse to adopt children in crisis may be, it is often not in the best interests of children. They are separated from family, and perhaps never reunited. Their identities may be lost in the scramble to get them to safety. They may be trafficked rather than adopted through reputable means. In the midst of a highly disruptive crisis, their lives are further disrupted by being removed from their usual support networks—family and community. And once international adoption begins in a country in crisis, it continues long after the crisis ends, motivated by neocolonial impulses and financial motives. The often-destructive effects of international adoption in the midst of crises are furthered by the general lax regulation of international adoption. The Hague Convention on Intercountry Adoption, as interpreted in the U.S., does not offer sufficient protection, and the U.S. fails to utilize all its available resources to prevent

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children being trafficked into international adoption by refusing to categorize illegal adoption as human trafficking. As the temptation to rescue children increases, the U.S. needs to do more to prevent the ouroboros of international adoption as a response to humanitarian crises.

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“For when we fail to see that our life is change, we set ourselves against ourselves and become like Ouroboros, the misguided snake, who tries to eat his own tail. Ouroboros is the perennial symbol of all vicious circles, of every attempt to split our being asunder and make one part conquer the other.”

—Alan W. Watts¹

I. INTRODUCTION

The video is haunting—a baby, diapered and bare-legged, being handed over a barbed-wire-topped cement wall to a camo-clad soldier in helmet and bullet-proof vest in Afghanistan.² As the baby dangles from one arm, there seems to be a frozen moment of triumph before the soldier swings the baby to another soldier who carries it away.³ As one watches the ten-second video on Twitter, it replays and replays, the baby lifted away again and again, an ouroboros, a perfect circle of a snake eating its tail.⁴ This story had a happy ending—the baby was reunited with its parents on the other side of the wall.⁵ The fate of sixty-two children moved from Ukraine to Poland at the beginning of the Russian invasion is less certain.⁶ Matt Shea, a former Washington State representative, claims to have rescued the children from an orphanage in war-

1. ALAN W. WATTS, *THE WISDOM OF INSECURITY* 43 (1951) (quoting Alan Watts).

2. Omar Haidari (@OmarHaidari1), TWITTER (Aug. 18, 2021, 10:37 AM), <https://twitter.com/OmarHaidari1/status/1428410907701436418>.

3. *Id.* (describing the video posted involving an Afghan baby being handed to a U.S. soldier who carries it away). That moment of triumph was sufficiently pride-inducing that it caused a Marine to apparently falsely claim onstage at a Trump rally to be the one who “rescued” the baby. Holmes Lybrand, Tara Subramaniam & Greg Clary, *Fact Check: Did the Marine Who Trump Brought on Stage at Rally Actually Hoist a Baby Over a Wall at Kabul Airport?*, CNN, <https://www.cnn.com/2021/09/30/politics/fact-check-trump-rally-marine-baby-kabul-airport/index.html> (Oct. 1, 2021, 9:23 AM).

4. *Cf.* Haidari, *supra* note 2.

5. Glenn Garner, *Afghan Baby Reunited with Father After Viral Video of Family Passing Them to U.S. Troops Over Fence*, PEOPLE (Aug. 24, 2021, 1:53 PM), <https://people.com/politics/afghan-baby-reunited-father-after-viral-video-family-passing-them-us-troops-over-fence/> (“The child has since been returned to their father, after they were treated for an illness at a Norwegian hospital at the airport, Pentagon spokesperson John Kirby said Friday in a press briefing. The family handed the infant over to receive medical attention, and they are now ‘safe at the airport’ behind the U.S. military’s perimeter, Marine Corps spokesperson Jim Stenger told *Forbes*.”).

6. David Gutman, *Former WA Rep. Matt Shea, Accused of Domestic Terrorism, Working to Secure Adoptions for Ukrainian Children in Poland*, SEATTLE TIMES, <https://www.seattletimes.com/seattle-news/former-wa-rep-matt-shea-accused-of-domestic-terrorism-working-to-secure-adoptions-for-ukrainian-children-in-poland/> (Mar. 16, 2022, 7:55 AM) (noting that although Washington state Rep. Matt Shea helped rescue sixty-two children, “international agencies say, with the chaos and confusion of war, now is not an appropriate time for international adoptions from Ukraine”).

torn Ukraine and has said he intends to take them to America for adoption.⁷ But he is not affiliated with any organization licensed for international adoption,⁸ not all children in orphanages in Ukraine are actually orphans,⁹ and the Ukrainian government has issued an official statement saying that children from Ukraine should not be adopted at this time.¹⁰ Nonetheless, American prospective parents are “lobbying Ukrainian adoption authorities, officials at the State Department and congressional leaders to try to raise awareness of their plight.”¹¹

Children entering the stream of international adoption in the midst of a crisis is rarely in the best interests of the child.¹² This child has been removed from her biological family, removed from everything familiar to her, after already losing her first family and home.¹³ The comfort of her primary caregivers is what she needs, not a new adoptive home.¹⁴ In some of the most perverse cases of children being adopted in the midst of a humanitarian disaster, the children become adopted to the U.S. when the U.S. is arguably complicit

7. *Id.*

8. Kathryn Joyce, *Ukraine's Kids and Adoption: Will an Ugly History Repeat Itself?*, SALON (Mar. 22, 2022, 6:02 AM), <https://www.salon.com/2022/03/22/ukraines-kids-latest-target-for-the-christian-adoption-industry/> (noting that Shea’s organization, “Loving Families and Homes for Orphans[,] was not a registered adoption agency”).

9. Gutman, *supra* note 6 (“[M]any children living in orphanages in Ukraine are not orphans.”).

10. Eli Francovich, *Ukrainian Orphans with Former WA State Rep. Matt Shea in Poland Get Legal Guardians*, SEATTLE TIMES, <https://www.seattletimes.com/nation-world/ukrainian-orphans-with-matt-shea-in-poland-get-a-polish-legal-guardian/> (Mar. 30, 2022, 9:55 AM), (“‘Ukraine does not give up their kids,’ [the Ukrainian consul in Poland] said, adding that all adoptions are on pause until the war with Russian ends.”). *See also Interstate Adoption Impossible During Time of War—Social Policy Ministry*, INTERFAX-UKRAINE (Mar. 14, 2022, 1:30 PM), <https://ua.interfax.com.ua/news/general/813075.html> (“Recently, the media and social networks are filled with messages about the readiness of foreigners to adopt a child from Ukraine and calls that Ukrainian children need to be adopted abroad. The Ministry of Social Policy notes that interstate adoption is impossible under the current conditions, and the dissemination of such unreliable information contains signs of fraud and a violation of the rights of children.”).

11. Dana Hedgpeth, *A Virginia Family’s Push to Give a Ukrainian Orphan Respite from War*, WASH. POST (July 24, 2022, 6:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/07/24/ukraine-girl-adoption-virginia-family/> (discussing American families who want to give Ukrainian orphans “a break from their respective orphanages”).

12. *See* JOANNE DOYLE, MISGUIDED KINDNESS: MAKING THE RIGHT DECISIONS FOR CHILDREN IN EMERGENCIES, SAVE THE CHILDREN 14 (2010) (arguing that international adoption during a crisis can have a negative psychological impact on children).

13. *See id.* (explaining that international adoption in times of crisis creates even more distress within already traumatized children).

14. *See id.* (explaining that children who have been traumatized by crises need to be given a “sense of normality”).

in the crisis that created the need for adoption—as in the adoptions from South Korea and Vietnam following U.S. wars in those countries,¹⁵ and now following the long-term war and painful withdrawal from Afghanistan.¹⁶ The complicity of the U.S. in separation of children from parents at the U.S.-Mexico border is the next frontier in adoption following separation.¹⁷

International adoption is itself an ouroboros, repeating the pattern of adoption as a response to humanitarian crises.¹⁸ Seeing the video of the child handed over the wall, and other similar images of the suffering of children in war zones, awakens a charitable impulse in the viewer, an impulse that often responds with a desire to adopt.¹⁹ After such images from Afghanistan began to proliferate on the Ethernet, Google Trends showed an astronomical increase in interest in adoption from Afghanistan.²⁰ Twitter also shows interest from

15. See KAREN DUBINSKY, *BABIES WITHOUT BORDERS: ADOPTION AND MIGRATION ACROSS THE AMERICAS* 94 (2010) (“It’s . . . not a coincidence that most of the countries supplying children have been exposed to American military intervention, presence, or occupation.”).

16. *Adoption Statistics*, U.S. DEP’T OF STATE, https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-statistics-esri.html?wcmode=disabled (last visited Oct. 5, 2022) (citing U.S. adoptions from Afghanistan).

17. Garance Burke & Martha Mendoza, *AP Investigation: Deported Parents May Lose Kids to Adoption*, ASSOCIATED PRESS (Oct. 9, 2018), <https://apnews.com/article/immigration-us-news-ap-top-news-international-news-arrests-97b06cde0c149c492bf25a48cb6c26f>. Moving separated children from the border into domestic adoption is beyond the scope of this article, which focuses on international adoption. *Id.* But the lessons learned about the inadvisability of family separation in response to crisis in international adoption certainly apply here. *Id.* For more on the legal issues involved in the Trump-era policy of family separation, see Carrie F. Cordero, Heidi Li Feldman & Chimène I. Keitner, *The Law Against Family Separation*, 51 COLUM. HUM. RTS. L. REV. 430, 433 (2020) (noting that then-Secretary of Homeland Security John Kelly stated that the U.S. was considering “families at the border as a deterrent to illegal immigration,” even though “evidence does not support the idea”); Ediberto Román & Ernesto Sagás, *A Domestic Reign of Terror: Donald Trump’s Family Separation Policy*, 24 HARV. LATINX L. REV. 65, 102 (2021) (using former President Donald Trump’s policy—to erect a border wall between U.S. and Mexico—as an example of the U.S.’s complicity). For an exploration of the internationally-recognized right to family connectedness, see generally Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163 (2015).

18. See *infra* Section III.B (elaborating on the perpetual cycle of international adoption in times of crisis).

19. See Haidari, *supra* note 2 (showing a video of a child being handed to a U.S. soldier from over a wall in Afghanistan).

20. GOOGLE TRENDS HELP, <https://support.google.com/trends/answer/4365533> (last visited Sept. 19, 2022). Google Trends shows relative search popularity for a search term during a particular time frame. *Id.* According to Google Trends, “each data point is divided by the total searches of the geography and time range it represents, to compare relative popularity. The resulting numbers are then scaled to a range of 0 to 100. The highest point in the figure is equal to 100.” *Id.*

For the search “Adoption from Afghanistan,” the Google Trends figure shows zero interest the weeks of August 1-14, 2021, but interest spiked to 100—the top of the interest range—for the week

prospective parents, with adoption agencies tweeting that they are receiving lots of calls from interested parents²¹ and others directly expressing interest in adopting orphans from Afghanistan.²² The Today Show featured a heart-warming piece on how to adopt Afghan refugee children.²³ There does not seem to be as strong an interest in adult Afghans, with many complaining about the crisis bringing adult refugees to our shores.²⁴ And once international adoptees become adults, we are willing to deport them for criminal infractions.²⁵ Americans' apparent fascination with rescuing those in need seems to

of August 15-21, 2021. GOOGLE TRENDS, Search of "Adoption from Afghanistan" in the U.S., <https://trends.google.com/trends/explore?date=2021-07-01%202022-08-18&geo=US&q=Adoption%20from%20Afghanistan> (last visited Oct. 5, 2022). The same spike occurred with the search "Adopting from Ukraine." GOOGLE TRENDS, Search for "Adopting from Ukraine" in the U.S., <https://trends.google.com/trends/explore?q=adopting%20from%20Ukraine> (last visited Oct. 5, 2022). There was zero interest before the week of March 6-12, 2022, when interest shot up to 100. *Id.*

21. See, e.g., D.J. Jordan (@DJJordanVA), TWITTER, (Aug. 31, 2021, 11:56 AM), <https://twitter.com/DJJordanVA/status/1432779350286508034> (tweeting that @VAKidsBelong received requests about how to adopt orphans from Afghanistan).

22. See, e.g., Sara (@sara112978), TWITTER (Aug. 16, 2021, 8:48 PM), <https://twitter.com/sara112978/status/1427477318184935426> ("How can we offer to foster or adopt an Afghan child? I have the means. How can I help get someone or a couple of kids out of there? #AfghanChildren #AfghanWomen #Adoption #Afghanistan #AfghanChild #AfghanAdoption"); Matt Left (@HTLegends), TWITTER (Aug. 16, 2021, 7:27 AM), <https://twitter.com/HTLegends/status/1427275824269516801> ("How do we adopt a refugee orphan? #ADOPTION #Afghanistan #Haitiearthquake2021 #Indianapolis").

23. Kait Hanson, *How to Adopt Afghan Refugee Children*, TODAY (Aug. 20, 2021, 1:32 PM), <https://www.today.com/parents/how-adopt-afghan-refugee-children-t228759> (noting that "[m]ore than half of the world's refugees are children" who are often orphans).

24. Tucker Carlson, *We Don't Know Who the Afghan Refugees Are*, FOX NEWS (Aug. 28, 2021, 2:13 AM), <https://www.foxnews.com/opinion/tucker-carlson-afghan-refugees> (complaining that terrorists are among those refugees); Katrin Bennhold & Steven Erlanger, *Why Europe's Leaders Say They Won't Welcome More Afghan Refugees*, N.Y. TIMES, <https://www.nytimes.com/2021/08/18/world/europe/afghanistan-refugees-europe-migration-asylum.html> (Oct. 12, 2021) ("panicked European politicians . . . are terrified of another mass movement of Muslim asylum seekers").

25. See Holland L. Hauenstein, *Unwitting and Unwelcome in Their Own Homes: Remedying the Coverage Gap in the Child Citizenship Act of 2000*, 104 IOWA L. REV. 2123, 2125 (2019) ("In 2001, the United States enacted the Child Citizenship Act (the 'Act') to automatically grant citizenship to all international adoptees parented by a U.S. citizen. However, the Act only extended citizenship to those children under the age of 18 at the time of the Act's passage. The resulting lack of coverage for a significant number of U.S. international adoptees has led to deportation for some and fear of deportation for others."); DeLeith Duke Gossett, "[Take from Us Our] Wretched Refuse": *The Deportation of America's Adoptees*, 85 U. CIN. L. REV. 33, 34 (2017) (noting that "[t]he last twenty years, in particular, have seen an increase in immigration enforcement as the list of deportable offenses for noncitizens has expanded under federal immigration law"). For the account of one such adoptee, see Maggie Jones, *Adam Crapsers's Bizarre Deportation Odyssey*, N.Y. TIMES (April 1, 2015), <https://www.nytimes.com/2015/04/01/magazine/adam-crapsers-bizarre-deportation-odyssey.html> (reporting the case of Adam Casper in Washington state, who was deported by U.S. Immigration and Customs

end when the needy reach age eighteen.²⁶

International adoption first arose as a response to crisis after World War II, and it has continued as a response to crisis.²⁷ It may be a family's individual crisis of poverty or illness or death, but it may also be a response to a country's crisis of war or natural disaster.²⁸ But as human and charitable as the impulse to adopt children in crisis may be, it is often not in the best interests of children.²⁹ They are separated from family, and perhaps never reunited.³⁰ Their identities may be lost in the scramble to get them to safety.³¹ They may be trafficked rather than adopted through reputable means.³² And in the midst of a highly disruptive crisis, their lives are further disrupted by being removed from the only things familiar to them—their family, the sights and sounds and smells of home, the language they know, the people who look like them.³³

The often-destructive effects of international adoption in the midst of crises is further exacerbated by the general lax regulation of international

Enforcement (ICE officers).

26. Hauenstein, *supra* note 25, at 2123 (“Within the Act exists a noticeable gap in coverage for those U.S. international adoptees who were over the age of 18 as of the Act’s passage in 2001.”).

27. Hauenstein, *supra* note 25, at 2127 (“International adoptions in the United States began in earnest after World War II.”).

28. See Elizabeth Barholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 159 (2007) (explaining that countries consider various forms of social crises when making adoption policy—“some combination of (1) perceived needs of homeless children, often precipitated by war, poverty or other forms of social crisis, and (2) political attitudes, which can make international adoption unacceptable as a method of addressing children’s needs regardless of the extent of those needs and the degree of social crisis”).

29. Hauenstein, *supra* note 25, at 2127 n.20 (“Such practices were most famously committed by Georgia Tann, owner of the Tennessee Children’s Home Society in years leading up to World War II. Tann significantly commercialized the adoption process, and her business thrived on adopting out an astronomical number of children as quickly as possible to capitalize most efficiently.” (citations omitted)).

30. Tara Zahra, *Lost Children: Displacement, Family and Nation in Postwar Europe*, 81 J. MOD. HIST. 45, 45 (2009) (“The problem of reuniting families after World War II proved to be more than a daunting logistical puzzle, moreover. Although they represented only a small fraction of the millions of displaced persons (DPs) in postwar Europe, so-called lost children held a special grip on the postwar imagination.”).

31. See Seymore, *supra* note 17, at 165–66 (noting the unique identity struggles of internationally adopted people).

32. See Katherine Herrmann, *Reestablishing the Humanitarian Approach to Adoption: The Legal and Social Change Necessary to End the Commodification of Children*, 44 Fam. L.Q. 409, 410 (2010) (noting the financial incentives for “child-trafficking, deceit, and kidnapping”).

33. See Seymore, *supra* note 17, at 199–200 (discussing harms stemming from home removal).

adoption.³⁴ While the Hague Convention on Intercountry Adoption³⁵ purports to govern such adoptions with the intent to protect children and families, not all international adoptions are Hague Convention-regulated adoptions.³⁶ Afghanistan, for example, is not a signatory to the Hague Convention.³⁷ The U.S. continues to permit children to be adopted from countries that are not signatories to the Hague Convention.³⁸ And the U.S. fails to utilize all its available resources to prevent children being trafficked into international adoption by failing to categorize illegal adoption as human trafficking.³⁹

Part II of this Article examines the history of international adoption, situating it as a response to crises of war and natural disaster.⁴⁰ Part III analyzes the problems inherent in a crisis approach to international adoption, from family separation to child laundering to human trafficking.⁴¹ Part IV looks to the failures of the U.S. approach to illegal adoption as child trafficking and to the Hague Convention and the U.S. system of international adoption that permits

34. See Elizabeth Long, *Where Are They Coming From, Where Are They Going: Demanding Accountability in International Adoption*, 18 CARDOZO J.L. & GENDER 827, 839 (exploring regulatory shortfalls in adoptions not regulated by the Hague Convention).

35. Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 [hereinafter Hague Convention].

36. See *Status Table*, HAGUE CONF. ON PRIV. INT'L L., <https://www.hcch.net/en/instruments/conventions/status-table/?cid=29> (last updated Jan. 3, 2022) (showing the signatories to the Hague Convention).

37. *Id.* (showing signatories). Adoption from Afghanistan is further complicated by the fact that it is a Muslim country, and Islam does not recognize adoption as the West practices it. See Faisal Kutty, *Islamic "Adoptions": Kafalah, Raadah, Istilhaq and the Best Interests of the Child*, in THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES 526, 526 (Robert J. Ballard et al. eds., 2015). *Kafalah*, a type of guardianship, is employed instead. *Id.*; see also Andrea Büchler & Eveline Schneider Kayasseh, *Fostering and Adoption in Islamic Law—Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, 6 ELEC. J. ISLAMIC & MIDDLE E.L. 31, 32 (2018) (explaining that Muslim countries often prohibit adoption but permit *kafalah*). But see Marcia C. Inhorn, "He Won't Be My Son": *Middle Eastern Muslim Men's Discourses of Adoption and Gamete Donation*, 20 MED. ANTHROPOLOGY Q. 94, 94 (2006) (exploring how some Muslim men consider alternative paths to fatherhood "against all odds"). Despite the difficulties of adoption from Afghanistan, the U.S. State Department figures show forty-one children have been adopted to the U.S. from Afghanistan. See *Adoption Statistics*, *supra* note 16.

38. See *Status Table*, *supra* note 36 (showing Hague Convention signatories); see also *Adoption Statistics*, *supra* note 16 (showing United States adoptions from countries not members to the Hague Convention).

39. David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption under the Coming Hague Regime*, 32 VT. L. REV. 1, 29–30 (2007) (explaining the harm caused by the State Department categorizing illegal adoption as something other than human trafficking).

40. See *infra* Part II (examining the history of international adoption).

41. See *infra* Part III (analyzing the problems inherent in crisis-provoked international adoptions).

the continued use of international adoption as crisis management.⁴² Part V suggests needed changes to prevent the ouroboros—the rinse-and-repeat use of adoption to address humanitarian crises that should be solved in ways that center children in their family.⁴³

II. HISTORY OF INTERNATIONAL ADOPTION

A. Post-World War II

“International adoption was itself a major legacy of World War II.”⁴⁴ The first wave of international adoption of children from other countries to the United States began after World War II as a response to the large number of orphans produced by the war.⁴⁵ It has been estimated that there were as many as thirteen million orphans in Europe following the war,⁴⁶ though many were not actually orphaned but only separated from living parents.⁴⁷

Many of the children adopted to the United States were from Germany and Greece, but Americans also adopted children from Japan and China.⁴⁸ The Displaced Persons Act of 1948⁴⁹ and the Refugee Relief Act of 1953⁵⁰ facilitated the entry of 5,814 orphans to the United States for adoption.⁵¹ Of

42. See *infra* Part IV (examining failures in international adoption).

43. See *infra* Part V (concluding that the child rescue narrative in crisis response harms children).

44. TARA ZAHRA, *THE LOST CHILDREN: RECONSTRUCTING EUROPE’S FAMILIES AFTER WORLD WAR II* 237 (2015).

45. HOWARD ALTSTEIN & RITA J. SIMON, *Introduction*, in *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1, 3 (1991); RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS* 5 (2000); see also DUBINSKY, *supra* note 15, at 93 (explaining that people commonly attribute expansion of international adoption to World War II).

46. Linda Shields & Barbara Bryan, *The Effects of War on Children: The Children of Europe after World War II*, 49 *INT’L NURSING REV.* 87, 88 (2002).

47. See *id.* at 91 (recounting how many children were taken from their adopted families and held in orphanages until being reunited with natural parents after World War II).

48. See ALTSTEIN & SIMON, *Introduction*, in *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE*, *supra* note 45, at 3 (noting that between 1948 and 1953, Americans adopted 2,418 Asian children, of whom 1,608 were Japanese).

49. See Displaced Persons Act of 1948, ch. 647, 62 Stat. 1009 (no longer in effect); LAURA BRIGGS & DIANA MARRE, *Introduction: The Circulation of Children*, in *INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN* 1, 5 (Diana Marre & Laura Briggs eds., 2009).

50. See Refugee Relief Act of 1953, ch. 336, 67 Stat. 400, *amended by* ch. 1169, 68 Stat. 1044. BRIGGS & MARRE, *supra* note 49, at 7.

51. ALTSTEIN & SIMON, *Introduction*, in *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE*, *supra* note 45, at 3.

course, the United States was not the only country engaged in international adoption at this time, and European countries engaged in international adoptions before the war ended.⁵² For example, in response to the bombing of the Basque city of Guernica by Spain's Franco, children from that city were sent to adoptive homes in Mexico, Scandinavia, Belgium, and the Soviet Union.⁵³ Jewish refugee children from Germany and German-occupied Austria and Czechoslovakia found adoptive homes in Holland and Belgium.⁵⁴

Post-war adoption was not universally thought to be a good idea.⁵⁵ The International Social Services organization, which often facilitated international adoption, expressed some ambivalence; it believed "that in European countries after World War II, international agencies took children too quickly from mothers in refugee camps."⁵⁶ There was concern that children were too quickly conferred to adoptive families, in particular to families in the United States, because of the material advantages at play.⁵⁷ In a number of cases, the child's own parents did not understand the significance of abandoning their parental rights; they sometimes even had the illusion that the adoption would facilitate their own emigration to the United States.⁵⁸

For others, international adoption was the best solution for displaced children.⁵⁹ Transferring refugee children in Germany to France, for example, was thought of as redressing the population imbalance caused by the Nazis by meeting an Allied goal of reducing the German population while meeting the growing demand for children in France.⁶⁰ Quick adoption into French families would ensure assimilation of these children as newly-minted French citizens.⁶¹ Included in this "humanitarian gesture to rescue unwanted children"

52. BRIGGS & MARRE, *supra* note 49, at 3.

53. *Id.*

54. *Id.*

55. See, e.g., Catherine Ceniza Choy, *Race at the Center: The History of American Cold War Asian Adoption*, 16 J. AMERICAN-EAST RELS. 163, 173 (2009) (explaining the International Social Services were alarmed by reports of Asian international adoption).

56. *Id.* (raising concerns that mixed-race children were treated like a commercial product).

57. See, e.g., Tara Zahra, 'A Human Treasure': *Europe's Displaced Children Between Nationalism and Internationalism*, 210 PAST & PRESENT 332, 335-38 (2011) (identifying children as the most able to assimilate).

58. ZAHRA, *supra* note 44, at 237.

59. See *infra* text accompanying notes 60-63; see also Choy, *supra* note 55, at 173 ("To us, the only solution for the children of mixed parentage is their placement outside their own country in good . . . homes. In the absence of such placements, they will not live or will have nothing to live for.")

60. Zahra, *supra* note 57, at 333, 338.

61. *Id.* at 338.

were the children of French soldiers with German women during post-war occupation.⁶² But children of colonial French soldiers—those from Africa—were not included in the adoption program “unless they had white skin.”⁶³

The fervor in America to adopt refugee children after the war was real, however.⁶⁴ Images of displaced young children circulated in the media and fundraising appeals “inspire[ed] couples in the United States and elsewhere to offer homes for adoption.”⁶⁵ In one appeal to the International Refugee Organization, a prospective adoptive parent put in her order for “two little girls between the ages of four and ten. As for nationality I prefer French, Irish, Scottish. I would prefer them to be of Protestant belief.”⁶⁶ But prospective parents were often disappointed to discover that the children in need of homes were older boys who were “just children, not geniuses,” and their interest in providing homes evaporated.⁶⁷

B. South Korea

The second wave of intercountry adoption to the United States began after the Korean War.⁶⁸ It is estimated that that war produced 100,000 orphans.⁶⁹ The devastation of the war also destroyed traditional family systems of support that would have previously absorbed orphaned children with relatives or within same surnames.⁷⁰ Now, with destruction of families and limited social infrastructure, lost, abandoned, neglected, and orphaned children crowded into five hundred shelters and orphanages developed through foreign aid organizations.⁷¹ It is perhaps not surprising that children adopted internationally were not always orphans, that records were sometimes lost or deliberately

62. *Id.* at 339.

63. *Id.*

64. Zahra, *supra* note 30, at 52.

65. *Id.*

66. *Id.*

67. *Id.* Zahra notes that the efficient killing machine that was the Nazi regime did not leave young children, who were unable to work, alive. *Id.*

68. ALTSTEIN & SIMON, *Introduction*, in INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE, *supra* note 45, at 3.

69. Dong Soo Kim, *A Country Divided: Contextualizing Adoption from a Korean Perspective*, in INTERNATIONAL KOREAN ADOPTION: A FIFTY-YEAR HISTORY OF POLICY AND PRACTICE 3, 5 (Kathleen Ja Sook Bergquist et al. eds., 2007).

70. *Id.* at 4.

71. *Id.* at 5.

falsified to aid adoption.⁷² And it is perhaps not surprising that some children died on the international flight to new homes in America.⁷³

For many Americans, adopting war orphans from Korea was seen as a moral imperative, since many of the children were the product of relationships between American soldiers and Korean women.⁷⁴ Harry and Bertha Holt, who later founded Holt International adoption agency, are credited with the first adoptions from Korea.⁷⁵ Motivated by a documentary about Amerasian children in Korean orphanages, Harry Holt lobbied Congress for a law allowing such adoptions and adopted eight Korean orphans.⁷⁶ Korean children were also placed in adoptive homes in Sweden, Norway and the United Kingdom.⁷⁷

While international adoption was presented as a temporary solution to the humanitarian crises of the Korean War, the adoption of children from Korea extended far beyond the war.⁷⁸ “It is estimated that between the early 1950s and the mid-1980s, in excess of 100,000 Korean-born children were adopted by Western families.”⁷⁹ In many ways, Korean adoptions were a shift from the consumer-driven domestic adoption market that had led to increased regulation of adoption after baby-selling scandals.⁸⁰ Korean adoptions were

72. See Daniel A. Edelson, *For the World's More Full of Weeping: Retroactively Abolishing South Korea's Civil and Criminal Statutes of Limitations for Illegal International Adoptions*, 5 YONSEI L.J. 117, 118 (2014) (noting the proliferation of stories of falsifications of records as well as other illegalities in South Korean adoption). Consider, for example, the documentary *In the Matter of Cha Jung Hee*, where an eight-year-old Korean girl was substituted for Cha Jung Hee and adopted out under that name as an orphan while her birth mother was still alive. IN THE MATTER OF CHA JUNG HEE (Mu Films 2010).

73. RACHEL RAINS WINSLOW, *THE BEST POSSIBLE IMMIGRANTS: INTERNATIONAL ADOPTION AND THE AMERICAN FAMILY* 62 (2017) (discussing how on a 1958 flight while Harry Holt ushered 101 Korean orphans to America, one 8-month-old child died of tuberculosis complications, another had to be left in Honolulu for medical reasons, and an additional 27 were hospitalized on arrival for tuberculosis).

74. Kim, *supra* note 69, at 7.

75. DUBINSKY, *supra* note 15, at 94; BARBARA A. MOE, *ADOPTION* 157 (2d ed. 2007); BRIGGS & MARRE, *supra* note 49, at 7 (noting that Holt International “remains one of the largest international adoption agencies in the country”).

76. MOE, *supra* note 75, at 157; BRIGGS & MARRE, *supra* note 49, at 6.

77. BRIGGS & MARRE, *supra* note 49, at 3.

78. Kim, *supra* note 69, at 7.

79. SIMON & ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS*, *supra* note 45, at 7.

80. RAINS WINSLOW, *supra* note 73, at 30–31; Malinda L. Seymore, *Adopting Civil Damages: Wrongful Family Separation in Adoption*, 76 WASH. & LEE L. REV. 895, 906–07 (2019) (discussing the baby-selling scandal involving Georgia Tann, which led to federal congressional investigation and oversight).

clothed in the language of rescue and humanitarianism, inducing federal legislators to see it as benign volunteerism that did not need regulation.⁸¹ What remained was a patchwork of weak state regulation and the humanitarian organizations themselves inexpertly policing themselves.⁸²

Professor Kimberly McKee posits that Korean adoption is not a humanitarian child rescue mission, but instead “is a neo-colonial, multimillion dollar global industry that commodifies children’s bodies.”⁸³ The continuation of international adoption from South Korea long after the war passed supports this contention.⁸⁴ In many ways Korea no longer fits the picture of the typical, impoverished, sending country for international adoption.⁸⁵ It is no longer considered a developing country and has “become a major economic force in the world’s markets.”⁸⁶ And, the total fertility rate in Korea is below replacement rate, making it an unlikely place to export children.⁸⁷ Yet Korea shows that once an international adoption program begins in response to humanitarian crisis, it often continues long past the end of that crisis.⁸⁸

Adoptions from Korea have slowed somewhat since its peak in the 1980s, but adoptions from Korea continue today.⁸⁹ In 1993, Korea’s Health Ministry announced an intention to end foreign adoption by 1996, but adoptions continued.⁹⁰ In 2008, Korea again announced an intention to end foreign

81. RAINS WINSLOW, *supra* note 73, at 62–63.

82. *See e.g., id.* (“[T]he Holts’ success also hinged on the state’s reliance on private organizations to tackle social welfare crises.”).

83. Kimberly D. McKee, *Monetary Flows and the Movements of Children: The Transnational Adoption Industrial Complex*, 21 J. KOREAN STUDIES 137, 138 (2016); *see also* DUBINSKY, *supra* note 15, at 94 (noting that a prerequisite to international adoption is the power imbalance between Western countries and their former colonies).

84. *See* Kim, *supra* note 69, at 7 (discussing the continuation and growth of Korean adoption as time went by after the Korean War).

85. Kongdan Oh, *Korea’s Path from Poverty to Philanthropy*, THE BROOKINGS INST. (June 14, 2010), <https://brookings.edu/articles/koreas-path-from-poverty-to-philanthropy/>.

86. SIMON & ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS*, *supra* note 45, at 8.

87. Peter Selman, *The Movement of Children for International Adoption: Developments and Trends in Receiving States and States of Origin, 1998–2004*, in *INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN* 32, 39 tbl. 1.8A (Diana Marre & Laura Briggs, eds., 2009).

88. *See, e.g.,* Kim, *supra* note 69, at 7 (showing how Korean adoption grew following the Korean War).

89. SIMON & ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS*, *supra* note 45, at 8 tbl. 1.3.

90. *Id.* at 9.

placement of children by 2012,⁹¹ but those adoptions are still taking place today.⁹² In 2016, there were 260 South Korean children adopted to the United States.⁹³

C. Vietnam

The Vietnam War brought another sending country online for international adoption.⁹⁴ Perhaps the best-known incident in Vietnam adoption was the air flights of children from Vietnam, known as Operation Babylift:

When the war in Viet Nam ended in 1975, more than 2,000 children were picked up in Saigon and flown to adoptive families throughout the United States, Canada, and Europe. Many of them were of mixed ancestry, literally embodying the U.S. (and French) war there. Organized by Holt International and a host of other organizations, Operation Babylift (with a name that sounds like a military campaign) was warmly embraced by liberals and conservatives alike as an opportunity to salvage something from the horror of the war.⁹⁵

The recent flights out of Afghanistan have, for many, evoked reminders of the last chaotic days of the Vietnam War and Operation Babylift.⁹⁶

91. See Norimitsu Onishi, *Korea Aims to End Stigma of Adoption and Stop 'Exporting' Babies*, N.Y. TIMES (Oct. 8, 2008), https://www.nytimes.com/2008/10/09/world/asia/09adopt.html?page-wanted=1&_r=2&em.

92. See *Adoption Statistics*, *supra* note 16.

93. *Id.*

94. DANA SACHS, *THE LIFE WE WERE GIVEN: OPERATION BABYLIFT, INTERNATIONAL ADOPTION, AND THE CHILDREN OF WAR IN VIETNAM* 7 (2011).

95. BRIGGS & MARRE, *supra* note 49, at 7. The Vietnam Babylift was not the first of its kind; children from Cuba were airlifted to the United States after Fidel Castro's revolution in a program called "Operation Pedro Pan." SACHS, *supra* note 94, at xiii; BRIGGS & MARRE, *supra* note 49, at 10–11 (noting that the CIA used the Pedro Pan babylift as a propaganda tool against Castro). One commentator argues that our embrace of adoption from war-torn countries is as much about guilt as it is humanitarianism. Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 429–30 (2009) (arguing that intercountry adoption from Vietnam grew as Americans wished "to atone for U.S. involvement in the wars and destruction of the native countries of these children").

96. See Michael S. Rosenwald, *Operation Babylift: A Frantic Saigon Rescue Effort Is Echoed in Kabul's Chaos*, WASH. POST (Aug. 29, 2021, 7:00 AM) <https://www.washingtonpost.com/history/2021/08/29/operation-babylift-saigon-kabul-airport/>; Melissa Zygowicz, *'It's History Repeating Itself': Veterans, Hmong Community Draw Parallels to Vietnam War and Afghanistan*, CBS 58 WDJT—Milwaukee (Aug. 18, 2021, 5:21 PM), <https://www.cbs58.com/news/its-history-repeating->

Operation Babylift was not a singular flight, but rather encompassed almost fifty flights.⁹⁷ The program was not completely without controversy at the time—some worried that in the chaos of the end of the war the children who were scooped up and transported abroad were not really orphans, and no attempts were made to find their parents.⁹⁸

A Vietnamese-speaking volunteer who was working with the children brought to America was startled to learn in talking to the children that many had living parents.⁹⁹ The Center for Constitutional Rights filed a class action suit, alleging that many of the Babylift children were not orphans and were being detained away from their parents in violation of the Fifth Amendment of the U.S. Constitution.¹⁰⁰ According to the Ninth Circuit opinion affirming an injunction requiring the production of information about the children, the availability of the children for adoption was in serious question:

[I]t now appears that some of the 2700 children airlifted were brought here improperly. We are presently dealing with a very limited record. The documentation accompanying some of the children is insufficient on its face to establish the child's status as an orphan, abandoned, or irrevocably released child, the validity of the private agency's custody of such a child under Vietnamese child custody law, or the child's eligibility for admission [to the U.S.]. While inadequate documentation is in many cases the product of the last minute haste of the evacuation, in at least some cases, as the district court found, it is because the children are not orphans and have not been validly released into the custody of the adoption agencies. From plaintiffs' assertions, it appears that some of the children have a living parent, and were merely left in orphanages for safekeeping

itself-veterans-hmong-community-draw-parallels-to-vietnam-war-and-afghanistan.

97. See generally SACHS, *supra* note 94, at 89 (noting that President Ford authorized funding to fly two thousand children out of Vietnam).

98. See BRIGGS & MARRE, *supra* note 49, at 7; SACHS, *supra* note 94, at 63. Indeed, legal cases brought by Vietnamese parents and other relatives to reclaim their children are evidence that some of the children were not orphans. See, e.g., Huynh Thi Anh v. Levi, 427 F. Supp. 1281, 1284–85 (E.D. Mich. 1977) (grandmother seeks return of four grandsons); Nguyen Da Yen v. Kissinger, 528 F.2d 1194, 1197 (9th Cir. 1975) (class action suit on behalf of non-orphans).

99. Kathleen Ja Sook Bergquist, *Implications of the Hague Convention on the Humanitarian Evacuation and 'Rescue' of Children*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 43, 44 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

100. See *Historic Case: Nguyen Da Yen, et al. v. Kissinger*, CTR. FOR CONST. RTS., <https://ccrjustice.org/home/what-we-do/our-cases/244guyen-da-yen-et-al-v-kissinger> (Oct. 9, 2007).

(Vietnamese orphanages allegedly serve some of the functions of day care centers). The parent(s) may or may not know the child is alive, or where it is. Other children were allegedly released with the understanding that the parents would be reunited with the child here; still others were released by hysterical parents terrorized by the fear that the child would be murdered by the approaching forces. In the latter situations plaintiffs question the validity of the releases.¹⁰¹

As discovery continued in the case, at least 274 children were found not to be available for adoption, and the records of some of the children had been falsified.¹⁰² Discovery and litigation dragged on, and after four years it seemed clear that none of the children would be reunited with their parents and were adopted into American homes.¹⁰³

One writer notes that Operation Babylift marked a change in philosophy in child-saving after wars: rather than seeking to reunite families torn apart by wars, Operation Babylift was all about adoption.¹⁰⁴ In perhaps the greatest tragedy, one of the Babylift airplanes crashed, killing seventy-eight children and six of the seven orphanage staff members aboard.¹⁰⁵ It seemed that the U.S. military was “aware that it was loading children onto a plane with a history of problems.”¹⁰⁶ Many of the children’s records were destroyed in the crash, obscuring their origins and identities.¹⁰⁷

After the war ended, with a government no longer friendly to America in charge, intercountry adoption ended.¹⁰⁸ But as happened in South Korea, international adoption eventually continued long after the war when it could no longer be conceived as a rescue mission related to the war.¹⁰⁹ In the 1990s, international adoption from Vietnam to the United States began again and

101. Nguyen, 528 F.2d at 1197.

102. *Historic Case: Nguyen Da Yen, et al. v. Kissinger*, *supra* note 100.

103. *Id.*

104. SACHS, *supra* note 94, at 53–55.

105. *Id.* at 77. The crash spawned a number of lawsuits by surviving children alleging tort liability on the part of Lockheed, the manufacturer of the aircraft. *See, e.g., Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835, 839–40 (D.C. Cir. 1981); *Friends for All Child., Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 603 (D.C. Cir. 1983).

106. SACHS, *supra* note 94, at 77.

107. *Id.* at 78.

108. SIMON & ALTSTEIN, *ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS*, *supra* note 45, at 12.

109. *Id.* (noting that tensions eased between Vietnam and the United States, allowing for an increase in adoptions of Vietnamese children).

grew from 53 placements in 1990 to 603 placements in 1998.¹¹⁰ In 2002, corruption allegations led the U.S. to halt adoptions from Vietnam.¹¹¹ After Vietnam reorganized its adoption practices, adoptions to the U.S. resumed in 2005.¹¹² But corruption scandals again led to a closure of adoptions from Vietnam in 2008, when the U.S. declined to renew a bilateral adoption treaty with that country.¹¹³ Other countries, including Ireland, Canada, and Australia, still allowed adoptions from Vietnam.¹¹⁴ In June 2014, the U.S. State Department announced the opening of a limited adoption program from Vietnam, focused on special needs and older children.¹¹⁵ Between 2015 and 2019, 103 children were adopted to the United States from Vietnam.¹¹⁶

D. Other Wars and Political Unrest

After World War II, after the Korean conflict, and after the Vietnam War—all of which involved active participation by Americans—adoption arose as part of the post-war rescue mission.¹¹⁷ Even wars where U.S.

110. *Id.*

111. Karen Smith Rotabi, *Fraud in Intercountry Adoption: Child Sales and Abduction in Vietnam, Cambodia, and Guatemala*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 67, 70 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012) (noting the scandal led to “14 individuals arrested in Hanoi for buying children from poor families, paying up to \$70 a child, selling them to individuals in other countries for \$1,000 to \$1,500”) (quoting MADELYN FREUNDLICH, *Market Forces: The Issues in International Adoption*, in ADOPTION & ETHICS: THE ROLE OF RACE, CULTURE, & NAT’L ORIGIN IN ADOPTION 37, 46 (2000)).

112. *Id.*

113. See *id.*; E.J. Graff, *Anatomy of an Adoption Crisis*, FOREIGN POL’Y (Sept. 12, 2010, 11:00 PM), <https://foreignpolicy.com/2010/09/12/anatomy-of-an-adoption-crisis/> (“[T]he State Department was confident it had discovered systemic nationwide corruption in Vietnam—a network of adoption agency representatives, village officials, orphanage directors, nurses, hospital administrators, police officers, and government officials who were profiting by paying for, defrauding, coercing, or even simply stealing Vietnamese children from their families to sell them to unsuspecting Americans.”) According to the U.S. State Department website, adoptions from Vietnam must satisfy suitability and eligibility requirements. *Vietnam Intercountry Adoption Information*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/VietNam.html> (Dec. 31, 2020).

114. Clodagh Sheehy, *Adoption Joy as Three Countries Give Irish Green Light*, INDEPENDENT.IE (July 5, 2013, 2:44 PM), <https://www.independent.ie/regionals/herald/news/adoption-joy-as-three-countries-give-irish-green-light-29397954.html>.

115. John Boudreau, *U.S. to Allow Adoptions from Vietnam After Ban in 2008*, BLOOMBERG (Sept. 15, 2014, 12:06 AM), <https://www.bloomberg.com/news/articles/2014-09-14/u-s-to-allow-adoptions-from-vietnam-after-ban-in-2008?leadSource=uverify%20wall>.

116. *Adoption Statistics*, *supra* note 16.

117. *International Adoptions*, ADOPTION HIST. PROJECT, <https://pages.uoregon.edu/adoption/>

involvement was less direct have led to adoption to the U.S.¹¹⁸ During the Cold War, fierce civil wars in Latin America often lead to the “disappearance” of leftists and, as a tactic to inspire terror, the adopting out of their children.¹¹⁹ Some of those children were placed abroad, “and many well-meaning adopters inadvertently became a part of this process of disappearances.”¹²⁰ During this time in Latin America, international adoption to the U.S. was often seen “as an extension of U.S. economic and military power.”¹²¹ Operation Pedro Pan, an airlift of children from Cuba brought to American to save them from communism, began as a CIA-driven rumor campaign that Fidel Castro intended to take all children from their Cuban parents and raise them as resources of the State.¹²² During Guatemala’s civil war, like in Argentina, orphaned and/or stolen children were adopted in country by military personnel complicit in the deaths of dissidents and were also placed abroad in the U.S. and Europe.¹²³ With the end of the Cold War, most Latin American countries stopped placing children internationally in significant numbers in favor of domestic placements.¹²⁴ The notable exception to this pattern was Guatemala, which followed the pattern of South Korea and Vietnam by becoming a sending country for international adoption long after their war ended.¹²⁵

topics/internationaladoption.htm (last visited Oct. 11, 2022) (discussing the postwar adoption habits of Americans).

118. *Id.*

119. BRIGGS & MARRE, *supra* note 49, at 11; DUBINSKY, *supra* note 15, at 18–19.

120. BRIGGS & MARRE, *supra* note 49, at 11; SIMON & ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS, *supra* note 45, at 15.

121. Laura Briggs, *Making “American” Families: Transnational Adoption and U.S. Latin America Policy*, in HAUNTED BY EMPIRE: GEOGRAPHIES OF INTIMACY IN NORTH AMERICAN HISTORY 344, 349–50 (Ann Laura Stoler et al. eds., 2006).

122. DUBINSKY, *supra* note 15, at 25–27.

123. *Id.* at 106.

124. Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 INT’L. SOC. WORK 575, 582–83 (2009) (explaining that in the 1980s, six of the top ten sending countries to the U.S. were in Latin America; by 2006, only two of the six remained in the top ten); *see also* BRIGGS & MARRE, *supra* note 49, 11–12. For example, international adoption from Paraguay dropped from a high of 497 in 1994 to a low of 7 in 1998; for Peru, the high point was 722 in 1991 to just 2 in 1993 and 26 in 1998; in Chile, there were 300 placements internationally in 1990, declining to 26 in 1998. SIMON & ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS, *supra* note 45, at 14 tbl. 1.5. In Brazil, “international adoptions fell from 2,100 in 1990 to 630 in 1999. . . . [And] 358 in 2002. . . .” Selman, *supra* note 87, at 42–43.

125. *See* Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, *supra* note 124, at 582–83. The pattern in Guatemala was different with steady increases in international adoption from 208 in 1989 to 911 in 1998. SIMON & ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS, *supra* note 45, at 15 tbl. 1.6. By 2004,

After decades of civil war and turmoil, Guatemala turned to international adoption as the “major child welfare intervention for vulnerable children.”¹²⁶ The number of children adopted abroad from Guatemala doubled between 1999 and 2003, and doubled again by 2007.¹²⁷ Approximately one in every one hundred children born in Guatemala made their way to adoptive homes abroad, the highest sending ratio of any country engaged in international adoption.¹²⁸ However, the adoption system in Guatemala lacked government oversight,¹²⁹ and soon allegations of corruption, baby buying, and child kidnapping arose.¹³⁰ The U.S. stopped approving adoptions from Guatemala, and Guatemala itself imposed a moratorium on international adoption while it sought to reform its system.¹³¹ When it reinstated an international adoption program in 2009, the U.S. declined to participate because of concerns about inadequate safeguards to prevent corruption.¹³² The only adoptions thereafter from Guatemala to the U.S. were so-called “pipeline cases,” those in the works at the time of the moratorium in 2008.¹³³

international adoption from Guatemala had increased to 3,572. See Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, *supra* note 124 at 584; BRIGGS & MARRE, *supra* note 49, at 12.

126. Kelley McCreery Bunkers & Victor Groza, *Intercountry Adoption and Child Welfare in Guatemala: Lessons Learned Pre- and Post-Ratification of the 1993 Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 119, 121 (Judith L. Gibbons & Karen Smith Rotabi, eds., 2012).

127. *Id.* (“By 2003, the number of intercountry adoptions had more than doubled to 2,677 children, and almost doubled again to 4,888 children in 2007 . . .”).

128. *Id.* Consider what the “one in one hundred” number means; in the U.S., there are currently 74.3 million children. *Child population: Number of children (in millions) ages 0–17 in the United States by age, 1950–2021 and projected 2022–2050*, CHILDSTATS.GOV, <http://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited on Oct. 13, 2022). If “one in one hundred” were placed in international adoption, that would amount to 743,000 children sent overseas for adoption. *Id.*

129. Bunkers & Groza, *supra* note 126, at 121.

130. Bunkers & Groza, *supra* note 126, at 121; DUBINSKY, *supra* note 15, at 109–21, (reviewing truths and rumors about child kidnapping for adoption and organ donation in Guatemala in the 1980s and 1990s).

131. Bunkers & Groza, *supra* note 126, at 127.

132. Bunkers & Groza, *supra* note 126, at 127; see also *FAQ: U.S. Withdrawal of Interest in Participating in Guatemala’s Pilot Adoption Program*, U.S. DEP’T OF STATE, https://travel.state.gov/content/travel/en/Intercountry-Adoption/adopt_ref/adoption-FAQs/us-withdrawal-interest-guatemala-pilot-program.html (last visited Oct. 13, 2022).

133. 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, 479 (2010) (“Nonetheless, it is apparent that during 2008 and 2009 a substantial number of cases initiated under the old system were being processed as transition or pipeline cases.”); see Romina Ruiz-Goirien & Travis Loller,

Political instability with the fall of the Soviet Union and Communist-Bloc countries also spurred international adoption programs.¹³⁴ When the Iron Curtain fell, the lens of Western media focused on deplorable conditions in Romanian orphanages, motivating thousands from the U.S. and elsewhere in Europe to adopt from Romania.¹³⁵ Romania soon all but shut down adoptions, “saying that the flood of would-be adopters had produced a babies-for-cash market that was resulting in children with no connection with orphanages being ‘sold.’”¹³⁶ The moratorium ended in 1993 with the Romanian Parliament passing new laws to regulate international adoption.¹³⁷ But a lack of government resources and over-reliance on adoption agencies to identify abandoned children and secure consents by birth parents led to concerns “about appearances of impropriety and possible unethical adoption practice.”¹³⁸ In 2001, Romania once again closed to international adoption,¹³⁹ but it reopened with reformed adoption laws in 2012 that restricts international adoption to adoptive parents who are related within the fourth degree of kinship to the child or where the adoptive parent is a Romanian citizen.¹⁴⁰

E. *The Haiti Earthquake of 2010*

Large natural disasters have also spurred disaster responses that included adoption, perhaps most notorious the reactions to the 2010 earthquake in

Adopting Daniel: US Couple Tests New Guatemala Law, NBC NEWS (Sept. 9, 2012, 8:13 AM), <https://www.nbcnews.com/id/wbna48960138> (reporting on the first pipeline case to culminate in a legal adoption from Guatemala approved for immigration to the United States).

134. BRIGGS & MARRE, *supra* note 49, at 12.

135. *Id.*; see also Cristina Nedelcu & Victor Groza, *Child Welfare in Romania: Contexts and Processes*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 91, 93 (Judith L. Gibbons & Karen Smith Rotabi, eds., 2012) (“Between August 1, 1990 and January 7, 1991, about 10,000 Romanian children were sent out of the country for adoption . . .”).

136. BRIGGS & MARRE, *supra* note 49, at 12; see also Nedelcu & Groza, *supra* note 135, at 93.

137. See Nedelcu & Groza, *supra* note 135, at 94.

138. *Id.* at 95.

139. *Id.* (“In 2001 adoptions were closed a second and final time, causing great concern and outrage from receiving countries.”).

140. See *Romania Intercountry Adoption Information*, U.S. DEP’T OF STATE, <https://travel.state.gov/content/travel/en/Intercountry-Adoption/Intercountry-Adoption-Country-Information/Romania.html> (last visited Oct. 13, 2022) (“A child habitually resident in Romania who is on the registry of the National Authority for the Protection of the Child’s Rights and Adoption may be adopted by a person habitually resident abroad, if . . . [t]he adoptive parent is related within the fourth degree of kinship to the child for whom the domestic adoption proceeding has been approved . . .”).

Haiti.¹⁴¹ Following the largest earthquake ever recorded in Haiti on January 12, 2010, the Haitian government reported 230,000 deaths and 300,000 injured.¹⁴² “American families rushed to local adoption agencies, hoping to adopt a child orphaned by the disaster.”¹⁴³ There was immediate concern about orphaned children, and humanitarian parole was granted to children who were already adopted by Americans or who had been matched to Americans.¹⁴⁴ The U.S. promised to evaluate whether additional children should also be permitted to leave, though the Haitian government said its “first priority regarding displaced children [wa]s to try to reunite them with relatives.”¹⁴⁵

Rachel Rains Winslow has argued that backlash against the Vietnam Babylift and increased regulation of international adoption to include the Hague Convention has ameliorated some of the problems of humanitarian rescue ideology in adoption, yet she concedes that the Haiti experience illustrates that the strong volunteerism strain remains.¹⁴⁶ In the aftermath of the devastation of the earthquake, for example, Governor Ed Rendell of Pennsylvania organized a babylift from Haiti, chartering a private airplane to bring children to Pittsburgh the day after the Obama Administration approved humanitarian parole.¹⁴⁷ Although only children who had been legally confirmed as orphans, who were already in the adoption process, or who had already been matched with adoptive parents were to be included, of the fifty-four orphans on the plane, nineteen had not met those requirements and an additional seven had not even been matched with prospective adoptive parents.¹⁴⁸ “Even with

141. Shani M. King, *Owning Laura Silsby's Shame: How the Haitian Child Trafficking Scheme Embodies the Western Disregard for the Integrity of Poor Families*, 25 HARV. HUM. RTS. J. 1, 1 (2012).

142. RHODA MARGESSON & MAUREEN TAFT-MORALES, CONG. RSCH. SERV., R41023, HAITI EARTHQUAKE: CRISIS AND RESPONSE 3 (2010), <https://apps.dtic.mil/sti/pdfs/ADA516429.pdf>.

143. RAINS WINSLOW, *supra* note 73, at 174; *see also* Judy Peet, *After Haiti Earthquake, Spike in Adoption Requests Benefits Other Countries in Need*, STAR-LEDGER, (Apr. 4, 2010, 2:03 AM), https://www.nj.com/news/2010/04/after_haiti_earthquake_spike_i.html (discussing the spike in adoption requests of Haitian children after the Haiti earthquake); *Americans Rush to Adopt Orphaned Haitian Kids*, TODAY SHOW (Jan. 20, 2010, 4:05 PM), <https://www.today.com/news/americans-rush-adopt-orphaned-haitian-kids-wbna34962518> (“There is no counting children newly orphaned by the quake, but aid groups estimate the number in tens of thousands.”).

144. MARGESSON & TAFT-MORALES, *supra* note 142, at 31.

145. *Id.*

146. WINSLOW, *supra* note 73, at 173–74.

147. *Id.* at 175. The day before humanitarian parole for Haitian orphans was approved, two private jets took twenty-six children to Florida, and the organizers were lauded for “acting without hesitation” before the “slowdown of bureaucratic protocol set in.” Bergquist, *supra* note 99, at 47.

148. Bergquist, *supra* note 99, at 48.

stricter international regulations, Rendell was never officially censured for his rescue mission.”¹⁴⁹

Prior to the earthquake, Haiti had a high population of children in orphanages,¹⁵⁰ many of whom were not orphans.¹⁵¹ Poor families used orphanages as boarding schools or childcare centers, and quite often the children in orphanages in Haiti have living parents or family members.¹⁵² There was concern that the environment was ripe for mistakes and outright trafficking following the earthquake.¹⁵³ Some of that concern was realized when Baptist missionaries from Idaho scooped up thirty-three children to take across the border to the Dominican Republic for adoption to the U.S., though none of the children were orphans.¹⁵⁴ Rather, they had living relatives “who simply

149. WINSLOW, *supra* note 73, at 175. Justice Amy Coney Barrett and her family adopted a child after the earthquake in Haiti, recounting in an interview that “a number of paperwork snafus” prior to the adoption had led them all to conclude that the adoption would not happen. Notre Dame Club of Washington, D.C., *A Conversation with Judge Amy Coney Barrett ‘97 J.D.*, YOUTUBE (Aug. 8, 2019), <https://youtu.be/OHMAHnT-y7c>. But, one month after the earthquake, “the adoption agency called us and said: ‘Any child who had an adoption in progress at the time that the earthquake happened, the State Department will lift some of the paperwork requirements that were keeping them in the country. So are you still willing to take him?’ [And] we said: ‘Of course.’” *Id.*; see Catherine Porter & Serge F. Kovaleski, *An Earthquake, an Orphanage, and New Beginnings for Haitian Children in America*, N.Y. TIMES (Oct. 19, 2020), <https://www.nytimes.com/2020/10/19/world/haiti-adoptions.html> (discussing Justice Barrett’s post-earthquake adoption, including information about the agency she used being decertified by the U.S. State Department in 2017).

150. *Haitian Orphans Rushed to New Homes Abroad*, CNN, (Jan. 18, 2010, 1:12 PM), <http://www.cnn.com/2010/WORLD/americas/01/17/haiti.orphans/index.html> (reporting that Haiti had 380,000 orphans prior to the earthquake).

151. *Parents: All Haitian ‘Orphans’ Had Relatives*, NBC NEWS (Feb. 21, 2010, 10:43 AM), <https://www.nbcnews.com/id/wbna35507224> (“[M]ore than half of the 380,000 children in Haiti’s orphanages are not orphans. Many have parents who—even before the quake—were simply unable to care for them.”).

152. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 119–20 (2006) (“[S]ome sending nations have a custom, particularly among the poor, of placing children in institutions for purposes of education, food, housing, and care, without intending to sever parental rights. These institutions, whether called orphanages, schools, or hostels, are commonly used by the poor as a kind of safety net or extended family resource.”); DOYLE, *supra* note 12 at 6 (noting that across the world, a large proportion of children living in orphanages are not orphans—92% of children in private residential care in Sri Lanka had living parents; 98% of children in orphanages in Liberia had a least one surviving parent).

153. Paige Tackett, Note, *“I Get by with a Little Help from My Friends”: Why Global Cooperation is Necessary to Minimize Child Abduction and Trafficking in the Wake of Natural Disaster*, 79 U. MO. KAN. CITY L. REV. 1027, 1030 (2011) (citation omitted) (“[C]hild trafficking is an enduring problem in Haiti: ‘illicit schemes can flourish amid the chaos, it would be virtually impossible to guard against both mistakes and criminal misconduct.’”).

154. *Id.* at 1027.

felt ill-equipped to care for the children, believing they could visit and/or recover the children when their housing and employment stabilized.”¹⁵⁵ But despite that understanding, the purpose of the New Life Children’s Refuge was, according to their action plan, to place the children in adoptive families in the U.S.¹⁵⁶

Ten members of the New Life Children’s Refuge, the Baptist missionaries, had rented a building across the border from Haiti in the Dominican Republic, intending to turn it into an orphanage.¹⁵⁷ Then, they sought orphans to populate their orphanage.¹⁵⁸ They first tried to take a different group of forty Haitian children across the border to the Dominican Republic, but they were turned away and told they did not have the appropriate government paperwork from the Haitian Government to do so.¹⁵⁹ Three days later, they tried again with a new group of thirty-three Haitian children; this time, they were arrested and charged with child kidnapping and criminal association.¹⁶⁰

“[T]he missionaries claimed good intentions and ignorance of Haitian laws,”¹⁶¹ but there was striking evidence that the missionaries had been warned multiple times that they could not simply take children across the border to the Dominican Republic.¹⁶² There was information that supported an intention to move the children into “grey market” adoptions without abiding by controlling law.¹⁶³ For example, the New Life Children’s Refuge was not registered as a U.S. international adoption agency,¹⁶⁴ the leader, Laura Silsby, was in the midst of a serious financial crisis when she began the undertaking

155. Bergquist, *supra* note 99, at 49.

156. King, *supra* note 141, at 10 (“Contrary to the parents’ expectations, Silsby’s express intent—according to her online action plan—was to place the children for adoption.”).

157. Tackett, *supra* note 153, at 1027 (describing the actions of the New Life Children’s Refuge in the aftermath of the earthquake in Haiti).

158. King, *supra* note 141, at 8–9 (citations omitted) (“[T]he January earthquake struck Haiti, and Silsby organized a mission to ‘gather 100 orphans from the streets’ of Haiti . . .”).

159. *Id.* at 9 (“[E]vidence was introduced in Silsby’s case showing that . . . she had previously attempted to take a different group of 40 children across the border.”).

160. *Id.* at 8 (“On January 29, 2010 . . . Haitian authorities arrested ten U.S. Baptist missionaries for attempting to take 33 children by bus across the border . . . [T]he missionaries were charged with child kidnapping and criminal association.”).

161. *Id.*

162. *Id.*

163. *Id.* (“While Laura Silsby awaited trial, the press brought to light several facts that raised serious suspicions about her intent to traffic or smuggle the children as part of a grey adoption scheme.”).

164. *Id.* at 9.

in the Dominican Republic and Haiti,¹⁶⁵ and her legal advisor, Jorge Torres-Puello, was arrested and accused of human trafficking.¹⁶⁶

Because of lobbying from the U.S., all of the Americans initially arrested were released—save for the leader, Laura Silsby.¹⁶⁷ Her charge was reduced to a lesser charge, arranging illegal travel, for which she was found guilty.¹⁶⁸ She was sentenced to time served, and released.¹⁶⁹ The court’s ruling relied heavily on the fact that many of the children’s parents had consented to their children being taken to an orphanage in the Dominican Republic.¹⁷⁰ The court did not, however, address whether the parents’ belief about what was happening—a temporary placement in an orphanage from which they could retrieve the children when desired—was what the missionary group apparently intended—adoption placements in the United States.¹⁷¹ In the fog of a natural disaster, fully unraveling the matter would have been difficult, which counsels against international adoption placements following natural disaster.¹⁷²

III. THE PROBLEMS WITH ADOPTION AS A DISASTER RESPONSE

The focus on rescue following a disaster often justifies dispensing with critically reflective responses—how can we be measured and thoughtful when there are children in need?¹⁷³ Yet it is especially in the midst of crises, when “there [are] frequently a failure of governments and legal systems,” and when

165. *Id.* at 8.

166. *Id.* at 10.

167. Bergquist, *supra* note 99, at 48–49.

168. *Id.*

169. King, *supra* note 141, at 11 (“Silsby was instead convicted . . . of organizing illegal travel, sentenced to time served (3 months and 8 days), and released . . .”).

170. *Id.* (citations omitted) (“Judge Bernard Saint-Vil explained that his decision was based on the Haitian parents’ testimony that they had ‘[given] their kids away voluntarily.’”).

171. Bergquist, *supra* note 99, at 53; King, *supra* note 141, at 10–11 (“The pressing issue—whether Silsby intended to deliver the children into trafficking rings or grey adoption markets—was not addressed or resolved.”).

172. See Ginger Thompson, *After Haiti Quake, the Chaos of U.S. Adoptions*, N.Y. TIMES (Aug. 3, 2010), <https://www.nytimes.com/2010/08/04/world/americas/04adoption.html> (“[C]hildren face years of legal limbo because they have arrived with so little proof of who they are, how they got here and why they have been placed for adoption that state courts are balking at completing their adoptions.”).

173. See Patricia Fronek & Denise Cuthbert, *History Repeating . . . Disaster-Related Intercountry Adoption and the Psychosocial Care of Children*, 11 SOC. POL’Y & SOC’Y 429, 431 (2012) (“Each disaster, man-made or otherwise, creates circumstances perceived as exceptional and thereby justifying extraordinary action by those who promote adoption.”).

there arises “crucial child welfare issues in the face of attempts to remove children from disaster zones for adoption,” that we must pay close attention to the dangers of precipitous actions.¹⁷⁴ It is in the midst of crises where children may be separated from family and perhaps never reunited.¹⁷⁵ Their identities may be lost in the scramble to get them to safety.¹⁷⁶ They may be trafficked rather than adopted through reputable means.¹⁷⁷ And, in the midst of a highly disruptive crisis, their lives are further disrupted by being removed from the only things familiar to them—their family, the sights and sounds and smells of home, the language they know, the people who look like them.¹⁷⁸ This section will address some of the problems associated with international adoption as a response to crisis.¹⁷⁹

A. *The Pernicious Effect of Child Rescue Narratives*

Narratives of international adoption as child rescue exist even without a pressing disaster, and it existed in domestic adoption in the infamous Orphan Train movement.¹⁸⁰ The Orphan Trains were the solution crafted by Charles Loring Brace of the New York Children’s Aid Society to help impoverished children in New York City.¹⁸¹ That child-saving movement relied on “removing them from their poor birth parents so that they could live with, or work

174. *Id.* at 431; *see also* DOYLE, *supra* note 12, at 9 (“In almost every humanitarian crisis on record, children have been taken away from their communities, often with disastrous consequences.”).

175. *See* DOYLE, *supra* note 12, at 10 (noting that during the Vietnam War, “[o]f the 2,500 children evacuated” to the U.S. and U.K., “fewer than ten were reunited with their families”).

176. *Id.* at 9 (“[I]n the chaos of emergency situations, where infrastructure may be crippled and child protection systems destroyed, there is often no way of knowing if a child has living family members who may be able to provide care. Tragic cases have emerged where children have been adopted abroad only to find out later that their surviving relatives have been desperate to find and care for them.”).

177. *Id.* at 5 (“Unregulated, unscrupulous care institutions have been known to recruit children in order to profit from international adoption or child trafficking.”).

178. *Id.* at 3 (“Regardless of the cause and motivation, a child’s separation from their family during an emergency situation is highly distressing and can have a long-term negative impact on their well-being.”).

179. *See infra* Sections III.A–F (analyzing the harmful impact of child rescue narratives to individual adoptees).

180. Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1097 (2003) (describing the 19th century “orphan trains” that brought children from New York City to western towns for placement as cheap labor).

181. *See id.* at 1091 (describing Brace’s hope to match “vagrant” children with families who needed an extra working hand).

for, parents of a different class.”¹⁸² Laura Briggs argues that the ideology of rescue “directs attention away from structural explanations for poverty, famine and other disasters, including international, political, military and economic causes. It mobilises ideologies of ‘rescue’, while pointing away from addressing causes.”¹⁸³ To the extent that Americans see themselves as the rescuers of abandoned and needy children, they need not consider how American foreign policy and its wars—hot and cold—created those abandoned and needy children, as in South Korea, Vietnam, Cuba and Romania.¹⁸⁴

Ideologies of rescue also reinforce racial hierarchies that envision the United States as the white saviors; for example, rejection of mixed-race children in South Korea following the war allowed representations that “racialized Asia as a stagnant place of backward-thinking people—in need of rescue by a dynamic and progressive United States of America.”¹⁸⁵ As noble rescuers, adoptive parents are placed in the “moral and normative center” of international adoption, while “othering” children and their natural families by creating “narratives about the moral inferiority or helplessness of the people they subjugate.”¹⁸⁶

By emphasizing the rescue narrative for international adoption following a crisis, it begins to seem inconceivable that there could be problems with international adoption.¹⁸⁷ As an example, illegal adoption is not seen as child trafficking because there is no exploited victim apparent in adoption, only needy children benefited by the practice.¹⁸⁸ Moral philosopher Allan Wood describes the problem with an unexamined attitude of beneficence:

It seems to me extremely important for would be benefactors of the

182. *Id.* at 1089. Professor Shani King identifies the Orphan Train movement as a precursor to international adoption: “While the ‘orphan trains’ were not ‘international,’ they reflected an early example of a large-scale attempt to ‘save’ children by taking them out of their environments and placing them into new environments with new families while encouraging a total break with their past.” King, *supra* note 95, at 419 n.11.

183. Laura Briggs, *Mother, Child, Race, Nation: The Visual Iconography of Rescue and the Politics of Transnational and Transracial Adoption*, 15 *GENDER & HIST.* 179, 180 (2003).

184. *See infra* Sections III.B–D (discussing the role of American foreign policy interventions in destabilizing the aforementioned countries).

185. Choy, *supra* note 55, at 166.

186. *See* King, *supra* note 141, at 15.

187. *See supra* Section II.A (discussing, for example, how adoptive American parents did not understand the potential ill effects of rushing to adopt European orphans in the wake of World War II).

188. *See infra* discussion accompanying notes 234–242, of the problems associated with excluding illegal adoption from definitions of trafficking in persons.

weak and vulnerable to be fully (and even painfully) aware of the inevitably exploitative side of their beneficence. This is needed both to preserve the dignity of those they help and to protect the helpers themselves from a certain blind arrogance which sometimes afflicts those who have been fortunate enough to parlay the doing of good into a successful career or life-defining activity.¹⁸⁹

Viewing adoption as an unmitigated good in all circumstances often leads actors into motivated reasoning in which the ends—a loving family for a needy child—justifies any means.¹⁹⁰

The rescue narrative is harmful to individual adoptees as it suppresses alternative views of the righteousness of adoption.¹⁹¹ “A ‘savior’ attitude is perpetuated by the social sanctioning of the industry that operates under an altruistic mission of child welfare. The dominant adoption narrative whereby parents and agencies ‘save’ children from a life of poverty or social stigma minimizes the identity challenges of adoptees.”¹⁹² The popular discourse of adoption as rescue situates adoptees as charity cases, not loved family members.¹⁹³ Adoptees who offer any critique of adoption are scorned as “angry” adoptees, insufficiently grateful for having been rescued.¹⁹⁴

The pervasive rescue narrative affects individual adoptees, adoptive families who become enamored of their role as rescuers, and policy-makers who are insufficiently reflective of their practices as they focus on what they see as an unqualified good result of new homes for needy children.¹⁹⁵ Without conscious focus on whether a child is truly in need of a new home, or whether a child has an existing family and community that can offer care, children

189. Allan W. Wood, *Exploitation*, 12 SOC. PHIL. & POL’Y 136, 153 (1995).

190. Malinda L. Seymore, *Ethical Blind Spots in Adoption Lawyering*, 54 U. RICH. L. REV. 461 (2020).

191. See generally Steve Kalb, *International Adoptee Identity and Community: Emerging Lessons Learned from Adoptee Experts*, 21 J. SOC. DISTRESS & HOMELESSNESS 122 (2012) (describing the manner by which adoptees are prevented from expressing complex views on adoptions as a result of societal narratives surrounding adoption).

192. *Id.* at 128.

193. *Id.* at 126 (describing ways the legitimacy of adoptees’ status as family members are challenged in popular discourse).

194. *Id.* at 123 (“When an adoptee unsettles discourse concerning adoption as an act of humanitarianism, she becomes ‘angry.’”).

195. See *supra* Section II.E (describing the negative consequences of the adoptive rescuer narrative affecting Haitian adoptees, adoptive American families, and American policymakers amidst the 2010 Haitian earthquake).

become separated from loving families as the very act of “rescue” turns them into “orphans.”¹⁹⁶

B. *The Perpetuation of International Adoption*

International adoption may begin as a response to crisis, but it rarely ends when the crisis ends.¹⁹⁷ The Korean War, and the obligation of Americans to take care of the children of American G.I.s with Korean women, may have started international adoptions from South Korea, but adoptions continue today.¹⁹⁸ International adoption of Korean children became a way for South Korea to bring in needed hard currency for its growing economy¹⁹⁹ and to solidify the relationship it needed with the powerful United States.²⁰⁰ As one South Korean scholar puts it, “[I]nternational adoption is here to stay and has become a permanent institution of Korean child welfare.”²⁰¹

And the continuations of adoption programs started in crisis is not solely driven by the sending country; intercountry adoption has become a permanent U.S. institution.²⁰² It is no longer a matter of special, stop-gap legislation, as that which permitted Harry Holt to adopt eight mixed-race Korean children.²⁰³ At that time, there was no permanent immigration legislation to allow international adoption, but there was “a decades-long history of Asian immigration

196. Fronek & Cuthbert, *supra* note 173, at 431 (“In contrast with disaster in more developed countries, heightened disaster and rescue discourses work to create a homogenously apocalyptic view of the disaster zone as a place where no care for children appears possible: effectively all or many children are viewed as ‘orphans’ in need of rescue (and available for adoption).”); *see also supra* Section II.E (providing examples of Haitian children who were presumed to be orphans, but were not actually, being put up for adoption by American “rescuers” after the 2010 earthquake).

197. *See supra* Sections II.A–E (noting how international adoption programs continued well after the wars, natural disasters, and other crises that sparked public interest in those adoption programs ended).

198. *See Selman, supra* note 87, at 37 (describing American military involvement in Korean adoption practices and that international adoptions continue after those issues subsided).

199. Marijke Breuning & Melissa Martinez, *Difficult Commitments: Intercountry Adoption to the United States and Accession to the Hague Convention*, 21 ADOPTION Q. 247, 252 (2018) (noting that international adoption reduces demands on local child welfare systems while bringing in currency that may support children in the system or may be diverted into government or private pockets).

200. *Cf. id.* (noting the United States’ influence over “sending countries” who are inclined to join the Hague Convention).

201. Kim, *supra* note 69, at 9.

202. WINSLOW, *supra* note 73, at 173–74.

203. *Id.* at 74.

exclusion.”²⁰⁴ When the Refugee Relief Act of 1953, which allowed adoptable orphans immigrant visas, was passed it was considered only temporary and was set to expire at the end of 1956.²⁰⁵ Now, international adoption is a complex network embedded in American society.²⁰⁶ The U.S. is a signatory to the Hague Convention and also allows non-signatory international adoptions.²⁰⁷ The enabling legislation for the Hague Convention controls accreditation of agencies and immigration as well.²⁰⁸ There are currently 238 “accredited agencies and approved persons.”²⁰⁹ International adoption is deeply embedded in American culture and is a multi-billion-dollar industry.²¹⁰

Starting an international adoption program from a foreign country to the U.S. seems easier than stopping one.²¹¹ Multiple stakeholders become reliant on the flow of cash and children and are loath to stop it even when the humanitarian justification of war or natural disaster ends.²¹²

C. Family Separation

In the midst of disasters, whether war or earthquake, it is not simply buildings that are destroyed; social infrastructure—families and communities—are also destroyed: “Families may be separated, fleeing on different paths, seeking different places of safety. And in this process of movement, displacement

204. Choy, *supra* note 55, at 170.

205. *Id.*

206. *See supra* Sections II.A–E (discussing the complexity of international adoption issues the United States has become entangled in throughout the past several decades).

207. *See supra* text accompanying notes 37–38 (discussing the United States’ continued allowance of international adoptions from countries that have not signed the Hague Convention, including those from Afghanistan).

208. *See* Mary Eschelbach Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption*, 45 BRANDEIS L.J. 105, 106 (2006) (describing the Hague Convention’s regulatory authority to accredit international adoption agencies).

209. *Locating an Adoption Service Provider*, INTERCOUNTRY ADOPTION ACCREDITATION & MAINT. ENTITY, <https://www.iaame.net/asp-directory/> (last visited Oct. 13, 2022).

210. Sheelah Kolhatkar, *How an Adoption Broker Cashed in on Prospective Parents’ Dreams*, NEW YORKER (Oct. 25, 2021) (estimating that adoption agency activities in the United States are worth approximately \$19 billion per year).

211. *See also supra* text accompanying notes 203–206 (noting how Holt was able to start an adoption agency with ease and with little regulation). Yet even after attempts to regulate with the Hague Convention, the adoption industry has grown. *See supra* text accompanying notes 207–210; *see also supra* Sections II.A–E (describing how quickly international adoption programs began after large-scale disasters but have persisted decades after the crises subsided).

212. *See supra* Sections II.A–E (describing how international adoptions programs, agencies, and advocates refused to end adoptions operations after humanitarian justifications ended).

and flight, children too become separated from their families.²¹³ Further, reuniting children with their families can be more complex than reuniting adults.²¹⁴ Tracing of adults relies on the autonomy of adult communication, while children often cannot communicate on their own.²¹⁵ Getting accurate information from children about their relatives would be difficult in ordinary times, and it is more difficult when they are frightened, lost, and traumatized.²¹⁶

Despite these difficulties in reuniting children with their families, humanitarian aid—including adoption—sometimes deliberately separates children from family as a way to provide aid.²¹⁷ This is a truly misguided disaster response:

However well-meaning this is, it ignores the large body of evidence which shows that in most cases children are best off in their own families, that the needs of children through infancy and childhood are best met through the constancy, continuity and stability of family membership. During emergencies, family adults remain the primary source of security and protection for children and family attachments, which take on increased importance in emergencies, need to be preserved.²¹⁸

Despite this evidence, the removal of children from existing families persists in international adoption following a disaster.²¹⁹ Recall that almost three hundred of the Operation Babylift children were not orphans;²²⁰ recall that all of the children scooped up in Haiti by the Baptist missionaries had families.²²¹

The public's imagination is fired by an image like the one of the parent handing the infant to American troops over a wall in Afghanistan.²²² But the

213. Lucy Bonnerjea, *Disasters, Family Tracing and Children's Rights: Some Questions About the Best Interests of Separated Children*, 18 *DISASTERS* 277, 277 (1994); see also DOYLE, *supra* note 12 at 3 (children may be separated from caregivers in the "confusion of the crisis").

214. See Bonnerjea, *supra* note 213, at 278–79.

215. *Id.*

216. *Id.* at 279.

217. *Id.*

218. *Id.*; see DOYLE, *supra* note 12.

219. Bonnerjea, *supra* note 213, at 279.

220. See *supra* Section II.C (describing Operation Babylift and its aftermath in Vietnam).

221. See *supra* Section II.E (describing the Haitian adoptions post-earthquake in 2010).

222. See *supra* notes 2–4 and accompanying text (describing how Afghan parents handed their infant child to American soldiers during the 2021 airlift evacuation of Kabul).

right reaction is not to commend the bravery of the parent, the magnanimity of the troops, or the heart of Americans who want to adopt the baby.²²³ We should, instead, ask, why isn't the parent lifted over the wall with the baby?²²⁴ We have learned much about child welfare since the Orphan Train movement, and we should no longer seek to lift children from poverty or disaster by leaving their parents behind.²²⁵ The International Red Cross states plainly, "Whenever possible, children should be evacuated from their place of residence together with adult family members."²²⁶ When there is no choice but to separate parents and children, the Red Cross further recommends the following best practices:

Ways must be found to maintain contact between child and family, and measures taken to ensure early reunification. If the principles devised to protect the best interests of the child cannot be respected, the evacuation should be reconsidered. . . .

Any decision to send children away must be based on the informed consent of their parents. . . .

Care-giving adults known to the children should accompany those evacuated without their families.

The personal and family particulars of each child must be recorded in a personal profile and history file. . . . A copy of the file should travel with the child. Further copies should be given to the parents . . . and a neutral monitoring agency, such as the ICRC's Central Tracing Agency. . . .

In extreme situations, where life is at immediate risk, full documentation may not be possible before evacuation, but every effort must be made to record at least rudimentary details such as names of the

223. See DOYLE, *supra* note 12, at 1–3 (arguing that adoption and separation of families should not be praised as a remedy in a humanitarian crisis).

224. See *id.* at 2–3 (discussing why humanitarian organizations should work to reunite families and save parents rather than focus on adoptions).

225. Bonnerjea, *supra* note 213, at 279; see Rebecca S. Trammel, *Orphan Train Myths and Legal Reality*, 5 MOD. AM. 3, 4–5 (2009) (discussing the pitfalls and criticisms of the Orphan Train movement).

226. INT'L COMM. OF THE RED CROSS, INTER-AGENCY GUIDING PRINCIPLES ON UNACCOMPANIED AND SEPARATED CHILDREN 24 (2004).

child and parents, date of evacuation and usual place of residence. Full documentation should be completed as soon as possible.

Any evacuation, whether for safety or for medical reasons, should be limited to a place as close as possible to the child's home and family.²²⁷

Some argue that the best interests of children require them to be rapidly moved into adoptive families when they have been separated from their original families.²²⁸ After all, the alternative may be a life on the street or institutional care.²²⁹ Professor Elizabeth Bartholet argues strongly that unparented children (which is a category distinct from orphaned children) should be moved quickly into nurturing homes.²³⁰ She concedes that, "Ideally, parents should be able to raise the children they produce;" but, "[a]doption serves children's needs essentially as well as biologically-linked parenting."²³¹ Her view seems to paint parents as fungible—if one set goes missing, a replacement set is just as good.²³² That may be so if there is no possibility of reunion, but separation following disaster should not be permission to simply find suitable parental replacements.²³³

The first priority following child separation should be reuniting children with their families.²³⁴ "Without their families to protect them from the negative social and psychological impacts of emergencies, children are at risk of physical, emotional and sexual abuse as well as exploitation, illness, injury and even death."²³⁵ The International Red Cross, in offering guidance to humanitarian organizations, states bluntly, "Unaccompanied or separated children must not be adopted in haste at the height of the emergency."²³⁶ They suggest that two years is a reasonable time before adoption, because taking all

227. *Id.* at 24–25.

228. See Elizabeth Bartholet & David Smolin, *The Debate*, in INTERCOUNTRY ADOPTION: POLICIES, PRACTICES, AND OUTCOMES 233 (Judith L. Gibbons & Karen Smith Rotabi eds., 2012).

229. *Id.*

230. *Id.*

231. *Id.* at 233–34.

232. See *id.* (suggesting that adoption is equitable to remaining with the biological parents).

233. See DOYLE, *supra* note 12, at 1 (arguing against separating children from their families without attempting to reunite them after natural disasters).

234. *Id.* at 2 ("For children who become separated in emergencies, family reunification is the first priority.").

235. *Id.* at 3.

236. INT'L COMM. OF THE RED CROSS, *supra* note 226, at 55.

feasible steps to trace family should take that amount of time.²³⁷

The Hague Conference takes the same position about the inadvisability of hasty adoption of displaced children and the importance of tracing family as soon as possible.²³⁸ After the 2004 tsunami, that Conference observed that it noted “with great concern reports in the media about the irregular removal of children victims of the recent tsunami disaster,” and added the adjuration:

[I]t is clear that in a disaster situation, like that brought about by the tsunami, efforts to reunify a displaced child with his or her parents or family members must take priority and that premature and unregulated attempts to organise the adoption of such a child abroad should be avoided and resisted.²³⁹

D. *Neo-Colonial Predation*

An enduring concern for the global South is the movement of children from their countries to the wealthier, white global North.²⁴⁰ As Professor Shani King notes,

Intercountry adoption typically involves an exchange between a developing country and an industrialized country. Whether the exchange is viewed as one between birth parents with very few resources, and families with resources, or as one between a country with an extensive (admittedly imperfect) social service infrastructure and a country with no social service infrastructure, the exchange bears a neo-colonialist hue.²⁴¹

In the West, adoption from the poor countries may be seen as a rescue mission with a humanitarian impulse, “[D]eveloping countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in

237. *Id.*

238. *Id.* at 56.

239. HAGUE CONF. ON PRIV. INT’L L., *Press Release, Asian-African Tsunami Disaster and the Legal Protection of Children*, in IMPLEMENTATION AND OPERATION OF THE 1993 HAGUE INTERCOUNTRY ADOPTION CONVENTION: GUIDE TO GOOD PRACTICE Annex 9-2 (2008) [hereinafter *Press Release, Asian-African Tsunami Disaster and the Legal Protection of Children*].

240. King, *supra* note 95, at 415 (describing *Monohumanism* in the context of intercountry adoption, in which non-western children are viewed narrowly “as the potential children of Western adults”).

241. *Id.* at 425.

which whites exploit and steal natural resources. In the 1970s and 1980s, children were the natural resource being exploited and out of which developing nations were being cheated.”²⁴²

For some in sending countries, international adoption is a mark of dependence on the West, “a shameful admission to the world of the government’s inability to care for its own, the loss of a vital national asset, and perhaps the ultimate example of the exploitation by rich nations of the poor nations of the world.”²⁴³ Yet at the same time, sending countries often rely on the financial windfall intercountry adoption brings in while also relieving them of responsibility and costs associated with caring for needy children.²⁴⁴ In the midst of crisis, the temptation of outsourcing their child welfare needs in exchange for an infusion of hard currency may be especially tempting.²⁴⁵

E. Psychosocial Issues

“Humanitarian emergencies caused by conflict or natural disasters pose added disruptions to displaced populations. These crises commonly lead to prolonged exposure to potentially traumatic events as well as collapse of psychosocial support networks.”²⁴⁶ Mental health issues for displaced persons may arise because of pre-flight stressors, trauma during flight, and issues relating to prolonged resettlement.²⁴⁷ Higher incidences of PTSD and depression are reported in populations subjected to conflict and natural or industrial disasters.²⁴⁸ Children are a significant portion of the population affected by

242. ALTSTEIN & SIMON, INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE, *supra* note 45, at 2.

243. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 364 (1997) (quoting Elizabeth Bartholet, *International Adoption: Overview*, in ADOPTION LAW AND POLICY § 10.04[1] (Joan Hollinger ed., 1988)).

244. HAGUE CONF. ON PRIV. INT’L L., A DISCUSSION PAPER ON THE FINANCIAL ASPECTS OF INTERCOUNTRY 11–12 (2012) (discussing the financial gains sending countries may receive from intercountry adoptions).

245. *Id.* at 12–13 (analyzing why poorer nations have continued to allow the intercountry adoption system, having become dependent on the money gained by sending children to adoptive parents in wealthier nations).

246. Michael Jaung et al., *International Emergency Psychiatry Challenges: Disaster Medicine, War, Human Trafficking, Displaced Persons*, 40 PSYCHIATRIC CLINICS 565, 568 (2017).

247. *Id.* at 571.

248. See generally Wietse A. Tol et al., *Mental Health and Psychosocial Support in Humanitarian Settings: Linking Practice and Research*, 378 THE LANCET 1581 (2011) (reporting the connection between mental health issues and populations exposed to conflict); Fiona Charlson et al., *New WHO Prevalence Estimates of Mental Disorders in Conflict Settings: A Systematic Review and Meta-*

such crises and warrant special intervention for mental health issues.²⁴⁹

In one interesting study, researchers compared psychological trauma experienced by children and young adults who evacuated after Hurricane Katrina in 2005 and those who were in the surge of refugees from Syria and Afghanistan in Berlin in 2015 and 2016.²⁵⁰ The Berlin refugees had experienced more trauma than the Katrina-affected children, a difference the researchers ascribed to the difference between natural and man-made disasters.²⁵¹ But there was one other difference between them.²⁵² Researchers noted that with the Berlin refugees, “It is evident that families had been separated in a majority of cases and this seemed to trigger on-going stress, even after a safe haven had been reached.”²⁵³

Indeed, one of the most protective factors for children’s mental health in crisis is being with a parent or familiar caregiver.²⁵⁴ During World War II, it was noted that children exposed to repeated bombings showed “no signs of traumatic shock” when in the care of their mothers.²⁵⁵ In fact, children who were evacuated and separated from their families because of air raids experienced more emotional stress from the separations than from the air raids themselves.²⁵⁶ The researchers concluded “that evacuation even under the best conditions is seldom a satisfactory solution for any length of time.”²⁵⁷ The break-up of the family resulted in a “loss of emotional security,” and in particular a loss of “a legitimate outlet for his feelings of love and aggression.”²⁵⁸

Analysis, 394 THE LANCET 240 (2019) (noting similar findings).

249. Jaung et al., *supra* note 246, at 568.

250. See generally Puja Myles et al., *A Comparative Analysis of Psychological Trauma Experienced by Children and Young Adults in Two Scenarios: Evacuation After a Natural Disaster vs Forced Migration to Escape Armed Conflict*, 158 PUBLIC HEALTH 163 (2018) (comparing the psychological trauma of Katrina evacuees and Syrian and Afghani refugees).

251. *Id.* at 172.

252. *Id.*

253. *Id.* The researchers suggest that further study needs to be done to determine differences in outcome between refugees accompanied by family and those separated from family. *Id.*

254. Theresa Stichick Betancourt & Kashif Tanveer Khan, *The Mental Health of Children Affected by Armed Conflict: Protective Processes and Pathways to Resilience*, 20 INT’L REV. PSYCHIATRY 317, 320–21 (2008).

255. ANNA FREUD & DOROTHY BURLINGHAM, *WAR AND CHILDREN* 21 (2d ed. 1944).

256. E. M. Henshaw & H. E. Howarth, *Observed Effects of Wartime Conditions on Children*, 2 MENTAL HEALTH 93, 94 (1941) (concluding that in light of the children’s emotional stress, there has been “underestimation of the disturbances caused in the emotional development of the child by evacuation, and an over-estimation of the fear of raids”).

257. *Id.*

258. *Id.* at 95.

Social support in times of crisis may extend beyond immediate family, to include familiar peers and significant others.²⁵⁹ Removing children from these greater networks of support can also impair the ability to cope with crises, especially for girls.²⁶⁰ This phenomenon explains the International Red Cross guidance that evacuations, when unavoidable, should be limited to a place as close as possible to the child's home and family.²⁶¹

Even without the complication of family separation in the midst of war or natural disaster, adoption presents its own set of psychosocial issues.²⁶² While adoption often has beneficial effects for adoptees,²⁶³ psychological studies show lifelong issues for many adoptees,²⁶⁴ like adoption identity issues, which may explain high levels of behavioral issues reported in adopted children and adolescents,²⁶⁵ as well as the fact that they are significantly overrepresented in mental health care facilities.²⁶⁶ Studies have also shown an increased risk

259. See Betancourt & Khan, *supra* note 254, at 318.

260. *Id.* at 322.

261. See INT'L COMM. OF THE RED CROSS, *supra* note 226, at 25.

262. See generally David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 FUTURE OF CHILD. 153, 154 (1993) (explaining psychological risks in adoption).

263. *Id.* at 162 (concluding that adoption is the most beneficial option for children compared to "institutional rearing, foster care, or life with . . . abusive biological parents"); EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP: PROMOTING HEALTHY IDENTITY FORMATION IN ADOPTION 14, 51 (2009) (concluding that through adoption, a positive identity can be developed by "[c]ommitment and love of the adoptive parents, exposure to positive aspects of the child's culture, and perhaps connection with other families who had adopted from the same country").

264. See generally Harold D. Grotevant et al., *Adoptive Identity and Adjustment From Adolescence to Emerging Adulthood: A Person-Centered Approach*, 53 DEVELOPMENTAL PSYCH. 2195 (2017) (finding that adopted adolescents had significantly higher levels of internalizing problems that emerged in adulthood); DONALDSON, *supra* note 263 at 29–30. This study found that, against expectations that adoption issues would taper off for adults, that adoptee identity continued into adulthood for both same-race and transracial adoptees. DONALDSON, *supra* note 263 at 30 ("[The result] suggests the lifelong nature of identity work and the reality that adulthood is a crucial period in which adoptive and racial/ethnic identities continue to be salient for adopted persons."). Almost one-fourth of same-race adoptees reported, as adults, that they felt extremely or somewhat uncomfortable with their identity as an adopted person. DONALDSON, *supra* note 263 at 32.

265. See Grotevant, et al., *supra* note 264, at 2195; see generally David Brodzinsky et al., *Children's Understanding of Adoption*, 55 CHILD DEV. 869 (1984); DAVID BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF (1992); Daniel W. Smith & David Brodzinsky, *Stress and Coping in Adopted Children: A Developmental Study*, 23 J. CLINICAL CHILD PSYCH. 91 (1994); Femie Juffer, *Children's Awareness of Adoption and Their Problem Behavior in Families with 7-year-old Internationally Adopted Children*, 9 ADOPTION Q. 1 (2006).

266. David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in THE PSYCHOLOGY OF ADOPTION 3 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); see generally Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 J. CLINICAL CHILD PSYCH. 447 (1993) (reporting that adoptees significantly overrepresented in clinical

of suicide and suicide attempts by adoptees.²⁶⁷

Adoptees may experience adoption as a profound loss—loss of family, loss of culture, loss of language, loss of all sense of familiarity—despite the “replacement” of the lost birth family by adoptive family.²⁶⁸ Adoptees may fear abandonment and rejection, and experience issues with trust and attachment that affects future relationships.²⁶⁹ Because of cultural biases that favor biological families, adoptees may face stigma associated with being adopted.²⁷⁰ In transracial adoptive families, the family is conspicuously not created by biology, which enhances that stigma.²⁷¹

These psychosocial issues must be kept firmly in mind when determining whether international adoption is the appropriate response after a humanitarian emergency.²⁷² There is a tendency to focus exclusively on the immediacy

populations). It is possible that the overrepresentation of adoptees in clinical populations is not because of increased incidences of psychological problems, but because of increased rates of referrals by adoptive parents and professionals who are aware of issues relating to adoption and, therefore, might be more inclined to refer. See Brodzinsky, *supra* note 262, at 154.

267. Annika von Borczyskowski et al., *Suicidal Behaviour in National and International Adult Adoptees: A Swedish Cohort Study*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 95, 95 (2006) (studies show increased risk of suicidal behavior in international adoptees). *But see* William Feigelman, *Are Adoptees at Increased Risk for Attempting Suicide?*, 35 SUICIDE AND LIFE-THREATENING BEHAV. 206, 206 (2005) (reporting no greater risk of attempting suicide and depression for adoptees).

268. Penny Caulan Partridge, *The Particular Challenges of Being Adopted*, 61 SMITH COLL. STUD. SOC. WORK 197, 199 (1991).

269. See generally Wendy Tieman et al., *Social Functioning of Young Adult Intercountry Adoptees Compared to Nonadoptees*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 68 (2006) (discussing how adult adoptees in the study were almost two times less likely to be married than nonadopted counterparts, were less likely to be living with a romantic partner, and were less likely to have had a relationship that lasted longer than one year); *see also* Michael F. McGinn, *Developmental Challenges for Adoptees Across the Life Cycle*, in HANDBOOK OF ADOPTION 61, 65 (Rafael A. Javier et al. eds., 2007) (comparing long-term consequences of infants who face abandonment and adoptees). *But see* Johanna Despax et al., *Adoptees' Romantic Relationships: Comparison with Nonadoptees, Psychological Predictors and Long-Term Implications of the Adoption Pathway*, 24 ADOPTION Q. 251, 265 (2021) (finding no differences between adoptees and nonadoptees not accounted for by pre-adoption experiences).

270. James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 CAP. U. L. REV. 293, 295–96 (2008); *see also* Amanda L. Baden, “Do You Know Your Real Parents?” and Other Adoption Microaggressions, 19 ADOPTION Q. 1, 13 (2016) (examining adoption stigma and microaggressions and identifying thirteen themes common to adoption stigma).

271. Jennifer Swize, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children*, 88 VA. L. REV. 1079 (2002) (discussing the intersection of race and adoption).

272. See Jayashree Mohanty & Christina Newhill, *Adjustment of International Adoptees: Implications for Practice and a Future Research Agenda*, 28 CHILD. & YOUTH SERVS. REV. 384, 388 (2006) (discussing social adjustment in international adoptees).

of crises rather than long-term psychological effects and on hopeful narratives of rescue rather than on psychological wellbeing.²⁷³

F. Child Trafficking

As one scholar puts it: “The evacuating of children outside their families of origin, in times of perceived emergency, creates both a need for heightened protections and a call for lowered barriers. The tensions between humanitarian impulses to rescue and international and domestic protective protocols result in attempts to circumvent legal processes.”²⁷⁴ In that unpoliced state, unscrupulous actors can find profit.²⁷⁵ A number of studies have shown a relationship between humanitarian emergencies like natural disasters, disease outbreaks, conflict, or disease outbreak and increased human trafficking.²⁷⁶ One way unscrupulous actors can take advantage of chaos is to abduct and/or buy and sell children.²⁷⁷

Trafficking children for the purposes of adoption²⁷⁸ is a well-known problem, though there is disagreement about how prevalent it is.²⁷⁹ It is an area rife for confirmation bias—those who believe international adoption is the best or only option for children from poor countries also tend to believe that illegal adoption is not a widespread problem.²⁸⁰ The Hague Convention on Intercountry Adoption apparently finds the problem sufficiently prevalent to

273. See generally Mary G. Liberman & John D. Morris, *Long-Term Effects of Adoption: An Empirical Study of Adult Adoptees*, 4 THE INTERNET J. ACAD. PHYSICIAN ASSISTANTS 1 (2004) (studying long-term effects of a group of adoptees).

274. Bergquist, *supra* note 99 at 49.

275. See Kolhatkar, *supra* note 210 (“Big money and a veil of secrecy attracts bad actors.”); Joseph Guyler Delva, *US, Haiti Holding Talks on Detained Missionaries*, REUTERS, <https://www.reuters.com/article/idUSN03191179> (Feb. 3, 2010, 3:46 PM).

276. Viktoria Curbelo, *Exploring the Relationship Between Humanitarian Emergencies and Human Trafficking: A Narrative Review*, 6 J. MOD. SLAVERY 7, 12–14 (2021) (reviewing five studies between 2016–19); Syed Rashid Ali et al., *Child Trafficking: The Outcome of Political Failure in the Region*, 45 J.L. & SOC’Y 1, 2 (2014) (regional conflicts and political instability increases child trafficking).

277. See Bartholet & Smolin, *supra* note 228, at 243.

278. *Id.* (arguing that there is much disagreement about abusive practices in adoption).

279. Elizabeth Bartholet, *International Adoption: Current Status and Future Prospects*, 3 FUTURE OF CHILD. 89, 96 (1993) (concluding that there is no evidence that “kidnapping” or “baby trafficking” is used widespread for international adoption purposes).

280. See, e.g., Bartholet & Smolin, *supra* note 228, at 237–43 (contrasting Professor Bartholet’s argument that “there is no persuasive evidence that [adoption abuse like paying birth parents to relinquish or other frauds of birth parents] are widespread” with Professor Smolin’s argument that “significant segments of the adoption community are in deep denial about the prevalence and seriousness of abusive practices in intercountry adoption”).

express as a first principle that international adoption regimes must “prevent the abduction, the sale of, or traffic in children.”²⁸¹ The sheer amount of money that pours into developing countries because of international adoption creates conditions that are ripe for exploitation by unscrupulous actors.²⁸² “Large amounts of money, relative to the economy of the sending country, create a temptation to launder children.”²⁸³

Regardless of the prevalence of adoption trafficking in ordinary times, in the midst of crises, international adoption often opens the door to the trafficking of children.²⁸⁴ “Human rights abuses, including human trafficking, are more likely to occur in an environment of limited civil society and rule of law.”²⁸⁵ Consider the experience in Haiti, with courts closed by earthquake damage and unscrupulous actors taking advantage of uncertainty about children’s availability for adoption.²⁸⁶ Even while working within the regime of American humanitarian parole where only children whose adoptions had been blessed by Haitian courts—those children already determined to be orphaned and those whose legal parents were created through the adoption process—were supposed to be transported; yet children who lacked legal parents in the United States were taken as well.²⁸⁷ And the actions of the Baptist missionaries were completely outside legal process.²⁸⁸ If the missionaries had managed to cross the border with the children, it would have been extremely difficult to repatriate them, and they could have been moved into the stream of adoption anywhere in the world.²⁸⁹ And, of course, we have little way of knowing if other children were successfully smuggled out of Haiti—those complicit in illegal adoptions are unlikely to announce it.²⁹⁰

281. See Hague Convention, *supra* note 35, at pmbl.

282. See Smolin, *supra* note 152, at 115.

283. *Id.* at 128.

284. *Id.*

285. Rotabi, *supra* note 111, at 69.

286. *Id.*

287. *Id.*

288. See Delva, *supra* note 275 (“The U.S. and Haitian governments are holding talks on the fate of 10 American missionaries accused of illegally trying to take children out of the quake-hit Caribbean country.”).

289. *Id.*

290. See Rotabi, *supra* note 111, at 67.

1. Child Abduction into Intercountry Adoption

There are well-known cases of child abduction into international adoption. In the midst of Guatemala's civil war, for example, the army stole children from dissidents to place the children with government-run agencies to be placed abroad in the U.S., Sweden, Italy, and France.²⁹¹ In 2011, a Guatemalan court issued an order—likely unenforceable—that American adoptive parents return their adopted child to her birth mother after finding that the child had been abducted by traffickers “who financially benefited when the child was adopted by the Missouri couple in 2008.”²⁹² In China, in the midst of a scandal where orphanages that placed children internationally were buying children from traffickers, it became clear that some of those children had been abducted.²⁹³ When a French organization, Zoe's Ark, tried to airlift 103 “orphans” to save them from war-torn Darfur—leaving from Chad—they were arrested for abducting the children, who were not orphans nor from Darfur.²⁹⁴ Indeed, “[s]ome of the children reported they were lured away with candy.”²⁹⁵

These cases—children snatched off the street—can be clearly labeled as child stealing.²⁹⁶ But child stealing for international adoption can happen in other ways as well.²⁹⁷ Parents may place a child in an institution for purposes

291. *Guatemalan Army Stole Children for Adoption, Report Says*, CNN WORLD (Sept. 12, 2009), <https://www.cnn.com/2009/WORLD/americas/09/12/guatemala.child.abduction/index.html> (reporting that 333 of 672 children placed in international adoption between 1977 and 1989 were stolen from their parents).

292. Reshma Kirpalani & Christina Ng, *Missouri Couple Silent on Order to Return Adopted Daughter to Guatemala*, ABC NEWS (Aug. 4, 2011, 1:30 PM), <https://abcnews.go.com/US/missouri-couple-silent-order-return-adopted-daughter-guatemala/story?id=14234379>; see also E.J. Graff, *The Lie We Love*, FOREIGN POL'Y, (Oct. 6, 2009, 5:14 PM), <https://foreignpolicy.com/2009/10/06/the-lie-we-love/> (recounting other cases of abductions for the purposes of international adoption from Guatemala).

293. Patricia J. Meier & Xiaole Zhang, *Sold into Adoption: The Hunan Baby Trafficking Scandal Exposes Vulnerabilities in Chinese Adoptions to the United States*, 39 CUMB. L. REV. 87, 89 (2008); see also Peter S. Goodman, *Stealing Babies for Adoption With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China*, WASH. POST (Mar. 12, 2006), <https://www.washingtonpost.com/archive/politics/2006/03/12/stealing-babies-for-adoption-span-classbankheadwith-us-couples-eager-to-adopt-some-infants-are-abducted-and-sold-in-china-span/7fb75927-9b0c-4d62-88f6-cbb799d3801e/> (discussing abductions of children in China for international adoptions).

294. Bergquist, *supra* note 99, at 46.

295. *Id.*

296. See *id.* (discussing how children were lured away with false promises, which can be easily construed as kidnapping).

297. See e.g., Smolin, *supra* note 152, at 119–20 (“The existence of this custom makes it relatively easy for facilitators and scouts to persuade poor birth parents to place children into institutions, for the parents do not understand themselves to be severing their parental rights or ties.”).

of childcare or education, never intending the separation to be permanent, yet the institution moves the child into the stream of international adoption.²⁹⁸ As Professor Smolin notes, “[I]magine the reaction of a Western parent who placed a child in boarding school, only to discover that the school had placed the child for adoption in a foreign country.²⁹⁹ Such an act would clearly constitute a form of kidnapping or child stealing.”³⁰⁰

Because international adoption can bring large amounts of money into impoverished countries, it creates considerable incentives for the unscrupulous to acquire children by nefarious means.³⁰¹ Those means may include kidnapping or baby buying.³⁰²

2. Baby Buying and Selling

Guatemala was not only plagued by kidnappings of children into adoption, but it also experienced serious problems of baby buying and selling as well.³⁰³ There were even allegations that women were being paid to become pregnant and then release the child for international adoption.³⁰⁴ Journalist E.J. Graff explained the financial incentives (in Guatemala as well as other countries) as follows:

Western adoption agencies often contract with in-country facilitators—sometimes orphanage directors, sometimes freelancers—and pay per-child fees for each healthy baby adopted. These facilitators, in turn, subcontract with child finders, often for sums in vast excess of local wages. These paydays give individuals a significant financial incentive to find adoptable babies at almost any cost. In Guatemala, where the GDP per capita is \$4,700 a year, child finders often earned \$6,000 to \$8,000 for each healthy, adoptable infant. In many cases, child finders simply paid poor families for infants. A May 2007 report on adoption trafficking by the Hague Conference on Private

298. *Id.* at 120.

299. *See id.* at 117 (listing many of the different scenarios used to get children).

300. *Id.* at 120.

301. *See* Kirpalani & Ng, *supra* note 292 (describing traffickers profiting off of abductions in China).

302. *Id.*

303. *See* Comm. on Hum. Rts., Rep. of the Special Rapporteur on the Sale of Child., Child Prostitution & Child Pornography, ¶¶ 13, 31, 41, 44, 60, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000).

304. *Id.* ¶ 40; *see* Rotabi, *supra* note 111, at 73–74.

International Law reported poor Guatemalan families being paid between \$300 and several thousand dollars per child.³⁰⁵

What seems like small amounts of money to Westerners can be more than a year's salary in other countries, easily incentivizing extreme measures to acquire valuable children.³⁰⁶

In 2000, the U.N.'s special rapporteur on child trafficking examined Guatemala's adoption process and concluded:

Legal adoption appears to be the exception rather than the rule. Since huge profits can be made, the child has become an object of commerce rather than the focus of the law. It would seem that in the majority of cases, international adoption involves a variety of criminal offences including the buying and selling of children, the falsifying of documents, the kidnapping of children, and the housing of babies awaiting private adoption in homes and nurseries set up for that purpose.³⁰⁷

The special rapporteur explained one way that the adoption process worked:

According to the information received networks of (usually female) recruiters, hired by lawyers, pay rural midwives approximately US\$ 50 to register the birth of a non-existent child, using a false name for the birth mother. Upon payment of approximately another US\$ 50, another woman "becomes" the mother and is given a baby - usually stolen - and told to take the baby to Guatemala City to give it up for adoption. The woman signs the notary's documents giving up "her" child and the baby is placed in a foster environment, preparatory to

305. Graff, *supra* note 292.

306. Mahsa Farid, *International Adoption: The Economics of the Baby Industry*, 12 WHITTIER J. CHILD & FAM. ADVOC. 81, 84, 88–89 (2012); Smolin, *supra* note 152, at 128.

307. Comm. on Hum. Rts., *supra* note 303, ¶ 13. The Special Rapporteur noted further, Guatemala has the weakest adoption laws in Central America. Several drafts of adoption laws are pending in Congress but no action has as yet been taken. Trafficking of children is not even typified as a crime under the law. It is reported that a stiffer penalty is imposed for the theft of a car than for the theft of a child.

Id. ¶ 19.

adoption proceedings.³⁰⁸

As a response to child abduction and baby buying allegations, the U.S. State Department required DNA tests to determine whether the relinquishing birth mother offered by the attorney was in fact the mother of the child to be adopted.³⁰⁹ Unfortunately, those DNA tests could be falsified, and soon there were cases where the actual biological mother appeared proving that the previous DNA test matching the child to a mother was fraudulent.³¹⁰

Similarly, with Cambodia adoptions, corruption was rampant.³¹¹ Two sisters, Lauryn Galindo and Lynn Devin, were convicted in the U.S. of crimes arising from a child trafficking scheme in Cambodia where they hired local facilitators to buy children; birth families were given payments from \$20 to \$200 and a bag of rice in exchange for their children.³¹² Birth parents were

308. *Id.* ¶ 31.

309. *See* Rotabi, *supra* note 111, at 74. Evidence from Consular cables from the U.S. Embassy in Guatemala showed that the Embassy had long been concerned about the integrity of adoptions from Guatemala to the U.S. *Finding Fernanda*, THE SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM, https://www.brandeis.edu/investigate/adoption/docs/FOIAs/Admission-of-Child-Stealing-DNA_June_95.pdf (last visited Oct. 17, 2022). In a June 1995 cable, Embassy officials reported to the Secretary of State:

As Embassy prepares for a change of guard in the adoption portfolio this summer, we encourage continued emphasis on combatting international child trafficking. . . . We must not become tacit accomplices by ignoring what is often right in front of us. Supply and demand are two sides of the same coin. We toe a fine line in balancing customer service with battling the unscrupulous and greedy, one which is often not well understood back home. . . . The issue is the following: Are we not morally obligated (if not legally) to prevent what is otherwise clearly reprehensible as well as criminal under any penal code—kidnapping, the illegal separation of biological parents from their children? Prospective adoptive parents do not have a greater ethical or legal right to children than the biological parents. . . . This past February we reported on our now lengthy experience with DNA testing in the most problematic adoption cases. . . . The need for a biological means of ensuring the validity of the orphan screening process was confirmed by the three cases last year where imposters actually submitted themselves for DNA testing, with negative results. . . . We can now state unequivocally, but sadly, that there are/are instances of child stealing in Guatemala. In recent meetings [between Embassy officials and Guatemalan officials, Guatemalan officials] acknowledged such trafficking. . . . Based on our experience with the strident, personal attacks initiated by adoptive parents and their supporters, including in the Congress, upon individual consular officers in cases that turn sour, it would certainly be expedient of us to ignore such facts and issue orphan visas without hesitation. It would also be dead wrong.

Id. The cable, as well as others, was acquired by a Freedom of Information Act request by investigative journalist, Erin Siegel, author of *Finding Fernanda*, a book about Guatemalan adoption. *Id.*

310. *See* Rotabi, *supra* note 111, at 74–75.

311. *Id.* at 71.

312. *See* Rotabi, *supra* note 111, at 72; Chad Turner, *Sometimes It Is Better Not to be Unique: The*

also tricked into relinquishment with promises that they could visit their children and reclaim them in the future.³¹³ Galindo reimbursed the facilitators for payments to birth parents, and paid them a bounty of \$50 per child.³¹⁴ Galindo then paid bribes to Cambodian officials to create a trail of documents to hide the children's identities,³¹⁵ a process that Professor David Smolin terms "child laundering."³¹⁶ The U.S. Government estimates that this child trafficking adoption enterprise netted Galindo and Devin over \$9 million.³¹⁷ Little of the money was spent on care of the children—they were kept in stash houses in appalling conditions.³¹⁸ Investigators "observed rusty cribs, hammocks covered in feces, and torn window screens," leaving the children vulnerable to mosquito-borne malaria.³¹⁹ An agent summarized the terrible conditions by saying, "If it had been dogs in the United States in a place like this the Humane Society would have been called and people would have been charged with cruelty to animals."³²⁰

Allegations of baby buying also surfaced in Chinese adoption.³²¹ In India's Andhra Pradesh state, a series of adoption scandals involving the buying of children occurred between 1995 and 2001.³²² In an all-too-familiar pattern in one of the incidences, two women were charged with "buying Lambada infants for relatively small sums (\$15 to \$45), and then receiving significantly larger sums (\$220 to \$440) from the orphanages for the children. Press reports indicated that the orphanages received \$2000 to \$3000 for each child placed in intercountry adoption."³²³

Illegal adoptions are, unfortunately, ubiquitous in the international child marketplace.³²⁴ There is ample evidence that it is not just a matter of a few

U.S. Department of State View on Intercountry Adoption and Child Trafficking and Why It Should Change, 6 DUKE F. FOR L. & SOC. CHANGE 91, 97 (2014).

313. See Rotabi, *supra* note 285, at 72.

314. *Id.*

315. *Id.* at 71.

316. Smolin, *supra* note 39, at 2–3; Smolin, *supra* note 152, at 115–17.

317. Smolin, *supra* note 152, at 140.

318. *Id.* at 139.

319. *Id.* (describing the conditions of stash houses).

320. *Id.*

321. Meier & Zhang, *supra* note 293, at 89.

322. See David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403, 456 (2005).

323. *Id.* at 456.

324. See generally, Smolin, *supra* note 152, at 117–20 (describing the common methods of operation for illegal adoptions in the international marketplace).

bad actors, but it is instead endemic to a process that involves money motives and a feel-good story of humanitarian rescue.³²⁵ With a pervasive narrative of child rescue following humanitarian crises, it is difficult to broaden the focus from remediating the immediate crisis to the overall best interests of children.³²⁶ The supply of potentially needy children is not necessarily the driving force toward rescue; instead, the desire for children to satisfy demand in a consumer-driven adoption market becomes cloaked in humanitarian motives to make that demand more palatable.³²⁷

IV. FAILINGS OF THE INTERNATIONAL REGIME TO PROTECT CHILDREN

The immediate aftermath of humanitarian disasters, whether man-made or natural, is a chaotic time to determine the best interests of children affected by the crisis.³²⁸ Countries must determine ahead of time that they will resist the pervasive narratives of international adoption as rescue because that narrative leads to the sometimes-irreparable separation of intact families, to psychosocial trauma associated with that separation, and to the vulnerability of children to trafficking through abduction and child-selling and child-buying.³²⁹ Existing structures—including anti-trafficking laws and the Hague Convention on intercountry adoption, as interpreted in the U.S.—have proven inadequate to prevent families in crisis from being torn apart.³³⁰ The next section examines the deficiencies in these instruments and offers suggestions of how to strengthen them.³³¹

325. See e.g., *id.* at 141 (illustrating a humanitarian award winner’s prosecution as an example of these endemic conspiracies).

326. *Id.*

327. See e.g., Zahra, *supra* note 30, at 337, 339 (describing a post-World War II adoption scheme of German babies).

328. See Smolin, *supra* note 133, at 478 (asserting that U.S. adoption agencies are often unwittingly complicit in trafficking).

329. See Erica Briscoe, *Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption: Are Its Benefits Overshadowed by Its Shortcomings*, 22 J. AM. ACAD. MATRIM. LAW 437, 442 (2009) (claiming “the Hague Convention needs to be modified to incorporate more detailed protective measures”).

330. See Smolin, *supra* note 152, at 169, 172 (highlighting how the implementation and understanding of anti-trafficking laws and the Hague Convention by the U.S. has been ineffective and harmful).

331. See discussion *infra* Section IV.A.

A. *Illegal Adoption ≠ Child Trafficking?*

The 2021 Department of State Report on Trafficking in Persons emphasizes a deep-seated recognition that humanitarian crises, including the COVID-19 crisis, exacerbate the problem of human trafficking.³³² What will not be found in the report, however, is any reference to illegal adoption as child trafficking.³³³

The U.S. is a signatory of the Palermo Protocol of the U.N. Convention Against Transnational Organized Crime, which addresses human trafficking.³³⁴ The Palermo Protocol asks signatory states to pass legislation to forbid trafficking in persons,³³⁵ and defines the act of trafficking as using force, coercion, abduction, fraud, deception, abuse of power, or giving or receiving payments to gain control over a person.³³⁶ Certainly, this language encompasses much of what we see with illegal adoption.³³⁷ But such acts are only trafficking when it is done for a particular purpose—the purpose of “exploitation.”³³⁸ Exploitation is defined to mean “the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.”³³⁹ The

332. U.S. DEP’T OF STATE, *TRAFFICKING IN PERSONS REPORT 21* (2021). The report begins with a letter from the Secretary of State, saying,

This year’s Trafficking in Persons Report sends a strong message to the world that global crises, such as the COVID-19 pandemic, climate change, and enduring discriminatory policies and practices, have a disproportionate effect on individuals already oppressed by other injustices. These challenges further compound existing vulnerabilities to exploitation, including human trafficking.

Id. at 3. The letter from the Acting Director recites, “The concurrence of the increased number of individuals at risk, traffickers’ ability to capitalize on competing crises, and the diversion of resources to pandemic response efforts has resulted in an ideal environment for human trafficking to flourish and evolve.” *Id.* at 5. The first twenty-two pages of the report explore the problem of human trafficking in the context of the humanitarian crisis of the year—the global pandemic of COVID-19. *Id.* at 1–22.

333. *See generally id.* (describing the failure to address the issue of child trafficking in the context of illegal adoption).

334. U.N. Convention Against Transnational Organized Crime and the Protocols Thereto art. 1, Nov. 15, 2000, T.I.A.S. 13127, 2225 U.N.T.S. 209.

335. *Id.* at art. 5.

336. *Id.* at art. 3.

337. *Id.* at art. 3 (defining “trafficking in persons”).

338. *Id.* at art. 3; *see also* Taylor W. Brown & Jini Roby, *Exploitation of Intercountry Adoption: Toward Common Understanding and Action*, 19 *ADOPTION Q.* 63, 65 (2016).

339. U.N. Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 334, at art. 3.

U.S. Trafficking Victims Protection Act³⁴⁰ essentially tracks the language of the Palermo Protocol, focusing on trafficking for the purposes of labor exploitation and sexual exploitation.³⁴¹

As Professor Smolin notes, the basic problem of including illegal adoption as child trafficking is the overall favorable impression of adoption:

The positive perceptions of adoption in the United States, both within and beyond the adoption community, make it difficult for many to accept that adoption could be harmful. The “adoption myth” in which virtuous adoptive parents bond with grateful and loving orphans makes it difficult to imagine that adoption could harm a child. The virtual absence of the voices of birth families, particularly in intercountry adoption, makes it difficult for readers to take seriously harms against the birth family. Therefore, contemplating adoption as potentially harmful requires a re-visioning of adoption, and hence is in part an act of moral imagination.³⁴²

Once again, the rescue narrative of adoption following humanitarian crises blinds us to the possibility that another approach might be better for children.³⁴³

The State Department has avoided the moral imagining of international adoption as potentially harmful.³⁴⁴ In a document sent to all embassies processing adoption visas, the department distinguished between adoption fraud used as a screen to traffic children into forced labor or prostitution from adoption fraud where “the aim of adoption is to place a child in a loving family.”³⁴⁵ By focusing on the beneficial aspects of adoption, the department ignores the profit motivation of the adoption facilitators.³⁴⁶ Adoption traffickers exploit

340. 22 U.S.C. §§ 7102–14 (2021).

341. 22 U.S.C. § 7102(11) (2021).

342. Smolin, *supra* note 39, at 3.

343. *Id.* (“Even those who accept the considerable evidence of child laundering within the intercountry adoption system may doubt that such conduct causes substantial harm.”).

344. *See infra* text accompanying note 345 (introducing the Department of State’s attempt to re-characterize and downplay the negative aspects of international adoption).

345. U.S. DEP’T OF STATE, FRAUDULENT INTERCOUNTRY ADOPTION DOES NOT CONSTITUTE TRAFFICKING IN PERSONS ¶ 6 (June 27, 2011), http://www.brandeis.edu/investigate/adoption/docs/DOS-cable-Fraudulent-ICA-Does-Not-Constitute-Trafficking_Jun11.pdf.

346. *See* Graff, *supra* note 292 (“Nigel Cantwell, a Geneva-based consultant on child protection policy, has seen the dangerous influence of money on adoptions in Eastern Europe and Central Asia . . . [when asked] how many healthy babies in those regions would be available for international

birth parents, turn children into objects to be bought and sold, and exploit the vulnerability of adoptive parents who seek a child legitimately available for adoption.³⁴⁷ That is still exploitation, in the way we describe it as exploitative for colonizing nations to strip a colony of its natural resources; do we then say it is not wrong, because the colonizer built a nice statue with the stolen gold?³⁴⁸ Limiting the word “exploitation” to forced labor or prostitution is not a textual reading.³⁴⁹ Turning children into objects to be bought and sold, regardless of the purpose, is exploitative.³⁵⁰

At the same time the Department places illegal adoption outside the bounds of human trafficking, it recognizes that “[t]he U.S. government appears to be unique among Hague contracting states and most of the international adoption community in rejecting the use of the term ‘trafficking’ to refer to illicit adoption.”³⁵¹ The State Department’s ‘unique’ position that child-buying is not child trafficking appears particularly puzzling in light of the fact that the U.S. is a signatory to the Hague Convention on intercountry adoption; after all, one of the stated aims of that convention is the prevention of “the abduction, the sale of, or *traffic* in children.”³⁵² So, in one international instrument the U.S. calls illegal adoption trafficking, but then disavows it as such in practice.³⁵³ The U.S. Trafficking Victims Protection Act calls for cooperation between countries in combatting trafficking and requires

adoption if money never exchanged hands. ‘I would hazard a guess at zero,’ he replied.”).

347. *Id.* (“As international adoptions have flourished, so has evidence that babies in many countries are being systematically bought, coerced, and stolen away from their birth families. Nearly half the 40 countries listed by the U.S. State Department as the top sources for international adoption over the past 15 years—places such as Belarus, Brazil, Ethiopia, Honduras, Peru, and Romania—have at least temporarily halted adoptions or been prevented from sending children to the United States because of serious concerns about corruption and kidnapping.”).

348. *See id.*

349. U.N. Convention Against Transnational Organized Crime and the Protocols Thereto, *supra* note 334, at art. 3, (noting the Palermo Protocol’s definition of trafficking).

350. *See Exploitation*, DICTIONARY.COM, <https://www.dictionary.com/browse/exploitation> (last visited Oct. 14, 2022) (noting that “[e]xploitation is the act of selfishly taking advantage of someone or a group of people in order to profit from them or otherwise benefit oneself.”); *see also* Wood, *supra* note 189, at 151 (noting that even when exploitation is beneficial, the exploiter is still doing it to further some end of theirs, and in turn, “it is degrading to human beings that they should be so treated, even if the exploitative arrangement is voluntary on both sides and not matter what the resulting distribution of benefits and harms”).

351. U.S. DEPT OF STATE, *supra* note 345, ¶ 8.

352. Hague Convention, *supra* note 35, at art. 32 (emphasis added).

353. *Id.*

monitoring of trafficking in other countries,³⁵⁴ yet the standards the U.S. employs for trafficking are not as capacious as those in other countries.³⁵⁵

There is little reason for the U.S. to limit child trafficking to exclude illegal adoptions.³⁵⁶ Excluding illegal adoption from the definition of human trafficking sends a message that illegal adoption is not a very grave offense and reduces the tools the U.S. has for fighting illegal adoption.³⁵⁷ Recall that in response to what was evidently a large and complex adoption trafficking scheme in Cambodia, the two perpetrators could be convicted of only relatively minor crimes like visa fraud.³⁵⁸ Child trafficking crimes would better match the actual culpability of actors who abduct or buy or sell children into international adoption.³⁵⁹

The Trafficking Victims Protection Act also specifically addresses post-conflict and humanitarian emergencies, requiring the Agency for International Development, the State Department, and the Department of Defense to “incorporate anti-trafficking and protection measures for vulnerable populations, particularly women and children, into their post-conflict and humanitarian emergency assistance and program activities.”³⁶⁰ Yet illegal adoption—a known problem associated with humanitarian crises—is not part of that protective planning.³⁶¹ Leaving illegal adoptions outside the reach of trafficking hampers the kind of thoughtful planning necessary to avoid separating children from families in a crisis.³⁶²

354. 22 U.S.C. §§ 7101–14 (2021).

355. See U.S. DEPT OF STATE, *supra* note 345, ¶ 9 (noting that not treating illegal adoption as child trafficking is “not shared by many of our foreign counterparts,” and describing an example in Ethiopia: “In December 2010, Ethiopian officials accused a Minnesota-based [Adoption Service Provider] of child trafficking for placing children without a birth parent’s consent, and subsequently revoked its license”).

356. See Turner, *supra* note 312, at 91 (explaining how “children are victims of nefarious human trafficking schemes, driven by sub-par adoption agencies” but are not prosecuted for child trafficking).

357. *Id.* at 92 (noting that adoption-related traffickers rarely go to jail and pay minor in fines in comparison to sex or labor traffickers).

358. See *supra* notes 312–320 and accompanying text; see also Turner, *supra* note 312, at 97.

359. See Turner, *supra* note 312, at 97 (noting Lauryn Galindo, the Cambodian adoption trafficker, was only sentenced to eighteen months in jail and a \$300 fine, “an undoubtedly lenient sentence compared to those sentenced for trafficking.”).

360. 22 U.S.C. § 7104(h) (2021).

361. See, e.g., Thompson, *supra* note 172 (describing how Westerners adopted Haitian children without correct documentation and possible fraud after the 2010 earthquake, including two siblings given to an orphanage by a man proven not to be a relative).

362. See, e.g., *id.* (noting that “decisions were hastily made” and “safeguards the United States [wa]s obligated to enforce under international law” were disregarded when evacuating children from Haiti).

The U.S. needs to expand its definition of trafficking under the Trafficking Victims Protection Act to include illegal adoptions, especially those done through abduction or buying and selling children.³⁶³ Doing so will signal our commitment to combatting illegal adoption, joining the rest of the Hague community that evinces that commitment.³⁶⁴

B. Fully Committing to the Hague Convention

Combatting trafficking in children is one of the main purposes of the Hague Convention on intercountry adoption.³⁶⁵ It seeks to do so in both substantive and structural ways.³⁶⁶ The Hague Convention creates a framework where each signatory State—both sending States and receiving States—creates a central authority to oversee international adoption.³⁶⁷ The sending State, the state of origin of the child, is responsible for establishing that the child is adoptable,³⁶⁸ while the receiving state, where the prospective adoptive parents habitually reside, is responsible for determining the eligibility and suitability of the prospective adoptive parents.³⁶⁹

The Hague Convention requires subsidiarity—that international adoption be considered only after in-country placement for children is considered.³⁷⁰ The Hague Convention also recognizes that each State should make it a priority to enable a child to remain in his or her family of origin when possible.³⁷¹ In aid of that goal, the sending country is to ensure that all persons whose consent is necessary for adoption have been counseled and informed of the

after the earthquake).

363. See Turner, *supra* note 312, at 112 (arguing child trafficking through intercountry adoptions “needs to be prosecuted as trafficking to ‘[free] the victims and [punish] their tormentors’”) (citation omitted).

364. See Hague Convention, *supra* note 35, at pmb1. (noting the Hague Convention on Intercountry Adoption’s commitment “to prevent the abduction, the sale of, or traffic in children” through adoptions).

365. See *id.*

366. See generally *id.* at art. I (describing the Hague Convention’s objectives to establish procedural safeguards and systems in member states to ensure adoptions are in children’s best interests and protect their fundamental rights).

367. *Id.* at art. 6. In the United States, the Department of State is the central authority. See Hansen & Pollack, *supra* note 208, at 112–13 (discussing difficulties in deciding what agency of the U.S. government should be the central authority).

368. Hague Convention, *supra* note 35, at art. 4(a).

369. *Id.* at art. 5(a).

370. *Id.* at art. 4(b).

371. *Id.* at pmb1.

effect of their consent.³⁷² The consent has to be freely given, and not induced by payments of any kind.³⁷³

One of the problems with the Hague Convention is its reliance on sending countries to determine whether a child is actually adoptable.³⁷⁴ To be adoptable, a child must be an orphan with no parents, have been abandoned with parents unknown, have been removed from parents because of abuse or neglect, or have parents who have voluntarily, without financial reward or threat or coercion, consented to adoption.³⁷⁵ Yet in many of the sending countries, and especially in the midst of war or natural disaster, there is little legal or social welfare infrastructure to enable countries to determine a child's adoptability.³⁷⁶ E.J. Graff analogizes international adoption to outsourcing manufacturing jobs overseas: "Just as companies outsource industry to countries with lax labor laws and low wages, adoptions have moved to states with few laws about the process."³⁷⁷ Thus, we are outsourcing the determination of adoptability to countries that are often hampered in making the necessary determination.³⁷⁸ Consider the problems in Guatemala, with baby buying and selling and abduction running rampant, and the inability of the government to curtail the illegal practices.³⁷⁹

At the height of Guatemala's adoption corruption, it was not a signatory to the Hague Convention.³⁸⁰ "Failure to join the convention does not prohibit a state from participating in intercountry adoption."³⁸¹ A second problem, then, with the U.S. and the Hague Convention is that the U.S. continues to

372. *Id.* at art. 4(c)(1).

373. *Id.* at art. 4(c)(1)–(2).

374. See Lara Walker, *Intercountry Adoption and the Best Interests of the Child: The Hague Convention of 1993 and the Importance of Bonding*, 27 CHILD & FAM. L.Q. 355, 364 (2015) (noting Article 4's guidelines dictate a child is adoptable if they have been abandoned or the mother gave informed and uncoerced consent).

375. See Hansen & Pollack, *supra* note 208, at 111.

376. See, e.g., Thompson, *supra* note 172 (recounting Haitian officials describing the country after the 2010 earthquake as "hardly able to stand on its own feet" and unable to "push back" against illegal adoptions).

377. Graff, *supra* note 292.

378. *Press Release, Asian-African Tsunami Disaster and the Legal Protection of Children*, *supra* note 239, at 34 ("It is acknowledged that States of origin may often lack the resources for this important responsibility of ensuring that proper consents are obtained. As this will usually be done at the local level, it is important that States have reliable and ethical personnel to oversee the consent procedure.").

379. See *supra* text accompanying notes 91–100.

380. Graff, *supra* note 292.

381. Breuning & Martinez, *supra* note 199, at 250.

allow adoptions from countries that have not implemented the Hague Convention.³⁸² Non-signatory countries are not required to following the strictures that the Hague Convention has created to ameliorate the trafficking of children.³⁸³

The fact that the U.S., the largest of the receiving countries in international adoption, continues to deal with non-signatory countries removes incentives for those countries to join the Hague Convention.³⁸⁴ In one study, countries that sent children to the U.S. in adoption were actually slightly less likely to accede to the Hague Convention than those that did not.³⁸⁵ Indeed, the willingness of the U.S. to continue adoptions from non-signatory countries creates a reverse incentive.³⁸⁶ After all, if they join the treaty, “failure to meet the treaty’s requirements can cause the United States (the single largest receiving country) to stop adoptions from a noncompliant Hague member, whereas it has continued to permit adoptions from nonmembers that do not need to comply with the convention.”³⁸⁷

Sending countries that do not join the Hague Convention are generally the poorest counties with the weakest child welfare infrastructures.³⁸⁸ To the extent that signatory countries have difficulty in determining whether children are truly available for adoption through an appropriate process, non-signatory countries have even more difficulties given their weaker infrastructures.³⁸⁹

While the Hague Convention does not prohibit signatory countries from dealing with non-signatory countries, the U.S. could decide not to allow adoptions from non-signatory countries.³⁹⁰ Doing so would incentivize more countries to commit to the protections required by the Hague Convention,

382. *Id.*

383. *Id.* at 250–51.

384. *Id.* at 257.

385. *Id.* at 256–57.

386. *Id.* at 252.

387. *Id.* As an example, Guatemala joined the Hague Convention after its adoption scandals came to light, but the U.S. refused to participate in adoptions from Guatemala after it joined the convention “largely because it was deemed to not comply with its treaty obligations.” *Id.* at 257.

388. *Id.* at 252 (citation omitted) (“Low-income countries may lack the resources to implement transparent and accountable processes due to low administrative capacity Relevant is not only the capacity to establish a Central Authority as required by the Hague Convention but also the quality of child welfare services.”)

389. *See, e.g.,* Graff, *supra* note 292 (describing Vietnam, a non-signatory country, where deceitful officials and orphanages would “persuade illiterate birth families” to give their children up for adoption).

390. Breuning & Martinez, *supra* note 199, at 250.

ultimately protecting children from illegal adoption.³⁹¹

V. CONCLUSION

The ouroboros symbol of the snake eating its tail is not exclusively a symbol of destruction, but also signifies the snake being reborn from itself.³⁹² A “rebirth” of international adoption would require a very different response to crises.³⁹³ It is rarely in the best interests of children traumatized by humanitarian crises to separate them from family and community in order to “rescue” them.³⁹⁴ Once the rescue narrative opens the door to international adoption, it often stays open long after the need for rescue ends, perpetuating patterns of colonial exploitation of the global South for the benefit of wealthier nations.³⁹⁵ Families separated in the aftermath of emergency responses are rarely reunited.³⁹⁶ Children thus separated often suffer psychosocial injuries far beyond those caused by the initial crisis.³⁹⁷ In the chaos of crisis, with attendant breakdowns of governments and the rule of law, bad actors take advantage in order to traffic children, driven by profit motives.³⁹⁸

Despite these harms of adoption as a crisis response, there are failings in the planning and execution of disaster responses that result in already-vulnerable children entering the stream of commerce into international adoption.³⁹⁹

391. *See id.* at 257 (arguing that the United States’ decision to enter bilateral adoption agreements with non-signatory countries, with lesser consequences for illegal adoptions, incentivizes countries to enter bilateral agreements and not join the Hague Convention).

392. *Ouroboros*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/Ouroboros> (last visited Oct. 14, 2022).

393. *See* Thompson, *supra* note 361 (describing the hasty and rash decisions made to extract children from Haiti after the 2010 earthquake without documentation and possible fraud).

394. *See id.* (highlighting that “[r]ushing children out of familiar environments in a crisis can worsen their trauma”).

395. *See* Graff, *supra* note 292 (explaining international adoption is a “demand-driven industry,” and since there are not enough children to meet Western demand and money, babies in poorer countries are “being systematically bought, coerced, and stolen away from birth families”).

396. *See, e.g., Historic Case: Nguyen Da Yen, et al. v. Kissinger, supra* note 100 (explaining how at least 274 out of 2,700 children evacuated during Operation Babylift at the end of the Vietnam War were ineligible for adoption but were unlikely to be reunified with their families).

397. *See* Thompson, *supra* note 172 (highlighting that “[r]ushing children out of familiar environments in a crisis can worsen their trauma”).

398. *See, e.g., id.* (stating how “expediting adoptions” in Haiti after the 2010 earthquake left children “at risk of trafficking”).

399. *See, e.g., id.* (noting how the United States’ initial plan for a “short-term, small-scale evacuation” of children from Haiti morphed into a months-long process, “[sweeping] up about 1,150 Haitian children” as the result of hasty decisions and a disregard for its international law obligations).

The U.S. needs to respond to illegal adoptions as trafficking in persons, rather than accepting that the benevolent purpose of adoption transforms exploitation into family-building.⁴⁰⁰ And while the protections of the Hague Convention on intercountry adoption provides some protections, the fact that the U.S. continues adoptions from non-signatory countries undermines its protections.⁴⁰¹ These are aspects of international adoption that must change.⁴⁰² Americans need to disavow their addiction to child rescue narratives behind which hides a consumer-driven desire for adoption of children from vulnerable parents in impoverished parts of the world.⁴⁰³ Seeing the chaos of war and natural disaster as an opportunity to adopt misunderstands the harms to children.⁴⁰⁴

400. See Turner, *supra* note 312, at 112 (“[I]ntercountry adoptions that amount to [child] trafficking are [often] prosecuted as . . . immigration or tax violation[s].”).

401. See Breuning & Martinez, *supra* note 199, at 257 (noting how countries are reluctant to join the Hague Convention because noncompliance may lead to the end of adoption programs, while “bilateral agreements with the [United States] carry no such penalty”).

402. See Graff, *supra* note 292 (arguing the Hague Convention is the best solution because the result in ratifying countries has been “a sharp decline in baby buying, fraud, coercion, and kidnapping for adoption”).

403. See *id.*

404. See *id.* (“Credulous Westerners eager to believe that they are saving children are easily fooled into accepting laundered children.”).