Comment, U.S. Intercountry Adoption Policy: A Brief History

Introduction

While international adoptions are becoming less common, this area of international law and policy draws significant attention from legal scholars, elected officials, and the adoption community.\(^1\) The experience of family is shared by all people, and society is deeply rooted in the preservation and support of the family. The legal and political institutions that facilitate protection of family rely on a localized set of values that are unique to countries, regions, and communities.

The legal construction of the family has experienced globalization in this increasingly connected global society. For decades families have looked outside of their country of origin to adopt children, but these adoptions are influenced by international law, politics, and relationships. The United States is uniquely positioned to approach international adoption from a human rights perspective, with an increased recognition of cultural and economic inequalities that lead to international adoption.

This comment examines the history of intercountry adoption in the United States and the international agreements that are connected to international adoption, as well as the need for greater human rights protections. The first section introduces international adoption in the United States today, the international law that controls these adoptions, and frameworks that explain the cooperation responsible for legitimizing international adoption policy. The second section discusses the history of family, adoption, and intercountry adoption in the United States through the lens of legal and political identity. Then the third section illustrates the means of exploitation at the heart of the international adoption debate. This section describes the international political economy’s role in international adoption, and the exploitation of global

poverty that occurs in sending states. The final section discusses the reasons behind the overall decline in international adoptions, and the policy shifts leading states to implement prohibitions on intercountry adoption.

I. International Adoption in the United States

A. Intercountry Adoption Today

In 2022, a total of 1,517 children were adopted by American families. Of those children 235 were from Colombia, which represented the largest number of children from one nation.\(^2\) The Intercountry Adoption Act, enacted in 2000, establishes the Hague Convention in Respect of Intercountry Adoption (the Convention) as the controlling law on the matter of intercountry adoption.\(^3\) The explicit purpose of implementing the Convention is to protect the rights of children, birth families, and adoptive parents.\(^4\) In a statement released by the White House, President Clinton praised the efforts of the Hague Convention in Respect of Intercountry Adoption for better protecting the rights of children involved in intercountry adoption. Clinton emphasized the standardization that the Convention and the U.S. legislation brings to the process of intercountry adoption for all parties involved.\(^5\) The systems and processes developed by the Hague Convention establish protections for the fundamental rights of the child recognized in international law.\(^6\) The goals of the Hague Convention are accomplished by way of a country’s designated central authority that is given broad discretion in the regulation of international adoptions.\(^7\) The Department of State serves as


\(^3\) 42 U.S.C. § 14901.

\(^4\) Id.


\(^6\) 42 U.S.C. § 14901.

the Central Authority for the United States, giving this agency complete authority over international adoptions involving individuals from the United States, as well as diplomatic responsibilities.\(^8\)

A critical part of this international agreement is the recognition of principles developed in the United Nations Convention on the Rights of the Child (UNCRC) and the United National Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children.\(^9\) Under the Convention an entirely new family relationship can be created, establishing a legally permanent parent-child relationship. Yet, the Convention prioritizes that the child remains in the care of her family of origin. The child should grow up in a family environment, in an atmosphere of happiness, love, and understanding.\(^10\) The State of origin must give due consideration for placement of the child within that State.\(^11\)

The Convention requires adoption to take place only after the State of origin has made certain determinations. The child must be found to be adoptable, and the child must consent to the adoption. Consent by the parents must have been freely given without any compensation, and the State must have made efforts to place the child in her home country.\(^12\)

In the past three decades international adoption by U.S. families has grown exponentially, and then has been slowly decreasing. Reviewing the trends through the past two decades distinguishes the period of intercountry adoption in the United States at the height of adoptions per year, and the current period where international adoption is less accessible. Not only is this distinction between periods useful for statistical analysis, but it also contextualizes the political relationships between states. In 2003 a total of 21,180 children were adopted by U.S. families from abroad. According to the Department of State, a

\(^8\) 42 U.S.C. § 14901.
\(^9\) Id.
\(^11\) Id.
total of 6,857 of those adoptions were children adopted from China.\textsuperscript{13} By 2005 the number of adoptees from Ethiopia more than doubled. The United States did not have the presence or infrastructure at that time in Ethiopia to facilitate any more adoptions, but eventually the United States had a much more significant presence in Ethiopian adoption.\textsuperscript{14}

In the reporting period for 2008, April 1 through September 30, 2008, 8,251 children were adopted from abroad by U.S. families.\textsuperscript{15} Of those 8,251 children, 2,036 children were from China, and 1,031 of those children were from Ethiopia, respectively.\textsuperscript{16} It is in 2008 that China and Ethiopia become the largest sending states, a sharp increase for Ethiopia in a handful of years.\textsuperscript{17} In 2009 a total of 12,753 children were adopted by U.S. families.\textsuperscript{18} A total of 3,001 children were adopted from China, which represents the largest portion of children from a single nation in 2009. Also, in 2009, 2,269 children were adopted from Ethiopia by U.S. families. Both China and Ethiopia sent the greatest number of children to the United States by a significant margin, with most sending nations facilitating less than one hundred adoptions per year.\textsuperscript{19} A total of 8,668 children were adopted by U.S. families in 2013.\textsuperscript{20} Of those children adopted, 2,697 of those children were from China. In 2013 a total of 1,568 children were adopted from Ethiopia.\textsuperscript{21}

In 2015, a total of 2,354 children were adopted from China by U.S. families out of a total of 5,648 children adopted from abroad.\textsuperscript{22}

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Id.
\textsuperscript{21} Id.
By 2015, the number of adoptions from Ethiopia significantly decreased from previous years. The total number of adoptions from Ethiopia in 2015 was 335.\(^23\)

In 2020, The Department of State altered its format for the Annual Report on Intercountry Adoption to include a letter from the Secretary of State. This letter includes policy directives and goals for the Department and COVID-19 related notices. The Department has begun to include brief reports on specific challenges with specific sending nations, and the Department’s policy priority regarding the issue. The Department intends to continue intercountry adoptions with states that have instituted a prohibition on intercountry adoption. In the annual report the Department seeks to improve confidence in successful intercountry adoption with the United States.\(^24\)

B. **International Politics and International Adoptions**

The international frameworks and relationships relevant to intercountry adoption are foundational to the exploration conducted through this comment. Policies are based on the system enveloping political actors where they are connected by common interests and values, and where they intend to be bound by a set of common rules in relationships and institutions.\(^25\)

Relational control is used to define a particular group’s interest in promoting, ensuring, or stabilizing their dominance over other groups or the function of a social system. These relational theories attempt to define the social order mechanisms that shape the institutions that govern society and its foundations. The international relations and law theories that shape international agreements, relationships, and institutions exist within an anarchic state system motivated largely by rational cooperation and control.\(^26\) Beyond idealistic or altruistic motives, self-interested

\(^{23}\) Id.


\(^{26}\) T. Baumgartner, W. Buckley & T. Burns, *Relational Control: The Human*
states should find it in their best interest to create and participate in international institutions.

The international agreements that were developed in response to the growing practice of international adoption were the United Nations Convention on the Rights of the Child, the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, and the Hague Convention. These organizations are not states but do operate in coordination with state actors by delegating the regulatory work to an entity with enforcement power.

The Hague Convention presents significant limitations for effective implementation. As scholars have noted, a greater burden is put on the sending state to determine whether the child is eligible for adoption. Some countries elect not to ratify the Hague Convention because they do not have the infrastructure to comply with the obligations required of sending states. The unbalanced dynamic between sending states and receiving states can be understood in part through the relational control theory where the more privileged nation attempts to control opportunities, outcomes, and attitudes for their interests.

II. A History of Family, Adoption, and Intercountry Adoption in the United States

A. A History of Adoption in the United States

The emergence of adoption in the United States relied heavily on the changing social conditions following the Civil War. For orphaned children at that time their options were placement with family members or indentured service. Adoption statutes of the late nineteenth century were part of a larger socioeconomic modernization. The philosophy of saving

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28  Id. at 710.
29  Id.
30  Baumgartner et al., supra note 26.
32  Id. at 463.
orphaned or homeless children dates back to organizations like the New York City’s Children’s Aid Society that would “rescue” children by sending them into the west to work on Protestant farms. By 1892 this Children’s Aid Society sent 84,318 children to work as farm laborers.\(^{33}\)

The first modern adoption law, the Massachusetts adoption law of 1851, resembles adoption laws throughout the country. Massachusetts began a legacy of transferrable parental rights under judicial scrutiny where consideration is given to the welfare of the child and the qualifications of the potential adopters. Beginning in the early twentieth century progressive reformers concerned with child welfare — including social workers, truant officers, and police — were willing to remove children from their families to rescue the child from parents perceived to be unfit.\(^ {34}\) During this time reformers invoked the legal conception of parens patriae, which asserts the state can act on behalf of parents when they fail to care for their children. Progressive reformers responsible for institutionalizing these child welfare practices recognized that children left in the custody of the state in orphanages, juvenile homes, or industrial schools were experiencing demoralizing conditions.\(^ {35}\)

Adoption laws as they exist today were enacted in every state by the twentieth century. By 1970 adoption was more common than ever before and there were around 175,000 adoptions annually.\(^ {36}\) Professor David Ray Papke suggests it is possible that the growth in adoptions sought in the United States may be connected to the culture of consumption that dominated in the mid-twentieth century.\(^ {37}\) Open adoptions became the status quo of U.S. adoptions when the Child Welfare League of America embraced a recommendation that declared open adoption to be integral to adoption services.\(^ {38}\) By 1999, private adoption agencies no longer only offered confidential adoption.\(^ {39}\) In the United States today two-thirds of the private adoptions are open and permit post

\(^{33}\) Id. at 465.

\(^{34}\) Id. at 466.

\(^{35}\) Id. at 468.

\(^{36}\) Id.

\(^{37}\) Id. at 469.

\(^{38}\) Malinda L. Seymore, Openness in International Adoption, 46 Colum. Hum. Rts. L. Rev. 163, 177 (2010).

\(^{39}\) Id. at 178.
adoption contact between the two families. In cultural imagery the contemporary picture of the family includes a child, and adoption is a way to create this image of a successful family. The law has constructed adoption with wide discretion to determine which individuals can adopt, and which children are adoptable, thus constructing families.

As the rate of unplanned pregnancies decreased, the stigmas that deemed children of color “unadoptable” were reframed. The principal rule on the matter of adoption in the United States is that a child is not eligible for adoption unless she has no legally recognized or living parent. Principles fundamental to domestic adoption policy are rooted in the nineteenth and twentieth century approaches to child neglect and abuse, poverty, institutionalized children, and unwed mothers. Where adoption was once a commonly used resource for unwed mothers, in the twenty-first century an average of fewer than 2% of single pregnant women chose to relinquish their children for adoption.

B. Fundamental Right to Family

The Supreme Court has interpreted the Constitution to endow a fundamental right to family under a wealth of case law. One of the building blocks of the constitutional right to family was *Meyer v. Nebraska*, in which the Supreme Court found in the Fourteenth Amendment rights that have been enumerated through prior precedents that allow individuals freedom to marry, establish a home, and bring up children. In this opinion the Court states these fundamental rights are “essential to the orderly pursuit of happiness by free men.” Based on the foundation laid in *Meyer*, in *Alsager v. District Court of Polk*

40 Papke, *supra* note 31, at 469.
44 Id. at 427.
45 Meyer v. Nebraska, 43 S. Ct. 625, 626 (1923).
46 Id. at 626.
County, Iowa, the U.S. District Court for the Southern District of Iowa concluded that there is a fundamental right to family integrity protected by the Fourteenth Amendment. Following that decision, the U.S. District Court for the Middle District of Alabama held that interpretations of the Alabama Code were unconstitutional in violation of family integrity because mothers were deprived of custody of their children where there was no showing of immediate or threatened harm. This decision establishes that termination of parental rights must only occur when the child is more likely to be harmed by staying with the parents than by permanently separating from them. The state has the burden of proving that a parent is unfit. The court found that all parents are entitled by the Constitution to a hearing on their fitness before their children are removed from their custody.

Institutionalized racial discrimination is resonant throughout U.S. history involving all racial minority groups including Indigenous, Black, Asian, Central American, and South American children. These distinct groups share an experience of legally sanctioned family separation.

Congress has an assumed responsibility to protect and preserve Indigenous tribes. In its enactment of the Indian Child Welfare Act (ICWA), Congress recognized that a high percentage of Indigenous families were separated by forced removal by nontribal agencies that was often unwarranted. The state recognized that the most vital element of the continued existence of Indigenous tribes is their children. Whether Congress intended to enhance tribal sovereignty, tribes regained the legally recognized control and care of their children under ICWA. ICWA demonstrates a clear policy goal to maintain family and cultural relationships. First, ICWA requires that prior to the involuntary termination of parental rights, efforts are made to provide services and rehabilitative programs to prevent

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49 Id. at 779.
the dismantling of an indigenous family. The party seeking to terminate the parental rights must prove that the services provided have been ineffective.\footnote{Adoptive Couple v. Baby Girl, 570 U.S. 637, 642 (2013).} The second element required by ICWA before termination is evidence showing, beyond a reasonable doubt, that the child will likely be in serious emotional or physical danger if the parent continues to have custody.\footnote{Id. at 643.} Finally, ICWA requires that adoption preference be given to the child’s extended family, then the child’s tribe, next to other tribal families, and finally to non-indigenous people.\footnote{Id.}

ICWA determines that tribal courts maintain jurisdiction over all proceedings on the placement of a member of that tribe. The tribal courts are the most appropriate agents to carry out the best interests of tribal children, as opposed to a white middle-class standard that has a legacy of rejecting tribal families as proper placement for children.\footnote{Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 37 (1989).} The integrity of ICWA depends on courts upholding the interests and benefits conferred by the statute.\footnote{Atwood, \textit{supra} note 52, at 675.}

While family law is an area almost exclusive to state courts, the federal government has a distinct role in its relationship with the tribal organizations. In this relationship, Congress has deemed tribes to have the exclusive governing power of the welfare of tribal children, regardless of any state interest.

Before the enactment of ICWA, white social workers were removing Indigenous children at a rate substantially higher than any other demographic group.\footnote{Jena Martin, \textit{The Good, the Bad, & the Ugly? A New Way of Looking at the Intercountry Adoption Debate}, 13 U.C. DAVIS J. INT’L L. & POL’Y 173, 194 (2007).} In the decade between 1958 - 1968 the Child Welfare League of America, the Bureau of Indian Affairs, and social workers across the United States collaborated on the “Indian Adoption Project” to remove children that were adoptable from the homes of their relatives on reservations.\footnote{Atwood, \textit{supra} note 52, at 603.} The child welfare organizations designated these children as at-risk partially due to a bias toward assimilation and an ignorance of Indigenous cultures.
Indigenous children were commonly institutionalized in educational institutions in the name of child welfare. This became codified U.S. policy in 1819 in the Indian Civilization Fund Act that gave financial support to missionary groups for educating Indigenous children.\(^{60}\) The federal boarding school system maintained complete separation of Indigenous children from their tribes. These boarding schools operated by white colonizers in the 1800s intended to introduce Indigenous children to civilization.\(^{61}\) Indigenous children were targets of the colonial power’s cultural genocide that stripped children of their language, religion, and cultural practices. During the 1970’s the Association of American Indian Affairs documented the displacement of Indigenous children, estimating that one-third of all Indigenous children were separated from their families.\(^{62}\)

The duty of care exercised by the U.S. Congress in ICWA comes from its direct interest, created by the trustee relationship, in protecting the future interests of the tribes. It is the responsibility of the United States to promote the principles of ICWA to protect this realm of tribal self-determination.\(^{63}\) Without recognition by the courts, the tribe’s interest in the welfare of its children will go unheard. The legacy of family separation in Indigenous communities continues into the twenty-first century, as seen in South Dakota. In South Dakota Indigenous people make up 9% of the population, but Indigenous children represent 52% of the children in state foster care.\(^{64}\)

Bodily and family autonomy are experienced differently by Black Americans. Mothers who were slaves did not have any claim to their children under the law, and the white slave owner could remove the child from their parents, sell the child, or kill the child with impunity. Slaves did not have any right to engage in individual autonomous decision making.\(^{65}\) Following the Civil War, Black parents were not allowed custody of their children.


\(^{61}\) Atwood, *supra* note 52, at 602.


\(^{63}\) Atwood, *supra* note 52, at 675.

\(^{64}\) Zug, *supra* note 42, at 187.

because the white southerners in possession of their biological children claimed the Black children were better off than with their free biological family. The Freedmans Bureau in the 1860s documented the experiences of Black families attempts to reclaim family ties through extend caregiving networks.

The child welfare system and social services institutions have utilized coercive programming to exclude Black families from benefits, like the 1954 Social Security Act. States like Mississippi took further steps to target Black families by creating rules on “immoral” and “unsuitable” households. The Mississippi legislature even considered a bill to make giving birth to an illegitimate child a crime, which was specifically aimed at Black women. The Adoption and Safe Families Act (ASFA) was a progression of this legacy of separation among Black families. The ASFA intended to fix the foster care system by doubling the number of children adopted annually. By 2000, over 40% of the children in foster care were Black.

Black women’s reproduction in the 1980s to present day is often the sight of state intervention. At the center of the criminalization of parents for child abuse cases are Black women and poor women. The crack epidemic allowed the child welfare state to intervene in Black families by charging mothers who use drugs with crimes like child endangerment. The ACLU Reproductive Freedom Project reported high percentages of prosecutions against Black women. Studies published in 1990 show that in South Carolina, that of the eighteen women charged with either criminal neglect of a child or distribution of drugs to a minor, seventeen of those women were Black. In studies conducted by the South Carolina State Council on Maternal

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67 Id.


69 Stark, supra note 66, at 172. (In 1982 there were 262,000 children in foster care, but by 1999 the number doubled to 568,000.)

70 Id. at 173.


72 Id. at 172.
Infant, and Child Health in 1991, their own research found that Black women and white women use drugs at the same rate.

C. History of Intercountry Adoption in the United States

The orphan rescue missions from regions of military conflict, like the airlift of German and Japanese orphans at the end of the Second World War or following the Korean War, known as Babylift, were a political tactic by a State superpower to both extend good will and rescue children from Communism.73 In 1975 the U.S. government decided the only humanitarian thing to do was to bring 2,000 Vietnamese orphans to the United States as “Operation Babylift.”74 Their mothers took them to orphanages because they did not believe they would survive the war. The Americans operating orphanages in Vietnam did not speak the language, were isolated from the culture, and were unaware that adoption was an option within Vietnam. These orphanages did not consider how to integrate into the existing systems that promote child welfare or adoption. The individuals working at these orphanages said to the New York Times that they should not have been operating in a country that they knew nothing about with the objective of taking the children out of the country.75

Around two dozen of these children had parents that came to the United States and were reunited with their family. The attorneys that brought the class action lawsuit on behalf of these Vietnamese families argued that the children had a constitutional right to due process, liberty, and freedom from illegal seizure.76 A grandmother and uncle sought a habeas corpus action for their four relatives to be returned to their care.77 The grandmother of the four boys brought by Operation Babylift based her right to custody on federal and international law which recognizes an interest in unity

75 Id.
76 Id.
and integrity of their natural family.\textsuperscript{78} The plaintiffs argue for relief under four federal laws including the Equal Protection and Due Process Clauses of the Fourteenth Amendment. This case and others brought on behalf of other families affected by the Babylift did not conclude with a reunification of these Vietnamese families.

In \textit{Huynh Thi Ahn v. Levi}, the court estimated that hundreds of the children brought to the United States were not orphans.\textsuperscript{79} When the operation was over it became apparent to the state that some of the children were in fact not orphans, but the state continued to place them throughout the country. The lack of legal foundation in immigration law, family law, and international law in the case of this family demonstrates the necessity of an institutional policy approach to international adoption. The discrepancies between domestic and international law to address issues present in international adoption make it clear that additional legal policy and institutions must be developed to facilitate legal and safe adoption.

The adoptive parents of these Vietnamese children desperately wanted to keep the children in their families. Adoptive parents that organized against the class action lawsuit clearly expressed their opinions of the political situation in Vietnam as being a threat to their adoptive children, specifically the potential spread of communism.\textsuperscript{80} To make the situation more complicated, the Vietnamese people were under siege and the society was crumbling under the brunt of war. The United States was the most significant military force annihilating Vietnamese communities for years on end. The aggressive occupying force then exercised power and control over a vulnerable situation so that they removed allegedly orphaned children from their country of origin. It appears that the impetus of the Babylift was an exercise of U.S. hegemony, and the benevolence of U.S. adoptive families was an effect.

The presence of international adoption in U.S. culture presents a glaring contradiction in that the United States began international adoptions as an effort to help children orphaned by war, and now it is strictly prohibited to adopt refugees from

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\textsuperscript{78} \textit{Id.} at 629.  \\
\textsuperscript{79} \textit{Id.} at 627.  \\
\textsuperscript{80} Johnston, \textit{supra} note 74.
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regions of war or natural disaster. U.S. intercountry adoption shapes families both within the United States and the country of origin. State and federal laws deliberately and irrevocably sever the ties of transnational adoptees to their families of origin to promote the interests of the adoptive family. U.S adoption framework prioritizes the unity of the adoptive family over maintaining connection to the child’s family and country of origin. Adoption is often perceived as an inherent good, but realistically it is a conditional good that is based on family separation that creates loss and tragedy for relinquishing families and communities.

D. UNCRC

The United States has not meaningfully brought in internationally recognized theories and frameworks that would create more equitable conditions in domestic and international adoptions, thus helping to prevent an exploitative market. While the United States has become party to the Hague Convention, the United Nations Convention on the Rights of the Child is the foundation for the Hague Convention. The Convention on the Rights of the Child (UNCRC) is an aspirational framework that moved human rights forward to protect children as a distinctly vulnerable group. Based on the Declaration of the Rights of the Child, the Convention identifies children in need of special legal protection and care. The Convention aims to leverage international cooperation to better the conditions of childhood for children faced with exceptionally difficult circumstances. The UNCRC provides principles and goals to inform policies that both protect and support children.

On the matter of intercountry adoption, the UNCRC prioritizes placement within the child’s country of origin. The UNCRC also contends that it is the state’s responsibility to take

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81 Martin, supra note 58, at 183.
85 Id. art. 21.
appropriate measures to prevent “improper financial gain” for any parties involved. Recognized in the UNCR is the right of a child to preserve her family relations and her nationality. The UNCRC recognizes identity rights as part of the panoply of legal human rights. In Article 8 the child is granted the explicit right to preserve their nationality, name, and family relationships without unlawful interference. This particular provision was proposed by Argentina in the aftermath of the Dirty War in Argentina when the children of political dissidents were taken from their families and put up for adoption. Additionally, a child that is deprived of their identity should be offered assistance to reestablish their identity. Though international agreements direct that domestic adoption take precedence over international adoptions, the Hague Convention allows for a less strict application of the primacy of domestic adoption. The UNCRC recognizes the special legal protection that indigenous communities require. Specifically, the child cannot be denied the right to be in a community with her group, and to enjoy her own culture.

The UNCRC is the most ratified international human rights treaty. The United States is the only member state that has not committed to the child protections set out in the UNCRC. The UNCRC was adopted in 1989, and 196 member states have ratified. The national campaign for the United States to ratify the UNCRC has been opposed by some theosis because of concerns that it would infringe on U.S. sovereignty, but the United States could benefit from advancing the basic standard of care provided to children. Proponents are not seeking to immediately restructure systems or child welfare institutions but instead have a theoretical framework to work towards better conditions for children. Not only were U.S. researchers and advocates involved

86 Id. art. 8.
87 Seymour, supra note 38, at 200.
in the Convention’s formation, but polls have shown that four out of five people in the United States favor the ratification of the UNCRC.\textsuperscript{91}

E. China and the U.S. Intercountry Adoption

The United States began international adoptions in East Asia following World War II.\textsuperscript{92} International adoption in China was a dual action solution to move children out of the overcrowded child welfare institutions and provide support for these institutions through required and voluntary orphanage donations.\textsuperscript{93} The intercountry adoption program was not implemented in China until more than ten years after the enactment of the one child policy.

Since the beginning of the intercountry adoption program, more than 100,000 children have been adopted from China. The largest number of Chinese children adopted by U.S. families in a single year was 8,000 children in 2005.\textsuperscript{94} Since 1993, China has been significantly influential in intercountry policy because its program sends the largest number of adoptees abroad. Between 2005 and 2009, though, there was a steady decline in adoptees from China globally, from around 14,500 to 6,000.\textsuperscript{95}

Domestic adoption has existed in China and could have met the needs of abandoned babies. In 1991, 61 children from China were adopted by U.S. families, and by 1995 that number rose to 2,130.\textsuperscript{96} In 2000, 5,058 children were adopted from China.\textsuperscript{97} Until 1999, domestic adoption in China was limited to couples that did not have children and were at least thirty-five years old.\textsuperscript{98} The government viewed domestic adoption as a bypass of the population control policy. In 1999, the adoption laws changed significantly to allow couples to adopt multiple

\begin{thebibliography}{98}
\bibitem{91} Id.
\bibitem{92} Id. at 52.
\bibitem{93} Id. at 46.
\bibitem{94} Id. at 50.
\bibitem{95} Id.
\bibitem{96} Id.
\bibitem{97} Id. at 57.
\end{thebibliography}
children, giving incentives to adopt orphaned children.\textsuperscript{99} Prior to the passage of the expansion of adoption options around 7,000 domestic adoptions occurred annually.\textsuperscript{100} In 2000, domestic adoptions increased to 56,000. Countries like China, Japan, and South Korea have seen significant decreases in fertility in recent decades.\textsuperscript{101}

F. \textit{Ethiopian and the U.S. Families}

Ethiopia is another nation that has been significantly present in intercountry adoptions with the United States. The high rates of adoptions from Ethiopia were closely related to catastrophic domestic events that caused widespread death, famine, and extreme poverty for the country. The decision to create avenues of international adoption between Ethiopia and other countries was a poor policy attempt to address serious human rights and political issues. More than 15,000 Ethiopian children have been adopted in the United States.\textsuperscript{102} The most significant rise in adoptions from Ethiopia were between 2000-2010. The AIDS crisis in Ethiopia in the early twenty-first century was covered in U.S. media as a dire humanitarian cause. An estimated one million children were orphaned by the AIDS crisis in the country.\textsuperscript{103} The U.S. Ambassador to Ethiopia warned the media attention would lead to an increase in interest for international adoptions, and as a result domestic actors looking to profit from the increased demand.\textsuperscript{104}

The number of licensed adoption agencies grew in Ethiopia along with the rate of intercountry adoption. In the capital city of Addis Ababa institutions were holding themselves out as orphanages but were temporary facilities where children were kept until they were delivered to adoptive

\textsuperscript{99} Id. at 58.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 16.
\textsuperscript{102} Casey Quackenbush \textit{Ethiopia Has Banned All Foreign Adoptions Amid Concerns over Abuse}, TIME MAG., Jan. 11, 2018, https://time.com/5098300/ethiopia-foreign-adoption-ban/.
\textsuperscript{103} Bunn, \textit{supra} note 27, at 702.
\textsuperscript{104} Bunn, \textit{supra} note 27, at 702.
parents.\textsuperscript{105} Investigations by the government revealed that such orphanages did not have beds, clothes, or food storage, and children were held for a few hours to one day before they were transferred to a different location. The Ethiopian government and U.S. adoption partners began investigating suspicious activity in 2008 to discover that organizations were openly buying and selling children for international adoption. Unlike other countries with similar corruption, the United States did not halt adoptions from Ethiopia because it wanted to continue this relationship. The government took action to slow down the processes for international adoption and the United States worked with the Ethiopian government to implement a Pre-Adoption Immigration Review to investigate whether individual children can be legally adopted.\textsuperscript{106} Ethiopian children, particularly orphans, are still incredibly vulnerable to exploitation, despite the progress that has been made in reducing poverty.\textsuperscript{107}

### III. Exploitation and Poverty

#### A. Poverty and Adoption

U.S. domestic welfare policy has demonstrated a disdain for impoverished homes and has used the child welfare system to separate children from their poor parents. The national consciousness has worked to move away from punishing families for poverty, but this development of sensitivity for families experiencing poverty has yet to extend to international families. Where domestic policy has moved away from targeting specific communities and removing children from their families, these changes have not been seen in the U.S. approach to international adoptions.

#### B. Global Adoption Market

\textsuperscript{105} Id. at 704.

\textsuperscript{106} Id.

The regulatory processes designed for intercountry adoption aim to protect against exploitation of children and their families. The long history of international adoption shows that exploitation has occurred and will continue to occur if the safeguards that are currently in place do not adapt to changing needs. The market for adoptable babies on an international scale is largely responsible for the violence and harm that has occurred in the context of international adoption.

Global capitalism has been prioritized higher than human rights, thus significant means of exploitation have been developed through these systems. The international system of states is one organization that functions within the global society, but global capitalism has created a distinct network of actors and interests that significantly impact policy taken on by state actors. The United States holds a significant position in both the international state system and the system of global capitalism. The conditions experienced by the global society as a result of U.S. political and economic hegemony is the responsibility of the United States to correct when there are human rights violations and exploitation. Due to the frequency of international adoptions involving the United States as the receiving state, the way that the United States carries out intercountry adoption influences the global system of international adoption.108

While the intercountry adoption program in China has been recognized as a model for process, child welfare institutions in China were exposed after the Hunan Adoption Scandal in 2005.109 Investigations discovered that the Hengyang Social Welfare Institute and other Chinese orphanages were purchasing children from intermediaries. Population control officials took children from their original families for the purposes of selling them to orphanages for intercountry adoption. Orphanages were incentivized by the compulsory donation program to participate in the trafficking of children.110 Though China has been party to the Convention, there were opportunities for

109 Smolin, *supra* note 91, at 60.
110 *Id.* at 62.
private actors to take advantage of children and their families for profit.

In the legal adoption process in Ethiopia, there were opportunities for self-interested actors to manipulate the process. Police officers were incentivized to be complicit in falsified infant abductions. Family members were bribed to provide false testimony at hearings. Illegal actors were corrupting the critical process of determining whether the state or the orphanage could take custody of the child.\textsuperscript{111}

The Department of State issued several notices to U.S. agencies about the Ethiopian government’s pause on intercountry adoption, but these agencies continued to make requests for Ethiopian intercountry adoption. Prospective families are required to pay fees for working with adoption agencies, and sometimes even provide financial support to the child before the adoption.\textsuperscript{112} The Department of State had to release additional notices because these agencies were submitting requests to collect fees from prospective parents, though it would not be possible to carry these adoptions out. Adoptive families are increasingly setting out for the birth parents of their adopted children. This issue has created a distinct industry created by companies that assist adoptive parents in finding the birth family.\textsuperscript{113}

\textbf{C. Coercion and Abuse in International Adoptions}

It is not coincidental that the families experiencing the most severe poverty are the most vulnerable to exploitation in the international market for adoptable children. Families that are the most vulnerable, should be the most protected. Scholars have posed the analysis of the effectiveness and appropriateness of intercountry adoption through the lens of international human rights law, which is founded upon principles of fundamental dignity and equality. The current state of international adoptions functions on a market system that does not promote principles of dignity or equality but severely damages the rights of individuals by exploiting their vulnerability to adopt their children.\textsuperscript{114}

\textsuperscript{111} Steenrod, \textit{supra} note 104, at 5.
\textsuperscript{112} Bunn, \textit{supra} note 27, at 708.
\textsuperscript{113} Seymore, \textit{supra} note 38, at 184.
\textsuperscript{114} Smolin, \textit{supra} note 105.
The correlation between successful adoption stories in a specific nation with increased press coverage of the atrocities occurring in that nation creates an interest for western families to adopt outside of their borders. Prospective U.S. families’ increased interest in foreign adoptions can be characterized as demand for the supply of children in need of homes. The trend for many years now has been that the supply of adoptable children has decreased, while the demand from the United States has stayed the same. This creates a capitalist market response to increase the cost to adopting families and increase the supply of adoptable children.115 In the under resourced countries that are sending children to the United States, like Ethiopia, the adoption governing agencies do not have the resources to regulate every individual involved with these adoptions.

The international community does not have sufficiently clear policies on child laundering or trafficking to create consistent accountability.116 Ethiopian and U.S. officers began investigating adoptions from Ethiopia. Adoption agencies were found to have bribed families to relinquish their children, falsified documentation, and paid intermediaries for the buying and selling of children.

The United States lobbied in favor of delegating central authority functions to private entities because the adoption community in the United States likely would not ratify if the international adoptions were only conducted by public entities. Many countries elected to have exclusively public entities implement Hague Convention functions.117 Prior to the implementation of the Hague Convention, members of Congress expressed the importance of protecting the children’s interest by federal regulations and monitoring of adoption service providers.118

The international community has responded to the increased need for protections for children and families particularly in the case of international adoption, and exploitation of poverty is the greatest threat. In 1966, the General Assembly adopted a resolution containing the International Covenant on Economic,
Social and Cultural Rights. Set forth in this Covenant are rights emanating from “the inherent dignity of the human person.”\textsuperscript{119} The Covenant recognizes the heightened need for protection of families, specifically mothers and children. The economic justice provisions of this convention are largely aspirational for the United States and most other countries, but they are critical justice goals to pursue.\textsuperscript{120} President Carter’s administration worked to implement the Covenant on Economic, Social, and Cultural Rights in 1979, but the Senate has not taken any further action to ratify it.\textsuperscript{121}

U.S. foreign policy and civil society are reluctant to accept that economic and cultural rights should be taken seriously and pursued as a policy objective. The United States has categorically denied the existence of economic, social, and cultural rights for decades in policy, rhetoric, and culture.\textsuperscript{122} U.S. policy is inconsistent with the Covenant on Economic, Social, and Cultural Rights in the obligations set forth in articles 11-14. These sections emphasize the right to food, housing, health care, and education, which in the United States are not recognized as a guaranteed rights.\textsuperscript{123} The Convention requires that states work in cooperation with one another to achieve these goals “to the maximum of its available resources” which would require the U.S. government to fund programs that provide common good resources but have been politically controversial and charged. Where state actors are limited in their ability to regulate international adoptions, there has been devastating harm to families in sending and receiving nations alike. Within the anarchic state system, there is no central authority that can command change, but international tools have the potential to influence state actors.

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\textsuperscript{120} Id.
\textsuperscript{122} Id. at 367.
\textsuperscript{123} Id. at 369.
\end{flushright}
IV. Changes in International Adoption

Globally international adoptions have decreased dramatically, largely in response to the exploitation of children and families. The United States has been very concerned with resuming these adoptions in countries that have prohibited international adoption. Governments have shown preferences to domestic adoptions, and the result has been significantly fewer international adoptions.

Beginning with the repeal of the one child policy in China, intercountry adoptions have decreased significantly. The Chinese government has stopped the processing of intercountry adoption as a COVID regulation. China has significantly scaled back its participation in the international adoption market because of societal pressure against intercountry adoption. Countries that were sending the most children to the United States have taken steps to develop systems to take care of orphaned children within the country of origin.

The Ethiopian parliament removed the existence of adoption by foreigners from the Revised Family Code, essentially banning the practice. In 2017, the Ethiopian Prime Minister’s Office announced it was immediately suspending all intercountry adoptions. At such point Ethiopian officials were issuing notices to cases in progress that they were no longer going to carry out these adoptions. Then in 2018 the Ethiopian Parliament passed legislation that banned all intercountry adoptions effectively.

The Ethiopian government argued that the vulnerable children living in Ethiopia should be cared for by state services. Political observers have witnessed this policy change by the Ethiopian government come at a time of increased nationalistic policy, and political instability. The political sentiment from people involved in family welfare services is that nationality is not replaced by money. While implementing an effective ban on international adoption the government is also working toward a greater budget for facilities like orphanages to have more capacity.

124 Martin, supra note 58, at 186.
125 Bunn, supra note 27, at 707.
126 Id.
127 Id.
128 Quackenbush, supra note 100.
129 Id.
In 2013 an American couple were imprisoned for the death of their adopted Ethiopian daughter and abusing their adopted Ethiopian son.\textsuperscript{131} Ethiopian and U.S. authorities reduced the number of adoptions from Ethiopia to the United States by 90% the same year.\textsuperscript{132} Advocates against intercountry adoptions from Ethiopia identify the disadvantages that women have in Ethiopian society. The pressure to give up their children can come from a cultural stigma against having children out of wedlock, or a lack of contraception and reproductive care.\textsuperscript{133}

The following section takes into account the scholarly work on the matter of prohibition. Though this comment does not seek to take a position on whether a prohibition on international adoption is correct or not, the perspectives offered by the wealth of international law and human rights scholars demonstrate the tense political positions. Both proponents and opponents of intercountry adoption are commonly concerned with children that would be in need of a family in the absence of intercountry adoption.\textsuperscript{134}

Proponents of international adoption argue that the best interest of the child is promoted through these adoptions. Where children would be either institutionalized or living on the streets, proponents believe that the superior living environment for the child is in an adopted family. Other supporters argue that international adoptions promote tolerance and cultural awareness to bring children from different cultural backgrounds to the United States.\textsuperscript{135} Intercountry adoption supporters argue that “children without families” should be seen and treated as a collective issue that the global community should address.\textsuperscript{136}

Proponents approach the human rights principles in intercountry adoption by questioning first whether the institutionalization of children, where adoption is possible, is a violation of the human

\textsuperscript{131} Quackenbush, supra note 100.
\textsuperscript{132} Id.
\textsuperscript{133} Steenrod, supra note 104, at 3.
\textsuperscript{134} Blair, supra note 88, at 355.
\textsuperscript{135} Martin, supra note at 58, at 185.
rights of the child. This question asks whether children have a right to a family, as well as a right to be protected from the harms of institutionalization. The scholars, state officials, and other actors that advocate for the proliferation of intercountry adoption attempt repeatedly to address the issues surrounding exploitation. One criticism from proponents is that there is an undeserved negative treatment of the benevolent U.S. families that are seeking a legitimate and equally beneficial means to expand their family.

A strategy to deflect criticism from intercountry adoption is to remove the concept of a “market” of children from the discussions around intercountry adoption, even though the reality is U.S. families are spending exorbitant amounts of money in intercountry adoptions. While families are paying private and public agencies to carry out the adoption process, those agencies are being sufficiently compensated for their services. The adoption service providers are incentivized by their profit motivations to continue providing the logistical services necessary to conduct an intercountry adoption.

Critics of intercountry adoption are concerned with the imperialist implications where the actors from the more powerful nation remove a child from their home country and force the child to assimilate to a new, argued as better, way of life. This is distinct from past forms of colonialism that introduced a set of values to a new country with the objective of extracting resources. Opponents of intercountry adoption often argue that children are the most significant resource of any nation.

Professor David Smolin’s call for a moratorium on intercountry adoption addresses the ethical principles that are violated in intercountry adoption. Smolin speculates that a partial moratorium may not suffice in providing legitimate protections, and may create discriminatory practices largely based on political relationships and international norms. The shift in perspective demonstrated in Smolin’s article is based on the overwhelming evidence that exploitation and violations of international human

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137 Id. at 199.
138 Id. at 205.
139 Id. at 216.
140 Martin, supra note 58, at 185.
rights standards are more prevalent in intercountry adoption than previously recognized.\textsuperscript{142}

The U.S. policy on adoption is an exclusivist model that removes the legal relationship between the adopted child and their birth parents.\textsuperscript{143} The consequence of exporting this legal philosophy to nations participating in intercountry adoption with the United States is abundant exploitation because the idea of relinquishment is not transferable to all cultures. Families that are relinquishing their children under dire circumstances may have the expectation that their child will remain legally tied to their family and community identity.\textsuperscript{144} The right of the child to identity and culture relies heavily on their perception of their birth family. In compliance with the UNCRC and The Hague Convention, there should be openness in adoptions to connect adopted children to their country of origin.\textsuperscript{145}

The opposing sides of the intercountry adoption debate are primarily concerned, on the one hand, with the prevention of extreme poverty and abandonment of children globally, and on the other hand concerned with the imperialist implication of developed nations taking children from their home countries that have fewer resources.\textsuperscript{146} Proponents of intercountry adoption believe, at times rightfully so, that children's lives are being saved and horrible exploitation like child prostitution, pornography, or forced labor are being avoided. The analysis of proponents views the reality of institutionalized children as more important than cultural identity or baby selling.\textsuperscript{147} This evaluation is based on a framework that separates the history of colonialism, imperialism, and global capitalism from the individual rights of children who deserve safety and even a family. A contradiction exists between the best interests of the child and the nation's right to possess its children. However, this contradiction does not consider that children should have a right to possess their culture.

\textsuperscript{142} Id. at 524.
\textsuperscript{143} Smolin, \textit{supra} note 83, at 443.
\textsuperscript{144} Id.
\textsuperscript{145} Seymore, \textit{supra} note 39.
\textsuperscript{146} Smolin, \textit{supra} note 83, at 181.
\textsuperscript{147} Id.
Conclusion

The U.S. policy approaches to international adoption have often resembled relational control theory where international relationships are exercised as a means to further the country’s hegemonic agenda. The global capitalist approach to international adoptions is a product of past colonial and imperialist policies that have an enduring legacy in states with fewer resources. The highest rates of adoptions are closely related to catastrophic domestic events that caused widespread death, famine, and extreme poverty in nations like Ethiopia, China, and Vietnam. The decision to create avenues of international adoption with children flowing to nations where there are abundant resources is an inherently flawed policy attempt to address pervasive human rights and political issues.

Participation in international agreements and adherence to agreed upon frameworks is crucial to equitable international relationships that are free from exploitation. While the international community is concerned with economic justice and the dehumanization of poverty, the United States has not ratified the UNCRC or the International Covenant on Economic, Social, and Human Rights. While these tools do not come with means of enforcement, and are largely aspirational, these agreements will hold U.S. foreign policy to a higher standard of care. As established in this Comment, the United States holds a great deal of influence on the experiences of thousands of people looking to build their families. The expectation of this government should be to provide the greatest level of protection from exploitation to the most vulnerable communities.

Saba Deutschmann