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Donovan M. Steltzner

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INTERCOUNTRY ADOPTION: TOWARD A REGIME THAT RECOGNIZES THE “BEST INTERESTS” OF ADOPTIVE PARENTS

Donovan M. Steltzner[†]

I. Introduction

Intercountry adoption—adopting a child born in another country—is becoming an increasingly viable alternative to domestic adoption for prospective adoptive parents. The numbers tell the story: approximately one out of every six children adopted by non-relatives in the United States comes from overseas.¹ Since 1979, Americans have adopted over 100,000 foreign-born children.² In 1995, Americans adopted over 10,000 foreign children, and the number adopted each year since then has grown steadily. In 1992, just 6,472 children received orphan immigrant visas; in 1999, that number had risen to 16,396.³ Indeed, about half of all intercountry adoption transactions worldwide involve American parents.⁴

Most of these adoptions occur without incident. In recent years, however, there has been an alarming increase in the number of adoptive parents of foreign-born children who were not informed of their child’s preexisting physical or psychological conditions.⁵ While mentally or

[†] J.D., Case Western Reserve University School of Law (2003); B.S., Grove City College (2000). Editor In Chief, *Canada-United States Law Journal*. I wish to thank Professor Hiram Chodosh for his assistance and guidance through the note writing process. Special thanks go to my mentor, Carmen Morris Twyman, and executive board members Tiffany Buxton and Jennifer McKay for their patience and suggestions as I hacked through the note-writing process. This note is dedicated to my parents, Dennis and Ardys Steltzner, and my transnationally-adopted siblings, Christina Theresa (Steltzner) Bagley (from Thailand) and John Dennis Steltzner (from the Philippines).

¹ See *Adoption: Numbers and Trends*, at http://www.calib.com/naic/pubs/s_number.cfm (last visited Apr. 6, 2003); National Adoption Information Clearinghouse, *Intercountry Adoption* [hereinafter IA-NAIC Stats], available at http://www.calib.com/naic/pubs/s_inter.cfm (last visited Apr. 6, 2003).

² Christopher S. Quarles and Jeffrey H. Brodie, *Primary Care of International Adoptees*, 58 AM. FAM. PHYSICIAN 2025 (1998).

³ IA-NAIC Stats, *supra* note 1.

⁴ See *New Rules Could Govern International Adoptions*, CHI. TRIB., May 28, 1993, at N22.

⁵ See generally *Implementation of the Hague Convention on Intercountry Adoption: Hearing Before the House Comm. on Int’l Relations*, 106th Cong. 34-36 (1999) [hereinafter House Hague Hearing] (statement of Jerri Ann Jenista, MD, Fellow, American Academy of Pediatrics), at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPaddress=wais.access.gpo.gov&dbname=106_house_hearings&do

physically challenged children are routinely adopted by parents who were fully informed of that child's infirmities, the number of children whose physical or psychological impairments are undiagnosed until after adoption is significant. In recent years, the number of cases has been significant enough to capture the attention of the American media.⁶ While it can be argued that the press has a tendency to create stories from the most horrific cases of so-called "problem children," the number of cases is still high enough to warrant serious scrutiny. Approximately 20% of Russian and Romanian orphanage survivors are believed to be so physically and psychologically damaged by their pre-adoption experiences that, even after four or more years, they will continue to require medical attention.⁷ A more universal survey of 1,500 overseas adoptees revealed that a full 30% had severe neuropsychiatric disorders, such as mental retardation, autism, fetal alcohol syndrome, and other chronic and long-term disabilities.⁸ The parents may be saddled with large costs, sometimes in the range of tens of thousands of dollars, for medical and psychological treatment for a child, often without reimbursement.⁹ A few parents admit that had they known of

cid=f:64746.wais, also available at 1999 WL 961676; See also *The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: Treaty Doc. 105-51 and its Implementing Legislation S. 682: Hearing Before the Senate Comm. on Foreign Rel.*, 106th Cong. 12 (1999) [hereinafter Senate Hague Hearing] (statement of Dr. Ronald Steven Federici, Developmental Neuropsychologist) [hereinafter Federici Testimony], at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_senate_hearings&docid=f:60674.pdf, also available at 1999 WL 796295.

⁶ See Senate Hague Hearing, *supra* note 5, at 1-2 (statement of Sen. Jesse Helms, Member, Senate Comm. on Foreign Rel.) [hereinafter Helms Statement], also available at 1999 WL 796290. *But cf.* Corin Cummings, *Adopting from Russia: A War of Perceptions*, RUSSIAN LIFE, June 1, 1998, at 16, available at 1998 WL 17338196; Cynthia Magriel Wetzler, *Helping the Adoption of Russian Children*, N.Y. TIMES, Aug. 22, 1999, § 14WE, at 9.

⁷ Margaret Talbot, *The Disconnected; Attachment Theory: The Ultimate Experiment*, N.Y. TIMES, May 24, 1998, § 6, at 24.

⁸ Federici Testimony, *supra* note 5.

⁹ See Deborah Hastings, *Effect of Loveless Orphanages 'Deadly': Adoptive Parents Don't Ask Enough Questions, Some Say; Treatment Expensive*, CHARLESTON (W.Va.) GAZETTE, Feb. 6, 2001, at P5A. Treatment options may range from basic psychological care, which may cost as little as \$7,000, to long-term residential care, which could be as much as \$100,000 per year. State aid that is otherwise earmarked for assisting a parent who has adopted a child with "special needs" may not be available for a parent who adopted a child internationally. In *Nancy G. v. Department of Children and Families*, 733 A.2d 136 (Conn. 1999), a parent was denied aid because her handicapped son was not adopted by an approved state agency, but the fact that her son was from India clearly played a key role in the court's decision: "[T]he adoption subsidy program [was] . . . aimed at encouraging the adoption of special needs children who are in foster care in

the child's infirmities prior to adoption they never would have completed the adoption.¹⁰

Even still, very few foreign adoptions fail.¹¹ For the sake of family stability, state courts are reluctant to dissolve a finalized adoption.¹² Even if the courts were to dissolve the adoption and order the state to take the child into custody, the treatment costs, not to mention the psychological cost to the child as a result of having been ripped from the home, may remain high. Recently, however, courts have become more willing, under certain circumstances, to hold an adoption agency liable for wrongdoing in a child's placement.¹³

This Note addresses one of the major problems in international adoption today, with a particular focus on Russian and Romanian international adoptions:¹⁴ the lack of a unified, cohesive "consumer protection"¹⁵ framework for adoptive parents. After all, the "best interest of adoptive parents" and the "best interest of adopted children," while seemingly in conflict, are, at their roots, inseparable. How can this be so?

Connecticut. This . . . would not include adoption subsidies to children brought to Connecticut from other jurisdictions." *Id.* at 145.

¹⁰ See, e.g., *Burr v. Board of County Commissioners of Stark County*, 491 N.E.2d 1101, 1103-1104 (Ohio 1986); see discussion *infra* Part IV.B.1.

¹¹ See, e.g., National Adoption Information Clearinghouse, *Disruption and Dissolution* [hereinafter NAIC-Disruption], available at http://www.calib.com/naic/pubs/s_disrup.cfm (last visited Apr. 6, 2003).

¹² Annulment of an adoption decree has become increasingly disfavored, with the courts favoring money damages awarded by the agency to the parents. See Danielle Saba Donner, *The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and "Consumer" Remedies*, 35 U. LOUISVILLE J. FAM. L. 473, 474 (1996). In the intercountry adoption context, most states require a separate adoption proceeding even though the child has been legally adopted in his or her country of origin. In rare cases, the court will intervene to terminate a parent-child relationship. See generally *In re Kristina P.*, 2001 WL 206140, at *1 (Conn. Sup. Ct. Feb. 16, 2001).

¹³ See discussion *infra* Part IV.

¹⁴ The international adoption system is problematic with respect to most countries, not only Russia and Romania. Some other countries that are major suppliers of adoptable children for U.S. parents, such as China, Guatemala, and South Korea, have their own problems with varying degrees of severity. However, the unique concerns of all countries are simply beyond the scope of this Note.

¹⁵ Adoptive parents are "consumers" of an *adoption placement service*, as provided by the adoption agency. It is the delivery of a "defective" service – the failure to match the child with parents who are willing and able to care for that child – that brings about the problems discussed in this Note. It would be morally reprehensible to some to refer to adoptive parents as "consumers" of children, for such a label implies that children are mere commodities that, like any other product, can or, indeed, *should* be traded in for a better model if they are somehow "defective."

The general consensus among social workers is the notion that the child is *the* client in the adoption transaction.¹⁶ Moreover, courts have, in the past, given implied imprimatur to this idea, ordering adoption agencies to consider the “best interest of the child” in their placement practices.¹⁷ It may well be true that one should consider the child to be the *primary* client in the adoption transaction, but the child is not the *only* client whose needs ought to be taken into account. Thus, not only should a foreign child be placed with parents that are best able to care for him or her, but the adoptive parents should be placed with a child that best matches their ability and willingness to care for that child’s special needs. To this end, the “best interests of adoptive parents” are served when they are able to make an informed decision based on all of the information that an adoption agency can obtain about the foreign child’s medical and psychological condition. This is especially indispensable in the international adoption context, where the “information gap” can be considerably larger than in domestic adoptions.

Section II of this Note explains the underlying reasons why American adoptive parents are turning increasingly to foreign adoptions as an alternative to the domestic adoption system. Section III discusses the economic and political conditions in Russia and Romania that gave rise to their problem of large numbers of adoptable children, and discusses the effects of institutionalization on a child’s physical and psychological well-being. Section IV analyzes the current types of “consumer remedies” available at the state level for adoptions gone wrong, including dissolution and the “wrongful adoption” suit, and argues that these existing remedies are, at best, inadequate. Section V argues that while international conventions may imply some rights for adoptive parents, proposed federal legislation on the subject fails to adequately address protections for adoptive parents. Section VI concludes by suggesting several possible solutions, including: amending proposed legislation to provide adoptive parents even more information, changing the way parents and children are represented by an agency, increasing aid targeted at foreign orphanages, improving in the domestic adoption system, and adopting certain changes in the tax code that would create greater incentives to adopt domestic children.

II. Adoptive Parents in the United States: Leaving the States In Search of a Child

Prospective adoptive parents are increasingly turning to the international adoption system for a variety of reasons. The most common

¹⁶ Donner, *supra* note 12, at 524.

¹⁷ *See id.* at 514.

reason that parents cite is the lack of adoptable domestic children.¹⁸ Others reasons include either being frustrated with or fearing delays, or being disqualified by a domestic adoption agency for being too old or being single.¹⁹

While most adoptive parents use international adoption services to avoid the perceived hassles of domestic adoption, some parents adopt overseas children to carry out a personal humanitarian mission. For example, after the Iron Curtain fell, Western journalists reported on the substandard conditions faced by institutionalized children in former Soviet bloc countries. These reports “tugged the heart-strings” of Americans, and many became willing to help “save the children” from their plight.²⁰ Some parents cite their strong religious convictions as a “heavy motivator” for adopting internationally, while more secular-minded people may claim to be moved by “a pure, unexplainable humanitarian impulse.”²¹

A. The Myth of “Child Shortage”

One of the key reasons prospective adoptive parents turn to international adoption agencies to obtain a child is a perceived lack of domestically available adoptable children.²² Typical explanations for this “shortage” include the liberalization of abortion laws, the availability of birth control, new societal mores and attitudes that make single motherhood a more tenable option,²³ and the perceived high number of “special-needs” children and children with problems.²⁴

¹⁸See Erica Lynn Kleiman, Note, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J. L. & SOC. PROBS. 327, 334 (1997).

¹⁹See, e.g., INTERNATIONAL CONCERNS FOR CHILDREN, REPORT ON INTERCOUNTRY ADOPTION 36 (Anna Marie Merrill ed., 1998) [hereinafter 1998 REPORT].

²⁰VICTOR GROZA ET AL., A PEACOCK OR A CROW: STORIES, INTERVIEWS AND COMMENTARIES ON ROMANIAN ADOPTIONS 51 (1999).

²¹Cummings, *supra* note 6, at 11.

²²Kleiman, *supra* note 18, at 334.

²³See 1998 REPORT, *supra* note 19, at 1; see also Donner, *supra* note 12, at 495 (“... the stigma of having a child out of wedlock diminished, [and] many single parents decided to keep their babies”).

²⁴See J.J. Thompson, *Afraid to Trust Survivors of Love’s Deepest Betrayals, Children with Attachment Disorder Require Unrelenting Kindness, Their Adoptive Parents Say*, ARKANSAS DEMOCRAT-GAZETTE, Sept. 29, 1999, at F1. See also *In re Kristina P.*, 2001 WL 206140, at *1 (Conn. Sup. Ct. Feb. 16, 2001) (“fearing that adopting an American child would more likely require them to cope with the physiological and behavioral effects of biological parents’ substance abuse, ... [they sought] an international adoption.”). For a Canadian perspective on the same issue, see Jim Rankin, *Nobody’s Children*, TORONTO STAR, Sept. 29, 2001, at A1.

In reality, the problem is simply a shortage of adoptable and healthy white²⁵ infants and young children.²⁶ Although white women have traditionally been the largest demographic to surrender children for adoption, that number is now down to less than 2%.²⁷ Only 32%²⁸ of the estimated 117,000 children that are eligible for adoption and are waiting in foster or group homes are white.²⁹ While adoptive parents might only wait between four and eighteen months to adopt a minority or "special-needs" child through the state foster care system,³⁰ the waiting time to adopt a healthy domestic white infant can be as long as seven to ten years.³¹ Although a little over half of all available adoptive children are African-American,³² white women generally express only latent interest in adopting them.³³ Thus, out of all "non-relative" adoptions,³⁴ only about 4% of all American adoptions are transracial.³⁵ Since the typical prospective adoptive parent is Caucasian,³⁶ the international adoption system, especially

²⁵ This Note uses the labels "Caucasian" and "white" interchangeably to refer to persons of European ancestry, and to skin tone and other shared physical characteristics.

²⁶ Kleiman, *supra* note 18, at 334.

²⁷ Evan B. Donaldson Adoption Institute, *Adoption in the United States: Statistics* [hereinafter Donaldson Stats], at <http://www.adoptioninstitute.org/FactOverview.html> (last visited Apr. 7, 2003).

²⁸ *Id.*

²⁹ U.S. Dep't of Health and Human Services, Administration for Children and Families, AFCARS 2000 [hereinafter AFCARS 2000], available at <http://www.acf.hhs.gov/programs/cb/publications/afcars/rpt0100/ar0100a.htm>.

³⁰ Donaldson Stats, *supra* note 27.

³¹ Kleiman, *supra* note 18, at 334. For a somewhat light-hearted perspective, see RAISING ARIZONA (20th Century Fox, 1987) ("Seven to ten years for a healthy white baby? Shit, what else you got? They had two Koreans and a Negro with the heart born on the outside."). *But cf.* JEAN NELSON-ERICHSEN & HEINO R. ERICHSEN, HOW TO ADOPT INTERNATIONALLY: A GUIDE FOR AGENCY-DIRECTED AND INDEPENDENT ADOPTIONS 5 (2000) (noting that the average wait for a healthy Caucasian baby can be shortened to between 12-36 months, if the parent uses certain private channels).

³² AFCARS 2000, *supra* note 29.

³³ MADELYN FREUNDLICH, ADOPTION AND ETHICS: THE ROLE OF RACE, CULTURE, AND NATIONAL ORIGIN IN ADOPTION 22 (2000). *But cf.* Kleiman, *supra* note 18, at 336 (contending that Caucasians are willing to adopt transracially, but adoption agencies often do not give prospective parents that option).

³⁴ Adoption by relatives (*i.e.*, stepparents, grandparents) consisted of about 15% of all adoptions in 1999. *See* Donaldson Stats, *supra* note 27.

³⁵ *See id.* New York State is somewhat of an anomaly, with approximately 11% of children being adopted by parents of a different race.

³⁶ No reliable statistics are available, but this is the "general understanding." Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1187 (1991).

in respect to Eastern Europe, satisfies the parents' needs by providing them an alternative source to obtain the highly desirable white child.

B. Avoidance of Delay and Discrimination

The long waits and the stringent requirements that are placed on domestic adoptive parents are some of the reasons why many choose to bypass the domestic adoption system altogether and opt for the expensive but more predictable international adoption system.³⁷ For those who are able to meet the eligibility requirements, the typical wait for a child of any race from the domestic adoption system is between nine and eighteen months.³⁸ In contrast, it takes between five and nine months to finalize an adoption from Russia.³⁹

The problem of the long wait times may be compounded in part by the continued race-matching practices of most public and some private U.S. adoption agencies. While there are many domestic children who await placement, potential parents who are more than willing to take them are often denied the opportunity to adopt solely because their skin color differs from that of the child. The Howard Metzenbaum Multiethnic Placement Act of 1994⁴⁰ ("MPA") was drafted specifically to eliminate this insidious practice. However, the MPA turned out to be a rather porous piece of legislation. Although an adoption agency could not "delay or deny the placement of a child for adoption . . . solely on the basis of the race,"⁴¹ agencies were permitted to consider the child's racial background as one of a number of factors to determine placement.⁴² Thus, those social workers who were committed to race-matching could easily work within the letter of the law and still disqualify parents on the basis of race. This problem was ostensibly remedied by the repeal and rewriting of that section,⁴³ but there are still those who have their doubts as to whether the change in the law will ultimately result in the appropriate adjustments in institutional behavior.⁴⁴

³⁷ See, e.g., Cummings, *supra* note 6, at 10.

³⁸ See Donaldson Stats, *supra* note 27.

³⁹ Cummings, *supra* note 6, at 10.

⁴⁰ Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, (portion discussed originally codified as 42 U.S.C. §1996b (1996)) [hereinafter MPA] (repealed).

⁴¹ MPA § 553(a)(1).

⁴² *Id.* § 553(a)(2).

⁴³ Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808(d).

⁴⁴ Some question whether state agencies, once 'culturally' committed to race-matching, will cease their practices. "There is enormous support among whites, especially those in the child welfare system, for race matching [although] . . . polls demonstrate very little support

Other parents look to the international system to avoid litigation by birth parents, which, at first glance, appears to arise more commonly in stateside adoptions.⁴⁵ Parents hear reports in the media about the "Baby Richard"⁴⁶ or "Baby Jessica"⁴⁷ cases or see the movie *Losing Isaiah*⁴⁸ and fear that the birth mother will return to harass them and take their child away. The media is partly to blame for reporting only the most egregious cases, as the actual incidence of removal is quite rare.⁴⁹ Although based in ignorance and false information, these fears persist. International adoptions mitigate such fears because they are finalized in the host country before the child comes to the United States.⁵⁰

among blacks in the general population for . . . race matching." Elizabeth Bartholet, Correspondence, *Private Race Preferences in Family Formation*, 107 YALE L. J. 2351, 2352-2353 (1998). An adoption placement worker could readily use "culture" as a proxy for "race," and deny a transracial placement on that basis alone. For a more detailed discussion of the language of the Act, see *infra* Part VI(D)(3) of this Note.

But it is equally unclear whether prospective adoptive parents would be willing to change their natural race preferences if they were given the option to adopt a child outside of their race. The results of a 1984 study concluded that out of 2 million couples willing to adopt, 68,000 were willing to adopt transracially. Kleiman, *supra* note 18, at 336 (citing David S. Rosettenstein, *Trans-Racial Adoption and the Statutory Preference Schemes: Before the "Best Interests" and After the "Melting Pot,"* 68 ST. JOHN'S L. REV. 137, 142 (1994)). It is true, as Kleiman asserts, that if every couple who wished to adopt transracially were permitted to do so, the number of minority children still in foster care would disappear. See AFCARS 2000, *supra* note 29. But if we consider that not all couples that are willing to adopt are even eligible to do so, and if we were to further assume an even distribution of eligible couples on both sides of the race-preference issue, the study merely shows that only 3.4% of all prospective adoptive couples would accept a child of a different race.

⁴⁵ Cummings, *supra* note 6, at 10-11.

⁴⁶ Baby Richard was taken from foster parents and was returned to his biological parents, who had married each other even though the birth mother fraudulently asserted to the father that the baby was dead. In re Doe, 638 N.E.2d 181, 181-182 (Ill. 1994), *cert denied*, 115 S. Ct. 499 (1994).

⁴⁷ Although Baby Jessica had lived with a foster family for two and one-half years, the court ordered that she be returned to her biological parents. In re B.G.C., 496 N.W.2d 239, 240-241 (Iowa 1993).

⁴⁸ *Losing Isaiah* is a movie about an African-American child whose bio-mother sought to regain custody of him after his adoption to a white couple. See Janet Maslin, *A Little Boy and a Plot Worthy of Solomon*, N.Y. TIMES, Mar. 17, 1995, at C8.

⁴⁹ Only about one percent of all adoptions are challenged in this manner. See Sean Elder, *Journey to Adoption*, Parenting, Nov. 1995, at 198. See also Kirsten Korn, Comment, *The Struggle for the Child: Preserving the Family in Disputes Between Biological Parents and Third Parties*, 72 N.C. L. REV. 1279, 1280 (1994).

⁵⁰ Many states require their own adoption decree be issued, even if the adoption was 'finalized' in the host country. This is "widely recognized as a mere formality." Kleiman, *supra* note 18, at 332.

The restrictive preliminary qualifications imposed by domestic adoption agencies force many prospective adoptive parents to adopt transnationally. Both public and private agencies generally “rank” prospective adoptive parents based on certain desirable attributes.⁵¹ As a result, many domestic adoption agencies will simply not accept a prospective adoptive parent if he or she is over forty years of age⁵² and, until very recently, routinely and almost universally placed singles and homosexuals on the bottom of their list of desirable parents.⁵³ Florida and New Hampshire have outright bans on gay and lesbian adoptions,⁵⁴ even though the empirical evidence showing that their sexual orientation alone makes unfit parents is lacking.⁵⁵ Basically, “[t]he standards an adoptive parent must meet in order to provide for the best interests of a particular child have historically reflected preference for marital, age, income, and religious participation requirements modeled after the ideal majoritarian family.”⁵⁶

In sharp contrast, foreign countries are generally less concerned with a parent’s age or sexual orientation. Some Latin American countries will take applicants who are older than forty-three.⁵⁷ Romania is open to taking older parents because the law prohibits placing a child with a parent who is less than eighteen years older than the adoptee.⁵⁸ Applicants wishing to adopt a child from China who are *under* age thirty-five need not apply.⁵⁹ When it comes to gay and lesbian adoptions, some countries are more hospitable

⁵¹ See, e.g., ERICHSEN, *supra* note 31, at 6 (noting that private agencies may discriminate on the basis of religion if they are affiliated with a denomination, and that birth mothers generally choose people that they themselves would have wanted as parents, i.e., young, active, attractive, etc.), and see Bridget M. Hubing, Note, *International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL’Y, 655, 667 (2001).

⁵² See 1998 REPORT, *supra* note 19, at 36.

⁵³ See Hubing, *supra* note 51, at 667. See also Rosanne L. Romano, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANSNAT’L LAW. 545, 550 (1994).

⁵⁴ FLA. STAT. ANN. § 63.042(3) (West 1985 & Supp. 1995); N.H. REV. STAT. ANN. §§ 170-B:4, 170-F:6 (1994). See also CONN. GEN. STAT. ANN. § 45a-726a (West 1993) (authorizing consideration of sexual orientation of prospective adoptive or foster parent).

⁵⁵ See Lisa Hillis, Note, *Intercountry Adoption Under the Hague Convention: Still an Attractive Option for Homosexuals Seeking to Adopt?*, 6 IND. J. GLOBAL LEG. STUD. 237, 246 (1998).

⁵⁶ Stephanie Sue Padilla, Note, *Adoption of Alien Orphan Children: How United States Immigration Law Defines Family*, 7 GEO. IMMIGR. L.J. 817, 821 (1993).

⁵⁷ 1998 REPORT, *supra* note 19, at 36.

⁵⁸ Dr. Alexandra Zugravescu & Ana Iacovescu, *The Adoption of Children in Romania*, in INTERCOUNTRY ADOPTIONS: LAWS AND PERSPECTIVES OF “SENDING” COUNTRIES 40 (Eliezer David Jaffe ed., 1995).

⁵⁹ 1998 REPORT, *supra* note 19, at 36.

than others. Out of fear that homosexuals were adopting children, Romania all but banned single-parent adoptions in 1995, but has relaxed enforcement of that rule somewhat since then.⁶⁰ Gays and lesbians who can disguise their sexual orientation from agencies and governments may of course be permitted to adopt as would any unmarried single person.

The monetary cost of an international adoption is high. Domestic public agencies charge very little (sometimes, nothing at all),⁶¹ yet parents

⁶⁰ GROZA, *supra* note 20, at 57.

⁶¹ Usually, the cost of a state agency adoption is "minimal to none;" however, the adoptive parent will probably need to pay attorney's fees as required to finalize the adoption. *See* Donaldson Stats, *supra* note 27.

One commonly-debated question is whether the high cost of intercountry adoption can be justified. At least one author calls the high cost of intercountry adoption "outrageous" and suggests that a price ceiling on adoption services in the amount of \$8,000 should be imposed as a matter of law. Jennifer M. Lippold, Note, *Transnational Adoption from an American Perspective: The Need for Reform*, 27 CASE W. RES. J. INT'L L. 465, 501 (1995). Lippold argues that the high price of intercountry adoption turns the child into a commodity, allowing children to be placed with the highest bidder, and not with the family wherein the child's best interest will necessarily be served. *Id.* I respect this view, but note that adoptive parents are paying a premium for the opportunity to adopt a child more quickly and with less hassle than if they had decided to adopt domestically. In other words, they believe, rightly or wrongly, that they are getting a bargain. Furthermore, price ceilings generally cause shortages, as prospective adoptive parents who would have not had the financial resources to adopt a child before the ceiling was imposed might rush into the "market" to receive the most desirable child. African American children, who are least desired among the racial groups for adoption purposes, would be passed over by Caucasian parents who, by and large, desire White children. Since such racial preferences and their consequences already exist under the current system, Lippold's "solution" would merely exacerbate the problem.

Part of the high price of overseas adoptions may also be conceptualized as a "White-child" tax – a penalty for engaging in racist or racialist behavior in familial selection. Since healthy young White (or "near-White," i.e., fairer-skinned) children are more difficult to adopt domestically, mostly due to the demand of the mostly-Caucasian pool of potential adoptive parents for children of like racial heritage, they are thus more costly, whether it be in money spent or in the "wait" time, to obtain. *See supra* note 31. Thus, the "tax" is simply the difference between the price adoptive parents are willing to pay to satisfy their discriminatory preferences and the cost of a public (or even private) domestic adoption. *See* Carol Lloyd & Hank Pellissier, *Interracial Adoption: One Couple's Story*, SALON, Aug. 4-5, 1997, at <http://www.salon.com/aug97/mothers/adoption970804> (last visited Apr. 7, 2003) (nothing that the cost variation is largely based on color, the

are often willing to spend up to \$14,000 for a private domestically-based adoption agency to obtain a child from Russia and Romania.⁶² Adoptive parents seem willing to pay a handsome premium for expedited service and the peace of mind that comes with what they may wrongly perceive as decreased transactional risk.

“gold standard” being a healthy white infant: “A paraplegic Bulgarian tot with a cleft palate costs \$30,000, whereas a mobile and dentally normal Chinese or Guatemalan urchin runs only \$15,000. And black children? Absolutely nothing Martinique, Grenada and Barbados offer free black children to anyone who wants to . . . pick them up.”)

One might argue that, since many parents often choose to adopt children from countries in East Asia and Central America, they are certainly not acting in a manner consistent with a racist or racialist world view. But I contend that the fact that these children are *not Black* may be a factor, albeit a subconscious one, in the adoptive parents’ decision-making process:

There are many more Asian and African babies adopted by Caucasian parents, as if the yellow-white combination is less transracial than the black-white one. Some of us involved in transracial adoption think of ourselves as somehow superior in the discrimination department, but we demonstrate our colorism by preferring brown children (whether Latino, African American, or mixed race) with European features that look familiar to us, over Black children, who share none of our physical attributes.

Jana Wolff, *Family Resemblance in Transracial Adoption*, at <http://www.pactadopt.org/press/articles/resemblance.html> (last visited Apr. 7, 2003). But given the history of the differences in the relations between Whites and non-Blacks (as opposed to White/Black relations), the biases of adoptive parents should not be at all surprising. Consider this: prior to the Civil Rights legislation of the 1960s, persons of Chinese ancestry, even in the Deep South, generally enjoyed higher social standing than African-Americans; indeed, some segregated “Whites-only” schools welcomed Chinese students. See JAMES W. LOEWEN, *THE MISSISSIPPI CHINESE: BETWEEN BLACK AND WHITE* 68 (1971). Even private schools south of the Mason-Dixon Line that did not admit African-Americans (and lost their tax-exempt status because of it) openly admitted East Asians. Jonathan L. Entin, *Defeasible Fees, State Action, and the Legacy of Massive Resistance*, 34 WM. & MARY L. REV. 769, 795 (1993).

It may be true that a child who looks more like his or her adoptive parents will adjust to his or her new family faster. Further, it may be easier for the parents, for they will not be needlessly burdened by having to answer too many questions from the child or needing to learn to live with the inappropriate stares of strangers. But while I do not necessarily fault parents for having a race-based preference when choosing to adopt a child, the price for having that preference must be paid – and that price may be very high. The Author thanks Professor Jonathan L. Entin for his assistance in locating several of these sources.

⁶² See Donaldson Stats, *supra* note 27.

III. *The Sample Host Countries: Russia and Romania*

In 2000, 4,269 Russian orphans received American visas, making Russia the second-largest single source of adoptees for Americans seeking children (China was in first place, with 5,053 children adopted).⁶³ Romania ranked fifth, with 1,122 children adopted by U.S. citizens.⁶⁴

A. **Russia**

The primary reason Russia has been such a large source of adoptable children is economics. Since the fall of Communism, the Russian people have faced hard economic times.⁶⁵ Unemployment is high, and Russian parents are often left with no choice but to leave their children to state care because they have no money for food.⁶⁶ In addition, there is a strong social stigma attached to keeping a disabled child, so children with marked physical and mental infirmities are regularly abandoned to state custody.⁶⁷ As of 2000, more than 650,000 children are housed in state-run institutions,⁶⁸ even though an estimated that 95% of these children have a

⁶³ Hastings, *supra* note 9. See also *Immigrant Visas Issued to Orphans Coming to the U.S.*, at http://travel.state.gov/orphan_numbers.html (last visited Apr. 7, 2003).

⁶⁴ *Immigrant Visas Issued to Orphans Coming to the U.S.*, at http://travel.state.gov/orphan_numbers.html (last visited Apr. 7, 2003). At the time of the writing of this Note, the figures for 2001 and 2002 were unavailable. By 2001, Romania had fallen to sixth place, and by 2002, to fifteenth. For the reason behind this decline, see *infra* note 80.

⁶⁵ Even a decade after the collapse of the Soviet Union in 1991, Russia "is still struggling to establish a modern market economy and achieve strong economic growth." Widespread corruption, a manufacturing base in dire need of modernization, and uncertainty over property rights in the new regime has slowed progress to some extent. See CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* (2002), available at <http://www.cia.gov/cia/publications/factbook/geos/rs.html> (last updated Mar. 19, 2003). As of 2002, the average Russian income is estimated at \$8,800. *Id.*

⁶⁶ In 1988, 86% of all women between the ages of 15 and 49 had at least one abortion. Association for Research in International Adoption, *Despair*, ARIA at <http://www.adoption-research.org/despair.htm> (last visited Apr. 7, 2003) (reviewing C. COX, ET AL., *TRAJECTORIES OF DESPAIR: MISDIAGNOSIS AND MALTREATMENT OF SOVIET ORPHANS* (1991)) [hereinafter COX].

⁶⁷ See Heidi A. Holzfaster, *Russian Orphans Cry Out for Assistance*, COX NEWS SERVICE (Dec. 6, 2000). See also Kimberly A. Chadwick, Comment, *The Politics and Economics of Intercountry Adoption in Eastern Europe*, 5 J. INT'L LEGAL STUD. 113, 117 (1999) (once a handicapped child is placed in an orphanage, chances of adoption are small).

⁶⁸ See Holzfaster, *supra* note 67.

living parent. As a result, only about 40-50 thousand of these institutionalized children are legally adoptable by Americans.⁶⁹

The Russian people are very sensitive to the fact that they have so many children they cannot adequately care for. They consider it a slight that other nations view Russia as being in the company of third-world countries with similar problems.⁷⁰ Some Russians look at the issue as a matter of national pride, and see the international adoption scheme as a road toward "cultural genocide."⁷¹ After all, "[e]verybody wants these kids to stay in Russia It is our policy that Russian orphans should grow up in Russian homes."⁷² In part to appease nationalist elements, the Duma, Russia's legislative body, has enacted law that now requires adoption agencies operating in Russia to be accredited by the government and, for monitoring purposes, to have an office in Russia.⁷³ Foreign adoptive parents must use the services of one of these approved agencies.⁷⁴

The primary concern arising from maintaining such large numbers of "social orphans" is the cost of housing them. Currently, the least-cost method is in use: housing the children in warehouse-style institutions. Orphanages are given about \$300 per month per child.⁷⁵ Given the severity of Russia's economic condition, the money, if and when it arrives, is often misallocated, frequently going toward "overhead costs" instead of childcare.⁷⁶ As a result, many of facilities are often barely able to keep out the cold in winter, are understaffed and mismanaged, and leave children with only minimal supervision by adults and provide little meaningful interaction with other children.⁷⁷ Moreover, salaries for orphanage workers

⁶⁹ Cummings, *supra* note 6, at 12.

⁷⁰ *Id.* at 10.

⁷¹ *Id.*

⁷² *Id.* at 16. In this respect, Russian attitudes toward adoption are similar to those present in the U.S. about thirty years ago.

⁷³ David E. Powell & Heidi A. Holzfaster, *As Orphans Multiply and Languish, Russia 'Decrees' U.S. Agencies Included in Adoption Ban*, BOSTON GLOBE, Dec. 10, 2000, at H2.

⁷⁴ U.S. Dep't of State, *International Adoption: Russia*, available at http://travel.state.gov/adoption_russia.html (last visited Apr. 7, 2003).

⁷⁵ Consider this in the light that 36.7% of the population lives below the poverty level of \$42/month. See Holzfaster, *supra* note 66.

⁷⁶ See HUMAN RIGHTS WATCH, *Cruelty and Neglect in Russian Orphanages*, available at <http://www.hrw.org/reports98/russia2/Russ98d-05.htm> (last visited Apr. 7, 2003).

⁷⁷ While there are some hints that the Russians are attempting to make some progress with the creation of a foster-home style system similar to that which exists in the United States, the program is very new and is untested. *Kasynov Signs Resolution on Family-Type Orphanages*, ITAR-TASS, Mar. 21, 2001, available at Westlaw, RUSNEWS database.

are so low that the institutions can attract only the least-skilled workers.⁷⁸ In addition, institutional workers often hold orphans out to be “inferior,” and it is this stigmatization that may prove to be one of the greatest obstacles to giving institutionalized children the best care possible.

Improving the conditions and correcting some of the human rights abuses against institutionalized children will be a project for at least the next few decades. Several orphanages in the Moscow and Volga regions have experimented with smaller, more intimate children’s cottages,⁷⁹ but implementing such a plan system-wide will take years.

B. Romania⁸⁰

Romania, like Russia, has experienced acute economic problems since the fall of the Iron Curtain. However, Romania’s orphan problem had its genesis in the policies of its former dictator, Nicolae Ceausescu.⁸¹ To enact his grandiose military and economic plans, he needed more laborers. To this end, the regime and its secret *Securitate* police force forced the peasantry to move from the countryside to the cities to work in the factories.⁸² The government outlawed abortion and all other forms of birth control⁸³ and ordered each family to produce five children.⁸⁴ The women

⁷⁸ Doctors are generally paid about \$100U.S.D. a month for their services. See HUMAN RIGHTS WATCH, *supra* note 76.

⁷⁹ HUMAN RIGHTS WATCH, *supra* note 76.

⁸⁰ Due to the reporting of wide-scale corruption in its adoption system and pressure from the European Union to remedy its human rights abuses, Romania suspended all international adoption transactions on June 1, 2001. Families that were in process of adopting may still be allowed to complete the adoption, but no new adoptions will be handled. The fear is that “. . . if we fail to eliminate corruption through radical measures, no . . . reform of the protection system of institutionalized children can be achieved.” Prime Minister Adrian Nastase, Speech at the National Council on Children’s Rights in Romania (Aug. 31, 2001), at http://www.roembus.org/english/comunities/copii/speech_delivered_by_prime_minist.htm. See also *EU Recommends Stepping Up of Reforms*, ROMANIAN BUS. J., Apr. 30, 2001, at 2001 WL 20484776. Romania had been showing some signs of institutional reform, but the scope has been very limited. See *Hope and Homes for Children*, ROMANIAN BUS. J., Mar. 31, 2000, at 2000 WL 12106632. But see also *National Authority for Child Protection Is Created*, ROMANIAN BUS. J., Feb. 22, 2001, at 2001 WL 20485641. Whether the reforms enacted will change some of the fundamental problems with the Romanian system remains to be seen. Due to the lack of published information concerning the reforms, the information given in this Note may not reflect the most recent developments.

⁸¹ See GROZA, *supra* note 20, at 14.

⁸² See *Id.*

⁸³ See *Id.* at 13.

who sought abortions and the doctors who performed them did so under threat of the death penalty.⁸⁵ When the peasantry left the countryside, food production inevitably fell, and food prices rose. Without birth control, thousands of children were born to parents who could not afford to feed them; these children were simply abandoned.⁸⁶ These orphans were then institutionalized. Social workers who worked within the system eventually came to believe that children were actually better off in the poor conditions of the state institutions than in the care of families.⁸⁷ Thus, it became nearly impossible to release a child back to his or her parents, even if the parent could show that he or she could afford to take care of the child.⁸⁸

Today, even some twelve years after the fall of the Ceausescu dictatorship, Romania's economic problems linger,⁸⁹ and approximately 100,000 children remain institutionalized.⁹⁰ Birth control devices are not widely used because they are too expensive.⁹¹ While abortions are now legal and cost about two dollars (U.S.), many doctors refuse to perform an abortion without a bribe.⁹²

Romanian adoption laws, like their Russian counterparts, attempt to balance the country's inability to take care of its own children with feelings of national pride. The current law requires that a child who has been declared an "orphan" must be reserved for adoption by Romanian parents for sixty days.⁹³ But only since 1997 has the Romanian government attempted to create a domestic adoption program—and due to lack of resources and trained personnel, the prognosis for that program is uncertain.⁹⁴ After the sixty-day waiting period, the Romanian Committee

⁸⁴ See Robert Z. Nemeth, *Local Compassion, Care Save Romanian Children*, SUNDAY TELEGRAM (Worcester, Maryland), Aug. 6, 2000, at C2.

⁸⁵ See GROZA, *supra* note 20, at 13.

⁸⁶ See *id.* at 14.

⁸⁷ Jane Perlez, *Romanian 'Orphans': Prisoners of Their Cribs*, N.Y. TIMES, Mar. 25, 1996, at A1.

⁸⁸ Even today, Romanian social workers have not been trained to encourage parents to take their children home. *Id.*

⁸⁹ Romania remains one of the poorest of the former Warsaw Pact nations. With an inflation rate of 34.5% (as of 2001) and an unemployment rate of about 9.1% (as of 2001), serious economic and political reforms will be required to bring Romania up to par with the standards for European Union membership, which it has been actively seeking. See CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (2002), available at <http://www.cia.gov/cia/publications/factbook/geos/ro.html> (last updated Mar. 19, 2003). The Romanian median income was estimated at \$6,800 per year in 2001. *Id.*

⁹⁰ See GROZA, *supra* note 20, at 25.

⁹¹ Perlez, *supra* note 87.

⁹² *Id.*

⁹³ Chadwick, *supra* note 67, at 126.

⁹⁴ See GROZA, *supra* note 20, at 58.

for Adoption reviews the case, and only then can a child be placed on the list of children who are eligible to be adopted by parents from abroad.⁹⁵ A distinct feature of the Romanian system is that adoptions are completed by proxy; adoptive parents need not go to the country until the child selected for them has already been processed through the system.⁹⁶ After the child is adopted, the placing agency is required to report periodically on the adopted child's progress and his or her adjustment to the adoptive family for a period of two years, and must send these reports to the Committee.⁹⁷

C. Problems with Institutionalized Children and Risks in Adoption

All adoptions, whether they are domestic or international, entail some level of risk-taking by the prospective parents. Both child and parent require an adjustment and bonding period ranging from months to years, depending on a variety of factors. However, when a child is institutionalized, as most orphans from Russia and Romania have been, the odds that the child will have physical and psychological problems are much greater.⁹⁸

Institutional life in an orphanage can be extremely damaging to a child's physical and social well-being. Due in part to poor sanitation and pollution, institutionalized children are at higher risk for such medical problems as asthma,⁹⁹ "central nervous system pathologies, developmental delays, failure to thrive, anemia, rickets, fetal alcohol syndrome, malnutrition, parasites, exposure to syphilis, and tuberculosis,"¹⁰⁰ infectious diseases, and motor problems.¹⁰¹ Furthermore, for every five months spent

⁹⁵ Zugravescu & Iacovescu, *supra* note 57, at 44.

⁹⁶ *Id.* at 48.

⁹⁷ *Id.* at 46.

⁹⁸ This is not to say that *only* children from Russia and Romania experience these problems. Problems with troubled institutionalized children are universal, which includes (to a much lesser extent) children in foster care in the United States. See Jordana Hart, *Forum Explores Hidden Problems in Overseas Adoptions; Parents Say Traumas Often Not Disclosed*, BOSTON GLOBE, Sept. 29, 1997, at B3. See also Michelle Mahoney, *Pre-adoptive Neglect Creates Nightmare for Families*, DENVER POST, Feb. 19, 1997, at F1.

⁹⁹ David Tuller, *Adoption Medicine Brings New Parents Answers and Advice*, N.Y. TIMES, Sept. 4, 2001, at F7.

¹⁰⁰ See Lisa H. Alberts et al., *Health of Children Adopted from the Former Soviet Union and Eastern Europe: Comparison with Preadoptive Medical Records*, 278 J. AM. MED. ASS'N 922, 922 (1997).

¹⁰¹ Marlene Cemons, *Past Traumas Afflict Many Former East Bloc Orphans*, L.A. TIMES, Mar. 17, 1996, at A1.

in an institution, the average child will exhibit a one-month physical growth delay.¹⁰²

The frequency of what would be considered malpractice in the United States committed by foreign doctors who assess children in the orphanage system can seriously impair the adoptive parent's ability to assess the risk of adopting a particular child, and to make a wise and informed choice. Doctors in Russia and Romania who treat institutionalized children routinely fail to correctly diagnose medical conditions. Western doctors are often bewildered at the regular practice of using nebulous or "obfuscatory"¹⁰³ (or, in some cases, meaningless) nonstandard medical terminology to label a host of physical and mental disorders.¹⁰⁴ For instance, diagnoses of "vegetative dystonia" were often given to survivors of the Chernobyl nuclear disaster,¹⁰⁵ and the ubiquitous "oligophrenia" label was given to virtually any child that appeared to have some developmental delay.¹⁰⁶ The label "encephalopathy" is commonly given to children whose mothers suffered from alcoholism while pregnant.¹⁰⁷ It is certainly true that these children often do have *something* wrong with them. However, the orphanage may receive more money from the government for housing children that have physical or mental deficiencies. Such a scheme acts as a perverse incentive for orphanage doctors to over-diagnose healthy children as "defectives."¹⁰⁸ In one notable instance, a psychiatrist gave a teenager a diagnosis of "schizophrenia," although "nothing abnormal was detected."¹⁰⁹ Even if accurate records do exist, they are often not dated. If a child has suffered from a chronic illness since birth, doctors may simply make repeated notations in the child's medical dossier, but with no corresponding dates.¹¹⁰

¹⁰² See Alberts, *supra* note 100.

¹⁰³ Barbara Kaplan Lane, *Doctor in Forefront of Overseas Adoptions*, N.Y. TIMES, May 4, 1997, § 13LI, at 25.

¹⁰⁴ COX, *supra* note 66. The author of the review notes that, while some positive changes have taken place in Russian psychiatry since the time the book was written (1991), many of the same problems in diagnosis and the subsequent treatment of mislabeled children still exist. *Id.*

¹⁰⁵ Dr. Jerri Ann Jenista, *Infections Disease and the Internationally Adopted Child*, at <http://www.comeunity.com/adoption/health/infectious-disease.htm> (last visited Apr. 7, 2003).

¹⁰⁶ COX, *supra* note 66.

¹⁰⁷ *Id.* See also *Sherman v. Adoption Center of Washington*, 741 A.2d 1031, 1034 (D.C. 1999) ('encephalopathy' is also used as a "general diagnosis applied . . . to Russian babies with unusual birth circumstances, such as either lengthy or rapid labor, C-section deliveries, or older mothers.').

¹⁰⁸ HUMAN RIGHTS WATCH, *supra* note 76.

¹⁰⁹ COX, *supra* note 66.

¹¹⁰ See HUMAN RIGHTS WATCH, *supra* note 76.

Most of the physical defects, once they are accurately identified, can often be treated by Western medicine. Mental and psychological traumas, however, are more difficult to diagnose, and, if severe, may be nearly impossible to cure.¹¹¹ The institutionalized child is often deprived of basic and essential human contact and socialization. Many children are literally imprisoned in their cribs, with their bottles propped upright, lashed to the sides of the crib, "like hospitals in [the U.S.] used to be many, many years ago."¹¹² The lack of attention and other types of stimulation to which institutionalized children are subjected manifests itself in notable deficiencies in areas of critical brain development.¹¹³ Furthermore, since even such basic skills as reactions to and the differences between pleasure and pain are learned *vis-à-vis* with adults or other children, deprivation of contact can result in seriously stunted development.¹¹⁴ The longer a child is in an orphanage, the more his or her cognitive abilities decrease, and the more developmental and behavior disorders become apparent.¹¹⁵ Children adopted from Russia tend to be older and generally have spent at least some time in institutions,¹¹⁶ so adoptive parents are often faced with at least some degree of antisocial behavior and learning disabilities in these children.

Out of reaction to their profound neglect, many of these children develop what is commonly known as "reactive attachment disorder": the inability to form emotional bonds and trust other people.¹¹⁷ Or, they can be overly and inappropriately affectionate with strangers.¹¹⁸ This reaction is a

¹¹¹ See Mario J. Ortiz, *When Love is Not Enough: Emotional Disorders Found in Kids Who are Adopted from Eastern Europe*, PLAIN DEALER (Cleveland, OH), Aug. 17, 1996, at E1. ("The deprivation is phenomenal A loving home is not going to cure brain damage.")

¹¹² Hastings, *supra* note 9.

¹¹³ Ortiz, *supra* note 111.

¹¹⁴ See Talbot, *supra* note 7.

¹¹⁵ Cimons, *supra* note 101.

¹¹⁶ Katharine Q. Seelye, *Couple Accused of Beating Daughters Tell of Adoption Ordeal*, N.Y. TIMES, Nov. 2, 1997, § 1, at 37; Chadwick, *supra* note 67, at 117.

¹¹⁷ See *Reactive Attachment Disorder of Infancy or Early Childhood*, in AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 127-130, § 313.89 (4th ed., text revision, 2000) [hereinafter DSM-4]. Reactive Attachment Disorder ("RAD") has two manifested subtypes: Inhibited type, in which there is "the persistent failure to initiate and to respond to most social interactions in a developmentally appropriate way;" and, "disinhibited type," in which the child is "indiscriminate[ly social] or [lacks] selectivity in the choice of attachment figures." *Id.* at 128. By definition, the onset of the disorder is typically before the age of 5. *Id.* at 129. The DSM-4 notes that RAD should be clearly differentiated from "Oppositional Defiant Disorder" or "Conduct Disorder," in which children who have been raised in institutional settings exhibit a wide range of antisocial and sociopathic behaviors. *Id.* at 129-130. Indeed, no causal or relational link has been found between RAD and Conduct Disorder. *Id.* See also *infra* note 120.

¹¹⁸ See Talbot, *supra* note 7. DSM-4, *supra* note 117, at 128.

survival mechanism that institutionalized children develop because they quickly learn not to depend on adults for physical or emotional comfort.¹¹⁹ Furthermore, many of these children also show behavioral problems associated with “conduct disorder,”¹²⁰ the manifestations of which may include varying degrees of “self-mutilation, cruelty to siblings, overt sexuality and morbid fascinations with fire and violence,”¹²¹ theft, inability to feel remorse, and blithely lying about the obvious.¹²² A few have even killed small animals.¹²³

As with any psychological disorder, there are degrees of severity.¹²⁴ A study of Romanian adoptees conducted by Dr. Victor Groza, an adoption researcher at Case Western Reserve University, divides adoptees into three groups. “About 20 percent” of institutionalized orphans have been “severely affected by their institutionalization” and continue to have “alarming emotional and marked developmental lags up to four years after adoption.”¹²⁵ The middle 60 percent managed to make significant strides towards catching up with their peers. The top 20 percent, the “resilient rascals,” show no ill effects of their institutionalization at all.¹²⁶ Yet even with all of these difficulties, about 78 percent of parents say they are happy

¹¹⁹ Continuity of affectionate care by one or a small number of caregivers who can give of themselves emotionally . . . originates the development of the child’s love relationships . . . Having repeated experiences of being comforted when distressed is a part of developing one’s own capacity for self-comfort and self-regulation, and later, the capacity to provide the same for others.

Talbot, *supra* note 7.

¹²⁰ See *Conduct Disorder*, in DSM-4, *supra* note 117, at 93-99, § 314.9. The “lumping” of RAD with “conduct disorder” is, unfortunately, quite common in the world of lazy journalism – and in the world of lazy law clerks and jurists who craft court opinions. See *infra* notes 121-124.

¹²¹ Hastings, *supra* note 9; DSM-4, *supra* note 117, at 95.

¹²² Mahoney, *supra* note 99; DSM-4, *supra* note 117, at 95.

¹²³ Mahoney, *supra* note 99, at F1. See Thompson, *supra* note 24; *But see* DSM-4, *supra* note 117, at 95.

¹²⁴ Full-blown attachment disorder is “very uncommon.” DSM-4, *supra* note 117, at 129. Some doctors think it is a ‘myth.’ Linda Borg, *Disconnected Kids: Influx of Neglected Infants Spotlights cases of ‘Attachment Disorder,’* PROVIDENCE JOURNAL-BULLETIN, Aug. 20, 1998, at H8. Calling it a myth, however, may be counterproductive, because doing so will not make the symptomology go away, even if the disorder might be overdiagnosed. Others think that it is a real problem, but it has been overblown by the press attention to exceptional cases. See Thompson, *supra* note 24.

¹²⁵ Talbot, *supra* note 7.

¹²⁶ *Id.* *But see* Hart, *supra* note 98 (in a study done by the International Adoption Clinic, the bottom 20 percent remain “almost unmanageable”).

with the adoption placement, and 98 percent would never consider giving their child back to the agency.¹²⁷

IV. Consumer Remedies for Adoption Placement Failure

The vast majority of adoption placements are eventually successful. In some cases, however, the adoption placement leads to *extreme* trauma that stems from the adoptive family's inability to absorb the mental and emotional costs that the adopted child brings upon a household. The cost of caring for a child whose physical and psychological ailments were undiagnosed at the time of adoption is often too great—after months of hard work and money spent on doctors and specialists, the parents are left with no choice but to end the relationship. In those adoptions that do fail, the parents find out—often too late—that love and a good home cannot alone remedy the most severe psychological trauma that has been inflicted on an institutionalized child.

Generally, there are two legal remedies that parents can enact if the adoption fails. First, if it is considered to be in the “best interest of the child,” an adoption can either disrupt, in which case the child is removed before the adoption is finalized,¹²⁸ or it can dissolve, in which case the child is removed after adoption.¹²⁹ Second, the parents can file a legal claim against an agency for “wrongful adoption” and ask for money damages.

A. Disruption and Dissolution

Disruption—that is, returning the child to the adoption agency or the state before the adoption has been finalized—is by far the most common remedy. Adoption disruption and dissolution rates have remained relatively constant since 1985, ranging between 10 and 20 percent of all adoptions.¹³⁰

¹²⁷ Talbot, *supra* note 7. But what parent would readily admit to a reporter (or to anyone else, for that matter) that they actually *regretted* the adoption, when the social pressure against saying, “I hate my child, and I wish that I never adopted him/her,” is so great?

¹²⁸ “The term disruption is used to describe an adoption which does not continue, resulting in the child returning to foster care and/or to another set of adoptive parent(s).” NAIC-Disruption, *supra* note 11.

¹²⁹ “The term dissolution is used to describe an adoption that fails after finalization, resulting in the child returning to foster care and/or another set of adoptive parent(s).” *Id.*

¹³⁰ *Id.* Statistics for the number of intercountry adoptions that fail and specific statistics for each country were not located. See Senate Hague Hearing, *supra* note 5, at 17 (testimony of Barbara Holtan, Director of Adoption Services, Tressler Lutheran Services); see also Hastings, *supra* note 9 (an adoption agency reports that, between 1995 and 2001, it has placed 105 children adopted from Russia and Romania into at least a second American family).

Thus, as the number of adoptions rise, the number of families that will feel forced to end their adoptions will increase commensurately. Disruption is more likely to occur with older children who have histories of previous placements and longer stays in foster homes or institutional settings.¹³¹ The disruption rate increases as the age of the child at the time of the adoption increases; virtually no infant adoptions disrupt, while 13.5 % of all adoptions of children ages twelve to eighteen disrupt.¹³²

In most cases of adoption disruption, the child's mental health is at issue. When the child has chronic and severe emotional problems, families give up even trying to cope with the child. Some children are sent to long-term residential care, which can cost up to \$100,000 per year, or to foster homes.¹³³ Others are placed in new adoptive homes, but this outcome often exacerbates the child's attachment disorder.

Dissolution—the annulment of the adoption decree—is more difficult than disruption. Very few states have any mechanism in place to nullify an adoption once it has been finalized unless the adopted child is being abused, or the parents were fraudulently induced to adopt the child. In *In re Kristina P.*,¹³⁴ a Connecticut court held that the parent's emotional abuse of, rejection of, and unwillingness to reunite with an unruly Russian orphan was sufficient cause to warrant terminating the adoptive parents' parental rights.¹³⁵ In *State ex rel. Paul v. Hill*,¹³⁶ a couple adopted four Russian children, and although they were assured that the children would have no substantial emotional problems, the children exhibited strong anti-social behavior. West Virginia's highest court ruled that the adoptive parents could work to nullify the adoption as a condition of replacing the children in an alternate adoptive home.¹³⁷

B. Wrongful Adoption

Some adoptive parents admittedly do have the patience and energy required to adopt and care for a "special needs" child; however, most adoptive parents are unable or unwilling to care for a physically- or mentally-challenged child, and will not adopt a child if they have prior knowledge of any deficit. Rather than vacating or setting aside an adoption decree, some parents are opting to recover damages for any extraordinary

¹³¹ NAIC-Disruption, *supra* note 11.

¹³² *Id.*

¹³³ Hastings, *supra* note 9. The government will pay the bill only if the child becomes a ward of the state; until then, parents themselves must foot the bill. *Id.*

¹³⁴ *In re Kristina P.*, 2001 WL 206140 (Conn. Sup. Ct. Feb. 16, 2001)

¹³⁵ *Id.* at *9, *14.

¹³⁶ *State ex rel. Paul v. Hill*, 496 S.E.2d 198 (W.Va. 1997).

¹³⁷ *Id.* at 211.

expenses that were incurred because the adoption agency failed to disclose or fraudulently misrepresented a child's medical history or condition.

The common law tort of "wrongful adoption" is a recent legal innovation. Before 1986, no court of law permitted an adoptive parent to recover damages against an adoption agency for fraud or negligent misrepresentation of a child's medical condition or familial background. Hence, the sole remedy available for parents was to seek an annulment of the adoption decree. Today, there are only thirty-one reported cases of "wrongful adoption" in nineteen states,¹³⁸ and only four of these cases pertain to international adoptions.¹³⁹

1. Domestic Adoptions

*Burr v. Board of County Commissioners of Stark County*¹⁴⁰ was the first "wrongful adoption" case in which the adoptive parents won their suit against an adoption agency. In *Burr*, a couple adopted a boy after they were informed by a county welfare department caseworker that this child was the product of a eighteen-year-old unwed mother who lived with her parents, and who had recently gone to Texas to look for a job.¹⁴¹ In reality, the child's mother was a thirty-one year-old mental patient with low intellect and a speech impediment who had a family history of high risk for Huntington's disease; his father was also presumed to be a mental patient.¹⁴² A series of psychological reports on the child done prior to the adoption showed that the state knew about the child's low intelligence, and the agency failed to disclose this to the parents. The child was mentally retarded and developed Huntington's disease. The parents testified that had they known about the boy's parentage and problems, they would not have adopted him.¹⁴³

¹³⁸ These states are: Arizona, California, Florida, Georgia, Illinois, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Washington, West Virginia, and Wisconsin. The District of Columbia has also decided this issue. See Harriet Dinagar Milks, Annotation, "Wrongful Adoption" Cause of Action Against Adoption Agencies Where Children Have or Develop Mental or Physical Problems that are Misrepresented or Not Disclosed to Adoptive Parents, 74 A.L.R. 5TH 1 (1999).

¹³⁹ These cases are: *Regensburger v. China Adoption Consultants, Ltd.*, 138 F.3d 1201 (7th Cir. 1998); *Ferenc v. World Child*, 977 F.Supp. 56 (D. D.C. 1997); *Sherman v. Adoption Center of Washington*, 741 A.2d 1031 (D.C. 1999), and *Prince v. Illien Adoptions International*, 806 F.Supp. 1225 (D. Md. 1992).

¹⁴⁰ *Burr*, 491 N.E.2d 1101 (Ohio 1986).

¹⁴¹ *Id.* at 1105-1106.

¹⁴² *Id.* at 1103-1104.

¹⁴³ *Id.*

The Ohio Supreme Court ruled that in order for the adoptive parents to have a cause of action against an adoption agency, they must prove each of the elements of fraud:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that the knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.¹⁴⁴

“The mere failure to disclose” was not actionable; rather, it was the “deliberate act of misinforming . . . which led to compensable injuries.”¹⁴⁵

The kinds of information that an adoption agency is required to disclose to the adoptive parent is generally governed by statute.¹⁴⁶ The major differences between the laws of each state rests primarily in how much information an adoption agency must disclose and whether an agency can be sued for mere negligence. While state courts have generally sided with the *Burr* court in the interpretation of their own laws, the standards by which adoptive parents can successfully bring claims against an agency are by no means uniform between them.

Some courts have ruled that adoption agencies have an affirmative duty to disclose any information that would enable the parents to make an informed decision.¹⁴⁷ “[A]doptive parents [should] assume the awesome responsibility of raising a child *with their eyes open*” (emphasis added).¹⁴⁸ In Pennsylvania, the state supreme court ruled that the state’s constitution created an obligation on the part of an adoption agency to make a good-faith effort to obtain medical histories, and disclose them fully and accurately.¹⁴⁹ However, a federal court sitting in Pennsylvania found that the state’s adoption act created no private cause of action for negligent

¹⁴⁴ *Id.* at 1105.

¹⁴⁵ *Id.* at 1109.

¹⁴⁶ See, e.g., MON. CODE ANN. § 40-3-101(1) (West 2002); WASH. REV. CODE ANN. §§ 26.33.350, 26.33.380 (West 1997); W.VA. CODE ANN. § 48-22-401 (Michie 2002).

¹⁴⁷ See *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354, 365 (Ill. App. 5th 1992); *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1111 (Mass. 1995).

¹⁴⁸ *Catholic Charities*, 588 N.E. 2d at 365.

¹⁴⁹ See *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994).

breach of duty and that there was no cause of action for negligent nondisclosure.¹⁵⁰

Courts in three states have held that the adoption agency has no duty whatsoever to the adoptive parents to investigate a child's medical history or genetic background. After all, the adoption agency cannot possibly be expected to be a "guarantor of the infant's future good health."¹⁵¹ In Mississippi, the state's highest court ruled that there is no affirmative duty to obtain a child's medical information through testing, even if such tests that would reveal any problems were easily obtainable.¹⁵² Meanwhile, the Wisconsin Supreme Court ruled that adoption agencies have no duty to disclose risk factors for hereditary disease, but when the agency does disclose information, it must do so as to not mislead.¹⁵³ Similarly, a Minnesota court ruled that clarifying what might otherwise be misleading information would not impose an "extraordinary or onerous" burden on adoption agencies.¹⁵⁴

Adoption agencies are not held liable if they are unaware of a child's conditions prior to adoption. However, when an adoption agency purposely conceals vital information—that is, gives parents information that it knows to be patently false or misleading at the time it was given—virtually all states hold the agency liable for damages, regardless of the agency's status as a public or private entity.¹⁵⁵ In *Roe v. Catholic Charities*, the families of three adoptees were not informed of the children's past episodes of violent and destructive behaviors.¹⁵⁶ One of the adoptees killed the family dog of a foster parent; another smeared feces on the walls in a previous foster home.¹⁵⁷ The court rejected the agency's argument that recognition of a fraud action would "hinder its efforts to place handicapped children with families."¹⁵⁸ Rather, the court noted that "straightforward dealing, rather

¹⁵⁰ See *Lord v. Living Bridges*, No. Civ. A. 97-6355, 1999 WL 562713, at *3 (E.D. Pa. July 30, 1999).

¹⁵¹ *Mohr*, 653 N.E.2d at 1111.

¹⁵² *Foster v. Bass*, 575 So.2d 967 (Miss. 1990)

¹⁵³ *Meracle v. Children's Service Society of Wisconsin*, 437 N.W.2d 532, 537 (Wis. 1989). See also *Milks*, *supra* note 138. (Rhode Island, Nevada and Alaska have no statutes requiring disclosure, and Minnesota and Kansas both require collection of health data but not disclosure).

¹⁵⁴ *M.H. v. Caritas Family Services*, 488 N.W.2d 282, 288 (Minn. 1992).

¹⁵⁵ The one exception to this rule is Pennsylvania. The state statutes expressly protect state employees. Adoptive parents cannot file a legitimate claim against the state and its agencies (in this case, a public adoption agency) unless that agency was liable for acts of negligence, not for acts arising from fraud or willful misconduct. See *Zernhelt v. Lehigh County Office of Children and Youth Services*, 659 A.2d 89 (Pa. Commw. Ct. 1995).

¹⁵⁶ *Catholic Charities*, 588 N.E.2d at 364.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 360.

than fraud” would facilitate placing handicapped children in homes.¹⁵⁹ Not only would an informed parent then have the financial and emotional stamina necessary to care for such a child, but they would also be prepared to obtain proper medical treatment for the child in due course.¹⁶⁰

2. Foreign Adoptions

In an intercountry adoption, the child normally has to face two separate adoption proceedings: first, in the country of origin, and second, in the state in which the adoptive parent or parents reside. In each of the four reported “wrongful adoption” cases dealing with foreign adoptions,¹⁶¹ however, the parents were unable to recover damages because the courts enforced exculpatory clauses releasing the adoption agency from liability for the negligent misrepresentation of a child’s medical information.

In *Ferenc v. World Child, Inc.*,¹⁶² a couple who had previously adopted internationally decided to adopt a three-year-old boy from Russia. The Russian doctor who examined the boy reported that he had “convergent strabismus,” flat feet, and a “delay of mental development” attributable to “social neglect in the family.”¹⁶³ Although the adoption agency officials assured the family that these conditions were neither unusual in their experience nor uncorrectable, it became apparent soon after the adoption that the child suffered from “irreversible congenital neurological and visual disorders.”¹⁶⁴ The parents sued the agency for fraudulent and negligent misrepresentation and for intentional infliction of emotional distress. The court noted that while “wrongful adoption” is a recognized tort in the District, the couple had signed a contract that noted the risks of international adoption, the problematic state of Russian medicine and the ambiguous clinical diagnoses that might arise.¹⁶⁵ Consequently, the court found that the contract shouldered the agency with the minimal duty to provide the parents with medical information “once it was available.”¹⁶⁶

Similarly, in *Sherman v. Adoption Center of Washington, Inc.*,¹⁶⁷ the parents proceeded with an adoption fully aware of exculpatory language in the contract and of the risks involved in dealing with Russian doctors and

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ See *supra* note 139.

¹⁶² *Ferenc v. World Child, Inc.*, 977 F.Supp. 56 (D. D.C. 1997).

¹⁶³ *Id.* at 58-59.

¹⁶⁴ *Id.* at 58.

¹⁶⁵ *Id.* at 61.

¹⁶⁶ *Id.* at 60-61.

¹⁶⁷ *Sherman v. Adoption Center of Washington*, 741 A.2s 1031 (D.C. 1999).

incomplete medical information.¹⁶⁸ The girl adoptee was declared “healthy” by the orphanage director and the immigration physician, a claim which was proven patently false, as the child was later diagnosed with hepatitis C.¹⁶⁹ The District court again ruled that the adoption agency neither knew nor should have known of the falsehood.¹⁷⁰ The court held that agency did not consciously conceal information about the child’s health, nor did it have a duty to verify the child’s medical information.¹⁷¹

Exculpatory clauses in the international adoption context are highly problematic because they shift the burden of information-gathering from the adoption agency, which has better access to pertinent information, to the adoptive parents. This arrangement, while reducing liability for the agency, does a disservice to the very person that most child welfare advocates agree is the “primary client” in the adoption transaction—the child.¹⁷² The right of a child to be placed in the best possible home, especially in a case where the child is handicapped and needs special attention that only a family that will be sensitive to his or her needs can provide, is abrogated in effect via contract between the adoption agency and an adoptive parent. Furthermore, the fact that a routine physical and a few tests on the child would have revealed the examining doctors’ gross errors, and that the results of such a test could have been made available to the parents, shows that the agency’s true concern was certainly not for the child, much less for the parents. Even if the agency’s actions towards the parents are legal, its actions toward the child were at least morally if not legally suspect. Therefore, it should have been possible for someone acting on the child’s behalf to sue the adoption agency because the process it used for choosing his or her parents was “defective.”

Any credible adoption agency acting in these types of situations would either have known or should have known that Russian and Romanian doctors are notorious for misdiagnosing or over-diagnosing medical conditions. Thus, it should be a greater imperative for the adoption agencies to perform at least some form of independent medical inquest of the child’s medical history and current condition. This alteration of the duty of care would not only be in the child’s “best interest,” but also would come closer to ensuring that the parent’s “best interests” are served as well. Such a change, however, would require a renovation of existing law.

¹⁶⁸ *Id.* at 1033.

¹⁶⁹ *Id.* at 1034.

¹⁷⁰ *Id.* at 1037.

¹⁷¹ *Id.*

¹⁷² Donner, *supra* note 12, at 524.

V. International Agreements and the Intercountry Adoption Act

The Intercountry Adoption Act of 2000 (“IAA”)¹⁷³ is the first major piece of legislation passed by Congress that specifically places adoption agencies providing transnational adoption services under the regulation of U.S. government agencies. To put this law into proper perspective, one needs to examine the major international resolutions and agreements that laid its foundation: namely, the 1959 UN Declaration of the Rights of the Child¹⁷⁴ and the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.¹⁷⁵

(Romania signed the Hague Convention in 1993.¹⁷⁶ Although the IAA was drafted, in part, to “address some of [the] problems [with adopted children and their parents] and bring accountability to agencies that provide intercountry adoption services,”¹⁷⁷ this new law will not protect parental interests any more than does the current regime.)

A. The United Nations Declaration on the Rights of the Child

The UN Declaration was drafted by the UN Commission on Human Rights and was adopted by the General Assembly in November 1959.¹⁷⁸ This resolution enunciates the special rights of children that were first set forth in the 1948 Universal Declaration of Human Rights,¹⁷⁹ which states that “[m]otherhood and childhood are entitled to special care and assistance.”¹⁸⁰ The Declaration builds on this theme, stating that “the child shall enjoy special protection . . . by law and by other means, to enable him to develop physically [and] mentally . . . In the enactment of laws for this purpose, the *best interests of the child* shall be the paramount consideration” (emphasis added).¹⁸¹ Furthermore, “special care and

¹⁷³ Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000) [hereinafter IAA].

¹⁷⁴ Declaration of the Rights of the Child, G.A. Res. 1386, U.S. GAOR, 14th Sess., Supp. No. 16, at 19, U.N. Doc. A/4354 (1959) [hereinafter Declaration], available at <http://www.cirp.org/library/ethics/UN-declaration/>.

¹⁷⁵ The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 10, 1993, 32 I.L.M. 1134 [hereinafter Convention].

¹⁷⁶ *Id.* Introductory Note, 32 I.L.M. at 1134.

¹⁷⁷ Helms Statement, *supra* note 6.

¹⁷⁸ Declaration, *supra* note 174.

¹⁷⁹ Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/3 (1948), available at <http://www.un.org/Overview/rights.html>.

¹⁸⁰ *Id.* art. 25(2).

¹⁸¹ Declaration, *supra* note 174, at Principle 2.

protection shall be provided both to him and to his mother, including adequate prenatal and post-natal care. The child shall have the right to adequate . . . medical services."¹⁸² Physically and mentally handicapped children are to be given "the special treatment, education and care required by [their] particular condition."¹⁸³

Interestingly, the Declaration makes no explicit distinction between biological and legal motherhood.¹⁸⁴ One can infer that the "protection" that is to be provided to mothers does not necessarily begin with pre-natal or end with post-natal care. Consequently, adoptive mothers may be entitled to the same protections as natural parents in this regard. In order for a child, institutionalized or otherwise, to receive "adequate medical services," his physical and mental conditions must be timely and accurately assessed. Thus, any attempt by an adoption agency or a government body to misrepresent a child's medical or psychological condition to an adoptive parent, whether by lack of diagnosis or by misdiagnosis, violates the spirit of this Declaration.

B. The 1993 Hague Convention

On May 10, 1993, the Convention on Protection of Children and Co-Operation In Respect of Intercountry Adoption¹⁸⁵ was approved by the Hague Convention as the final act of its 17th Session. The Convention recognized that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding."¹⁸⁶ Noting that it is best that a child stay in his or her family of origin, the Convention anticipates that "intercountry adoption may offer the advantage of a permanent family" to a child.¹⁸⁷ Such adoptions are to be made in consideration of "the best interests of the child and with respect for his or her fundamental rights."¹⁸⁸

To that end, the "sending state"—the country from which the child comes—is given certain responsibilities. It must determine: (1) that the child is adoptable, (2) that intercountry adoption is in the child's best interests, and (3) that permission for the adoption has not been induced by illicit means.¹⁸⁹ Also, the sending state is required to "prepare a report

¹⁸² *Id.* Principle 4.

¹⁸³ *Id.* Principle 5.

¹⁸⁴ *See, e.g., Id.* Principle 4.

¹⁸⁵ Convention, *supra* note 175.

¹⁸⁶ *Id.* at 1139.

¹⁸⁷ *Id.* Introductory Note, 32 I.L.M. 1134.

¹⁸⁸ *Id.* at 1139.

¹⁸⁹ *Id.* art. 4, 32 I.L.M. at 1139-1140.

including information about [the child's] . . . background, social environment, family history, medical history including that of the child's family, and any special needs of the child."¹⁹⁰ The receiving state must determine whether the prospective adoptive parents are "suitable" and have been adequately "counselled as may be necessary."¹⁹¹ What this would mean in actual practice would be up to the determination of each signatory state.

The Convention does not, in and of itself, permit or abolish certain adoption practices. Rather, it recognizes that intercountry adoptions are the norm, and attempts to establish some standards to ensure that the rights of children are protected in the process. Unlike the IAA or U.S. federal legislation, there are no definitions given for the terms used in the Convention, so one can infer that the signatories can interpret the ambiguous language as they see fit. Furthermore, there is no designated body to oversee the adoption transaction to insure compliance by the member countries; rather, the Convention delegates each nation's "Central Authority"¹⁹² to police its own agencies.¹⁹³ Since each signatory state has the right to determine the form and substance of any enacting legislation, whether the Convention will truly insure better treatment of the world's adoptable orphans remains to be seen.

C. The Intercountry Adoption Act of 2000

Although the United States signed the Hague Convention in 1994, it was not ratified by the U.S. until October 6, 2000, when the Intercountry Adoption Act was signed into law by former President Clinton.¹⁹⁴ The IAA's purposes, as stated in Section 2, are:

- (1) to provide for implementation by the United States of the Convention;
- (2) *to protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions subject to the Convention, and to ensure that such adoptions are in the children's best interests;*
and

¹⁹⁰ *Id.* art. 16, 32 I.L.M. at 1141.

¹⁹¹ *Id.* art. 5, 32 I.L.M. at 1140.

¹⁹² *Id.* art. 6, § 1, 32 I.L.M. at 1140.

¹⁹³ Chadwick, *supra* note 67, at 137.

¹⁹⁴ IAA, *supra* note 173. See Final Draft Regulations of Hague Regulations for P.L. 106-279 (proposed Oct. 23, 2001) (to be codified at 22 C.F.R. pt. 96) [hereinafter Final Draft Regulations], available at <http://www.haguereggs.org/images/Oct01%20DraftStandards.PDF>.

- (3) *to improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.*¹⁹⁵

The IAA designates the U.S. Department of State as the “central authority” prescribed by the Convention,¹⁹⁶ sets standards and procedures for international adoption agency accreditations,¹⁹⁷ and outlines penalties for violations of the Act.¹⁹⁸ Finally, the IAA places responsibility in the hands of an “accrediting agency” to oversee the approval of agencies that are involved in the international adoption industry.¹⁹⁹ Although the IAA is the law of the land, it will not be fully implemented until the State Department finalizes the Draft Regulations.

1. Relevant Provisions of the IAA

The IAA and its accompanying regulations is designed to provide “equal protections” to adoptive parents and the adopted children.²⁰⁰ Adoption agencies accredited under Act’s provisions are required to perform the typical home study and criminal background checks, per the U.S. state and host country requirements.²⁰¹ More significantly, the agency must “[provide adoptive parents] with a training program that includes counseling and guidance . . . before such parents travel to adopt the child or the child is placed with such parents for adoption.”²⁰² What exactly constitutes “counseling and guidance” has not been clearly defined; however, the Department of State is required to take into account the

¹⁹⁵ IAA, *supra* note 173, § 2(b), 114 Stat. at 826 (emphasis added).

¹⁹⁶ *Id.* § 3(7), 114 Stat. at 827.

¹⁹⁷ *Id.* § 201, 114 Stat. at 830-35

¹⁹⁸ *Id.* § 404, 114 Stat. at 842-43

¹⁹⁹ *See id.* § 202.

²⁰⁰ *See* House Hague Hearing, *supra* note 5, at 9 (statement of Mary A. Ryan, Assistant Secretary for Consular Affairs, U.S. Dep’t of State), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?IPaddress=wais.access.gpo.gov&dbname=106_house_hearings&docid=f:64746.wais.

²⁰¹ IAA, *supra* note 173, § 203(b)(1)(A)(ii), 114 Stat. at 833.

²⁰² *Id.* § 203(b)(1)(A)(iii), 114 Stat. at 833.

opinions of “public and private entities with experience in licensing and accrediting adoption agencies” when drafting those regulations.²⁰³

Furthermore, the IAA provides that any person who “makes a false or fraudulent statement or misrepresentation of material fact”²⁰⁴ may be subject to a fine of no more than \$50,000 per violation, and not more than \$100,000 for each succeeding violation.²⁰⁵ Those who knowingly or willfully violate the Act’s provisions may be subject to fines of up to \$250,000 and up to 5 years in jail.²⁰⁶ For egregious and repeated violations, an agency can be disbarred from arranging international adoptions.²⁰⁷ It is unclear what would constitute a “material fact” for which the adoption agency would be liable for its omission; the IAA could presumably cover such things as improper inducement and omissions by the adoption agency to the child’s background and health. In the Final Draft Regulations, the agency or those who work on behalf of an agency must use “reasonable efforts to obtain all available information on the medical and social history of the child.”²⁰⁸ If this information cannot be obtained, the “agency or person shall document in the case record the efforts made to obtain this information and/or reasons why the information was not obtainable.”²⁰⁹

Notably, the IAA requires an approved agency to carry “adequate” liability insurance “for professional negligence.”²¹⁰ This insurance would

²⁰³ *Id.* § 203(a)(2), 114 Stat. at 832. The Final Draft Regulations provide more details about the “comprehensive and in-depth” orientation and training program agencies would have to provide to prospective adoptive parents. That programs must cover, *inter alia*:

The effect on children of malnutrition...and other known genetic, health, emotional and developmental risk factors associated with children cared for in institutions of the child’s country of origin . . .

Data on institutionalized children and the impact of institutionalization on children, including the effects on children of the length of time in an institution of the type of care provided in the child’s Convention country;

Information on attachment disorders and other emotional problems that institutionalized or traumatized children and children with a history of multiple caregivers may suffer even after their adoption

Final Draft Regulations, *supra* note 194, at § 96.13 S.2.

²⁰⁴ IAA, *supra* note 173, at § 404(a)(2), 114 Stat. at 842.

²⁰⁵ *Id.* § 404(a)(3).

²⁰⁶ *Id.* § 404(b)(3)

²⁰⁷ *See id.* § 202(b)(3).

²⁰⁸ Final Draft Regulations, *supra* note 194, § 96.13 T.2.

²⁰⁹ *Id.* § 96.13 T.3.

²¹⁰ IAA, *supra* note 173, § 203(b)(1)(E), 114 Stat. at 834. The proposed amount is no less than one million dollars per occurrence. Furthermore, any agency that contracts with other agencies or persons within and outside the U.S. is required to post a “bond, liability insurance, or an escrow account sufficient to cover...liability.” Final Draft Regulations, *supra* note 194, § 96.13 F.3.

presumably cover damages arising from actions brought against agencies by adoptive parents in state courts for a successful “wrongful adoption” suit. This insurance would include coverage for any actions of fraud against a foreign person²¹¹ performing services for the agency.²¹²

2. Weaknesses of the Act

One of the IAA’s greatest weaknesses is that it does not provide a private right of action. Only the Department of State can bring an action in court against an agency violating the IAA’s provisions.²¹³ According to the Final Draft Regulations, adoption agency clients who accuse an agency of wrongdoing will only be able to lodge complaints using a standard complaint form; this form can then be given to the agency itself, to a “Convention Complaint Registry,” or to the accrediting agency.²¹⁴ If the client alleges fraud, the agency must review and respond to the complaint within seven working days.²¹⁵ Although the agency may file a complaint in court against a “supervised” adoption agent in another country, the adoptive parent does not share comparable rights. The overseas subsidiary may thus be liable to its domestic parent agency for wrongdoing (presumably to indemnify the parent agency in the case of a fine) but not to the parties that were truly wronged—the adoptive parent *and* the child.

Since there are no provisions in the IAA concerning legal complaints, the Final Draft Regulations defers to the states to set their own standards.²¹⁶ Although the “duty of disclosure” standards vary from one state to the next, most of the state courts that have taken up the issue have ruled, as previously noted, that in order for a “wrongful adoption” claim to stand, the plaintiff must show that the agency fraudulently withheld material information about the child.²¹⁷ In contrast, the Final Draft Regulations’

²¹¹ “Person . . . includes for-profit entities and individual practitioners providing adoptive services [but does not] include any agency of government.” Final Draft Regulations, *supra* note 194, § 96.1(dd). “Adoptive service means . . . performing a background study,” so medical personnel who provide pre-adoption check-ups would ostensibly fall under this category, so long as they do not work as an agent of a government entity. *Id.* § 96.1(f)(3) (emphasis in original).

²¹² *Id.* § 96.5(f)(2)(f)(x).

²¹³ IAA, *supra* note 173, § 504.

²¹⁴ Final Draft Regulations, *supra* note 194, § 96.13 K.1.

²¹⁵ *Id.* § 96.13 K.3.

²¹⁶ *Id.* Preamble, Relationship to State Laws and Regulations. Such a scheme is understandable, given the fact that states generally have their own adoption laws and standards of agency liability.

²¹⁷ See *supra* Part IV(A) of this Note.

“reasonable efforts” disclosure test²¹⁸ appears to be closer to a simple negligence test, and is thus a higher standard than that which used by almost all of the state courts. Hence, the IAA failed to resolve the discontinuity between the states by mandating a federal disclosure standard that overrides the state approach. In sum, the adoption agency may be subjected to heavy fines for failing to turn over *all* of the child’s medical records in their possession, but the parents may have no recourse in the courts to sue for damages.

VI. Toward a Recognition of Parental Rights in Intercountry Adoption?

Adoptive parents are remarkable in their willingness to go to the “four corners of the world”²¹⁹ to obtain a child. The foreign children available for adoption, who are often in the very worst state-run institutions, need parents and would unquestionably benefit from the stability and sanctuary that a good family life brings. International adoption agencies provide the service that brings the parents in search of a child and the child in need together in a familial relationship. But as we have seen, parents who do not receive accurate information about a child’s medical conditions often end up paying a high price for their ignorance. Any solution to this problem must take into account the fact that the full cost of the adoptive parent’s lack of awareness is borne not only by the parents, but also by the adoption agency, in the case of a lawsuit or if the child is returned to their custody, by the taxpayer and, ultimately and most unfortunately, by the foreign child.

Because “best interests of adoptive parents” are served by giving prospective adoptive parents all the information that they need to make an informed choice about whether to adopt a particular child, any resolution of international adoption problems must be multifaceted and as complex as the adoption process itself, and should consider such ideas as amending the IAA, increasing targeted foreign aid to appropriate Non-Governmental Organizations (“NGOs”), encouraging the adoption of domestic children by altering the tax code, and ending race matching.

²¹⁸ See Final Draft Regulations, *supra* note 194, § 96.13 T. Until we have a test case, what exactly constitutes a “reasonable effort” to obtain information remains unclear.

²¹⁹ *When It Comes to Adoption, It's a Wide, Wide World*, BUS. WK., June 20, 1988, at 164 (Marc Frons & Suzanne Wooley, eds.). See also Michael S. Serrill, *Going Abroad to Find a Baby*, TIME, Oct. 21, 1991, at 86.

A. An Adoptive Parent's Right to Full Disclosure and Investigation of a Child's Medical History and Condition

Obviously, parents require accurate medical and other relevant information about a child to make an informed decision about adoption, especially since the available of reproductive choices and familial permutations are greater than ever before. Since an adoption agency and prospective parents are in a "relationship of trust and confidence,"²²⁰ international adoption agencies should be required to use "reasonable efforts to obtain all available information on the medical . . . history of the child."²²¹ In addition, the Final Draft Regulations to the IAA should be amended to impose an additional duty: a non-delegable obligation to verify the child's current health and to investigate the truthfulness of the diagnoses in a child's medical dossier. Realistically, chances are good that a child's medical records will not be complete, so the focus should be on *accuracy*, not comprehensiveness. In that light, the Final Draft Regulations should be further amended to require that the child receive a physical examination by a doctor who is licensed to practice medicine in the U.S. in order to determine present his or her medical condition *before* that child is brought to the United States. The "comprehensive and in-depth" orientation and parent training component in the Final Draft Regulations²²² is long overdue and is indeed a positive step toward informing prospective adoptive parents. The orientation and training, however, would have only limited value, since the information is not specifically related to the child the adoptive parents would receive.

Furthermore, the Final Draft Regulations should be amended to unequivocally forbid the use of exculpatory clauses in adoption service contracts. Any contract that allows the adoption agency to forgo its fiduciary duties to parents would be against public policy, and any contract that incorporated such a clause would be voidable. While any additional requirements will presumably cost adoption agencies (and hence the adoptive parents) more time and money, two positive benefits outweigh these costs. First, the prospective parent will have accurate information. While full information might result in a parent not adopting a particular child, the orphanage would have accurate information on which to base the most appropriate future medical treatment for that child.²²³

²²⁰ *Catholic Charities*, 588 N.E.2d at 361. See also *Burr v. Board of County Commissioners of Stark County*, 491 N.E.2d 1101, 1106 n.3 (Ohio 1986).

²²¹ Final Draft Regulations, *supra* note 194, § 96.13 T.2.

²²² *Id.* § 96.13 S.2.

²²³ It might be possible for a non-governmental organization ("NGO") to fill the role of investigator, since many of them work in the orphanages; however, the agency would still be required to conduct its own investigation.

B. Removing the Adoption Agency's "Conflict of Interest"

In most international adoption transactions, the adoptive parents and the child are brought together by the local and foreign subsidiaries of the same agency.²²⁴ As previously discussed, the child is usually considered to be the "client" in the adoption transaction.²²⁵ As such, the "best interest of the child" reigns as the paramount consideration. But agencies also owe limited fiduciary duties to the adoptive parents.²²⁶ It is clearly in the "best interest" of an adoptable foreign child, particularly one who has been institutionalized, to leave that setting with new parents—any new parent would be superior to what that child already has—as soon as possible. The "best interest" of the adoptive parent is to obtain a child for which that parent is willing and able to care. Adoption agencies themselves also have interests at stake: completing the adoption transactions in as little time and money as possible. But adoption agencies can mitigate their own risk by charging higher fees to cover adoptions that take a longer time to complete. Consequently, the parties' opposing goals may create a "conflict of interest" for the adoption agency.

Given this potential conflict of interest, parent's rights as clients might be protected by a rule similar to the rules that govern lawyers in similar situations. The ABA Model Rules of Professional Conduct²²⁷ and the Model Code of Professional Responsibility²²⁸ forbid an attorney from representing a client if that "representation may be materially limited by the lawyer's responsibilities to another client or to a third person"²²⁹ or "if it would be likely to involve him in representing different interests."²³⁰ However, the attorney can still represent the client if he or she reasonably believes that his or her client's representation will not be affected *and* the lawyer has consulted with the client, being sure to inform that client of the implications and consequences of that representation.²³¹ If one were to impose a similar rule in the adoption context, the agency would be required to inform the prospective adoptive parent that their own interests might be subordinated to the child's best interest. Most parents would find such a

²²⁴ There are such creatures as "independent" adoption transactions, but because of the problems with corruption and "baby-selling," most nations require those who wish to adopt to use an agency approved by that country's government. *See supra* Parts III(A) and (B) of this Note.

²²⁵ Donner, *supra* note 12, at 524.

²²⁶ *See generally supra* Part IV of this Note.

²²⁷ MODEL RULES OF PROF'L CONDUCT [hereinafter MODEL RULES].

²²⁸ MODEL CODE OF PROF'L RESPONSIBILITY (1980) [hereinafter MODEL CODE].

²²⁹ MODEL RULES R. 1.17(b).

²³⁰ MODEL CODE DR 5-105(B).

²³¹ MODEL RULES R. 1.17(b)(1), (2); MODEL CODE DR 5-105(C) (emphasis added).

statement outrageous, and adoption agencies would probably try their best to evade the rule.

The same result might be accomplished by employing an even more radical and far-fetched approach: requiring adoption agencies based in the United States to completely sever their relationships with their foreign subsidiaries. In this proposal, the prospective adoptive parents would be represented by a domestic adoption agency; the foreign child would be represented by a completely independent "child advocacy" agency operating in the foreign host country. The domestic agency would owe fiduciary duties only to the parents, not to the child being adopted; likewise, the foreign agency would owe all of its duties of loyalty to the child. The foreign agency would establish the qualifications necessary to parent a particular child in its care; the domestic agency would then have a duty to investigate the child that the parents select and notify them of any medical or psychological problems. The parent would then make the final decision, and the adoption would take place.

Aside from the anticipated adoption agency objection to this form of practice, a few questions would need to be answered. Would the new foreign-based adoption agency need to reapply for approval to operate in that country, since it is no longer a subsidiary of that agency that the government originally approved? Would such a scheme needlessly extend the time that it takes for a child's placement? Further, might the foreign agency still owe the adoptive parents *some* duties, since they are still paying for their services, albeit indirectly? Even assuming that, given enough time, energy and money, all the legal problems could be solved, the question that then must be answered is more of a fundamental one: how far should we go to protect the rights of parents? Do we wish to replace the "bridge-building" function of the international adoption agency with the image of two adversarial, perhaps antagonistic parties (two lawyers?), quibbling across a table over details about a child? Even if such a system could protect the rights of parents to the fullest extent possible, we might secretly worry about the fitness of those adoptive parents who wished to negotiate for a child in this manner.

C. Increasing the Amount of Foreign Aid Targeted at Institutionalized Children

If a foreign child is given proper attention and care in the country of origin, it is less likely that adopted child will come to this country with mental and physical infirmities. While some of the child's disabilities arise from lack of prenatal care, others undoubtedly arise from the abuse and neglect experienced due to poor caretaking. The United States Agency for International Development ("USAID") notes that "national and local budget shortfalls" in Romania have produced serious problems in the care for

institutionalized children.²³² Monetary donations, by governments and individuals, targeting non-governmental organizations that work with orphaned children will help increase the skill level and the number of institutional workers. Such aid would need to be carefully provided, however, since targeted aid to orphanages may look like a scheme designed to give countries money in exchange for their children. Properly administered, increased levels of targeted foreign aid will not only help insure that adoptive parents leave the country with a child with fewer potential problems, but will also provide a side benefit in that a human-rights travesty—the conditions of institutionalized children worldwide—may be closer to being ameliorated.

D. “Preemptive” Solutions

One way to avoid the problem of adopting children with medical and psychological problems from foreign countries may be to create incentives or disincentives that make foreign adoption a less attractive alternative in comparison to domestic adoption system, or, conversely, to make domestic adoption a more attractive option.

1. Limit the Availability of the Adoption Tax Credit

The primary reason parents search for adoptable children overseas is the slow and bureaucratic domestic adoption system. That they are willing to pay extra to circumvent the domestic system is reflected in the high cost of an intercountry adoption.²³³ To alleviate some of this financial burden, Congress enacted Section 23 of the Internal Revenue Code (“Code”),²³⁴ which allows adoptive parents to take a tax credit to offset adoption expenses of up to \$10,000.²³⁵

²³² UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *Romania*, at <http://www.usaid.gov/pubs/bj2001/ee/ro/> (last visited Apr. 7, 2003).

²³³ See Donaldson Stats, *supra* note 27.

²³⁴ Small Business Job Protection Act, Pub. L. No. 104-188, § 1807, 110 Stat. 1755, 1899 (1996), current through Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 202, 115 Stat. 38, 46-49 (2001) (codified as 26 U.S.C. § 23) (modified original text from an adoption credit of \$5,000, or \$6,000 for a “special-needs” child, to the current \$10,000 credit limit).

²³⁵ The adoption tax credit can only be taken in full if the modified adjusted gross income (“MAGI”) is less than \$150,000; after \$150,000, the amount of the credit that can be taken slides down to zero at a MAGI of \$190,000. See *id.* See also IRS Form 8839, Qualified Adoption Expenses, available at <http://www.irs.gov/pub/irs-pdf/i8839.pdf>. There is no longer a higher credit allowance for special-needs children.

A tax break or a credit is, in effect, a government subsidy that rewards a particular behavior. In this case, the subsidy serves as an incentive to encourage Americans to adopt children. It can also be seen as a reward: an adoption frees the government from its obligation to care for a child, thus saving the taxpayers' money. In the case of an intercountry adoption, it is a foreign government that is indirectly subsidized, for when a child leaves its system, there is then more money *per capita* to be spent on the children left behind.²³⁶

As a matter of public policy, the U.S. government should encourage domestic adoption. To this end, the Code might be amended to either grant a larger credit to those who adopt domestically, or to deny the credit to those who adopt a child from abroad. The elimination of the tax credit for intercountry adoptions would force prospective adoptive parents to bear the full cost of their actions. It would also compel them to assess in their own minds whether the monetary gain they would realize in the form of a tax credit if they adopted a child domestically exceeds the "cost" of dealing with the frustrations and "unpredictability" of the domestic system. If the "cost" exceeds any "benefit" they hoped to have gained, the parents will still adopt foreign children. However, upon implementation, one should expect an increase in the number of domestic adoptions and a commensurate decrease in the number of foreign adoptions.²³⁷

2. Label all Intercountry Adoptions as "Special Needs" Placements

Another solution to the problem of parent disinformation may be to simply label all intercountry adoptions as involving children with "special needs" *by definition*. Because most adoptable foreign children have spent *some* time in an institution, prospective parents can expect some degree of physical, behavioral or emotional problems.²³⁸ Thus, the "special needs" label would serve as a warning to those who wished to adopt children from foreign countries.

The danger in this "solution" is that the "special needs" categorization may have such negative connotations that few prospective adoptive parents would wish adopt children with that label. This result would be patently unfair to those children who have relatively minor medical and

²³⁶ Certainly, this is a good thing. However, this confers no benefits upon the United States, the individual state governments, or their taxpayers.

²³⁷ How *much* of a decrease in demand for adoption services that would be expected would depend on the "price elasticity" of this market – that is, how sensitive adoptive parents may be to the change of the price of adoption services per their willingness to pay. See Editorial, *Adoption Rhetoric and Reality*, CHI. TRIB., May 12, 1996, at 22 (contending that the tax credit will reward many of the same people who would have adopted anyway).

²³⁸ See generally *supra* Part III(C) of this Note.

psychological conditions. Such children can be readily adopted by parents who are not necessarily qualified or willing to take care of a child with more serious conditions.

3. Revise the Interethnic Adoption Statutes

The prevalent practice of race-matching in domestic adoption is only suitable in an ideal world where the ratios of the races of prospective adoptive parents bore some semblance to the ratios of the races of adoptable children. The wisdom of allowing more transracial adoptions to take place is compelling. The overwhelming majority of prospective adoptive parents are white,²³⁹ while about 70% of the children who await adoption domestically are non-white. Transracial adoption is, while controversial, an “infinitely superior” alternative to institutionalization.²⁴⁰

The interethnic adoption section of the U.S. Code²⁴¹ was originally designed, in part, to “[prevent] discrimination in the placement of children on the basis of race, color, or national origin.”²⁴² Under the statute, public or private agencies may not delay or deny an individual from becoming an adoptive parent *or* the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent or of the child involved.²⁴³ The statute does not, however, define what constitutes “delay,” nor does it explain *how much* consideration an adoption agency can give to a child’s racial background.

The statute should be revised to include an informational requirement. All agencies—public *and* private—would be required to inform prospective adoptive parents about the possibility of transracial adoption. Public agencies would be threatened with loss of federal dollars for noncompliance. As an incentive, a public agency would be awarded bonuses—that is, more federal monies—for completing a certain number of transracial adoptions as derived by a formula that takes into account the ratio of the racial groups of the applicant parents and adoptable children and the population of the state.²⁴⁴ A private agency would be given certain tax

²³⁹ See Bartholet, *supra* note 36.

²⁴⁰ This is the opinion of the author, a transracial adoptee who spent five years in a “group home” near Akron, OH, from 1973-1978. *But see* Kleiman, *supra* note 18, at 339-40. (The National Association of Black Social Workers asserts that transracial adoption is an intervention affecting the entire black community. Furthermore, the NABSW puts “pressure” on social workers “to avoid transracial placement at all costs.”)

²⁴¹ 42 U.S.C. § 1996b.

²⁴² MPA, *supra* note 40.

²⁴³ 42 U.S.C. § 1996b(1)(B).

²⁴⁴ Any formula that computes bonuses from the federal government must also include a factor that takes into account minority parent recruiting efforts. A state with a substantial

incentives for completing transracial adoptions, and that tax benefit would also derived by formula.

VII. Conclusion

The intercountry adoption system allows parents to find adoptable children without having to deal with the frustrations that are often accompany a domestic adoption placement. As with any other "transaction," adoption is fraught with risks for the child as well as the parent. Adoptable children in foreign countries are routinely given substandard medical care, and are frequently abused and mistreated. It should thus come as no surprise that children that are so badly treated for an extended period of time suffer from physical and psychological disorders that may be severe and last a lifetime. Furthermore, adoptive parents are often misinformed about their child's true physical and mental condition by the adoption agency. In most states, however, adoption agencies can be held liable for outright lies but not for mere omissions. Regrettably, the Intercountry Adoption Act of 2000 and the Final Draft Regulations do not override the international adoption agency's duty of care, permitting the states to continue to set their own standards.

The "best interest of adoptive parents" rests in the ability to make fully-informed adoption choices. Thus, any policy that distorts the ability for parents to make this assessment should be reviewed with great scrutiny. First, adoptive parents who use the international adoption system should be able to receive from an adoption agency the same kinds of basic information on a child's physical and mental health that is generally made available to parents who adopt domestically, and this right should be guaranteed by national legislation. Second, the information parents receive must be reasonably complete and free from error; harsh penalties for grossly incomplete or inaccurate information should be codified in national legislation. Third, the tax Code and the Multiethnic Placement Act should be amended to reflect a national social policy that encourages domestic adoption.

The orphanage system in Eastern Europe will take years to reform. However, the domestic adoption system has many children waiting for good adoptive homes. In a system where risks are spread to the person who is most equipped to evaluate them, prospective adoptive parents can thus make fully-informed adoption choices that are not only reflective of all possible options, but will inevitably be in the "best interests" of *all* of the parties involved—parents, children, agencies, and the state—because the adoptions will be less traumatic to family unit, and even fewer adoptions will fail.

minority population would be penalized if *too many* transracial adoptions took place, and not enough focus was placed on minority recruitment efforts.