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Impacts of the Circumspection of Women's Rights Abroad on International Adoption

Jennifer Bowman

Abstract

International adoption has been lauded and derided by the public since its initial surge into popularity following the Second World War. While international adoptions are regulated by numerous legal instruments (international and domestic), problems of gender discrimination, exploitation, and human trafficking are widespread and systemic. This article examines the impacts of the circumspection of women's rights generally and women's reproductive rights on international adoption.¹ Ultimately this article argues that foreign policy initiatives promoting women's reproductive freedoms economic empowerment would mitigate the problematic features of international adoption and they would be an important step toward reducing adoption rates generally. This article will explore avenues through which the United States can advance these causes, by way of the available international legal institutions and agreements, in addition to its foreign policy activities.

Introduction

International adoption has been the subject of heated debate in recent years. The United Nations and individual countries have undertaken Conventions, Declarations, and domestic policies to regulate the international adoption market. While these efforts have had some

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1. Many in the activism community prefer the term "reproductive justice" to "reproductive rights." The term "reproductive justice" was coined in 1994 by attendees of the International Conference on Population and Development. The argument being the term "reproductive rights" focuses on negative rights (i.e. the right not to have obstacles to sexual health services) whereas "reproductive justice" is framed to encompass a positive legislative agenda (i.e. States' responsibility to ensure that reproductive rights are fulfilled, not just unencumbered). For the purposes of this article, the term "reproductive rights" should be interpreted as encompassing both positive and negative rights. See Joan C. Chrisler, *Justice: Introduction: A Global Approach to Reproductive Justice-Psychosocial and Legal Aspects and Implications*, 20 WM. & MARY J. OF WOMEN & L. 1, 1-4 (Fall, 2013)

success, detractors note the existence of an environment conducive to exploitation, coercion, and other human rights violations such as human trafficking.² Expansion of international adoption can lead to an expansion in the prevalence of these abuses and human rights violations.³ International adoption is directly affected by the circumspession of women's rights abroad and American foreign policy regarding same.

The United States should eschew foreign aid initiatives that provide funding exclusively for abstinence only education and funding for anti-abortion initiatives, a return to which seems likely in light of recent actions by the Trump administration; reverse the extreme budget cuts to USAID'S family planning arm; better integrate the American foreign policy establishment's efforts to incorporate issues of gender equality and women's rights into its respective domains; and strive to create a more robust international legal apparatus for international adoption. Of course, the United States should continue to work within established international regulatory frameworks to address international adoption abuses and violations, but must also make a commitment to solving the root causes from which these problems stem.

International Adoption Trends in the United States

There have been several factors in the United States leading to higher interest in international adoption.⁴ International adoption rates in the United States surged in the post-World War II era.⁵ With the advancement of the civil rights movements and other socially conscious activists' movements, there developed a collective sense of global responsibility wherein many Americans felt as though international adoptions were a charitable act to remove children from developing countries.⁶ Although adoption rates in the United States have

2. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2006).

3. *Id.*

4. Gabriella Marquez, *Transnational Adoption: The Creation and Ill Effects of an International Black Market Baby Trade*, 21 J. JUV. L. 25, 26-27 (2000).

5. Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 420 (2009).

6. *Id.* at 423.

ebbed and flowed in the past several decades, Americans still adopt more children from other nations than any other country in the world.⁷

The statistics regarding adoption rates in the United States are staggering:

Between 7,000 and 10,000 parentless foreign-born children enter the United States each year. They are adopted by American parents and granted U.S. Citizenship. More than 130,000 foreign children have immigrated to the United States and have been adopted by Americans since 1947. According to one estimate, international adoptions constitute sixteen percent of all non-relative adoptions in the United States.⁸

At the same time, the American foster care system has been inundated with children, many of whom suffer physical or psychological impairments.⁹ In the United States, adoptive parents can choose between three types of domestic adoptions: “public agency adoptions, private agency adoptions, and independent adoptions.”¹⁰

In any domestic adoption, prospective adoptive parents must meet a specific set of criteria.¹¹ Unfortunately, domestic adoption criteria can be prohibitive for many parents. Adoption agencies tend to show preference to prospective adoptive parents who are: straight, married, young, and not suffering from any disability.¹² Conversely, in international adoptions, prospective adoptive parents need only meet the criteria set by the child’s home country which are usually less restrictive (although they are still subject to the immigration laws and policies of the United States and the sending country).¹³ While domestic adoptions are usually less costly, generally, international adoptions have a much shorter waiting period.¹⁴

7. Lynn D. Wardle & Travis Robertson, *Adoption: Upside Down and Sideways? Some Causes and Remedies for Declining Domestic and International Adoptions*, 26 REGENT U. L. REV. 209, 213 (2013).

8. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. SOC. PROBS. 327, 327-28 (1997).

9. *Id.* at 327.

10. *Id.* at 329.

11. *Id.* at 330.

12. *Id.* at 344.

13. *Id.* at 330-31; 347.

14. *Id.* at 332.

Many Americans choose to adopt internationally due to the trend in domestic laws protecting the rights of biological parents.¹⁵ Laws in other countries regarding the revocation of consent are generally lenient and afford biological parents long periods of time to “revoke their consent to the termination of their parental rights.”¹⁶ Furthermore, there have been trends in courts to overturn adoptions in favor of biological parents who challenge adoptions.¹⁷ In contrast, international adoptions are less likely to be contested by the biological parents and are therefore more finite.¹⁸

Lastly, there has generally been a resurgence in the demand for adoption as fertility rates in the United States have declined.¹⁹ Medical procedures available in the United States to treat infertility are often prohibitively expensive and have comparatively low rates of success.²⁰ For all of these reasons, international adoption has become a popular method for Americans to expand their families.

The Debate Around International Adoption

International adoption is a controversial issue.²¹ As with any matter involving children, debates are centered on the commonly accepted standard of what is in the “best interest of the child.”²² Proponents of international adoption laud this practice as the best way to provide a permanent, stable, and safe environment for children whose home countries are destabilized and economically moribund.²³ They claim that international adoption saves the lives of children who otherwise suffer under the burden of poor socioeconomic, political, or social conditions in their home countries. This therefore justifies the

15. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. SOC. PROBS. 327, 341 (1997).

16. *Id.*

17. *Id.* at 342.

18. *Id.* at 343.

19. Marquez, *supra* note 4, at 26.

20. *Id.*

21. King, *supra* note 5, at 447.

22. Margaret Liu, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187, 193 (1994).

23. *Id.*

removal and replacement of a child by the means of international adoption.²⁴

This reasoning has unsurprisingly lead some detractors to view international adoption as discriminatory and as an extension of colonialism.²⁵ The theory being that international adoption is a continued exploitation of the source country: resources, labor, and now children.²⁶ These detractors argue that the impetus for adoption should not be the result of a savior complex. The prospective adoptive parents should be willing and able to love the child for who they are, support the child's heritage, and accept their racial differences.²⁷ The United Nations International Children's Emergency Fund (UNICEF) has adopted this perception on international adoption and argued that international adoption be used only as a "last resort" when a child cannot be reconnected with a biological relative.²⁸

Other critics argue that fees charged by agencies at certain stages of the process leads to the "commodification of children."²⁹ Of chief concern is setting fees charged to the prospective parents. Setting fees based on the desires of prospective parents, they argue, can result in different prices for different children based on their appearance and/or country of origin.³⁰ There is an added problem when paying fees to birth parents. The payment of fees to birth parents and/or the families of birth parents create incentives for reluctant, but desperate families to give up a child without full consideration of the action.³¹

In this same vein, the emphasis placed on the "best interest of the child" fails to acknowledge the impacts of international adoptions on birth parents.³² Birth parents may choose to place their children up for

24. Sarah R. Wallace, *International Adoption: The Most Logical Solution to the Disparity between the Numbers of Orphaned and Abandoned Children in Some Countries and Families and Individuals Wishing to Adopt in Others?*, 20 ARIZ. J. INT'L & COMP. L. 689, 707 (2003).

25. Liu, *supra* note 22, at 194-95.

26. *Id.*

27. *Id.*

28. Notesong Srisopark Thompson, *Hague is Enough? A Call for More Protective, Uniform Law Guiding International Adoptions*, 22 WIS. INT'L L.J. 441, 454 (2004).

29. Richard D. Carlson, *A Child's Right to a Family Versus a State's Discretion to Institutionalize the Child*, 47 GEO. J. INT'L L. 937, 981 (2016).

30. *Id.* at 981.

31. *Id.* at 981.

32. Marie A. Failingler, *Moving Towards Human Rights Principles for Inter-country Adoption*, 39 N.C.J. INT'L L. & COM. REG. 523, 538 (Winter, 2014).

adoption for a host of reasons: socioeconomic reasons, cultural stigma, safety concerns, etc. In cases where birth parents are without alternatives, international adoption is an enticing solution. However, many birth parents are then unable to watch their children grow up, unable to ensure their religious education, and have no way of knowing how much, if any, of their culture is being imparted on their children by the adoptive family.³³ Similarly, the adopted children are at risk of losing touch with their heritage, traditions, and customs.³⁴

Finally, the simple demand for international adoptions has led to the formation of a black market for human trafficking.³⁵ The growth of the black market for adoptive children has occurred, in part, because of financial crises in some foreign nations.³⁶ Biological parents and government officials alike can be persuaded to circumvent regulations for under the table payments.³⁷ Many adoption agencies abroad use a third party individual to facilitate the adoption process in international adoptions.³⁸ Frequently, these individuals are not subject to licensing requirements and are rarely subject to review or investigation.³⁹

Would-be adoptive parents undergo great risks in adopting children via black market trades which are not advertised or acknowledged by those facilitating the adoption.⁴⁰ Medical records for the child may not exist or in many cases may be falsified, and prospective parents run the risk of adopting children with a wide range of debilitating physical and mental illnesses.⁴¹

Unfortunately, the existence of a black market for children creates heinous effects on above-board adoption processes.⁴² There has been a surge of fraudulent adoptions where legal procedures and processes are circumvented, and there has been escalation of cases where children and infants are stolen from their biological families to be

33. *Id.*

34. *Id.*

35. *See* Marquez, *supra* note 4, at 26.

36. *Id.* at 28-29.

37. *Id.* at 29.

38. *Id.* at 30.

39. *Id.* at 31.

40. *Id.* at 34.

41. *See* Marquez, *supra* note 4, at 34.

42. *Id.*, at 32.

sold for adoption.⁴³ Because of the number of individuals involved in these situations, and the extreme covert nature of the process, efforts to reign in unlawful international adoptions have been relatively unsuccessful.⁴⁴ The arguments against international adoption are significant and complex, and few solutions exist on a global scale.

Regulations on International Adoptions and Women's Rights

In addition to the polarized nature of opinions concerning international adoption, there is also its legal complexity. This complexity stems foremost from the fact that trans country adoptions are subject to the laws of three different jurisdictions: the state of residence of the prospective adoptive parents, the adoptee's country of origin, and the laws of the United States.

Over the last 75 years, a number of declarations, agreements, treaties, conventions, and other legal instruments have emerged to address some of the concerns outlined above. The Convention on Protection of Children and Co-operation in Respect of Intercountry Adoptions (the Convention), was approved unanimously on May 29, 1993.⁴⁵ Its predecessor, The Hague Convention of 1965, was the first international effort to normalize the processes and procedures involved in international adoptions.⁴⁶ The 1993 Convention's primary objectives are:

To establish safeguards to ensure that intercountry adoptions take place in the best interests of the child and with respect for his or her fundamental rights as recognized in international law; (2) to prevent the abduction, the sale of or traffic in children; and (3) to secure the recognition in Convention countries of adoptions made in accordance with the Convention.⁴⁷

As of 2014, 93 countries had either ratified or acceded to the Convention.⁴⁸ The United States, despite being one of the original signatories, did not ratify the Convention until 2008. It needed time to enact its domestic legislation, which came in the form of the Inter-

43. *Id.* at 32-33.

44. *Id.* at 26.

45. Failinger, *supra* note 32, at 526.

46. *Id.*

47. Joan H. Hollinger, *Adoption Law and Practice*. Vol. 1, Lexis Pub., 2000.

48. *Id.* at 2.

county Adoption Act of 2000.⁴⁹ The Convention is considered the “most authoritative source of standards and procedures governing international adoption.”⁵⁰

The Convention is not without weaknesses. Critics allege that the Convention fails to address the underlying causes that result in children being placed for adoption. The implementation of the Convention’s procedures is too costly for poorer nations, who often have the largest number of children placed for adoption and high rates of corruption in the government.⁵¹ The Convention’s prohibitive costs, have perpetuated the creation of unregulated black markets and rampant exploitation of children and birth-families for financial gain and profit.⁵²

The influential Convention on the Rights of the Child (the CRC) contains 54 articles and 2 optional protocols; it has been ratified by 193 countries.⁵³ The CRC goes further than any other Conventions mentioned so far as it elucidates some of the substantive rights of children.⁵⁴ Nonetheless, critics of the CRC argue that it fails to take on gender discrimination that is integrally involved in the countries participating in international adoption.⁵⁵ Although the CRC does include sexual and reproductive rights among its list of essential human rights, it falls short of establishing required minimums for access to contraception and safe abortions. The CRC has also yet to condemn member states for violations of sexual and reproductive rights equally to violations of other provisions.⁵⁶

49. Joan Heifetz Hollinger 2-11 Adoption Law and Practice §11.07 United States Ratification and Implementation of Hague Convention: Intercountry Adoption Act (IAA) of 2000, 1; Caeli Elizabeth Kimball, *Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 33 DENV. J. INT’L L. & POL’Y 561, 574 (Fall, 2005).

50. Hollinger, *supra* note 49, at 1.

51. Wallace, *supra* note 24, at 721; Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, 22 PACE INT’L L. REV. 1, 27 (2010).

52. Wechsler, *supra* note 51, at 27.

53. Cheryl L. Allen, *The US-Russian Child Adoption Agreement: An End to Failed Adoptions?*, 35 FORDHAM INT’L L.J. 1690, 1718 (November, 2012).

54. Failing, *supra* note 32, at 526-27.

55. Ladan Askari, *Girls’ Rights Under International Law: An Argument for Establishing Gender Equality as a Jus Cogens*, 8 S. CAL. REV. L. & WOMEN’S STUD. 3,4, 5 (Fall, 1998).

56. Allen, *supra* note 53, at 221.

The UN Convention on the Rights of the Child was significant in that it was the first document to be produced by the UN on the issue of international adoption that had the status of a treaty.⁵⁷ Previous instruments used by the UN were declarations, or other types of documents, which in international law merely state existing law. In comparison, Conventions have the same legal status of a treaty.⁵⁸ Unfortunately, this still did not make the CRC legally binding, because it was issued by the General Assembly and “according to Article 10 of the UN Charter, GA resolutions are only ‘recommendations.’”⁵⁹

Equally problematic was text in Article 20(3) of the CRC, which stated “‘due regard’ is to be given to the ‘desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’”⁶⁰ Article 21(b) also states that international adoption is an acceptable resolution, but only if there were no suitable resettlement available in the child’s home country.⁶¹ This means that a child in a developing country could end up in an institution rather than being made available for international adoption. Many consider this to be in conflict with the “best interests” standard.⁶²

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) of 1979 does not deal directly with international adoptions. However, when CEDAW coupled with the Declaration on the Elimination of Violence Against Women, the two work together to make a significant impact construing women’s rights as human rights. Specifically, making women’s issues a part of the broader and ongoing international conversation on human rights.⁶³

While these developments were important, the instruments fail to highlight sexual and reproductive rights as a part of the women’s rights issues. They are addressed only vaguely in the context of a State’s duty to “eliminate discrimination against women in the field

57. Wechsler, *supra* note 51, at 21-22.

58. *Id.*

59. *Id.* at 22.

60. *Id.*

61. *Id.*

62. *Id.*

63. Alma Beltran Y Puga, 2012 *Latcrit South-North Exchange on Theory, Culture, and Law: Paradigmatic Changes in Gender Justice: The Advancement of Reproductive Rights in International Human Rights Law*, 3 CREIGHTON INT’L & COMP. L.J. 159-60 (Fall, 2012).

of healthcare in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”⁶⁴ Historically, the discussion of the right to adequate health care has omitted sexual and reproductive health services.⁶⁵

The UN International Conference on Population and Development (the Conference) was pivotal in the development of women’s rights as human rights. At the Conference, the gathering body determined that sexual and reproductive rights express human rights that are already protected in the existing treaties, Conventions, and other consensus documents.⁶⁶ As one scholar put it:

These rights rest on the recognition of the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.⁶⁷

Women’s rights activist groups have seized upon this to establish the robust nature of the State’s “by removing women’s barriers to exercising them, and the duty to ensure the fulfillment of those rights through the relevant legislative, judicial, administrative, and budgetary channels.”⁶⁸

In summary, the wide swath of international legal and regulatory Declarations, Conventions, Charters, etc., have each in their own right been signs of progress in the realm of international adoption in certain areas. Some have the benefit of legally binding its signatories, while others are to be commended for trying to find ways to combat the underlying social circumstances that lead to many international adoptions. Some instruments incorporate women’s rights specifically into their drafts and are particularly important because of their large degree of participation from the international community.

Women’s rights groups, however, have been criticized for their weaknesses in certain areas, where a pattern has emerged. Some have criticized the “best interests of the child” standard and call for a move away from that standard and toward an alternative one.⁶⁹ Others are

64. *Id.*

65. *Id.* at 160.

66. *Id.*

67. *Id.*

68. *Id.* at 149.

69. *Id.* at 149.

deficient for their lack of enforceability or because of the prohibitively high costs associated with source-countries' implementation of their procedures, leading to corruption and exploitation.⁷⁰ And a large number of these instruments fail to address the underlying causes leading to international adoption, such as women's lack of reproductive rights in source-countries, extreme levels of poverty which render birth-mothers vulnerable to the potential financial incentives related to adoption, and individual countries' specific policies that embody gender discrimination.⁷¹

Intersection of International Adoption, Women's Rights, and Gender Discrimination

The international community has, in large part, failed to see issues related to international adoption as issues of women's reproductive rights and economic empowerment.⁷² Yet these are some of the most influential factors in creating a market for international adoption and simultaneously a field for abuses and human rights violations. There is precedent to suggest that access to contraception and safe abortions curtails adoption rates.⁷³ Two brief case studies illustrate the relationship between women's reproductive rights and adoption rates.

In 1966, Romania, under the rule of Nicolae Ceausescu, implemented a policy mandating Romanian women bear five children, while simultaneously banning contraception and abortion.⁷⁴ The result is considered one of the most atrocious human rights violations on record.⁷⁵ As Romanian women lacked reproductive autonomy, Romanian orphanages and asylums became supersaturated with thousands of children left uncared for.⁷⁶ Although this is an extreme example, it is significant to highlight the correlation.

Contrast those circumstances with what occurred in the United States around the same time. Between 1970 and the mid 1980s adop-

70. *Id.* at 149.

71. Liu, *supra* note 22, at 187.

72. *Annotated Legal Bibliography on Gender*, 15 CARDOZO J.L. & GENDER 721, 726 (Spring, 2009).

73. Wardle & Robertson, *supra* note 7, at 210-11.

74. Liu, *supra* note 22, at 187-88.

75. *Id.* at 204.

76. *Id.* at 187-88.

tion rates declined sharply in the United States, ostensibly on account of the United States Supreme Court's ruling in *Roe v. Wade*.⁷⁷ In *Roe v. Wade* the Supreme Court "acknowledged that a woman's right to decide whether to terminate her pregnancy was protected under the constitutional principles of individual autonomy and privacy."⁷⁸ Less restrictive access to safe abortions led to an increase in abortion rates.⁷⁹ The subsequent rise in abortion rates correlates with the decline in adoption rates, obviating many of the problems concerning implementation of adoption procedures and protocols.⁸⁰

Reproductive rights are not the only women's rights issues that have an impact on international adoption rates. Gender discrimination also plays a significant role.⁸¹ An important criticism of many of the international conventions, declarations, treaties, etc. governing international adoptions is that they fail to safeguard women of all ages.⁸² Therefore, adolescent and prepubescent girls are often removed from the discussion.⁸³ Arguably, girls with access to education, medical care, jobs, and family planning resources would be less likely to have unplanned pregnancies and the supply of children available for international adoptions would likewise diminish.

Strict adherence to traditional gender roles entrenched in global cultures also plays a large role in international adoption rates.⁸⁴ In many cultures, women's roles are confined to the family therefore they are unable to provide as much value to the family unit.⁸⁵ These two case studies are illustrative of gender discrimination's role in the increase of adoption rates.

China has a cultural preference for male children.⁸⁶ This stems historically from the country's only recently terminated One-Child Policy.⁸⁷ This gender discrimination results in Chinese orphanages

77. Wardle & Robertson, *supra* note 7, at 211.

78. Julia L. Ernst, Laura Katzive, & Erica Smock, *The Global Pattern of U.S. Initiatives Curtailing Women's Reproductive Rights: A Perspective on the Increasingly Anti-Choice Mosaic*, 6 U. PA. J. CONST. L. 752, 753 (2004).

79. Wardle & Robertson, *supra* note 7, at 211.

80. *Id.* at 5.

81. Askari, *supra* note 55, at 4.

82. *Id.* at 5.

83. *Id.* at 12.

84. Chrisler, *supra* note 1, at 15.

85. Kimball, *supra* note 49, at 565.

86. *Id.*

87. *Id.* at 565-56.

having ninety-five percent (95%) baby girls and approximately 150,000 infant girls being abandoned each year.⁸⁸

Contrast this with South Korea, which in an attempt to curb its high fertility rates, offered free contraception and abortion to Korean women.⁸⁹ These resources, while in and of themselves an inherent good, have a pernicious influence when combined with the cultural preference for male children. The result was not only increased abortion rates, but also an increase in female Korean children being offered up for adoption.⁹⁰ Countries that practice gender discrimination often are the counties with a higher ratio of births per population size.⁹¹

The move in international law to advocate for women's rights under the auspices of existing human rights doctrines already shows promise. Of course, there is always room for growth in these efforts. One of the biggest problems is that motherhood is still viewed as the default and defining role for women. As that role tends to define a woman's public persona, it is viewed as fair game for public scrutiny and regulation.⁹²

Women's economic empowerment, in tandem with progress on women's reproductive rights, would do much to ameliorate common problems in international adoption practices. A common grievance about international adoption is that the transfer of children from impoverished areas to wealthier family units in developed countries does nothing to help the birth parents.⁹³ With the often exorbitant prices paid in international adoptions, many argue that money should be diverted to the birth parents to allow them to keep and properly raise their children.⁹⁴ The economic status of these families would improve with the economic empowerment of women. Enabling

88. *Id.* at 565.

89. Catherine M. Bitzan, *Our Most Precious Resource: How South Korea is Poised to Change the Landscape of International Adoption*, 17 MINN. J. INT'L L. 121, 134 (2008).

90. *Id.* at 134-35.

91. Chrisler, *supra* note 1, at 15-16.

92. Berta Esperanza Hernandez-Truyol, *Women's Rights as Human Rights – Rules, Realities and the Role of Culture: A Formula for Reform*, 21 BROOK. J. INT'L L. 605, 614 (1996).

93. Joseph M. Isanga, *Surging Intercountry Adoptions in Africa: Paltry Domestication of International Standards*, 27 BYU J. PUB. L. 229, 234 (2012).

94. *Id.* at 236-37.

women to pursue careers and education through reproductive autonomy and by removing other barriers, such as work place discrimination, would help families become fiscally stable and able to provide for children.

Setbacks in U.S. Foreign Policy on Family Planning in the Post *Roe v. Wade* Era

Historically, the United States has been involved in programs dealing with international family planning because of an increase in the world's population, and all of its attendant problems.⁹⁵ Unfortunately, in the post *Roe v. Wade* era, multiple administrations have defunded foreign policy initiatives that advocate abortion as a family planning option.⁹⁶ Instead, U.S. foreign policy has promoted and endorsed programs advocating abstinence only education.⁹⁷

Senator Jesse Helms, in 1973, following the Supreme Court's decision in *Roe v. Wade*, began an attack on the Foreign Assistance Act in an effort to undermine the decision in *Roe*.⁹⁸ The amendment to the Foreign Assistance Act proposed by Senator Holmes halted funding for programs acknowledging abortion as a tool for family planning.⁹⁹ A similar interpretation was later adopted by the United States Agency for International Aid (USAID).¹⁰⁰

USAID is one of the United States government's most significant agencies tasked with spreading democracy and ending poverty in developing nations.¹⁰¹ In 1982, the agency came under fire for its refusal to continue funding a publication produced by the Alan Guttmacher Institute.¹⁰² The Alan Guttmacher Institute (presently known as the Guttmacher Institute), is a research organization who

95. Tobey E. Goldfarb, *Abstinence Breeds Contempt: Why the U.S. Policy on Foreign Assistance for Family Planning is Cause for Concern*, 33 CAL. W. INT'L L.J. 345, 363 (2003).

96. Ernst, Katzive & Smock, *supra* note 78, at 753-54.

97. *Id.* at 753.

98. *Id.*

99. Ernst, Katzive & Smock, *supra* note 78, at 773-74.

100. Goldfarb, *supra* note 95, at 355.

101. USAID, *Misson, Vision and Values* (May 03, 2017), <https://www.usaid.gov/who-we-are/mission-vision-values>.

102. Goldfarb, *supra* note 95, at 355-56.

focuses on issues of reproductive health and reproductive rights on a global scale.¹⁰³

The problem between USAID and the Guttmacher Institute came to a head in *Alan Guttmacher Institute v. McPherson*, in which the Alan Guttmacher Institute brought suit against the administrator of USAID.¹⁰⁴ The basis of the lawsuit was USAID's denial of funding to publish literature authored by the Alan Guttmacher Institute due to its alleged pro-abortion stance.¹⁰⁵

The publication, *Perspectives*, had historically received funding from USAID.¹⁰⁶ In 1982, The Alan Guttmacher Institute applied to USAID for funding for the 1983 year.¹⁰⁷ Finding that *Perspectives* would not be funded, USAID noted that there were several instances where *Perspectives* was seemingly taking a pro abortion stance.¹⁰⁸ The Court, after a lengthy analysis, dismissed the action.¹⁰⁹

In 1984, President Reagan announced the Mexico City Policy (later called the Global Gag Rule), which halted funding to any non-governmental organization whose approach to family planning advocated for abortion.¹¹⁰ Although several lawsuits were filed in reaction to this policy, none were successful.¹¹¹ The Global Gag Rule is one of the most harmful policies that causes horrendous effects on women's reproductive autonomy.¹¹² Some countries, in response to the Global Gag, "suspended efforts to permit distribution of emergency contraception, which prevents pregnancy and thereby reduces abortions."¹¹³

For a period of time under the Clinton and Obama administrations, these stances were reversed and new policies were enacted promoting women's rights issues.¹¹⁴ In 2009, President Obama re-

103. See generally, GUTTMACHER INSTITUTE, <https://www.guttmacher.org> (last visited Feb. 26, 2018).

104. Goldfarb, *supra* note 95, at 355.

105. *Id.*

106. *Alan Guttmacher Inst. v. McPherson*, 805 F.2d 1088, 1090 (2nd Cir. 1986).

107. *Id.*

108. *Id.*

109. *Id.* at 1096.

110. Ernst, Katzive & Smock, *supra* note 78, at 774-75.

111. *Id.*

112. *Id.* at 790.

113. *Id.* at 789.

114. Marilou McPhedran, *Compliments of CEDAW: U.S. Foreign Policy Coherence on Women's Human rights and Human Security*, 2014 MICH. ST. L. REV. 281, 282-95 (2014).

pealed the Global Gag Rule, indicating a shift in the United States foreign policy as relates to family planning.¹¹⁵ “By Executive Order in August 2012, President Obama confirmed gender equality and women’s empowerment as a ‘core focus of our foreign policy.’”¹¹⁶

The United States foreign policy activities present opportunities to advance women’s reproductive rights, the economic empowerment of women, and to realize improvements in the domain of international adoption. Policies that reassert control over women’s reproductive rights and limit access to both contraceptives and safe abortions undoubtedly lead to higher adoption rates. Foreign policy attitudes towards family planning have been drastically different in each administration. Just recently, President Trump reinstated the Gag Rule, repealing an Obama era action.¹¹⁷ This recent version of the Gag Rules goes further than its predecessors by pulling “funding from any health clinic that performs abortions or advises patients about them.”¹¹⁸

Moving Forward: Methods to Advance Women’s Rights, Curtail International Adoption Rates, and Expand on Existing Legal Framework

There are opportunities within existing international law frameworks to advance the twin causes of women’s reproductive rights and economic empowerment that would bring along an improvement in the international adoption arena. Women’s economic empowerment, in tandem with progress on women’s reproductive rights, would do much to ameliorate the most commonly cited problems with international adoption practices. It will be recalled that a common grievance about international adoptions is that they transfer children of disadvantaged origin to the world’s wealthier family units or individuals, while neglecting the underlying social circumstances that make this approach more likely in the first place.¹¹⁹

115. Mary Pat Treuhart, *Feminist-in-Chief? Examining President Obama’s Executive Orders on Women’s Rights Issues*, 91 CHI.-KENT L. REV. 171, 174 (2016).

116. McPhedran, *supra* note 114, at 295.

117. Julia Hahn, *The Detrimental Effects of President Donald Trump’s Executive Order Restricting Access to Healthcare in Foreign Countries*, 18 RUTGERS J.L. & RELIG. 418, 418 (2017).

118. *Id.*

119. Isanga, *supra* note 93, at 234.

A main claim by those who are critical of international adoption pertains to the fiscal resources involved, as is the reason for the view that these adoptions are exploitative.¹²⁰ When poverty is often at the root of the birth parents' decision to offer a child up for adoption, it would be one thing for international monetary support to flow into that country in ways that assist the birth parents in raising that child. However, in current reality, large sums of money go toward taking those children away from birth families, not enabling birth families to care for their children.¹²¹ Critics view this as an undermining of human rights, specifically those of birth families (and their children, at that).¹²²

The economic status of these families would surely be improved with the economic empowerment of women, part of which includes the advancement of reproductive rights and access to family planning resources. By enabling women to pursue careers, the education needed for those careers, the exercising of their reproductive autonomy, and by removing other barriers such as gender-based workplace discrimination, these families' economic status will rise to a level where birth parents feel financially capable of caring for their children. When added to the fact that this empowerment would also likely mean smaller family sizes, it is hardly an analytic leap to conclude that the need to resort to problematic adoption practices would be significantly reduced.¹²³

Some prominent scholars advocate for programs that would mandate financial contributions to source-countries of international adoptees.¹²⁴ These funds could be earmarked for family preservation and in-country placement for these children.¹²⁵ This kind of program would have the dual advantage of both curbing the flow of children outside of their country of birth, while also improving the living standards for that child in her birth-country.¹²⁶

One scholar has called for making gender equality a "jus cogens," which would raise the issue of gender equality to the "level of

120. *Id.* at 236-37.

121. *Id.* at 236-37.

122. *Id.* at 234.

123. Isanga, *supra* note 93, at 236.

124. King, *supra* note 5, at 464-65.

125. *Id.*

126. *Id.*

a peremptory norm,” thus circumventing problems with treaty law that impede the full protection of girls’ rights:

International law, its shortcomings notwithstanding, may still prove to be the most effective strategy for elimination of systematic gender discrimination against girls if the right to gender equality is recognized as a *jus cogens*. Recognizing gender equality as a *jus cogens* norm will be advantageous for the promotion of girls’ human rights. By elevating gender equality to the level of a peremptory norm, the flaws of treaty law which prevent girls’ human rights from being fully protected, will be alleviated.¹²⁷

As discussed above, the move to conceptualizing women’s rights as human rights and thus utilizing more fully the existing human rights international law instruments is a promising approach. This notion was represented famously by Hillary Clinton in 1995 at the United Nations Fourth World Conference in Beijing:

“Human Rights are women’s rights - and women’s rights are human rights.” This was Hillary Rodham Clinton’s message at the 1995 United Nations Fourth World Conference on Women in Beijing (“Beijing Conference”). The quotation has become a catchphrase for international non-governmental organizations (“INGOs”) based in the Global North. Advocacy by INGOs to protect women’s interests almost exclusively relies on established human rights norms and binding legal covenants. For the most part, human rights discourse is and will likely continue to be effective in securing women’s interests internationally.¹²⁸

Importantly, in the event of a potential conflict between a human rights declaration on women’s rights and text in one of the Conventions mentioned above (the Convention, or the CRC, for example), universal human rights doctrines would take precedence, adding clout to this approach in overcoming potential obstacles.¹²⁹ This conflict would likely come in the form of the Convention and CRC’s approach of advancing a “special rights” interpretation of children’s rights—i.e., rendering children a special class afforded special rights, conflicting with this universal human rights approach to women’s

127. Askari, *supra* note 55, at 5.

128. Askari, *supra* note 55, at 5.

129. Renu Mandhane, *The Use of Human rights Discourse to Secure Women’s Interests: Critical Analysis of the Implications*, 10 MICH. J. GENDER & L. 275, 276 (2004).

rights.¹³⁰ As one author wonders, “Does the specific trump the general, as one canon of statutory interpretation in American law provides for in cases of conflicting statutes?”¹³¹ The argument continues:

Supporters of international adoption should therefore step back and away from these special children’s rights instruments and think about how more general human rights instruments apply to the plight of children who are living on streets or in orphanages in countries where there is little or no prospect for them to have a decent life in a permanent family. What seems to have escaped the notice of most scholars, diplomats, and advocates is that international and regional conventions conferring human rights on all persons can support arguments for state policies and practices more favorable to inter-country adoption. Nearly everyone’s instinct is to look at the special conventions relating to children and to look no further. Yet if a similar predicament arose for any adults, we would look to general human rights instruments with confidence that we would find in them an adequate basis for ascribing to those adults a right comparable to what adoption proponents seek for children.¹³²

In addition to better leveraging existing legal frameworks, some have suggested reforms to the current system in order to better advocate the rights of women and children in pursuit of improved international adoption outcomes. One suggestion is the replacement of the “best interests of the child” standard with one similar to that voiced by the “vulnerability movement” or with a standard of “human dignity.”¹³³ These standards would take into consideration the rights of individuals other than the prospective adoptee, such as the rights of the birth parents.¹³⁴

This becomes particularly salient in situations where financial considerations alone are pressuring the birth family to relinquish their child. This standard would entail the provision of social and financial support to birth families to enable them to raise their child within their care.¹³⁵ A dignity principle would also place responsibilities and

130. James D. Dwyer, *Inter-Country Adoption and the Special Rights Fallacy*, 35 U. PA. J. INT’L L. 189, 196 (2003).

131. *Id.* at 200-01.

132. *Id.* at 223.

133. *Id.* at 209.

134. Failingler, *supra* note 32, at 573-74.

135. *Id.* at 573-74; 589.

obligations upon the international community to help these parents raise their children, rather than simply sitting idly by for an influx of funds from a prospective adoptive family.¹³⁶

Conclusion

Until it is more fully regulated by international law, international adoption will continue to be a contested issue. The market for international adoptions today is inextricably linked to a field of human rights violations, potential for exploitation, and abuses. As it stands, there are many theoretical approaches advancing a fundamental shift in the discourse of human rights to something all encompassing. This is an ambitious goal and would require a universal agreement that is idealistic in the short term. The United States is in a position to make foreign policy changes that can have a sharp and immediate impact on international adoption rates.

The United States can advance several practical solutions through its foreign policy initiatives and should do so. Restoring funding to the family planning arm of USAID and terminating the Gag Rule are two practical causes that would help to restore the reproductive autonomy of women abroad and consequently curtail international adoption rates. The United States, independently and in its work through the United Nations, should advance the notion of women's rights and human rights and expand its efforts through international diplomacy, until such time that the international community is ready to re-conceptualize international adoptions.

136. *Id.* at 573-74.