Protecting Our Children or Our Pride - Regulating the Intercountry Adoption of American Children

Galit Avitan
Introduction

For decades, intercountry adoption has provided a favorable solution to the growing problem of children without families and families without...
children. As the popularity of intercountry adoption has grown, so has a commercial market vying to exploit the hopes of prospective parents and the vulnerabilities of parentless children. Over the last few decades, examples of black market transactions have been rampant, and even legal intercountry adoptions are often hampered by unforeseeable hurdles and delays.

In 1993, the Hague Conference on Private International Law produced a multilateral treaty, the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention" or "Convention") in order to streamline the process through which intercountry adoptions occur and provide protections to both prospective parents and children. States that ratify the Convention must follow the protocols and procedures prescribed by the Convention when overseeing intercountry adoptions that involve other Convention states. Because Americans adopt more children from other countries than do the citizens of any other country, the United States' implementation of the Convention is vital to the Convention's effectiveness. The United States has taken significant steps to implement the treaty. In 1994, the United States became a signatory to the Convention, and in 2000, Congress passed the Intercountry Adoption Act ("IAA") to begin implementing the Convention. The IAA designates the United States Department of State ("State Department") as the agency responsible for prescribing regulations that specify the United States' Convention duties.

As of April 2007, the State Department has finalized four regulations, bringing the United States many steps closer to implementing the Convention.

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2. See id. at 352 ("While increased willingness on the part of families to adopt internationally and growth in the number of facilitators may expand the opportunities for children to find permanent homes, these trends also exacerbate the risks of unethical or negligent adoption practices that are harmful to children and magnify the need for regulation . . .").
3. See Caeli Elizabeth Kimball, Student Article, Barriers to the Successful Implementation of the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 33 DENY. J. INT'L L. & POL'Y 561, 567 (2005) (recounting the kidnapping and selling of children from Honduras, Guatemala, and Romania); Blair, supra note 1, at 355-65 (recounting recently documented, illicit intercountry adoption practices in Cambodia). For a recent account of concerns over the intercountry adoption of Guatemalan children, see Marc Lacey, Guatemala System is Scrutinized as Americans Rush in to Adopt, N.Y. TIMES, Nov. 5, 2006, at 1.
4. This Note refers to a "legal adoption" as one that does not involve any black market practices: that is, an adoption of a truly adoptable child who is either an orphan or who was voluntarily relinquished by informed, consenting birth parents. State, federal, foreign, and international law all impose requirements that determine whether an intercountry adoption is "legal." See Richard R. Carlson, The Emerging Law of Intercountry Adoptions: An Analysis of the Hague Conference on Intercountry Adoption, 30 TULSA L.J. 243, 250-51 (1994).
5. See generally infra note 17 and accompanying text.
8. Id. § 14911(a) (designating the State Department as the "Central Authority").
Two of the regulations are particularly relevant to this Note: (i) Part 96 of Title 22 of the C.F.R. which implements the IAA's regulatory hierarchy, and (ii) Part 97 of the same Title which creates procedures for certifying that all incoming and outgoing adoptions are completed in accordance with Convention and IAA standards.

Like the IAA, these new regulations primarily regulate intercountry adoptions where the United States is the receiving country. A small but noteworthy section of the IAA, however, regulates the intercountry adoptions of U.S. born children by foreign parents. For this reason, each of the final regulations contains a small section that regulates outgoing cases.

Many professionals in the adoption industry are surprised to learn that American children are adopted by foreign parents. The final regulations, however, will affect a small but growing group of children. Limited reporting reveals that, for the most part, these children are African American infants and their white adoptive parents are from Canada and Europe. Their birth parents usually voluntarily relinquish their parental rights and choose to place their child with foreign adoptive parents.

To date, virtually all scholarly work on intercountry adoption has considered the United States as a receiving country, rather than a sending country. This is not surprising, because incoming cases account for a large percentage of the total adoptions made by Americans and of the total intercountry adoptions that take place globally. This Note, how-

10. See generally 22 C.F.R. § 96.12 (setting a system where only "accredited agencies and approved persons" can provide adoption services between two Convention countries and where agencies can only become accredited by an "accrediting entity").
11. 22 C.F.R. § 97.
12. See infra note 33 and accompanying text.
14. See id. at 12.
16. See Joan Hollinger, 2 ADOPTION LAW AND PRACTICE § 11.01 (citing State Department statistics) [hereinafter ALP].
17. See id. ("More foreign-born children enter the United States each year through intercountry adoption than are estimated to enter all other receiving countries combined."); Elizabeth Bernstein, Rules Set to Change on Foreign Adoptions, WALL ST. J., at D6, (Nov. 2, 2006) (reporting that Americans adopted 22,700 children from abroad); Hague Convention on Int'l Adoptions: Status and the Framework for Implementation (Nov.
ever, aims to provide a starting point for an equally important, though hitherto nonexistent, discussion on the United States as a sending country. 

At a general level, this Note explores the potential effects of the final regulations on the intercountry adoption of American children. At a specific level, this Note considers the regulations in conjunction with a case study of African American infants who have been placed with Canadian and European families for over a decade. Part I presents this case study in the context of the needs of African American children. Part II contextualizes the State Department regulations for outgoing cases by providing a brief development of the Hague Convention and by examining the IAA scheme for outgoing cases.

Part III analyzes the regulation provisions that apply to outgoing cases and concludes that the new regulations subject the intercountry adoptions of American children to grave uncertainty, increased costs, and long delays. To draw broader implications on the regulations' effect on outgoing cases, Part IV applies this analysis to the intercountry adoptions of African American children. This Part argues that, by prioritizing American adoptions over intercountry adoptions, the new regulations diminish American children's odds of finding permanent placement. In this respect, the new regulations run counter to federal laws and policies that aim to facilitate permanent placement for minority children who are the least likely to find domestic adoptive parents. Finally, Part IV offers a child-centered proposal that addresses concerns over delay and uncertainty while ensuring safe placements for American children.

I. The United States as a Sending Country: Intercountry Adoption of American Children

Despite the general lack of reliable adoption statistics, several facts in United States adoption trends are hard to dispute: first, more Americans are adopting from abroad than ever before; second, less American infants are available for domestic adoptions than in the past 30 years; and third, African American children, who are the hardest to place domestically, are being adopted by foreign parents. This Part aims to unravel the social and racial realities that account for these developments.

A. Social Trends Affecting Adoption Supply and Demand: Americans Looking Abroad

A number of social changes have dramatically affected the supply of and demand for adoptable children in the United States over the last 30 years. Because of increased access to abortion, fewer women are carrying

14, 2006) (statement of Rep. Christopher H. Smith) ("[O]ver the last decade the number of foreign children adopted annually by American citizens has doubled, from 11,340 to 22,739. It is worth noting, parenthetically, that in the United States there are more children adopted from abroad than all of the other countries of the world combined.") [hereinafter 2006 Panel I on Hague Implementation].
their babies to term before giving them up for adoption.\textsuperscript{18} Greater access to birth control has also resulted in fewer unwanted births.\textsuperscript{19} As the social stigma associated with single parenthood has declined, fewer unwed mothers are voluntarily relinquishing their babies to adoption agencies.\textsuperscript{20} When coupled with declining birth rates, these trends explain why fewer American infants are available for adoption than in previous decades.\textsuperscript{21} At the same time, American adults are continuing to consider adoption as a means of creating a family,\textsuperscript{22} especially as infertile couples consider alternatives to the emotional and financial costs associated with assisted reproductive technology.\textsuperscript{23}

While precise data on adoption is in limited supply,\textsuperscript{24} adoption professionals have observed two significant trends. First, prospective adoptive families prefer to adopt infants, and, accordingly, a child's likelihood for adoption decreases with age.\textsuperscript{25} Second, while the supply of available healthy infants has been decreasing, the demand for such children among prospective adoptive parents continues to increase.\textsuperscript{26}

A critical racial dimension to this supply and demand scheme explains why the United States sends children abroad for adoption while it remains

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\textsuperscript{18} ALP, supra note 16, at § 1.05[2][b].
\textsuperscript{19} See Solangel Maldonado, Discouraging Racial Preferences in Adoptions, 39 U.C. Davis L. Rev. 1415, 1431 n.70; ALP, supra note 16, at § 1.05[2][b] & n.4 & 13; Elizabeth Bartholet, International Adoption, 203 PLI/Crim, 9, 11, 16 (2005).
\textsuperscript{20} See Maldonado, supra note 19, at 1431, 1431 n. 71; ALP, supra note 16, at § 1.05 n.2 ("Since the mid-1990s, it is estimated that fewer than 2 percent of the millions of children born out-of-wedlock in the United States each year are voluntarily relinquished for adoption, regardless of their birth parents' race or ethnicity." (citing Anjani Chandra et al., Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States, National Center for Health Statistics, Advance Data no. 306, May 11, 1999)); ALP, supra note 16, at § 2.01 (noting a sharp decline in voluntary relinquishment of infants by out of wedlock children); Danielle Saba Donner, The Emerging Adoption Market: Child Welfare Agencies, Private Middlemen, and "Consumer" Remedies, 35 U. LOUISVILLE J. Fam. L. 473, 495 (1996).
\textsuperscript{22} See ALP, supra note 16, at § 1.05[2][b] ("As we approach the 21st century, there is little evidence that the numbers of infants, especially healthy infants, available for adoption will increase, but there is considerable evidence that, despite legal and financial barriers, the interest among married and unmarried individuals in adopting remains strong and may even be increasing."); Bartholet, supra note 19, at 13.
\textsuperscript{23} ALP, supra note 16, at § 1.05[2][b].
\textsuperscript{24} See id. at § 1.05[1][b] (describing the incompleteness of the limited large-scale reports on adoption in America, but noting that "it is nonetheless possible to use the data from these sources to make some educated guesses about the numbers and types of adoption that now take place").
\textsuperscript{25} See Elizabeth Bartholet, Adoption and the Parental Screening System, Families By Law 72, 72 (Naomi R. Cahn & Joan Hollinger eds., 2004) (recounting the desirability list of adoption screening systems, which places healthy infants on top).
\textsuperscript{26} See ALP, supra note 16, at § 1.05[2][b]; see also Bridget M. Hubing, Student Article, International Child Adoptions: Who Should Decide What is in the Best Interests of the Family?, 15 N.D.J.L. ETHICS & PUB. POL'Y 655, 659 (2001); 2006 Panel I on Hague Implementation, supra note 17, at 1.
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the world's largest receiving country. Most prospective adoptive parents in the United States are white and prefer to adopt healthy white infants.\(^{27}\) In fact, many involved in the adoption industry openly acknowledge the "adoption hierarchy" where "[b]lond, blue-eyed girls are at the top and African American boys are at the bottom."\(^ {28}\) Because of this adoption hierarchy, the very small pool of healthy, adoptable infants consists primarily of African American children.\(^ {29}\)

Adoption professionals agree that the number of African American children in need of permanent homes far surpasses the number of African American families willing or able to adopt.\(^ {30}\) Because African Americans often extend their homes to nephews, nieces, grandchildren or other extended family members, they are less likely to adopt children who are strangers. In such communities, where childrearing has traditionally extended beyond the nuclear family, the flexibility of a guardianship is preferred over a legally binding adoption.\(^ {31}\) Furthermore, the white professionals who dominate the adoption industry operate according to norms and assumptions that alienate some African American couples that decide to adopt from an agency.\(^ {32}\) Finally, it is very possible that prospective African American parents do not know that healthy African American infants are available for adoption. In fact many Americans, even those in the adoption industry, are surprised to learn that any healthy American infants are available for adoption.\(^ {33}\)

Certainly some white families in the United States adopt African

\(^{27}\) Maldonado, supra note 19, at 1423 n.36 (citing Elizabeth Bartholet, Family Bonds: Adoption, Infertility, and the New World of Child Production, (1993)); Jeff Katz, Listening to Parents: Overcoming Barriers to the Adoption of Children from Foster Care, Evan B. Donaldson Adoption Institute 9 (Mar. 2005) (noting that 51% of women seeking to adopt are white).

\(^{28}\) Gabrielle Glasser, Sending Black Babies North, Sunday Oregonian, July 4, 2004 (interview with Margaret Fleming of Adoption-Link); see also Dawn Davenport, Born in America, Adopted Abroad, Christian Monitor, Oct. 27, 2004, at 11 ("Although exceptions certainly exist, American parents generally prefer babies to toddlers, girls to boys, and Caucasians to African Americans, adoption professionals report. Other ethnicities fall in between, depending on their skin color. African-American boys are at the bottom of this 'ranking' system, they say, which is why they're harder to place.").

\(^{29}\) See Hubing, supra note 26, at 659 ("[T]he greatest desire is for healthy, white children; however, the number of preferred children available in the United States does not meet this demand.").

\(^{30}\) See Elizabeth Bartholet, Race Separatism in the Family: More on the Transracial Adoption Debate, 2 Duke J. Gender L. & Pol'y 99, 101 (1995) ("The problem is not that black adults are not adopting, but that there are so many black children in need of homes .... Blacks would have to adopt at many times to rate of whites to provide homes for all of the waiting black children."); 60 Minutes: Born in USA, Adopted in Canada (CBS television broadcast July 24, 2005) [hereinafter 60 Minutes].

\(^{31}\) See ALP, supra note 16, § 1.05[2][a], § 1.05[2][a] n.5.1.

\(^{32}\) See Katz, supra note 27, at 11 ("Even when adoption standards were not culturally insensitive ... most social workers dealing with adoption were white and ... these workers frequently used white, middle class norms ... to evaluate prospective parents.").

\(^{33}\) 60 Minutes, supra note 30 ("Many adoption professionals we talked to were shocked when they heard that the U.S. was, as they put it, 'exporting black babies.'").
American infants. However, interracial adoptions in this country have long been a subject of heated debate. Despite laws aimed to facilitate the adoption of African American children by parents of any race, white parents who adopt African American children continue to face negative social stigma. This stigma continues to deter white parents from adopting African American children despite their availability.

At the same time, and perhaps as a result, American couples are increasingly turning to intercountry adoption as a means to build a family. In 2006, for example, Americans adopted over 20,000 children from abroad, a number that reflects a 100 percent increase over the last 10 years. Many interrelated factors explain why prospective adoptive parents turn to intercountry adoption when healthy American babies are available in the United States. Given the delays and uncertainties associated with adopting a healthy white infant, those parents who are set on adopting a white child must look to countries where white children are in great supply, such as the Soviet republics. These couples are often motivated by a desire to adopt a child who resembles them so as to not stand out as adopt-


36. In 1972, the National Association of Black Social Workers ("NABSW") announced its vehement opposition to transracial adoptions, claiming that "[b]lack children in white homes are cut off from the healthy development of themselves as Black people" and terming this phenomenon a "particular form of genocide." Nat'l Ass'n of Black Social Workers, Preserving African-American Families, Position Paper (1972), quoted in Cynthia T. Mabry, "Love Alone is Not Enough!" in Transracial Adoptions—Scrutinizing Recent Statutes. Agency Policies, and Prospective Adoptive Parents, 42 WAYNE L. Rev. 1347, 1352-53 (1996). Almost immediately after these declarations, agencies "either established same race placement policies or used the NABSW report to justify existing race-matching policies." Id. at 1353; see also Maldonado, supra note 19, at 1467-68 (arguing that the legacy of social opposition and legal barriers to transracial adoptions is "still felt today, a decade after Congress prohibited federally funded agencies from considering race in adoptive placements").

37. See Maldonado, supra note 19, at 1455-56 ("Scholars have speculated that the NABSW's opposition to transracial adoption, along with agencies' race-matching policies, deterred prospective adoptive white parents from seeking African American children and turned them to international adoption."). But see Clemetson & Nixon, supra note 34 (noting recent increases in interracial adoptions).

38. See Maldonado, supra note 19, at 1456 ("[i]n the years following the NABSW's statement in 1971, the number of Americans adopting internationally increased almost 200%.").


40. See Davenport, supra note 28 (stating that in 2003, 37% of all intercountry adoptions were from countries where the majority of children are Caucasian); Donovan M. Stelzen, Note, Intercountry Adoption: Toward a Regime that Recognizes "Best Interest" of Parents, 35 CASE W. RES. J. INT'L L. 113, 118 (2003) (noting that major Eastern European sending countries such as Russia and Romania satisfy white Americans' demand for white children).
tive parents,\textsuperscript{41} and will pursue an intercountry adoption despite the grave risks involved.\textsuperscript{42} But this explanation oversimplifies the issue, because many prospective parents may be willing to adopt children of another race,\textsuperscript{43} and many intercountry adoptions are in fact transracial.\textsuperscript{44} Some families may be motivated by racial preferences that specifically exclude African American children.\textsuperscript{45} Still others may be inspired by extensive media coverage of appalling conditions in the orphanages of Third World countries and look abroad with humanitarian motives.\textsuperscript{46}

In addition, many prospective American parents are familiar with the bureaucracy and expenses that await them if they choose to adopt an American-born child. Many couples dread the prospect of spending large sums of money with American adoption agencies that may flood them with forms and keep them waiting up to eight years to receive a child.\textsuperscript{47} These agencies can give no assurances that a placement will finalize, and often the only available child is not an infant.\textsuperscript{48} Not surprisingly, many prospective parents believe that an intercountry adoption is more likely to provide them with a healthy baby and will be cheaper and faster than a domestic agency adoption.\textsuperscript{49} Even though some of these reasons rely on unsubstantiated assumptions,\textsuperscript{50} an increasing numbers of Americans are considering intercountry adoptions as their only means of obtaining a child.\textsuperscript{51}

\textsuperscript{41} See Davenport, supra note 28.

\textsuperscript{42} See Stelzner, supra note 40, at 128-132 (detailing the risks parents face when adopting children from Eastern Europe and the damaging physical and psychological affects that orphanages have had on these children).

\textsuperscript{43} See Katz, supra note 27, at 9 (citing an NSFG study finding that the "vast majority of adoption seekers reported they would consider adopting minority children. Of all women seeking to adopt, 79% reported they would accept a black child and 90% other non-white children.").

\textsuperscript{44} Maldonado, supra note 19, at 1427. However, Maldonado argues that, while white parents are willing to adopt transracially, they still prefer children of other races to African American children. Id. at 1423 ("Although most white Americans prefer to adopt white children, many are willing to accept Asian or Latin American children if they cannot adopt a white child... but rarely will [white parents] choose African American children, except as a last resort.").

\textsuperscript{45} See id. at 1467 ("[It is likely that Americans have implicit preferences for children from Asia and Latin America, who tend to be lighter-skinned than African American children.").

\textsuperscript{46} See Davenport, supra note 28 (attributing trans-national adoption partially to a "desire to help").

\textsuperscript{47} See ALP, supra note 16, § 1.05[3][a] (describing the numerous difficulties of adopting an American child).

\textsuperscript{48} See id.

\textsuperscript{49} See Maldonado, supra note 19, at 1435.

\textsuperscript{50} See generally id. at 1435-39 (demystifying the fictions that compel Americans to look abroad for healthy infants). Maldonado argues that African American infants are likely to be healthier than infants from abroad, id. at 1435 ("[m]ost foreign-born adoptee have 'at least one important medical condition'"), that international adoptions are much riskier than adoptions of American children, id. at 1442-44, and that international adoptions are not any more humanitarian than adoptions of African American children who are likely to languish in foster care, id. at 1452-53.

\textsuperscript{51} See Immigrant Visas Issued to Orphans Coming to U.S., supra note 39.
B. Demand from Abroad for American Children: Intercountry Adoption of African American Infants

The children most affected by Americans' shift towards intercountry adoption are African American children who are in the foster care system as a result of parental relinquishment or court intervention. The statistics on the overwhelmingly disproportionate number of African American children in the foster care system are consistent and undisputed. While African American children constitute 17 percent of the nation's youth, they make up 42 percent of children in foster care. In some large cities African American children make up more than 70 percent—and sometimes up to 95 percent—of the foster care population.

African American families are the most likely of any racial or ethnic group to be disrupted by child protection authorities, and they are the most likely to enter the child welfare system after being removed from their homes. Unfortunately, these children also have the smallest chance of being reunited with their parents and once they enter the foster care system, they remain there longer, are moved more often, and receive less desirable placement than white children. Scholars and practitioners recognize that, irrespective of age, African American children are several times less likely to be adopted than white children. One comprehensive study of California children in out-of-home placement concluded that African American children's adoption opportunities are "dramatically diminished" compared to white children, and their odds of being adopted can sometime be five times less than those of white children. Even though newborns are the most sought-after children by prospective parents, the same study found that "[a]n African American infant has nearly the same likelihood of being adopted as a Caucasian three- to five-year-old."

While healthy African American children at the most desirable infant stage cannot find permanent families in this country, prospective adoptive parents from abroad are turning to the United States to adopt. Very little has been written about the intercountry adoption of African American children, and, until recently, these adoptions have gone largely unnoticed.

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53. ROBERTS, supra note 52, at 8 n.11 (citing a 2002 U.S. Dep't of Health and Human Services Report).
54. See id. at 8 (referencing Illinois, San Francisco, Chicago, and New York).
55. See id. at 8, 13.
57. See ROBERTS, supra note 52, at 19; see also Zanita E. Fenton, Colorblind Must Not Mean Blind to the Realities Facing Black Children, 26 B.C. THIRD WORLD L.J. 81, 85-86 (2006).
58. Barth, supra note 56, at 298.
59. See id. at 296.
60. Id.
61. See Davenport, supra note 28 (terming these adoptions a "little known trend").
When it comes to intercountry adoption, both the media and academic scholars generally regard the United States as a receiving country. The media focuses on dramatic stories of impoverished foreign orphanages and celebrities who look abroad to fulfill a humanitarian longing, and academics analyze the legal and social trends that have led Americans to look abroad. As noted above, cases where the United States is a receiving country account for the majority of intercountry adoptions in the world. Such adoptions are easy to quantify because adoptive parents must acquire immigration visas for their adoptive children and federal immigration agencies keep a precise record of every such visa granted. These adoptions also leave a paper trail in the state court system because many adoptive parents seek to finalize the adoption of their foreign-born children in their state's court even if a foreign court approved the adoption.

By contrast, state courts are rarely involved when foreign parents adopt American children. Furthermore, no central system is in place to record the American children who emigrate to be adopted. Section 102(e) of the IAA requires the State Department to establish a Case Registry that maintains records of all intercountry adoptions—including outgoing, incoming, and non-Convention adoptions. Recognizing the challenges associated with documenting outgoing cases, the State Department has recently finalized a regulation that specifically aims to facilitate documentation of outgoing cases. However, while these measures are helpful, the

62. See, e.g., Daniel Engber, Madonna and Child, Africa Edition: How Do You Adopt a Child in the Developing World?, SLATE (Oct. 11, 2006), http://www.slate.com/id/2151356/ (recounting Madonna's adoption of a Malawian child); Bartholet, supra note 19 (recounting recent social and legal changes that have led to a rise in intercountry adoptions in the United States).


64. See ALP, supra note 16, § 11.04[7][a] (noting that "under current practice in most states, adoptive parents are advised to obtain a . . . formal recognition of the foreign adoption decree from their home State," usually by filing paperwork with the local court).

65. Telephone Interview with Douglas Chalke, Executive Director, Sunrise Adoption Centre (Oct. 26, 2006) [hereinafter Chalke Interview].

66. 42 U.S.C. § 14912 (e) (providing that the Secretary of State and Attorney General "establish a case registry of all adoptions involving immigration of children into the United States and emigration of children from the United States, regardless of whether the adoption occurs under the Convention").

67. See Hague Convention on Int'l Adoptions: Status and the Framework for Implementation 6 (Nov. 14, 2006) (statement of Catherine Barry) ("The IAA requirement to track outgoing countries presents a challenge. Such cases are now handled at the State level, and no information is now provided to the Federal Government."); Inter country Adoption—Reporting on Non-Convention and Convention Adoptions of Emigrating Children, 71 Fed. Reg. 54,001 (Mar. 6, 2007) (codified at 22 C.F.R. Pt. 99). The proposed rule 22 C.F.R. 99 read "[n]o regulation is being proposed at this time to establish reporting requirements in cases involving children immigrating to the United States (incoming cases), because sufficient information can be collected through other means, primarily the DHS petition process and the immigration visa and issuance process". 71 Fed. Reg. 54,001 (proposed Sept. 13, 2006).
current information gap will continue to widen until the United States ratifies the IAA.

While journalists have written a number of case-specific accounts of adoptions of American children, scholars have not conducted more thorough studies of these adoptions. However, when these specific stories are coupled with agencies and countries' adoption statistics, a more complete picture begins to unfold.

In 2005, the United States was the third largest supplier of infants to adoptive parents in Canada, up 29 percent from the previous year. The United States has sent over 250 children to Canada since 2003. Although the children's race is not recorded, it is likely that most of these children are African American, while most adopting families are white.

One Florida agency alone places 90 percent of its African American infants in Canada. Adoption-Link, an agency that specializes in the adoption of African American children, sends up to a third of its African American infants abroad. In 2005, this figure amounted to 12 children, accounting for 25 percent of all placements made by Adoption-Link that year. A 60 Minutes investigation revealed that nearly 300 families in British Columbia alone have adopted African American children from the United States, and that there may be as many as 500 American children being adopted by foreign families each year. An earlier estimate from the Hague Conference suggests the number is "a few hundred" a year. American agencies are placing African American infants with white parents from Canada, Germany, France, the Netherlands, Sweden, Switzerland, Belgium, England, Italy, Austria, and Peru.

Foreign prospective parents adopt from the United States primarily because they are likely to get an infant very soon after filling out their adoption forms. In the words of a German adoptive father, "if you want a newborn, you go to America." One Canadian adoptive mother looked to the United States as an option because she could not adopt in Canada as a single mother.

69. See id.
70. See Davenport, supra note 28.
71. See id. (referring to Shepherd Care in Hollywood, FL).
72. See id. (referring to Adoption-Link in Chicago); see also E-mail from Cheryl Kinnaird, Office Manager, Adoption-Link, to author (Oct. 25, 2006) (on file with author) [hereinafter Kinnaird E-Mail].
73. See Kinnaird E-Mail, supra note 72.
74. See 60 Minutes, supra note 30.
76. See Davenport, supra note 28; Glasser, supra note 28; 60 Minutes, supra note 30; Kinnaird E-Mail, supra note 72.
77. See Davenport, supra note 28; Glasser, supra note 28.
78. See Davenport, supra note 28.
79. See Glasser, supra note 28.
tion within weeks. Another couple in British Columbia received news of their first American adoptive son within two weeks of sending their paperwork. A few years later, they waited only three weeks for their adoptive daughter. A British Columbia agency states that, with regards to the intercountry adoptions it facilitates from the United States, "[m]ost of the babies are new born infants at the time of adoption. The children usually come home with adoptive parents directly from the hospital." Adoption-Link states that it can place African American babies when they are only days old. In 2005, of the 12 children Adoption-Link placed abroad, 11 were infants.

Most, if not all, of these adoptions result from the voluntary relinquishment of the birth parents. Because the scant documentation of these intercountry adoptions tends to focus on the children and their adoptive parents rather than the birth parents, we know little about the birth parents' motivation for relinquishing their child. Some studies suggest that mothers who voluntarily relinquish their infants are "those with the most to lose from becoming parents at that stage of their lives," such as those women who are steadily employed or are pursuing higher education. One Canadian practitioner believes that some African American mothers opt for these adoptions in order to get pre-natal care that is otherwise not affordable. Perhaps some mothers who are threatened by state social services intervention see voluntary relinquishment as a way to preempt state involvement and ensure stability for their child.

Why these birth parents choose to place their children abroad rather than in the United States is another matter. Some birth parents choose foreign families because they believe their child will experience less racism abroad than in the United States. Because European and Canadian agencies are becoming increasingly aware of America's supply of adoptable children, it is becoming easier for birth parents to place their children abroad.
babies, perhaps in some instances intercountry adoptions provide the speediest solution for a safe, permanent home.

American parents adopted over 20,000 foreign children in 2006. When compared with the number of incoming cases, outgoing cases account for a very small percentage of all the intercountry adoptions that involve Americans. This simple comparison, however, diminishes the significance of outgoing American adoptions. First, given the sharp decrease of infants available for adoption in the United States, these intercountry adoptions may well account for a significant percentage of all American infant adoptions. Second, as mentioned above, the exact number of these adoptions is unknown and may thus be grossly understated. Third, the number of U.S. born children who are placed in Canada—seemingly the single largest importer of children from the United States—has been steadily increasing. These developments suggest that America's policy towards outgoing cases may affect a growing number of children. Finally, as discussed more fully below, intercountry adoption is a potential solution for a group of children that face abysmal odds of finding a permanent home in the United States. For these children, however few, an intercountry adoption may be the most feasible solution for a permanent home.

II. U.S. Implementation of the Hague Convention

The State Department regulations that oversee outgoing American adoptions merely implement the requirements set out by the IAA and the Hague Convention. This Part will provide the background and relevant statutory provisions for each of these sources of law.

A. The Hague Convention: Unprecedented Endorsement for Intercountry Adoption

The United Nation's most significant statements regarding intercountry adoption are the 1987 Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children and the 1989 Convention on the Rights of the Child. Scholars nonetheless view these documents as either inconclusive or unnecessarily restrictive of intercountry adoption. Both embody the controversial "subsidiarity principle," which subordinates intercountry adoption to keeping a child in his home state, even when the only domestic alternatives might lead to indefinite foster care or

91. But see, e.g., Clemetson & Nixon, supra note 37.
94. See, e.g., Carlson, supra note 4, at 258.
institutional placement.\textsuperscript{95}

Due to much pressure from influential receiving countries such as the United States, the Hague Convention is more accepting of intercountry adoptions.\textsuperscript{96} The Convention, however, also makes intercountry adoption subsidiary to local adoption, stating that intercountry adoption “may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”\textsuperscript{97} Pursuant to this principle, an intercountry adoption can only take place after competent authorities in the state of origin give “due consideration” to the possibility of local placement,\textsuperscript{98} and only if a “suitable family” cannot be found in the state of origin.\textsuperscript{99} Compared to the U.N. approach, however, the Convention clearly represents an unparalleled endorsement of intercountry adoption.\textsuperscript{100}

As a major receiving country the United States was very enthusiastic about the Hague Convention’s endorsement of intercountry adoption.\textsuperscript{101} In fact, U.S. delegates to the Convention argued that intercountry placement could often be in the best interests of American children.\textsuperscript{102} Despite the wholehearted enthusiasm U.S. delegates may have expressed for all intercountry adoptions, when it came time for the United States to implement a policy for outgoing cases, Congress drafted a statute that impedes the intercountry adoption of American children.

B. The IAA and Outgoing Cases: Implementation of Due Diligence

With respect to incoming cases, the IAA embodies the Convention’s pro-adoption spirit. The IAA’s main objectives are to implement the Convention, to ensure intercountry adoptions are in the children’s best interest, and to improve the Federal Government’s ability to assist both incoming and outgoing cases.\textsuperscript{103} A substantial portion of the IAA establishes a complex, hierarchical accreditation and accountability system with the State

\textsuperscript{95} See id. at 260; Isabelle Lammerant, Assistant Coordinator of IRC/ISS, Ethics and International Adoption, Opening Address at the Conference on International Adoption (May 4, 2004), available at http://www.adoption.gouv.qc.ca (last visited Feb. 2, 2007) (“The Convention on the Rights of the Child specifically states . . . the subsidiarity of national adoption with respect to maintaining or re-integrating the child in his original family [and] the (double) subsidiarity of international adoption, with respect to maintaining or re-integrating the child in the original family, on the one hand, and to national adoption, on the other hand.”).

\textsuperscript{96} See Carlson, supra note 4, at 264 (“Together with the endorsement of intercountry adoption, [the Convention’s] provisions constitute a clear rebuttal of restrictive interpretations of the earlier U.N. Documents.”).

\textsuperscript{97} Hague Convention pmbl. (emphasis added); see also Elizabeth Bartholet, International Adoption: Current Status and Future Prospects, 3 THE FUTURE OF CHILDREN 89, 94 (1993) (arguing that a late draft of the Convention "endors[ed] the 'subsidiarity' principle . . . [by] permitting international adoption only as a last resort, after possibilities for in-country care have been exhausted").

\textsuperscript{98} Hague Convention, Chapter II, Art. 4 (b).

\textsuperscript{99} Hague Convention pmbl.

\textsuperscript{100} See Carlson, supra note 4, at 264.

\textsuperscript{101} See id. at 256.

\textsuperscript{102} See id. at 256 n.47.

\textsuperscript{103} 42 U.S.C. § 14901(b).
Department as overseer. In February of 2006, the State Department issued Final Rule 22 C.F.R. Part 96, which establishes the regulatory framework for the accreditation and approval of any entity that facilitates an intercountry adoption between the United States and another Convention state ("Convention adoption").

Pursuant to U.S. policy on implementation of international treaties, the United States will not fully implement the Convention until it is able to carry out its obligations under the treaty. As of this writing, the State Department, as the agency responsible for prescribing the regulations necessary to implement the IAA, has finalized four regulations and continues to solicit comments for several more. After the State Department finalizes all of its regulations and the United States ratifies the Convention, all American actors providing Convention adoption services must comply with the regulations within the allotted timeframe.

The IAA provision most relevant to this Note is Section 303, "Adoption of Children Emigrating from the United States," which regulates outgoing cases. Section 303(b) vests state courts with jurisdiction over outgoing intercountry adoptions. According to section 303 and the corresponding regulations, the parties to an intercountry adoption—usually the adoptive parents, their lawyer, or the American agency acting on their behalf—must first apply to the appropriate state court to obtain verification that the adoption is Hague-compliant. The state court provides such verification by either finalizing the adoption or granting custody for the purpose of a Convention adoption. Only then can the parties apply to the State Department for either a "Hague Adoption Certificate" ("HAC") or a "Hague Custody Declaration" ("HCD"). Without such certification, the Convention does not require the adoptive parents' country of origin to recognize the adoption. The State Department will only issue such an "official certification" after it has concluded that the state court has finalized the child's adoption, or has granted custody for the purpose of an

104. In short, the State Department enters into agreements with "accrediting entities," which in turn are responsible for accrediting agencies that wish to perform "adoption services" in a "Convention adoption," and for monitoring the continued compliance of such "accredited agencies." The IAA defines each of these terms in 42 U.S.C. § 14902.
106. 42 U.S.C. § 14911(c).
107. 42 U.S.C. § 14932.
109. The IAA defines "adoptions services" in section three. 42 U.S.C. § 14902(3).
110. This timeframe is 30-90 days after ratification, depending on the regulation. Compare 22 C.F.R. § 96 (30 days) with 22 C.F.R. § 97 (90 days).
112. Id. § 14932(b).
113. See, e.g., 71 Fed. Reg. 64,453 (Responses to Comments 6 & 7).
114. § 14932(b).
115. See 71 Fed. Reg. 64,453 (Response to Comment 7).
116. See Hague Convention, art. 23(1) ("An adoption certified by the competent authority of the State of the adoption as having been made in accordance with the Convention shall be recognized by operation of law in the other Contracting States.").
adoption, in accordance with the Convention, the IAA, and the regulations.\textsuperscript{117}

The State Department is likely to give great deference to the state court's findings because it is the state court that actually considers the specific circumstances of each case. The state court must review a background study of the child, a home study of the prospective parents, and proof that the receiving country will allow the child to reside there permanently.\textsuperscript{118} The court must also determine that the intercountry adoption "is in the best interest of the child."\textsuperscript{119} Lastly, the court must consider the adoption in light of the subsidiarity principle. The IAA implements the Convention's "due consideration" standard by placing an affirmative duty on the agencies to make "reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States . . . in a timely manner."\textsuperscript{120} The state court cannot finalize the adoption or grant custody unless the court is satisfied that the agency made such efforts to find American parents.\textsuperscript{121}

### III. The Final Regulations: Implementation of the Reasonable Efforts Standard

Once the United States implements the Convention, any American agency that provides adoption services for an intercountry adoption must comply with all Convention, IAA, and State Department requirements. We will not know the full effect of the Convention in the United States until years after it is fully implemented. As of this writing, very little has been written about the new regulations,\textsuperscript{122} though agency workers, scholars, and practitioners have expressed uncertainty and apprehension over the new regulations' implementation.\textsuperscript{123} While most experts agree that imple-

\begin{footnotes}
\textsuperscript{117} 42 U.S.C. \textsection 14932(c); 22 C.F.R. \textsection\textsection 97.2, 97.3.
\textsuperscript{118} 42 U.S.C. \textsection 14932(a), (b). The parents' background report includes a criminal background check. See 42 U.S.C. \textsection 14932(a)(2). The child's background study includes information on the biological parents' consent and on the child's special needs, if any. See generally 22 C.F.R. \textsection 96.53 (enumerating the background study requirements). These requirements directly comply with the Hague Convention and are probably the least controversial aspect of the IAA. See Mary Eschelbach Hansen & Daniel Pollack, The Regulation of Intercountry Adoption, 45 \textit{Brandeis L.J.} 105, 115-16 (2006).
\textsuperscript{119} 42 U.S.C. \textsection 14932(b).
\textsuperscript{120} Id. \textsection 14932(a)(1)(B)(i), (ii).
\textsuperscript{121} Id. \textsection 14932(b).
\textsuperscript{122} Recent publications on the regulations include one scholarly article, Hansen & Pollack, supra note 118, and publications by adoption interest groups. See, e.g., Ethica, Comments on the Final Regulations Implementing the Hague Adoption Convention (March 2006), http://www.ethicanet.org/HagueRegComments.pdf (last visited Feb. 2, 2007).
\textsuperscript{123} See Bernstein, supra note 17 (recounting general nervousness in the adoption industry over effects of implementation); Ethica, supra note 122; Chalke Interview supra note 65; Kahn Interview, supra note 88; Kinnaird E-Mail, supra note 72. For example, under the IAA, an accrediting entity must accredit all agencies providing adoption services. 42 U.S.C. \textsection 14921(a). It remains unclear how many agencies that currently provide services for intercountry adoptions will attempt to undergo the accreditation process. As of April of 2007, the State Department has approved two Accrediting Entities, the Council on Accreditation ("COA") and Colorado's Department of Human Ser-
menting the IAA will heighten the overall cost and delay of intercountry adoption in the short term,\textsuperscript{124} the rules' long-term effects on the cost, quality and speed of intercountry adoptions remain unknown. This Part addresses specific concerns over outgoing cases.

A. Section 96.54(a): Four Recruitment Procedures

The IAA and the corresponding State Department regulations mandate that agencies make "sufficient reasonable efforts" to find a placement in the United States before they can place an American child abroad.\textsuperscript{125}

Section 96.54(a) ("subsection (a)") interprets the reasonable efforts standard to require an adoption agency to undergo four recruitment procedures aimed at passing information about a child's availability to prospective adoptive parents in the United States. The procedures are: (i) dissemination of information on the child and her availability for adoption through print, media, and internet resources designed to communicate with prospective adoptive parents in the United States; (ii) listing information about the child on a national or state adoption exchange for at least sixty days after the birth of the child;\textsuperscript{126} (iii) responding to inquiries about adoption of the child; and (iv) providing a copy of the child's background study to potential American prospective parents.\textsuperscript{127} Part 97 of the Code of Federal Regulations, which enumerates the State Department's certification procedures, reaffirms this requirement: "[r]easonable efforts pursuant to 22 C.F.R. 96.54 must be made to actively recruit and make a diligent search for prospective adoptive parent(s) to adopt the child in the United States. . . ."\textsuperscript{128}

Before a state court can finalize a Convention adoption or grant custody to the foreign adoptive parents, the agency placing the child must demonstrate that it made reasonable efforts to find a "timely and qualified adoptive placement for the child in the United States."\textsuperscript{129} The IAA further specifies that the agency must furnish the state court with documentation of its reasonable efforts.\textsuperscript{130} Because the agency must comply with the IAA requirements in addition to those specified in the regulations, it follows that the agency must (i) make the required reasonable efforts, (ii) prove to a state court that it made such efforts, and (iii) provide documentation of its efforts.

As the Convention is not yet in effect, state courts are usually not

\textsuperscript{124} See Bernstein, supra note 17; Hansen & Pollack, supra note 118, at 106, 120.
\textsuperscript{125} 22 C.F.R. § 96.54(b).
\textsuperscript{126} The State Department expanded this time limit from 30 to 60 days in response to comments on the proposed rule. See 71 Fed. Reg. 8,112.
\textsuperscript{127} Id. § 96.54(a)(1-4).
\textsuperscript{128} Id. § 97.3(c) (emphasis added).
\textsuperscript{129} Id. § 96.54(b).
\textsuperscript{130} 42 U.S.C. § 14932(a)(2).
involved in the outgoing placement of American children.\textsuperscript{131} Rather, the adoption agency involved and the receiving country determine whether a placement is in the best interest of a child. Undoubtedly, the IAA's requirement that all outgoing cases receive final approval from state courts will heighten costs and cause delays. An agency must spend time and money to file petitions and appear before court to prove that it made reasonable efforts to place the child in the United States and that despite these efforts, a placement outside the United States is in the best interest of a child. Not only must the agency employ or contract with an attorney to appear in court on its behalf, it must also provide placement for the child while this process is ongoing.

Because an agency will need to meet the recruitment requirements to the satisfaction of a state judge,\textsuperscript{132} the agency will need to keep a detailed record of all of the steps it takes to fulfill the requirements. The agency will also be required to disseminate information through three media,\textsuperscript{133} whereas it may currently use only one or two. Finally, because an agency will need to list the child's information for at least sixty days, it will have to find a temporary placement for a child that it could otherwise have placed with foreign adoptive parents at birth.

Even under the best of circumstances, appearing before court is likely to raise fees and prolong the adoption process. An intercountry adoption from the United States already costs Canadian adoptive parents much more than an adoption from their own province within Canada. Canadian parents adopting an American child currently pay about $10,000-25,000,\textsuperscript{134} as opposed to about $8,000 for a domestic adoption.\textsuperscript{135} Europeans and especially Canadians are willing to pay these prices because these adoptions afford them so many benefits: the process is relatively quick, the child is healthy and very young, and placement is almost certain. Once the adoption process necessitates state court intervention, the high costs, delays, and uncertainties associated with any court proceeding are sure to dissuade some foreign prospective parents from adopting a child from the United States.

\textsuperscript{131} Except in Illinois and Florida. See Chalke Interview, supra note 65.
\textsuperscript{133} 22 C.F.R. § 96.54(a)(1)-(4) (2006). An agency must disseminate information on a child's adoption availability through "print, media and internet resources" by "listing information about the child on a national or State adoption exchange or registry ... [by r]esponding to inquiries about adoption of the child ... [and by p]roviding a copy of the child background study to potential U.S. prospective adoptive parent(s)." Id.
\textsuperscript{134} See Kahn Interview, supra note 88 (estimating costs at $25,000); 60 Minutes, supra note 30 ($10,000).
B. The Great Exception

1. Broad Exception Defined

The recruiting procedures enumerated in section 96.54(a) are subject to two exceptions, both seemingly broad enough to obviate the entire recruitment scheme. The first exception refers to open adoption cases—that is, cases in which the birth parent(s) have identified the specific adoptive parents ("birth parent exception"). The second exception refers to "other special circumstances" as identified by the state court having jurisdiction. Because the regulations do not attempt to define these special circumstances, and because the birth parent exception directly relates to the intercountry adoptions of African American children, this Note is primarily concerned with the latter exception.

As discussed in Part I.B above, most intercountry adoptions of African American children are open adoptions, and as such seem to fall squarely within the birth parent exception. In fact, according to Douglas Chalke, a Canadian practitioner who has been instrumental in educating the State Department on the intercountry adoptions of U.S. children by Canadians, the exception was included precisely in order to insulate such adoptions from the burdensome procedures enumerated in subsection (a). The Hague Convention, Mr. Chalke explains, did not aim to protect children involved in adoptions between two developed countries. He argues, therefore, that the regulations should not hinder those open intercountry adoptions that are currently completed with relative ease and speed.

2. Exception Deflated

Unfortunately, however, both the regulations and the comments preceding the rules suggest that the "reasonable efforts" test exists independently of subsections (a)'s recruitment procedures, and thus the reasonable efforts test may apply even to cases falling under the birth parent exception. Under section 96.54(b) ("subsection (b)"), an agency must demonstrate that it made "sufficient reasonable efforts" to find placement in the United States in all cases except when making no efforts is "in the best interests of the child." The rule, however, leaves the relationship between subsections (a) and (b) unclear. There is nothing in subsection (a) about the "best interest of the child," and there is nothing in subsection (b) about the birth parent exception. This conundrum begs the question of whether the "best interest of the child" exception encompasses the birth parent exception or whether the two exceptions are unrelated, though sometimes overlapping.

136. 22 C.F.R. § 96.54(a).
137. Id.
138. See Chalke Interview, supra note 65.
139. Id.
140. Id.
141. 22 C.F.R. § 96.54(b).
The following chart illustrates the possible interactions of the two subsections:

<table>
<thead>
<tr>
<th>Birth parent identifies adoptive parents (subsection (a) exception)</th>
<th>Subsections (a) &amp; (b) overlap: no reasonable efforts are necessary and adoption is approved</th>
<th>Are reasonable efforts necessary?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Birth parent has not identified adoptive parent</td>
<td>Are reasonable efforts necessary?</td>
<td>Reasonable efforts required</td>
</tr>
</tbody>
</table>

What are we to make of the two question-marked areas? That is, are reasonable efforts required even in cases that fall within only one exception? If so, how are those efforts related to the four enumerated recruitment procedures?

The comments to section 96.54 provide some initial insight. In response to several comments to the proposed rule, the State Department changed the regulation to “clarify, in [subsection (b)], that the standard does not, in fact, provide an exception to the ‘reasonable efforts’ rule; rather, it provides exceptions to the prospective adoptive parent recruiting procedures set forth in 96.54(a)-(d), thereby recognizing that in some cases, ‘reasonable efforts can include no efforts at all, if no efforts are in the child’s best interest.”

This enigmatic comment warrants several observations. First, “the standard” that is the main subject of the entire comment, probably refers to “placement standard,” after the title of section 96.54. Second, the comment clearly treats “reasonable efforts” and “recruiting procedures” as two separate requirements. Some cases (the subsection (a) birth parent exception) will be exempt from the recruitment procedures, but the comment emphasizes that there are no exceptions to the reasonable efforts test. The comment does not clarify, however, the relationship between the recruitment procedures and the “reasonable efforts” requirement.

Moreover, the emphatic language of the IAA suggests that all outgoing cases—including those falling within the subsection (a) exception—are subject to the reasonable efforts requirement. The IAA states that the agency is to make “reasonable efforts to actively recruit and make a diligent search for prospective adoptive parents to adopt the child in the United States.”

There is no implication anywhere in the IAA for an unqualified exemption from this requirement.

Section 96.54 elicited so much confusion that, while the State Department was soliciting comments to Part 97, several commentators requested

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143. Placement Standards in Outgoing Cases, 22 C.F.R. § 96.54.
144. 71 Fed. Reg. 8,113 (Response to Comment 11) (“the standard does not, in fact, provide an exception to the ‘reasonable efforts’ rule”).
an exception to "the reasonable efforts" requirement in § 97.3(c) for cases where the birthparents directly identify prospective parents outside the United States.\textsuperscript{146} Instead of clarifying the issue, the State Department's response referred the commentators back to the same source of confusion: "[t]his provision cross-references 22 C.F.R. 96.54(a), which \textit{specifically} excludes from the reasonable efforts requirement cases in which the birthparent(s) have identified specific prospective adoptive parents."\textsuperscript{147} And yet, the very comments cited above state that the standard does not provide exceptions to the "reasonable efforts" rule.\textsuperscript{148} So which is it?

The final rule does not identify the term "recruitment procedures," and the comments, of course, have no precedential value. Some state judges facing an intercountry adoption where the birth parents have identified foreign prospective parents will probably read the subsection (a) exceptions as conclusive and find that no reasonable efforts are necessary. While section 96.54(c) requires an agency to give "significant weight" to a birth parent's placement preference,\textsuperscript{149} it does not require the same of state courts. Therefore, taken as a whole, section 96.54 enables judges to determine that, in some cases falling within the birth parent exception, the interest of the child is best served by requiring the agency to recruit American parents. In such cases, the regulations authorize the court to compel recruitment despite the immediate availability of a foreign family and despite the birth parent's express desire to place the child with a particular family. This possibility will leave agencies guessing whether or not to make reasonable efforts for any given case before appearing in court.

Unfortunately, as will be discussed below, the regulations encourage agencies to resolve their doubts in favor of making reasonable efforts, thereby exposing all outgoing cases to prolonged delays.\textsuperscript{150} In so doing, the regulations contravene both "socio-cultural and constitutional traditions that honor parental decisions about what is best for a child,"\textsuperscript{151} as well as federal statutes that aim to facilitate the speedy adoption of minority children.

IV. Mandated Delay—Grave Consequences for Outgoing Cases in General and Adoptable African American Infants in Particular

Because cases involving the intercountry adoption of American children have not been thoroughly researched or documented, it is very likely

\begin{footnotesize}
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\item \textsuperscript{146} 71 Fed. Reg. 64,454.
\item \textsuperscript{147} \textit{Id.} (emphasis added).
\item \textsuperscript{148} 71 Fed. Reg. 8,113 (Response to Comment 11).
\item \textsuperscript{149} 22 C.F.R. § 96.54(c).
\item \textsuperscript{150} See infra Part IV.A for a discussion of the grave problems associated with long delays.
\item \textsuperscript{151} Joan Heifetz Hollinger, \textit{Adoption and Aspiration: The Uniform Adoption Act, the Deboer-Schmidt Case, and the American Quest for the Ideal Family}, 2 DUKE J. GENDER L. & POL'Y 15, 21 (1995) (referring to the Uniform Adoption Act of 1994, which requires a birth parent who makes a direct placement to select the prospective adoptive parents).
\end{itemize}
\end{footnotesize}
that some—even if very few—cases will involve children whose parents did not identify adoptive parents. For such cases, agencies will have no choice but to undergo the recruitment procedures detailed in subsection (a) and delay placement. As discussed above, the regulations also authorize state courts to superimpose the reasonable efforts standard over cases falling within the birth parent exception. In light of the statistics cited in Part I.B above, the possibility that some American children’s placement will be subject to mandatory delay is not only bad policy, but also runs counter to several federal child welfare laws. The sections below explore the harmful agency practices that prompted legal change and offer an alternative to the State Department’s implementation of the subsidiarity principle.

A. Grave History Lesson of Mandated Delays

The most problematic “recruitment effort” is found in section 96.54(a)(2), which places a minimum time limit on the agency’s efforts to find permanent placement in the United States.\(^{152}\) While the proposed draft of section 96.54 allotted a time period of thirty days, the State Department yielded to several commentators’ requests by increasing the period to 60 days to “ensure that reasonable efforts are taken to place the child within the United States.”\(^{153}\) The writers of the final regulation explain that a 60-day requirement would not “unduly delay[] an intercountry adoption,” and is “sufficiently short to avoid harming a child.”\(^{154}\)

Past race-matching laws and practices reveal that prescribing any minimum time period during which an agency must recruit certain types of prospective parents leads to prolonged delays that jeopardize the child’s chance of placement.\(^{155}\) In the heyday of the race-matching days,\(^{156}\) several states had laws that prescribed a time period within which agencies had to search for adoptive parents of the child’s race before a transracial adoption could take place.\(^{157}\) The California Family Code stated, for example, that a “child is free for adoption with a family of a different racial background” only if placement with an adoptive family with the same racial background could not be made within 90 days from the time the

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152. 22 C.F.R. § 96.54(a)(2) (requiring an agency to “list[ ] information about the child on a national or State adoption exchange or registry for at least calendar sixty days”) (emphasis added).
154. Id.
155. See, e.g., Jenifer Mullins, Note, Transracial Adoptions in California: Serving the Best Interests of the Child or Equal Protection Violation?, 17 J. JUVENILE L. 107, 108 (1996) (describing the requirement in California that parents of a different race may adopt a child only if the adoption agency has unsuccessfully searched for same-race parents for 90 days).
156. The “race-matching days” refers to a period where agencies used racial categories to delay or deny placement between parents and children who were not of the same race. See generally Joan Hollinger, A GUIDE TO THE MULTIENTHIC PLACEMENT ACT OF 1994 4-7 (ABA 1998) (describing agency race-matching practices before the Multiethnic Placement Act) [hereinafter MEPA Guide].
157. See id. at 4; Bartholet, supra note 35, at 1189 (discussing California specifically).
child was legally adoptable. In practice, however, agencies acted according to their own internal policies, and often took longer than 90 days to find same-race parents by delaying the parental termination procedure that would deem the child legally adoptable. In states without time-specific requirements, agencies delayed transracial adoptions because they felt compelled to exhaust all other options before placing a child in a transracial adoption.

During their search for same-race parents, many agencies held minority children in foster care or institutional care for significant periods of time if no same-race adoptive family was immediately available. The resulting delay greatly diminished these children's chances of finding a permanent family. As months and years went by, these children were "pushed deeper into the hard-to-place category, as they get older and accumulate what are often damaging experiences in foster care."

Even though these race-matching practices are illegal today, their harmful effect may still resonate in the placement of outgoing American children. The regulations only hold an agency accountable for its negligence in actively recruiting American parents when it appears before a court in order to finalize an adoption. The current scheme provides no mechanism for the court to intervene and chastise an agency for failing to find timely placement for these children. The question remains whether the same agencies that disregarded children's needs in the past could now be trusted to prioritize children's interests. So long as an agency can claim that it is still actively recruiting American parents, no mechanism exists to motivate—let alone penalize—an agency that is lagging behind in its placement efforts.

Unfortunately, the IAA and the regulations will encourage agencies to resolve doubts in favor of prolonging their reasonable efforts at the expense of timely placement. The regulations mandate that reasonable efforts take

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158. CAL. FAM. CODE. § 222.35 (1991) (repealed 1994); see also Mullins, supra note 155, at 115 (arguing that California's statutory scheme, as it existed in 1996, "cause[d] unnecessary delays as well as discourag[e]d potential adoptive parents from attempting to adopt a child that does not share their race").

159. See Bartheol, supra note 35, at 1193-94.
160. See id. at 1195.
161. See id. at 1193.
162. See id. at 1203 ("Current racial matching policies stand in the way of... homes for minority children. Moreover, the reason that so many of the waiting Black children are older is in part because matching policies have kept them on hold.").
163. See id. at 1204.
164. See discussion infra Part IV.B.
165. The International Social Service Organization ("ISS"), an international nonprofit, has documented several harmful practices that states have adopted to endorse the subsidiarity principle. Among these is the practice of prescribing minimal time periods before which an international adoption cannot take place. ISS warns that such practices are especially detrimental to children who "have little chance to find a national family." International Social Service, Evaluation of the Practical Operation of the Hague Convention § 2(2) (2005), http://www.hcch.net/upload/adop2005_iss.pdf (last visited Apr. 18, 2007).
166. See 22 C.F.R. § 96.54(b).
at least 60 days, but they do not set a maximum time period. The only restriction on the agency is that placement in the United States be “timely and qualified.” Unlike the provision that provides a minimum time limit for the agency’s search, the regulations provide no equivalent outer limit for timeliness. While the regulations require an agency to prove in court that it made “sufficient reasonable efforts” to undergo the mandatory recruitment procedures for American parents, nothing in the regulations or the IAA proscribe a simultaneous obligation on the agency to find interested foreign parents. This imbalanced emphasis on reasonable efforts within the United States is evident in the IAA’s mandate that only “despite such efforts” can an intercountry adoption proceed. As agencies consider whether to continue their recruitment efforts—even beyond the 60 days—or to facilitate an intercountry adoption, they are likely to proceed with the safer course.

Furthermore, by placing such heavy emphasis on the reasonable efforts requirement, the regulations insulate agencies from scrutiny. Under the regulations, all accredited agencies are subject to several layers of supervision, but those responsible for supervising the agencies will be cognizant of the IAA and the regulations’ emphasis on reasonable efforts. Agencies that are lagging in their recruitment efforts will be able to use the great weight that the regulations place on reasonable efforts to insulate themselves from accusations of neglect. In the race-matching days, where agencies were similarly mandated to recruit same-race parents, when an agency was not engaged in active minority recruitment, “years may go by while the agency waits for a same-race family.” Even once the minimum time period for same-race placement passed, agencies often made no effort to look for white families for waiting minority children. Similarly, the regulations do not give agencies any incentive to recruit families from abroad, and instead emphasize only the recruitment of American families even if foreign parents are ready and willing to adopt.

Finally, in those outgoing cases where a birth parent does not identify prospective parents, agencies are almost certain to recruit American parents and delay placement before going to court. Under subsection (b), a court could arguably find that reasonable efforts would not be in the best interest of the child in a case where the birth parent exception does not apply. However, an agency must decide whether to make reasonable efforts before it comes to court. Because the regulations encourage agencies to undergo the mandated delay, a court’s after-the-fact court determi-

167. Id.
168. 22 C.F.R. § 96.54(b).
170. See generally 22 C.F.R. § 96.1 (referring to supervisory responsibilities of the State Department, Accrediting Entities, and primary providers); 71 Fed. Reg. 8,066 (explaining evaluation process for accrediting entities and primary providers).
171. See Bartholet, supra note 35, at 1203.
172. See id. at 1205.
173. See supra Part III.B.2 for the chart which illustrates the possible interactions of subsections (a) and (b).
nation that reasonable efforts are not required would not help a child whose placement has already been delayed.

With regards to the race-matching delays, one scholar noted that "[d]elay puts the child at risk of yet more delay and, ultimately, the denial of placement altogether." The same results are likely to occur under the current regulatory scheme. Not only will a series of delays significantly harm the child’s chances of finding permanent placement, research on children’s development suggests that the disruption resulting from delay increases the likelihood that the child will suffer developmental harm. As the agency searches for a placement in the United States, it must place the child in a temporary housing situation, such as foster care. Prominent studies show that, for young children, “any change in routine leads to food refusals, digestive upsets, sleeping difficulties, and crying.” Even at the infant stage such disruption can affect the child’s emotional development. The disruption is even more harmful when an infant is displaced, as from fostering to adoption.

B. Conflicting Goals for the Same Children: The Regulations’ Tension with Federal Law

The disproportionate presence of minority children in foster care led Congress to abolish race-matching practices through the Multiethnic Placement Act of 1994 (“MEPA”). MEPA intended to decrease the length of time that children wait to be adopted and eliminate discrimination on the basis of the race, color, or national origin of the child or the prospective parent. MEPA forbids agencies that receive federal funds from delaying or denying an adoptive placement based on the child’s or the prospective parent’s race, color, or national origin. Under a 1996 amendment to MEPA, agencies may not even “routinely consider” these factors when placing a child.

For outgoing intercountry adoptions, however, the State Department regulations require adoption agencies to consider the prospective parents' national origin, and direct agencies to delay placement on this basis for a specified amount of time. Whereas agencies previously jeopardized these children’s chances for permanent placement by matching according to prospective parents’ race, the final regulations jeopardize these children’s chances by matching according to prospective parents’ national origin. Thus, the regulations not only directly contradict MEPA’s prohibition on placement delays, but as to the intercountry adoption of African American

174. See Bartholet, supra note 35, at 1204.
175. MEPA Guide, supra note 156, at 5.
177. Id.
178. Id.
179. MEPA was signed into law as part of the Improving America’s School Act of 1994, 20 U.S.C. § 6301.
181. Id.
children, they also undermine MEPA's objective of curbing the placement delays of minority children.

The regulations also undermine the goal of the Adoption and Safe Families Act of 1997 ("ASFA"), which was to "promote the adoption of children in foster care."182 ASFA's emphasis on permanency is of great relevance to African American children who have been voluntarily relinquished by their parents and for whom adoption is the only route to a permanent placement.183 Section 101 of ASFA states that "if continuation of reasonable efforts [to reunify the family] is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner . . . and to complete whatever steps are necessary to finalize the permanent placement of the child."184 Under ASFA's "concurrent planning" model, reasonable efforts to reunify a children with his or her parents should occur concurrently with efforts to find a permanent adoptive home for the child.185

As part of its focus on permanency, ASFA establishes swifter timetables for terminating parental rights and creates incentives for states to facilitate more adoptions.186 Furthermore, Section 107 mandates that an adoption agency provide documentation of the steps it is taking "to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family . . . and to finalize the adoption."187 At a minimum, an agency's documentation must include "child specific recruitment efforts."188

African American children whose parents have voluntarily relinquished their parental rights are the uncontroverted, ideal recipients of ASFA's emphasis on adoption. These children already face great odds against finding permanent families, and adoption is their only solution. The delays built into the State Department regulations directly oppose


183. ASFA's emphasis on promoting permanency has been termed a "one-sided solution" by those who believe that unconstructive family preservation and reunification services were the real sources of the child welfare system's failure. See Will L. Crossley, Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation, 12 B.U. PUB. INT. L.J. 259, 277-78 (2003); cf. Roberts, supra note 52, at 106 ("Concern for permanency places a limit on the federal mandate that state agencies make reasonable efforts to reunify children in foster care with their parents."). However, the same scholars recognize that "states should often facilitate adoption of children who have been abandoned by their parents" since there is a "big difference between removing barriers to the adoption of children who are already available to be adopted and viewing the legal relationship between children in foster care and their parents as a barrier to adoption." Roberts, supra note 52, at 113.


186. See generally Roberts, supra note 52, at 110; Hollinger, supra note 151, at 92 (states receive $4,000 incentive payment for each finalized adoption and $6,000 for each special needs adoption).


188. Id.
ASFA’s attempt to facilitate the speedy placement of children, and, in particular, African American children who make up the majority of out-of-home children.

Whether these two federal statutes can be reconciled with the regulations will likely be a matter of much debate. The regulations, after all, are simply responding to the reasonable efforts requirement of the IAA. Because the regulations leave open the possibility that all outgoing cases are subject to the reasonable efforts requirement, and because MEPA’s national origin requirement arguably conflicts with this discriminatory treatment of intercountry adoptions, in theory no agency that places American children abroad would be able to receive federal funding. The possibility of losing federal funding will no doubt be a critical factor when agencies decide whether to facilitate intercountry adoptions. Such a sweeping rule also means that the majority of public agencies would be unable to place American children who are in the state foster care system with families living abroad. Currently over-burdened, under-staffed public agencies lack the resources to explore the option of intercountry adoption for children awaiting permanent placement. The regulations act as another major burden, making the possibility of intercountry placement highly unlikely.

C. A Child-Centered Proposal

The current scheme for outgoing cases embraces the subsidiarity principle in extreme form. Some adoption interest groups nonetheless argue that, by creating the subsection (a) exception, the regulations are not doing enough to ensure that American children are adopted by American parents. When the IAA was before Congress, one representative argued that the IAA “will provide much-needed protection for U.S. children being

189. In a hearing before the Senate Foreign Relations Committee on the implementation of the IAA in 1999, Mark McDermott made the following statement:

Section 303 would require children to stay longer in non-permanent situations like foster care while efforts are made to find United States citizens to adopt them instead of adoptive parents from other countries. This is not good social policy since it harms children. Congress has made great strides recently to promote the early placement of children in permanent homes. The delays mandated by Section 303 would be a step backwards.


190. Failure to comply with MEPA is a violation of Title VI of the Civil Rights Act of 1964, which forbids recipients of federal funding to discriminate based on race, color, or national origin. An applicable agency that violates MEPA would at the very least forfeit any federal funding it received, as well as subject itself to judicial proceedings initiated by the Department of Justice adjudication and/or private litigants seeking equitable relief, 42 U.S.C. § 2000d; see Mabry, supra note 36, at 1,362 (citing 42 U.S.C. § 2000d, 5115a(b)).

191. See, e.g., Ethica, supra note 122, at 4 ("The regulations disregard the subsidiarity principle of the Convention in outgoing cases by allowing children to be placed outside the country without considering alternatives inside the U.S. if the birth parent has identified a person abroad.").
adopted abroad by foreigners.” Since Congress began discussing implementation of the Hague Convention, the writers and proponents of the IAA have provided countless examples that confirm the need for implementation, yet none deal with cases of American children who are adopted by foreign parents.

This is not to suggest that the IAA should not apply to outgoing cases; certainly some safeguards that protect children’s interests, such as a thorough home study and background check, are necessary before intercountry adoptions of American children are finalized. Even if the Hague Convention was meant only to regulate adoptions between developed and developing countries, in practice the treaty must—and should—apply equally to all Convention countries. After all, the IAA’s subsidiarity principle is consistent with the Hague Convention. The problem lies with a scheme that values the subsidiarity principle over the best interest of the child. Several changes to the IAA and the regulations can ensure a safe placement for American children and adequately address concerns regarding delay and still comport with the Convention’s subsidiarity principle.

First, Congress should amend the IAA to specify that the reasonable efforts standard should not apply to all outgoing cases. Section 303 should explicitly state that reasonable efforts need not be made when making such efforts is not in the best interest of the child. With such express authority the State Department can create its own valid exceptions to the reasonable efforts standard and state judges could justifiably find that reasonable efforts may not be necessary in a particular case.

Second, the State Department should amend the regulations to reflect a child-centered approach. Currently, by jeopardizing a child’s opportunity for permanent placement, the regulations penalize the adoptable child for the failures of others. After all, the unsuccessful recruiting of American parents is the result of either an agency that neglected its obligation to recruit or prospective American parents who chose not to adopt an American child.

Any subsidiarity principle that the State Department adopts must address the failure of recruitment by tackling each of its causes, rather than by stifling a promising alternative. For example, the State Department should provide agencies with specific guidelines for creative and successful recruitment tactics. One study reports that many—if not most—prospective parents have some personal connection to an adoption agency, and that word-of-mouth is the most common way that people hear about the need for adoptive parents. The same study also reports that limited resources constrain agencies’ ability to implement innovative recruitment strategies. Rather than requiring that agencies list and disseminate

195. Id. at 22.
information about an adoptable child—tactics that most agencies probably already undertake—the State Department should utilize its resources to gather experts and brainstorm strategies for successful recruitment. Most experts agree that community outreach is the best way to reach prospective parents, especially among minority communities. The regulations could address this need by requiring agencies to employ social workers that will focus on community outreach. Finally, the regulations should induce agencies to diligently recruit by increasing court intervention and by imposing fines and penalties. The State Department can delegate this responsibility to the same accrediting entities that oversee the agency's compliance with the Convention, the IAA and other regulatory requirements, or to the state court with jurisdiction over the adoption.

The State Department should address the second cause for the failure of recruitment by raising awareness among Americans on the availability of American children for adoption. After 60 Minutes broadcasted a story on the intercountry adoption of African American children in February of 2005, one adoption agency in Georgia that specializes in the adoption of African American children received over 200 calls and emails from American and foreign families seeking to adopt African American babies. To advance the subsidiarity principle, the State Department should utilize such far-reaching strategies in order to increase the likelihood of a domestic adoption.

While adherence to the subsidiarity principle may prove costly, the child whom this principle is aimed to protect should never be the one to pay the price. Accordingly, the regulations should clarify that an agency's reasonable efforts to find American parents should never interfere with an intercountry adoption by foreign parents who are indisputably qualified to adopt. The regulations should require agencies to make their recruitment efforts before a child's birth and/or while prospective foreign parents show interest and undergo a home study. If, at the end of the day, the child is born or otherwise becomes adoptable, and only foreign parents are ready to adopt, the adoption should take place. If, however, qualified domestic parents are also ready to adopt immediately or within the foreseeable future, then the regulations should place a heavy presumption in favor of the domestic adoption.

As a practical matter, the section 96.54(a)(2) recruitment procedure, which sets a minimum time period during which the child's name must be listed on a national registry, must be struck. The subsection (a) birth parent exception should remain to ensure that the birth parent's decision is honored even when domestic parents are qualified and interested in the child. However, under a child-centered approach the State Department could decide that the subsidiarity principle should supersede the deference normally given to a birth parent's decisions. Either way, the child will be

196. See id.; see also 60 Minutes, supra note 30.
197. See 60 Minutes, supra note 30.
placed immediately. If the birth parent exception remains, it should be amended by adding the following: “Except... in other special circumstances where the best interest of the child dictates that no efforts are necessary...” Such a change would at least provide a correlation between the subsection (a) and (b) exceptions. So long as a correlation exists between subsections (a) and (b), subsection (b) need not be changed. Rather, a new subsection (c) should read: “Nothing in this section should be interpreted as requiring the delay of an intercountry adoption. An intercountry adoption is secondary only to an immediate, qualified adoptive placement in the United States.”

A State Department representative testifying before Congress in November of 2006 stated that 22 C.F.R. Part 97 “creates sound safeguards and uniform protections for U.S. children who are being adopted by prospective adoptive parents from another Convention country.” 199 The suggested proposal, however, would provide equally sound safeguards and protections: nothing in the proposal will jeopardize the safety of the child. Under the IAA, prospective adoptive parents are still subject to a thorough background study that includes information about their criminal record. 200 The regulation provisions that ensure the child’s adoptable status will still govern all outgoing cases. 201

By adopting a child-centered perspective, the suggested proposal will facilitate rather than hinder American children’s permanent placement. As such, the proposal aligns squarely with other federal regulation aimed at facilitating permanent placement for American children. The proposal reconciles the IAA with MEPA because national origin will no longer delay a child’s placement. It also supports ASFA’s goal of ensuring swift placement.

Finally, the proposal would reduce the cost and uncertainty resulting from the regulations’ ambiguous language and state court involvement. Agencies would no longer have to guess whether a court might apply the reasonable efforts standard to a particular case. If no prospective parents, foreign or domestic, have shown interest in the child, the agency would need to continue recruiting American parents. If either American or foreign prospective parents are qualified and are ready to adopt, the agency would need to appear before the court to finalize the adoption or grant custody.

One American adoption counselor notes that “it’s an embarrassment that Americans, with all of the wealth and all of the things that are going on here, that we cannot place our own children.” 202 In an ideal world—at

200. See 42 U.S.C. § 14932(a)(2)(B) (referring to the requisite background report/home study that is required of all prospective parents).
201. 22 C.F.R. § 96.53.
202. See 60 Minutes, supra note 30 (quoting Michelle Johnson, a sociologist in Minneapolis).
least, under the subsidiarity principle—the agency's active recruitment efforts and the education of prospective parents would result in a host of interested American parents. But until such a world materializes, the child's interest must supersede national embarrassment or pride.

Conclusion

The State Department has finalized regulations that subject all outgoing cases to increased costs, uncertainty, and prolonged delay. The regulations reflect an extreme form of the subsidiarity principle that penalizes American children for the failures of others. These regulations are particularly harmful for African American children who are already in a precarious position in the United States, where, despite these children's good health and young age, many prospective adoptive parents have overlooked their availability for adoption. Finally, the regulations undermine the objectives of several federal statutes that aim to facilitate permanent placement for all American children, and in particular for those children who are likely to end up in the foster care system.

The State Department should amend the regulations and adopt a balanced, child-centered approach that provides protections and safeguards while facilitating a speedy placement for American children. An American scholar writing on child trafficking in sending countries observed that “[p]lacement of children at a very young age is an important goal... it is therefore of utmost importance to design a regulatory system implementing the Hague Convention that fosters, rather than hinders, early placement.” The same policy should apply to American children in need of homes.

203. Blair, supra note 1, at 394.