



10-7-2015

Take Off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children

DeLeith Duke Gossett

Follow this and additional works at: <http://digitalcommons.law.scu.edu/lawreview>

Recommended Citation

DeLeith Duke Gossett, *Take Off the [Color] Blinders: How Ignoring the Hague Convention's Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 SANTA CLARA L. REV. 261 (2015).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol55/iss2/2>

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.

**TAKE OFF THE [COLOR] BLINDERS: HOW
IGNORING THE HAGUE CONVENTION'S
SUBSIDIARITY PRINCIPLE FURTHERS
STRUCTURAL RACISM AGAINST BLACK AMERICAN
CHILDREN**

DeLeith Duke Gossett*

*“A definite purpose, like blinders on a horse, inevitably
narrows its possessor’s point of view.” ~ Robert Frost*

TABLE OF CONTENTS

Introduction.....	262
I. Race and Colorblindness in America.....	266
A. Colorblindness as an Aspirational Goal	268
B. Co-opting Colorblindness to Keep the Status Quo	271
1. Restrictive v. Structural Racism	272
2. Bell’s Interest Convergence Theory.....	274
C. Color-Blind Racism in Post-Racial America.....	279
II. The Co-Option of Adoption to Satisfy White Interests....	284
A. Co-opting Domestic Adoption	284
B. International Adoption and the Hague Convention’s Subsidiarity Requirement.....	288
C. Co-opting International Adoption.....	293
1. Reframing Whose Interests?.....	293
2. Children in Families First Legislation.....	301
III. Structural Racism Against Black American Children...	307
A. The Plight of Black American Children in Foster Care.....	307

* Associate Professor of Law, Texas Tech University School of Law. Professor Gossett would like to acknowledge and thank Dean Darby Dickerson and Texas Tech University School of Law for the generous support of this project, and Eric A. Chiappinelli for his input into earlier drafts of the article. Finally, Professor Gossett would like to thank Chris Hill for his excellent research assistance, and John Stegman and the Santa Clara Law Review editors for their valuable editing suggestions.

B. The Exportation of Black American Children.....	314
Conclusion	318

INTRODUCTION

From its beginnings, adoption in the United States centered on the precept of “the best interests of the child.”¹ The international community has also embraced this position,² incorporating the “best interests” tenet into the Hague Convention on Protection of Children and Cooperation in Respect of Inter-country Adoption (“Hague Convention” or “Hague”), a multilateral treaty established to avoid corruption in international adoption practices.³ Agreeing that “the best interests of the child should be the paramount principle governing the placement of children outside their biological families,” the Hague Convention includes a subsidiarity principle that emphasizes domestic placement as a child’s best interest and allows for international adoption only as a last-resort measure.⁴ As a

1. Ruth-Arlene Howe, *Adoption Laws and Practices: Serving Whose Interests?*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 86 (Michele Bratcher Goodwin ed., 2010). Beginning with the first adoption law passed in Massachusetts in 1851, adoption evolved as “both a state judicial process and a specialized child welfare service to promote the so-called best interests of children in need of permanent homes.” *Id.* (citing Massachusetts Act to Provide for the Adoption of Children, Mass. Rev. Stat. ch. 324 (Supp. 1851)); SIGNE HOWELL, *THE KINNING OF FOREIGNERS: TRANSNATIONAL ADOPTION IN A GLOBAL PERSPECTIVE* 163–65 (2006). Over the next twenty-five years, fifteen states enacted laws similar to Massachusetts that stressed the best interests of the child. See Michele Bratcher Goodwin, *Baby Markets*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 3 (Michele Bratcher Goodwin ed., 2010).

2. Jini L. Roby et al., *Social Justice and Intercountry Adoptions: The Role of the U.S. Social Work Community*, 58 *SOC. WORK* 295, 300 (2013), available at http://globalfop.files.wordpress.com/2012/11/social-justice-and-intercountry-adoption_-the-role-of-us-social-work.pdf. Although not defined by the Hague Convention, the *Guide to Good Practice by the Hague Conference on Private International Law* suggests that best interests considerations should include “the individual, familial, cultural, and social contexts of the proposed adoption [which] should be individualized and contextualized to take into account the child’s entire environment and existing relationships.” *Id.*

3. Hague Conference on Private International Law: Final Act of the 17th Session, Including the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 *I.L.M.* 1134, 1134–46 [hereinafter *Hague Convention*].

4. *Id.* at 1139–40 art. 4(b); ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PRODUCTION* 94 (1993) [hereinafter *BARTHOLET, FAMILY BONDS*].

current partner to the Hague Convention, the United States, through the State Department, closely monitors non-compliant countries and will ultimately shut down adoptions from countries whose systems do not adapt to Hague norms and thus do not serve the best interests of children.⁵

In recent years, the United States has become known as the largest “receiving country” for international adoptions, bringing in nearly a quarter of a million children of other races and nationalities.⁶ The globalization of the adoption industry has changed the racial make-up of the American family and led to a more culturally diverse population. But, despite the increase in racially diverse families, the United States is certainly not colorblind in its approach to adoption. The well-known secret within the adoption community is that adoptive preferences follow a racial hierarchy. Race is still negatively incorporated into the cost of private adoptions, as industry standards continue to value black American children⁷ less than their lighter counterparts. According to one adoption agency director, the “adoption hierarchy” is reflective of a racist society that places—with corresponding monetary values—blonde, blue-eyed girls at the top and black boys at the bottom.⁸ This “evidence of racial hierarchy in the adoption market” suggests that racism has not been eradicated from American society, and the nation is not yet as

5. For example, adoptions from Guatemala were shut down in 2007 when officials learned that U.S. demand led to coercion and kidnapping of children. Kevin Voigt, *International Adoption: Saving Orphans or Child Trafficking?*, CNN.COM (Sept. 18, 2013), <http://www.cnn.com/2013/09/16/world/international-adoption-saving-orphans-child-trafficking/>.

6. Peter Selman, *Intercountry Adoption as Globalized Motherhood*, in *THE GLOBALIZATION OF MOTHERHOOD: DECONSTRUCTIONS AND RECONSTRUCTIONS OF BIOLOGY AND CARE* 89 (Wendy Chavkin & JaneMaree Maher eds. 2010). Families in the United States adopted approximately 250,000 children from other countries over the last fifteen years, *Intercountry Adoption: Statistics*, U.S. DEP'T STATE, http://adoption.state.gov/about_us/statistics.php (last visited Apr. 6, 2015). Roughly the same number of children have aged out of the United States foster care system unadopted in that same time period. See Gary Stangler, *Aging Out of Foster Care: The Costs of Doing Nothing Affect Us All*, HUFFINGTON POST BLOG (July 28, 2013 12:59 pm), http://www.huffingtonpost.com/gary-stangler/aging-out-of-foster-care-_b_3658694.html.

7. To eliminate confusion, the term “black” is used to refer to black and biracial Americans born in the United States, while the term African signifies children adopted from Africa.

8. Anne-Marie O'Neill, *Why Are American Babies Being Adopted Abroad?*, PEOPLE (June 6, 2005), <http://www.people.com/people/archive/article/0,,20147746,00.html> (quoting Adoption-Link Director Margaret Fleming).

colorblind as some would like to believe.⁹ As parents seek children from abroad, more than 100,000 American children still await adoption in the United States foster care system, with minorities disproportionately represented and “aging out” of the system.¹⁰ Almost a quarter of a million children have aged out in the last fifteen years, nearly the same number of children that Americans have adopted through international adoption in the same time period.¹¹

What is less known is that the United States is also a “sending country,” as it allows the international adoption of its black and biracial children, many from foster care.¹² The United States does not follow the adopted children’s progress, so the little data that exists on these children is inaccurate at best. But the State Department’s figures on the number of children sent are much lower than the numbers of children reportedly received by Western European and Canadian governments, suggesting the United States underreports the number of minority children it sends abroad.¹³ As reports of the practice have emerged, so has a consensus that the “emphasis should be in finding children good homes here, not shipping them out of the country.”¹⁴ Yet the United States currently allows Americans to ignore the Hague’s subsidiarity principle and participate in either Hague or non-Hague-compliant international adoptions, creating a two-system approach to international adoption for its own citizens while requiring other countries to adhere to Hague Convention protocols.¹⁵

9. See Solangel Maldonado, *Discouraging Racial Preferences in Adoption*, 39 U.C. DAVIS L. REV. 1415, 1471 (2006).

10. U.S. DEPT OF HEALTH & HUMAN SERVS., THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT: PRELIMINARY FY 2013 ESTIMATES 1 (July 2014), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> [hereinafter 2014 AFCARS Report]; Maldonado, *supra* note 9, at 1452.

11. *Intercountry Adoption: Statistics*, *supra* note 6; Stangler, *supra* note 6; Wilhelmina A. Leigh et al., *Aging Out of the Foster Care System to Adulthood: Findings, Challenges, and Recommendations*, JOINT CTR. FOR POLITICAL AND ECON. STUDIES HEALTH POLICY INST. (Dec. 2007), http://www.blackadministrators.org/pdf/Aging_Out_of_the_Foster_Care_SystemFINAL.pdf.

12. See *infra* Part III.B.

13. See *id.*

14. O’Neill, *supra* note 8 (quoting Roots Adoption Agency CEO Toni Oliver).

15. France also allows this unique situation. All other Hague signatory countries allow international adoptions only among member countries. Elizabeth Willmott Harrop, *Adopting from Africa, Saving the Children?*, THINK

Many well-meaning adoptive parents “believe that the myth of color-blindness can somehow deflect the realities of a racist society,” even as they adopt children of color from other nations.¹⁶ But as black American children are either bypassed in favor of more “exotic” African children, or have to go overseas to find a home, some have boldly called the international adoption practice “covert racism.”¹⁷ As one reporter observed, “The irony of one of the world’s wealthiest nations exporting its own children has not gone unnoticed. For many, it raises questions about identity, race and the tangled legacy of American slavery,” answered partly by “this country’s tortured racial politics.”¹⁸

This Article begins in Part I by tracing the evolution of “color-blind” thought from America’s racist beginnings to the “post-racial” America that was supposedly ushered in with President Obama’s election. This section highlights Derrick Bell’s interest convergence theory that suggests that colorblindness was co-opted to satisfy white concerns and explains how colorblindness has instead given way to “color-blind racism.” Part II argues that, as with colorblindness, the best interests standard has been co-opted through international adoption to serve the desires of white prospective parents. It examines the Hague Convention’s purposes, emphasizes the subsidiarity provision that calls for international adoption only as a last-resort measure, and notes that the U.S. currently allows its citizens to adopt from

AFRICA PRESS (Aug. 6, 2012), <http://thinkafricapress.com/legal/adoption-trade-sets-shop-africa>.

16. Lisa Ko, *Baby Rescue or Baby Factory?*, PBS (May 19, 2010), <http://www.pbs.org/wnet/need-to-know/culture/baby-rescue-or-baby-factory/774/> (quoting from a telephone conversation with Professor Michele Goodwin, editor of *Baby Markets: Money and the New Politics of Creating Families*); see also KATHRYN JOYCE, *THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION* 136 (2013) (citing a report from the African Child Policy Forum that adoptions from Africa increased threefold from 2003 to 2010).

17. Globalization has been defined as “the growing interpenetration of states, markets, communications, and ideas across borders” and is a hallmark of modern society. Alison Brysk, *Introduction: Transnational Threats and Opportunities*, in *GLOBALIZATION AND HUMAN RIGHTS* 1 (2002).

18. Gabrielle Glaser, *Sending Black Babies North*, *THE OREGONIAN* (July 4, 2004), at L05, available at <http://gabrielleglaser.com/files/articles/the-oregonian-sending-black-babies-north-gabrielle-glaser.pdf>; O’Neill, *supra* note 8; see also David Smolin, *Intercountry Adoption as Child Trafficking*, 39 *VAL. U. L. REV.* 281, 287 (2004) [hereinafter Smolin, *Child Trafficking*] (arguing that modern adoption practices resemble the purchase of human beings, which is analogous to slavery practices).

countries that are both Hague- and non-Hague-compliant. It also examines the recently-proposed Children in Families First Act,¹⁹ which sought to facilitate more incoming international adoptions, even as black American children are sent away for foreign adoption. Part III discusses how the current two-system international adoption approach furthers structural racism against black American children, as black American children disproportionately languish in, and age out of, foster care with negative outcomes.

The Article closes with the stance that allowing the current two-tiered system of international adoption to continue is inconsistent with the Hague Convention. As a matter of public policy, the United States should enforce, for all adoptions, the proviso within the Hague Convention that allows for international adoption only if all avenues for intra-country adoption have been exhausted and there are no children available for adoption within the United States. The United States should not be disposing of its own available black children, sending them away to other countries for adoption, and then replacing them with children, of any color, from other nations.

I. RACE AND COLORBLINDNESS IN AMERICA

Dr. W.E.B. DuBois once remarked, “The problem of the twentieth century is the problem of the color line.”²⁰ It was a line that separated black and white in almost every form of American society—a “hangover” from the days of slavery, according to Justice Hugo Black²¹—with such a depth of racism that historian M.I. Finley argued that not “[e]ven emancipation and over a century of freedom” could remove its stigma.²² That is because in America, where “[b]y law, every

19. Children in Families First Act of 2014, S. 2475, 113th Cong. (2014); Children in Families First Act of 2013, S. 1530, 113th Cong. (2013).

20. W.E.B. DUBOIS, *THE SOULS OF BLACK FOLK* (1903).

21. JAMES T. PATTERSON, *BROWN V. BOARD OF EDUCATION* 54 (2001).

22. Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009, 1012, 1016 (1993) (citing M.I. FINLEY, *ANCIENT SLAVERY AND MODERN IDEOLOGY* 11 (1980)). A recent study showed that slavery, although banned more than a century ago, continues to influence racial attitudes, particularly in the former slave states. Avidit Acharya et al., *The Political Legacy of American Slavery* (Oct. 18, 2013), <http://www.mattblackwell.org/files/papers/slavery.pdf>; *Legacy of Slavery Still Fuels Anti-Black Attitudes in the Deep South*, U. ROCHESTER (Sept. 18, 2013), <http://www.rochester.edu/news/show.php?id=7202>.

negro [was] presumed to be a slave,” race was the sole determinant of who was free and who was subject to slavery.²³

Progress, though slow, was made, and many Americans now subscribe to colorblindness and a belief that discrimination has all but disappeared; indeed, charges of racism or discrimination are often considered “as excuses or as minorities playing the infamous ‘race card.’”²⁴ Thus, “racism” has become one of the new “taboo” words, and the very mention of race is often seen as “race baiting.”²⁵ Even so, recent events have demonstrated that the nation has not attained the color-blind status it proclaims and racial tensions persist amidst adherence to post-racial thought.²⁶

23. Finkelman, *supra* note 22, at 1012–16.

24. Eduardo Bonilla-Silva & David Dietrich, *The Sweet Enchantment of Color-Blind Racism in Obamerica*, 634 ANNALS AM. ACAD. POL. & SOC. SCI. 190, 194 (2011).

25. Kenneth B. Nunn, *The “R-Word”: A Tribute to Derrick Bell*, 22 U. FLA. J.L. & PUB. POL’Y 431, 433–34 (2011). “Just as racism and the expression of racially prejudiced sentiments have become taboo, the word ‘racism’ and the imputation to others of racially prejudiced sentiments are becoming taboo. As the *Daily Show* reported in August: ‘The race card’s maxed out.’” *Id.* (quoting James Taranto in the *Wall Street Journal*). See also Jack Mirkinson, *Megyn Kelly Defends Her Santa Comments, Attacks Critics For “Race Baiting,”* HUFFINGTON POST (Dec. 14, 2013), http://www.huffingtonpost.com/2013/12/14/megyn-kelly-defends-santa-comments_n_4443619.html.

26. Race was recently brought to the forefront of American conversation when a white police officer was not indicted after he fatally shot Michael Brown, an unarmed black teenager, in Ferguson, Missouri, which has a two-thirds black population but nearly all-white police force. Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), http://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html?_r=0; see also *Violence in Ferguson: Police Fire Tear Gas, Smoke Bombs at Demonstrators*, ABC NEWS (Aug. 14, 2014), <http://abcnews.go.com/US/violence-ferguson-police-fire-smoke-bombs-tear-gas/story?id=24973522>. Less than one month later, protests ensued after a Staten Island grand jury refused to indict a white officer who had placed an unarmed black man in a deadly chokehold. J. David Goodman & Al Baker, *Waves of Protest After Grand Jury Doesn’t Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>. Both events followed the acquittal of charges of second-degree murder and manslaughter against George Zimmerman, a “white Hispanic” who shot Trayvon Martin, a “suspicious” hoodie-clad black youth armed only with a drink and candy Skittles. Becky Bratu, *From Scorn to Gratitude, Mixed Reactions to Obama’s Remarks on Zimmerman Verdict*, NBCNEWS.COM (July 19, 2013), http://usnews.nbcnews.com/_news/2013/07/19/19564830-from-scorn-to-gratitude-mixed-reactions-to-obamas-remarks-on-zimmerman-verdict?lite. His verdict was met with protests across the nation and expressions of shock and rage against “a nonstop debate about the degree to

A. *Colorblindness as an Aspirational Goal*

Many scholars point to Justice Harlan's dissent in *Plessy v. Ferguson*²⁷ as the beginning of what has been termed "color-blind" racial theory.²⁸ Homer Plessy had challenged the constitutionality of an 1890 Louisiana statute that required railway companies to maintain "equal but separate" accommodations for "colored" passengers after he was forcibly removed from a train for refusing to vacate a passenger car intended for whites only.²⁹ Justice Brown authored the majority opinion and concluded that separate but equal was a constitutionally acceptable standard.³⁰ Affording great discretion to the Louisiana legislature to determine the reasonableness of its own actions, Justice Brown maintained that appropriate divisions could be based on the color of one's skin and rejected the argument that "the enforced separation of the two races stamps the colored race with a badge of inferiority."³¹ Such lawful segregation, according to Justice Brown, did "not necessarily imply the inferiority of either race to the other," but was an assumption that the colored race had stamped upon itself.³² Therefore, in his view, the State of Louisiana could enact a law that required the separation of the races, one of whom had just endured more than 100 years

which race played a role in the shooting and in the trial." Jon Cohen & Dan Balz, *Race Shapes Zimmerman Verdict Reaction*, WASH. POST (July 22, 2013), http://www.washingtonpost.com/politics/race-shapes-zimmerman-verdict-reaction/2013/07/22/3569662c-f2fc-11e2-8505-bf6f231e77b4_story.html.

27. 163 U.S. 537, 540–42 (1896).

28. See *id.* at 559 (Harlan, J., dissenting).

29. *Id.* at 537, 540–42. Plessy challenged the law, originally entitled the "Separate Car Act," which provided for "separate railway carriages for the white and colored races" under both the Thirteenth and Fourteenth Amendments. *Id.* Plessy was only one-eighth black; the opinion noted "that the mixture of colored blood was not discernible in him." *Id.* at 541.

30. *Id.* Justice Brown discounted the idea that the Louisiana law at issue implicated the Thirteenth Amendment, which abolished slavery and was intended to prevent "the imposition of any burdens or disabilities that constitute badges of slavery or servitude." *Id.* at 542–43, 551–52. Setting the tone for the entire opinion, he insisted that the statute imposed a mere legal distinction between the two races based on color, but did nothing to make them unequal or reinstate slavery. *Id.* at 543. Nor would Justice Brown find that the Fourteenth Amendment, which prohibits states from making or enforcing laws that deny equal protection to all citizens, provided a basis on which to invalidate the Louisiana law. *Id.* at 544.

31. *Id.* at 551.

32. *Id.* at 544, 551. "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*

of slavery at the hand of the other, based solely on the color of its skin. And if the formerly indentured race felt slighted by the law, it was solely because it chose to feel inferior by the seemingly equal act,³³ created by people from the subjugating race.³⁴

Dissenting, Justice Harlan advanced that the separation of citizens solely on the basis of race was “a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the constitution,” which could not be justified “upon any legal grounds.”³⁵ He warned that the Louisiana statute, and the majority’s construction of it, allowed “the seeds of race hate to be planted under the sanction of law,” which merely served to create a caste system of “legal inferiority” based solely on the color of one’s skin.³⁶ In his view, the Fourteenth Amendment provided legal effect that all stood equal under the Constitution, “without regard to race.”³⁷ Even if more aspirational than descriptive, Justice Harlan declared that “Our Constitution is color-blind, and neither knows nor tolerates classes among citizens.”³⁸

The Supreme Court was called upon six times in the aftermath of *Plessy* to untangle applications of the “separate

33. *Id.* According to Justice Brown, even if it were the case that the law caused some slight, it was not the job of the Court to change it. *Plessy*, 163 U.S. at 551–52. Justice Brown wrote:

Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane.

Id.

34. During Reconstruction, several black politicians served in the U.S. House of Representatives, and P. B. S. Pinchback served as Louisiana governor from late 1872 to January, 1873. However, following the removal of federal troops from that state in 1877, black politicians became a rarity again. Nikki Brown, *Jim Crow/Segregation*, KNOWLA ENCYCLOPEDIA LA. (May 20, 2011), <http://www.knowla.org/entry/735/>.

35. *Plessy*, 163 U.S. at 559, 562.

36. *Id.* at 557–58, 560, 563. *Plessy*’s counsel raised the issue as to how far race-based laws could be taken, i.e., what prohibited the legislature from enacting “laws requiring colored people to walk upon one side of the street, and white people upon the other, or requiring white men’s houses to be painted white, and colored men’s black, or their vehicles or business signs to be of different colors,” an exaggerated, but prescient observation of the segregated Jim Crow America to come. *Id.* at 549.

37. *Id.* at 556, 559–60.

38. *Id.* at 559.

but equal” doctrine in the field of public education.³⁹ Using tortured reasoning to reach predictable results, the Court found that the Fourteenth Amendment did not require integration into the white schools of Mississippi,⁴⁰ nor did it require taxpayers in Georgia to take money away from a high school for whites to “establish and maintain a high school for colored children.”⁴¹ These cases simply moved the passenger train analysis into the classroom; neither case challenged the actual separate but equal doctrine.⁴² In time, the Court looked beyond the actual facilities and focused on the “intangible benefits” that separate settings could not provide.⁴³ Still, of those six cases, none challenged the separate but equal doctrine, except *Sweatt v. Painter*, which acknowledged the issue but left it for another day.⁴⁴

That day came when public schoolchildren in four states challenged their schools’ maintenance of segregated, but equal, facilities.⁴⁵ NAACP lawyer Thurgood Marshall argued that segregation into “separate educational facilities” based solely on race was “inherently unequal,” and, finally, the Court agreed.⁴⁶ Tracing school development since *Plessy*, the Court noted the dominant place that public education had come to be afforded in modern society.⁴⁷ Given schools’ preeminence in the function of state and local governments, the Court underscored the fact that once the states “had undertaken to provide [the right of education, it] must be

39. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 491 (1954).

40. *Gong Lum v. Rice*, 275 U.S. 78, 87 (1927).

41. *Cumming v. Board of Educ.*, 175 U.S. 528, 545 (1899).

42. See *Brown*, 347 U.S. at 491.

43. *Id.* at 491–92 (citing *Sweatt v. Painter*, 339 U.S. 629, 633–34 (1950); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641–42 (1950); *Mo. ex rel. Gaines v. Canada*, 305 U.S. 337, 345 (1938)). At the graduate level, the Court found that qualified black students who were made to attend separate educational facilities were denied equality with white students. *Id.*

44. *Brown*, 347 U.S. at 492; *Sweatt*, 339 U.S. at 636. NAACP Legal Defense and Education Fund attorney Thurgood Marshall, arguing for the petitioner in *Sweatt* and in *Brown v. Board*, invoked Justice Harlan’s dissent in *Plessy* in his brief to the Court, arguing that “classifications and distinctions based on race or color have no moral and legal validity in our society. They are contrary to our constitution and laws.” Ian F. Haney Lopez, *Is the “Post” in Post-Racial the “Blind” in Colorblind?*, 32 CARDOZO L. REV. 807, 809 (2011).

45. *Brown*, 347 U.S. at 486–87, 492 n.9 (involving children from Kansas, Virginia, Delaware, and South Carolina).

46. *Id.* at 493, 495.

47. *Id.* at 492–93.

made available to all on equal terms.”⁴⁸ The Court noted that the children’s facilities were indeed equal “with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.”⁴⁹ However, the Court looked beyond the tangible to “the effect of segregation itself on public education.”⁵⁰ In reaching its decision, the Court referenced several psychological studies that showed that segregation based solely on race stamped children with a badge of inferiority sanctioned by law.⁵¹ Resonating with, although not referring to, Judge Harlan’s dissent in *Plessy*,⁵² the Court declared that such law-sanctioned segregation, “denoting the inferiority of the negro group” and detrimentally impacting the children, could not stand.⁵³ The Court had finally made steps towards colorblindness, at least in the area of school segregation.⁵⁴

B. Co-opting Colorblindness to Keep the Status Quo

Colorblindness means that color should no longer be a basis of discrimination where “a majority oppresses a racially-defined minority.”⁵⁵ The slate should be wiped clean, and all should be equal and on the same footing. If *Plessy* ushered in more than half a century of legalized racism, *Brown v. Board* provided the impetus for a civil rights movement that actively sought to end all vestiges of racism in American society.⁵⁶

48. *Id.* at 493.

49. *Id.* at 492. The highest courts in Kansas, Virginia, Delaware, and South Carolina had each declared the separate schools were either equal in every way or were in the process of being equalized. *Id.* at 486–87, 492 n.9.

50. *Id.* at 492.

51. *Id.* at 494.

52. PATTERSON, *supra* note 21, at 205. The Court did not refer to Justice Harlan’s dissent in *Plessy* and “did not proclaim that the Constitution was colorblind.” *Id.* at xxiii, 68.

53. *Brown*, 347 U.S. at 494.

54. While the Court paved the way for desegregation by prohibiting discrimination, it did not expressly require integration. See Lopez, *supra* note 44, at 809–10 n.8 (citing Christopher W. Schmidt, *Brown and the Colorblind Constitution*, 94 CORNELL L. REV. 203, 234 (2008) (recording a colloquy wherein Marshall sought to reassure a hesitant Justice Frankfurter that the NAACP was “not asking for affirmative relief,” but only for an end to “state-imposed segregation.”)); see also Briggs v. Elliott, 132 F. Supp. 776, 777 (1955) (per curiam) (“The Constitution . . . does not require integration. . . . It merely forbids the use of governmental power to enforce segregation.”).

55. William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1, 11 (2011–12).

56. PATTERSON, *supra* note 21, at 71 (quoting Fisk University President Charles Johnson) (“If segregation is unconstitutional in educational

While Thurgood Marshall and the NAACP struggled for racial equality through the courts, citizens engaged in non-violent acts of civil disobedience to show the unjustness of segregation.⁵⁷ Students “sat-in” at segregated lunch counters,⁵⁸ and Rosa Parks refused to give up a seat at the front of a bus reserved only for whites, leading others to do the same.⁵⁹ Men, women, and children paraded on city streets and bridges, and they marched on the mall in Washington;⁶⁰ almost every stride was met with violence and resistance.⁶¹

1. *Restrictive v. Structural Racism*

Under a traditional or restrictive-racism construct, racism is identified by the intentionally harmful conduct by conscious and deliberate racists.⁶² Rooted in the actor’s dual beliefs of personal superiority and the targeted person’s inferiority because of particular characteristics, the traditional or restrictive form of racism requires a showing of intentional discrimination.⁶³ In other words, racist behavior is not unconscious; the actor deliberately takes action, intent on causing a particular result that he believes his victim deserves.⁶⁴ It requires “conscious volition,” or a showing of intent—the actor must consciously act on a racist belief to

institutions, it is no less so unconstitutional in other aspects of our national life.”); see also Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353, 1412 (1995) (claiming that *Brown* “raised black expectations for an all-embracing society.”); Aldon Morris, *Centuries of Black Protest: Its Significance for America and the World*, in RACE IN AMERICA 46 (Herbert Hill & James Jones, Jr. eds., 1993) (claiming that *Brown* enabled blacks to believe that the “entire edifice of Jim Crow” could be dismantled); E.W. Kenworthy, *Civil Rights Bill—Why It Is Taking So Long*, N.Y. TIMES (May 17, 1964), at E12 (proclaiming that *Brown* “stands as the great turning point in the battle for civil rights.”).

57. Early civil rights groups such as the Fellowship of Reconciliation (FOR) and the Congress of Racial Equality (CORE) drew from the nonviolence teachings of Mohandas Gandhi and sought change through nonviolent mass resistance. RAYMOND ARSENAULT, FREEDOM RIDERS 23, 59 (2006). Employing nonviolent civil disobedience tactics, Dr. Martin Luther King, Jr. became the recognized leader of the civil rights movement. PHILIP ABBOTT, POLITICAL THOUGHT IN AMERICA 301–02, 309–12 (1991).

58. PATTERSON, *supra* note 21, at 120–21.

59. ARSENAULT, *supra* note 57, at 57–58.

60. ABBOTT, *supra* note 57, at 312.

61. PATTERSON, *supra* note 21, at 37, 87.

62. *Id.*

63. Wiecek, *supra* note 55, at 4.

64. *Id.*

bring about the intended action.

For example, the Ku Klux Klan members who killed and stuffed into an earthen dam three young civil rights workers for registering Southern blacks to vote, acted on their racist beliefs to cause the particular outcome.⁶⁵ The same is true of the church bombers who stole the lives of four little black girls attending Sunday school at a Birmingham church,⁶⁶ and those who bombed the buses and then beat the “Freedom riders” who traveled into the Deep South on interstate buses to challenge unconstitutionally segregated transportation facilities.⁶⁷ As did those responsible for beating, shooting, and throwing into the Tallahatchie River a young black teenager who reportedly whistled at a white woman,⁶⁸ and Birmingham Commissioner of Public Safety Eugene “Bull” Connor who loosed vicious dogs and turned high-pressure water hoses on peaceful marchers, including children.⁶⁹

In the face of such blatant racism, the tide of public sentiment slowly turned in sympathy towards the peaceful protestors.⁷⁰ However, as the Civil Rights Movement made gains, social thought evolved to include a bad-actor philosophy.⁷¹ Only those who employed measures like the above were considered to be racist, and the restrictive racism construct came to include only “the most overtly bigoted.”⁷²

Structural racism, on the other hand, does not need a bad

65. PATTERSON, *supra* note 21, at 130.

66. *Id.* at 123.

67. ARSENAULT, *supra* note 57, at 143–48. Organized by the Congress of Racial Equality (CORE), the 1947 Journey of Reconciliation became the first organized “Freedom Ride” as it sought to enforce the provisions of *Morgan v. Commonwealth of Virginia*, 328 U.S. 373 (1946), a ruling which invalidated as unconstitutional a Virginia statute that required segregation of interstate bus passengers, but was largely ignored in the South. *Id.* at 19–21.

68. See Barbara Schwabauer, *The Emmett Till Unsolved Civil Rights Crime Act: The Cold Case of Racism in the Criminal Justice System*, 71 OHIO STATE L.J. 653, 655 (2010); PATTERSON, *supra* note 21, at 86.

69. Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, N.Y. TIMES (May 4, 1963), at A1.

70. PATTERSON, *supra* note 21, at 123. Compare *Walker v. City of Birmingham*, 388 U.S. 307 (1967) (characterizing the Birmingham marchers as a disorderly mob who displayed an impatient commitment to their cause) with *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (describing the same marchers as an organized group with defined leadership, whose peaceful enjoyment of their freedoms should not be contingent upon the uncontrolled will of an official who denied them free exercise of their constitutional rights) (Stewart, J., both opinions).

71. Nunn, *supra* note 25, at 436.

72. Wiecek, *supra* note 55, at 10.

actor. It results when a society systemically favors one group over another, leading to segregation, denial of opportunity, and racially-disparate outcomes for the disfavored group.⁷³ Also known as institutional racism, it reinforces a “racial hierarchy of status” that results in the “social domination” of one group over another.⁷⁴ For example, structural racism advances that racism against blacks was so rooted in American society, i.e., it was part of the structural makeup, that changing the actions of a few bad actors still did not affect all the racially-based negative outcomes for the subjugated group.⁷⁵ In other words, structural racism exists despite intent, because a model of society that associates certain races with negative stereotypes will feed implicit biases that produce unconscious racism, even in the absence of blatantly racist actions.⁷⁶

2. *Bell's Interest Convergence Theory*

According to critical race theorist Derrick A. Bell, Jr., racism is such a permanent part of American culture that rather than trying to change individual beliefs one bad actor at a time (an impossible task), the whole structure of society must change to eliminate racism.⁷⁷ In his “Interest-Convergence” thesis, Bell suggested that racism would be eliminated only if the entire social structure of America changed in a manner palatable to the majority.⁷⁸ In other words, racial equality takes place only when “it converges with the interests of whites,” or, stated differently, institutional changes and social policy advancements are made only when whites collectively benefit.⁷⁹

73. *Id.* at 5–6.

74. *Id.* at 6 (citing Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1810 (2000)).

75. Nunn, *supra* note 25, at 435.

76. Wiecek, *supra* note 55, at 7–8 (citing, e.g., Jerry Kang & Kristen Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 473 (2010); Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 970–71 (2006)).

77. Nunn, *supra* note 25, at 435.

78. *Id.*

79. *Id.* “Interest convergence theory therefore rejects the notions of classical legal theory that idealism, abstract legal doctrine, or the deployment of novel legal strategies will bring about significant advances in civil rights. While all of these may play a role, interest convergence theory holds that it is the actual or perceived alignment of the interests of the elite with those of the subordinated

Further, Bell advanced that structural racism hides behind “the illusion of colorblindness and neutrality,”⁸⁰ and suggested that racism continually reinvents itself—much as the character from *Catch Me if You Can* continuously reinvented his persona from pilot to doctor to prosecutor—to escape notice and continue course.⁸¹ Bell believed that racism would co-opt and appropriate any threatening movement or ideology as its own and, as one such example, pointed to *Brown v. Board of Education*’s holding that “separate but equal” was inherently unconstitutional.⁸² According to Bell, *Brown* reframed the narrative that “equality and fairness finally triumphed in both law and public opinion over the forces of intolerance.”⁸³ Instead, Bell argued that *Brown* was actually driven by geopolitical concerns and happened only because it converged with the interests of white elites.⁸⁴ After all, blacks had been arguing against “separate but equal” for years to no avail.⁸⁵ Public sentiment regarding desegregation in 1954 certainly had not changed.⁸⁶ Why the sudden shift from a doctrine to which the Court had so doggedly adhered?⁸⁷

The answer, according to Bell, was not so much the concern for the injured schoolchildren, or “those concerned about the immorality of racial inequity,” as it was concern by

that is outcome determinative in achieving substantive justice.” William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21, 23 (2011).

80. Wiecek, *supra* note 55, at 6–7, 13–14.

81. See Nunn, *supra* note 25, at 435; see also *CATCH ME IF YOU CAN* (DreamWorks 2002) (chronicling the exploits of con artist Frank Abagnale, Jr., who used different personas to escape detection).

82. 347 U.S. 483, 491 (1954); Nunn, *supra* note 25, at 435–36.

83. Nunn, *supra* note 25, at 435–36.

84. Carter, *supra* note 79, at 23; Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524 (1980).

85. Bell, *supra* note 84, at 524 (citing *Roberts v. City of Bos.*, 5 Cush. 198, 206 (1849)).

86. *Id.* at 525–26.

87. “The NAACP had been litigating school desegregation cases for decades, losing each time, or winning, at best, very narrow victories. Then, in 1954, the skies opened. The Supreme Court of the United States held, for the first time in a school desegregation case, that separate is never equal.” Carter, *supra* note 79, at 24 (quoting Richard Delgado, *Rodrigo’s Roundelay: Hernandez v. Texas and the Interest-Convergence Dilemma*, 41 HARV. C.R.-C.L. L. REV. 23, 41 (2006); Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 372–73 (2002)).

white elites in how the United States was perceived in a post-war world.⁸⁸ The abandonment of segregation needed to happen because whites in policymaking positions could not advance the principles of equality and freedom in their foreign policy efforts against Communism when racial strife existed at home.⁸⁹ Bell pointed to black servicemen returning from World War II who became discontent with racial prejudice at home after experiencing a different world abroad.⁹⁰ It was hard to expand the creed “all men are created equal” to third-world countries when democracy did not extend to the nation’s black men who fought for that very principle.⁹¹ So, instead, whites co-opted the movement for equality with *Board v. Brown* and lessened the threat.⁹²

Even if Bell was incorrect that *Brown v. Board’s* lip service to colorblindness and equality was co-opted merely to satisfy foreign interests, the fact remains that no matter the reasons behind it, the decision did little to change the status quo at home.⁹³ Orders to integrate schools in the South were largely disregarded, and some districts openly resisted.⁹⁴ The defiance of Arkansas governor Orval Faubus in using armed force to prevent nine black students from attending Central High School in Little Rock, Arkansas was quelled only by President Eisenhower’s deployment of the 101st Airborne

88. Bell, *supra* note 84, at 524.

89. *Id.* Professor Mary Dudziak discovered documents that supported Bell’s argument that *Brown* was aimed at containing communism abroad. See Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61, 62–63, 80–93 (1988) (“[T]he international focus on U.S. racial problems meant that the image of American democracy was tarnished. The apparent contradictions between American political ideology and practice led to particular foreign policy difficulties with countries in Asia, Africa and Latin America. U.S. government officials realized that their ability to sell democracy to the Third World was seriously hampered by continuing racial injustice at home.”). The *Pittsburgh Courier* said of *Brown*, “This clarion announcement will also stun and silence America’s traducers behind the Iron Curtain.” PATTERSON, *supra* note 21, at 71.

90. Bell, *supra* note 84, at 524–25.

91. *Id.* “America cannot maintain its leadership in the struggle for world democracy as long as the conditions exist which caused our arrest and conviction. We don’t fool anybody. People abroad know and are losing faith.” ARSENAULT, *supra* note 57, at 54 (quoting CORE founder Bayard Rustin following his arrest and subsequent incarceration arising out of the Journey to Reconciliation Freedom Ride).

92. See Bell, *supra* note 84, at 523–24.

93. See PATTERSON, *supra* note 21, at 221; Bell, *supra* note 84, at 528–29.

94. See Bell, *supra* note 84, at 528–29; Lopez, *supra* note 44, at 810.

Division.⁹⁵ The enrollment of the first black man at the University of Mississippi erupted into such rioting and violence that President Kennedy had to send 16,000 federal troops to intervene.⁹⁶ And President Kennedy had to nationalize the Alabama National Guard when Governor George Wallace tried to block the entry of two black students to the University of Alabama to make good on his “segregation now, segregation tomorrow, segregation forever” campaign promise.⁹⁷ Equality may have been the ideal, but it was certainly not the practice, neither in schools nor the rest of society. Colorblindness had been rejected by the majority of the Court in *Plessy*. It was rejected by a society that replaced slavery with Black Codes and then with Jim Crow.⁹⁸ It was rejected by a society that fought the desegregation of its schools and met marches for racial equality with violent resistance. Color was just too important.

But then a curious thing happened. After decades of struggle, civil rights lawyers “dropped their demands for colorblindness and began to stress the necessity of race-conscious remedies to achieve integration and substantive equality.”⁹⁹ They sought measures like affirmative action, race-based preferences to remedy the effects of blacks having been previously systemically and categorically denied equality in a racially segregated society.¹⁰⁰ And, consistent with Bell’s theory, as racial change threatened the

95. Juan Williams, *Daisy Bates and the Little Rock Nine*, NPR (Sept. 21, 2007), <http://www.npr.org/templates/story/story.php?storyId=14563865>; Bell, *supra* note 84, at 528–29.

96. NADINE COHODAS, *THE BAND PLAYED DIXIE* 86 (1997).

97. PATTERSON, *supra* note 21, at 94.

98. The Black Codes replaced slavery with laws, “which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value.” *Slaughter-House Cases*, 16 Wall. 36, 70 (1872). Based on the Black Codes, post-Reconstruction “Jim Crow” racial segregation laws institutionalized the inferiority of the black race. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 393 (1978) (Marshall, J., concurring in part and dissenting in part) (describing segregation under Jim Crow laws).

99. Lopez, *supra* note 44, at 810.

100. *Id.* at 811. President Johnson signed the Civil Rights Act of 1964, which prohibited discrimination in employment based on race, color, religion, or national origin. 42 U.S.C.A. §§ 2000e et seq. Noting, however, that civil rights laws alone could not remedy past discrimination, President Johnson issued an executive order that required government contractors to “take affirmative action” in placing minority employees in all aspects of hiring and employment. Exec. Order No. 11246, 30 FR 12319 (1965).

established structure of power and privilege, those who had previously opposed colorblindness now had an interest in its use.¹⁰¹ Whites accused those seeking affirmative action in favor of blacks as “impermissibly using ‘race’ to create a competitive advantage in the American distributive system.”¹⁰² In the vernacular, whites believed race was being impermissibly used to the advantage of blacks and to the disadvantage of whites. Hiding “behind a color-blind façade,” colorblindness was once again co-opted and repurposed to attack affirmative action.¹⁰³

One of the first assaults came in the form of a challenge from a 38-year-old white male to a medical school admissions program in *Regents of University of California v. Bakke*.¹⁰⁴ In a fractured decision that produced six opinions, none with a majority, the Supreme Court struck down a quota program that filled 16 of 100 open slots with “disadvantaged” minorities as an impermissible system of classification based on race in violation of the Fourteenth Amendment.¹⁰⁵ Even though Justice Powell conceded that the black population “to some extent struggles still” (this, on the heels of a volatile civil rights movement just a decade before), he reduced over 350 years of bondage, servitude, and brutal inequality to “transitory considerations,” comparable to the recent experiences of some Italian, Greek, and Slavic immigrant groups.¹⁰⁶ Justice Powell recognized that the framers of the

101. Lopez, *supra* note 44, at 810. While the Civil Rights Act “presumed to promote a color-blind society,” affirmative action efforts went far beyond that. PATTERSON, *supra* note 21, at 127, 136–37, 194.

102. Russell, *supra* note 56, at 1410.

103. Lopez, *supra* note 44, at 810; Nunn, *supra* note 25, at 436.

104. 438 U.S. 265 (1978).

105. *Id.* at 275, 320.

106. *Id.* at 292 n.32, 298. “The reply of many whites, especially of white ethnics who had only recently made it out of their own ghettos, was: our groups too faced prejudice and discrimination; we haven’t made it to the top of American society, either, as is shown by our sparse representation at elite levels; and it is not fair to change the rules in midstream, after we have committed ourselves to them.” Russell, *supra* note 56, at 1410 (quoting RICHARD D. ALBA, *ETHNIC IDENTITY: THE TRANSFORMATION OF WHITE AMERICA* 317 (1990)). To counter the prejudice they had encountered, first- and second-generation immigrants “reaffirmed their own ‘whiteness’” by persecuting blacks, who ranked lower on the racial hierarchy. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 29 (1993). *But see Bakke*, 438 U.S. at 400–01 (Marshall, J., concurring in part and dissenting in part):

The experience of Negroes in America has been different in kind, not

Fourteenth Amendment had sought to bridge the gap of inequality between the “Negro race and the white ‘majority.’”¹⁰⁷ However, he refused to employ a similar contemporary approach on the basis that the Amendment, when reduced to writing, used “universal terms, without reference to color, ethnic origin, or condition of prior servitude.”¹⁰⁸ He concluded that, “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.”¹⁰⁹ After all, justice was to be colorblind.¹¹⁰

C. Color-Blind Racism in Post-Racial America

Many believe that the United States has entered a post-racial era, where colorblindness has been attained and race no longer matters.¹¹¹ Best understood as a “rhetorical

just in degree, from that of other ethnic groups. It is not merely the history of slavery alone but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot.

Id.

107. *Bakke*, 438 U.S. at 293 (citing *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 71 (1872)). Justice Powell downplayed the significance of the white “majority” as a group “composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals.” *Id.* at 295.

108. *Id.* at 293.

109. *Id.* at 289–90. Justice Marshall lamented that the Court’s approach would “ensure that America will forever remain a divided society.” *Id.* at 396, 401 (Marshall, J., concurring in part and dissenting in part). Nevertheless, Justice Powell opined that diversity in higher education was a “compelling interest,” and suggested that a more narrowly tailored program that used race “plus” as a factor in admissions, as opposed to a quota, would not violate the Constitution. *Id.* at 311, 316–18, 321–24.

110. In the wake of *Bakke*, a woman challenged the University of Michigan Law School’s admissions program, which used race as a “predominant” factor, claiming it gave minority applicants ‘a significantly greater chance of admission than students with similar credentials from disfavored racial groups.’” *Grutter v. Bollinger*, 539 U.S. 306, 317 (2003). Writing for the majority, Justice O’Connor found diversity to be a compelling interest that could justify the narrowly tailored use of race in the selections process for public universities. *Id.* at 322, 343. Envisioning a truly color-blind nation, but mindful that the Fourteenth Amendment sought to eliminate all racial classifications, Justice O’Connor set an aspirational time limit of twenty-five years for discontinuing the use of racial preferences. *Id.* at 341–43.

111. Wiecek, *supra* note 55, at 3.

response to colorblindness,” post-racialists respond to charges of racism with a denial that race is an issue.¹¹² In other words, if colorblindness was once aspirational, then post-racialism is the attainment of that goal.¹¹³ Many claimed that the election of Barack Obama was “proof positive that the United States had entered a ‘post-racial’ era.”¹¹⁴ In a country with such a tortured racial history, the election of a black man to the American presidency was indeed monumental.¹¹⁵ As *The Economist* exclaimed, “America has turned the page on race.”¹¹⁶ To be sure, traditional racism as seen in days of Bull Connor has largely subsided and taken many of the overtly bad actors and actions with it.¹¹⁷

Post-racialism draws on the bad-actor construct of restrictive racism and attributes acts of racism to the individual bigotry and animus of a few bad actors.¹¹⁸ Thus, the acceptable litmus test for racism in post-racial America has become whether someone commits an overtly racist act or utters a racial epithet as evidence of whether racism actually

112. Lopez, *supra* note 44, at 822. “Post-racialism does not challenge this indifference, this sense that we are not responsible or capable of remedying racial injustice. It rather reassures us there is no injustice there to be remedied.” *Id.* at 831.

113. See *Bakke*, 438 U.S. at 327 (Brennan, J., concurring and dissenting).

114. Bonilla-Silva & Dietrich, *supra* note 24, at 191; see also Domenico Montanaro, *NBC News/WSJ Poll: Affirmative Action Support at Historic Low*, NBCNEWS.COM (June 11, 2013), http://firstread.nbcnews.com/_news/2013/06/11/18885926-nbc-news-wsj-poll-affirmative-action-support-at-historic-low; Lopez, *supra* note 44, at 807.

115. See Adam Nagourney, *Obama Wins Election; McCain Loses as Bush Legacy Is Rejected*, N.Y. TIMES (Nov. 4, 2008), <http://www.nytimes.com/2008/11/05/us/politics/05campaign.html?pagewanted=all>. “Barack Hussein Obama was elected the 44th president of the United States on Tuesday, sweeping away the last racial barrier in American politics with ease as the country chose him as its first black chief executive.” *Id.*

116. *Trouble with the Humans: Working-Class Whites Are Angry with the Democrats for Lots of Reasons. Race Is Not One of Them*, THE ECONOMIST (Oct. 21, 2010), <http://www.economist.com/node/17308059>. “The electorate may be divided by race, but no longer mainly because of race.” *Id.*

117. But see Candace J. Semien, *Southern Alumnus Investigates Modern-Day Lynchings*, WAFB.COM (Feb. 16, 2012 3:13 p.m.), <http://ebrnorth.wafb.com/news/families/52190-southern-alumnus-investigates-modern-day-lynchings>; Dexter Rogers, *Death in Mississippi: Lynching or Suicide*, HUFFINGTON POST (Feb. 28, 2011 8:11 a.m.), http://www.huffingtonpost.com/dexter-rogers/frederick-jermaine-carter_b_827970.html.

118. Lopez, *supra* note 44, at 829; see also Schwabauer, *supra* note 68, at 654 (describing traditional or restrictive racism as “intentional acts (or omissions) committed by individuals who were motivated by their racial animus.”).

exists or not.¹¹⁹ The “absence of these examples in their lives says to them racism has vanished or is a great deal less prevalent than in the past.”¹²⁰ Acts of racism that cannot be ignored are explained away as “isolated occurrence[s] that result from a few malevolent individuals,” not as the prevailing attitude of society.¹²¹

Believing that traditional racism no longer exists, or was largely overcome with President Obama’s election, post-racialists reject structural racism and refuse to recognize its structural residue.¹²² But as Harvard law professor Randall

119. David Mura, *Explaining Racism to My Daughter*, in TAHAR BEN JELLOUN, *RACISM EXPLAINED TO MY DAUGHTER* 103 (1999).

120. *Id.* at 105–06.

121. Nunn, *supra* note 25, at 438. Recent legal jurisprudence feeds this theory, as many laws have “arguably created or reflect an egalitarian norm” by prohibiting discrimination based on characteristics of race. Maldonado, *supra* note 9, at 1469; *see also* 42 U.S.C.A. § 2000e et seq. The Supreme Court has generally characterized racism only in the traditional or restrictive-racism theory, requiring a deliberate act by one who consciously sets out to harm another with racial animus. Wiecek, *supra* note 55, at 4, 7. The Court has not looked favorably on issues grounded in structural racism, such as affirmative action plans, leading some to say that the “most effective agent perpetuating [structural racism] has been the Supreme Court’s refusal to recognize it.” *Id.* at 4, 6–7.

122. Structural inequities show the color line still divides modern American society along racial lines. Housing patterns remain segregated, MASSEY & DENTON, *supra* note 106, at 60–82, and the 2010 census recorded an increasing wealth divide between white and black households, with the median white household income at \$110,729, twenty-two times greater than the \$4,955 of black households. Tami Luhby, *Worsening Wealth Inequality By Race*, CNN MONEY (June 21, 2012), <http://money.cnn.com/2012/06/21/news/economy/wealth-gap-race/>. Even though blacks make up about twelve percent of the population, they accounted for a mere nine percent of the nation’s job gains. *Id.* Unemployment for blacks is twice that of whites, and historically has been since the government began tracking unemployment figures in 1972. Annalyn Censky, *Unemployment Falls . . . But Not For Blacks*, CNN MONEY (Jan. 6, 2012), http://money.cnn.com/2012/01/06/news/economy/black_unemployment_rate/index.html?iid=EL. At the beginning of 2012, the unemployment rate for blacks stood at 15.8 percent for blacks and 7.5 percent for whites. *Id.* Disparities in educational opportunities have increased with black males making up only 2.8 percent of the undergraduate population even as white overrepresentation has risen at the top 468 schools. ANTHONY P. CARNEVALE & JEFF STROHL, GEORGETOWN U., GEORGETOWN PUB. POLICY INST., *SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL PRIVILEGE* 7–9, 19, (2013), *available at* <http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/Separate&Unequal.FR.pdf>; SHAUN R. HARPER, THE JOINT CTR. HEALTH POL’Y INST. *BLACK MALE STUDENTS AT PUBLIC FLAGSHIP UNIVERSITIES IN THE U.S.: STATUS, TRENDS, AND IMPLICATIONS FOR POLICY AND PRACTICE*, 8, 20 (2005), *available at* <http://www.jointcenter.org/hpi/files/manual/Black%20Male%20Students%20at%20Public%20Flagship.pdf>. As one scholar aptly recognized, “[r]ace remains a

Kennedy reminds, to declare that racism no longer exists is to deny the “breadth, depth, and subtlety of racial divisions in American life [and to forget that] something as thoroughly ingrained as American racial prejudice, particularly its antiblack variant, would not suddenly dissipate despite the goodwill effectively summoned by Obama’s skillful campaign.”¹²³ Thus, scholars argue that those who still consider the United States to be a color-blind society are actually taking a “very blind-sighted approach to race and color issues that prevents acknowledgment of unresolved issues of race and color inextricably intertwined with issues of power, status, and the allocation of resources.”¹²⁴

The problem with color-blind theory, however, when advanced by the former majority, is that it fails to see the flip side of the coin: “white privilege.”¹²⁵ Based on the Latin word *privilegium*, meaning “a law affecting an individual,” white privilege has been defined as “an invisible package of unearned assets” belonging to whites because of a history of systemic racism.¹²⁶ As some suggest, perhaps the greatest privilege of being white is that whites are not daily confronted with their race.¹²⁷ Yet, when the issue is ignored, it reinforces what sociologists have termed “white

stunningly powerful predictor of super- and subordination, ensuring that race has not nearly played itself out in America’s long struggle for a more perfect union.” Lopez, *supra* note 44, at 808.

123. RANDALL KENNEDY, *THE PERSISTENCE OF THE COLOR LINE: RACIAL POLITICS AND THE OBAMA PRESIDENCY* 9 (2011). “‘You know,’ the President recently remarked, ‘on the heels of [my electoral] victory over a year ago, there were some who suggested that somehow we had entered into a post-racial America, all those problems would be solved.’ Then he deadpanned: ‘That didn’t work out so well.’” Lopez, *supra* note 44, at 807.

124. Howe, *supra* note 1, at 89. Recently, after issuing a disclaimer that her statements were not racist, former Alaskan Governor and Vice Presidential hopeful Sarah Palin flippantly compared the national debt to slavery. When confronted with her use of hyperbole, which treated a system of bondage and torture as synonymous with a monetary obligation, Palin declared that people would be offended by her word usage only if they “misinterpreted” what she said. Jonathan Capehart, *Sarah Palin Invokes Slavery, Inappropriately of Course*, THE WASH. POST (Nov. 15, 2013), <http://www.washingtonpost.com/blog/post-partisan/wp/2013/11/15/sarah-palin-invokes-slavery-inappropriately-of-course/>.

125. Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL’Y 245, 246–47 (2005).

126. *Id.*

127. *Id.* at 245 (citing Barbara J. Flagg, “Was Blind, But Now I See”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 969 (1993)).

normativity.”¹²⁸ Whites begin to think that their privileged status is the norm, and that they are entitled to any benefits accruing to them under that system.¹²⁹

Indeed, under current post-racial thought, because color lines no longer exist, differences in race are not to be acknowledged.¹³⁰ And those who dare to even bring up the issue of race are often vilified as racists themselves, or accused of “race baiting” or further marginalizing those who have made so much advancement.¹³¹ Termed “color-blind racism,” this “new form of societal racism” is just another example of how colorblindness has once again been seized to “defend and justify the contemporary racial order.”¹³² Unlike “the rallying cry of liberals during the years when Martin Luther King, Jr., dreamed of the day when all people would ‘be judged not by the color of their skin but by the content of their character,’ . . . [t]hose advocating colorblindness today are often not the proponents of racial equality.”¹³³ Instead, colorblindness has been co-opted as “a doctrine of conservatives” who believe that mentioning race is a matter of “playing the race card” in an effort to unfairly disadvantage whites.¹³⁴ And despite current color-blind rhetoric, whites

128. Wiecek, *supra* note 55, at 11.

129. *Id.* at 12.

130. See KENNEDY, *supra* note 123, at 248. *But see* Mura, *supra* note 119, at 100 (contrasting his daughter’s wish “to live in a world where the terms ‘racism’ and ‘race’ no longer exist” with the desire for her to understand that it is sometimes “necessary and a good thing to group people by race in order to redress a social injustice.”).

131. See Darron T. Smith, *Kieran Romney and the Paradox of Transracial Adoption*, HUFFINGTON POST (Jan. 2, 2014), http://www.huffingtonpost.com/darron-t-smith-phd/kieran-romney_b_4531158.html (“[M]ost whites are paralyzed by the thought of being labeled ‘racist’ to the point that some clumsily and disingenuously invoke statements like ‘some of my best friends are Black’ to appear as though they are not racist. What the pundits seemed most upset about is that the obvious was spoken and the elephant in the room was addressed, rather than maintaining the façade of colorblindness.”); Mirkinson, *supra* note 25.

132. Bonilla-Silva & Dietrich, *supra* note 24, at 190–91; Lopez, *supra* note 44, at 828. One author analogized the continued black struggle as “the competition between blacks and whites to a race. The white person sees the black person line up at the starting line and says, okay, let’s have a fair race. If I win I’m the better qualified. But what the white person doesn’t realize . . . is that the black person has run several miles already to get to the starting line. It’s not a fair race at all.” Mura, *supra* note 119, at 121.

133. Twila Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 78 (1993–94).

134. PAMELA ANNE QUIROZ, *ADOPTION IN A COLOR-BLIND SOCIETY* 1 (2007).

still continue to dictate social policy—including adoption policy—most often to their own advantage.¹³⁵

II. THE CO-OPTION OF ADOPTION TO SATISFY WHITE INTERESTS

A. *Co-opting Domestic Adoption*

The dominant thought towards United States domestic adoptions in the mid- to late-twentieth century was that of the “as-if-genealogical” family.¹³⁶ “As if” adoptions described the ideal that adopted children should be incorporated into families “as if” they were born into that family, meaning the children should look like the adoptive parents and share their genealogical makeup.¹³⁷ Thus, children were “matched” to parents who favorably compared in social, racial, and physical aspects.¹³⁸ Adoption, then, tended to reflect the status quo, as the courts, churches, adoption professionals, and the general population maintained legal, religious, political, and social justifications for keeping children with families of their same race.¹³⁹ That meant the adoption industry, like the rest of American society, remained largely segregated for years.¹⁴⁰

Indeed, many “believe that affirmative action undermines standards of merit in order to redistribute social goods proportionately for minority groups,” Perry, *supra* note 133, at 78, and why the United States Supreme Court was primed to take a color-blind approach to deny the most recent challenge to affirmative action. See Richard Wolf, *Justices Voice Support for State Affirmative Action Ban*, USA TODAY (Oct. 15, 2013), <http://www.usatoday.com/story/news/nation/2013/10/15/supreme-court-affirmative-action-race-michigan/2969443/> (discussing *Schuette v. Coalition to Defend Affirmative Action*, 133 S. Ct. 1633 (2013)). The Supreme Court has generally characterized racism only in the traditional or restrictive-racism theory, requiring a deliberate act by one who consciously sets out to harm another with racial animus. Wiecek, *supra* note 55, at 4, 7. The Court has not looked favorably on issues grounded in structural racism, such as affirmative action plans, leading some to say that the “most effective agent perpetuating [structural racism] has been the Supreme Court’s refusal to recognize it.” *Id.* at 4, 6–7.

135. QUIROZ, *supra* note 134, at 3, 14.

136. JUDITH S. MODELL, *KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE* 2 (1994).

137. *Id.* at 20 (“The thrust of adoption law and policy is to pretend that blood is there; a fictive kinship is *just like* a biological relationship.”).

138. Julie Berebitsky, *Family Ideals and the Social Construction of Modern Adoption*, in *ADOPTIVE FAMILIES IN A DIVERSE SOCIETY* 29, 36 (Katarina Wegar ed., 2006).

139. QUIROZ, *supra* note 134, at 36, 41.

140. Ellen Herman, *The Adoption History Project: African-American Adoptions*, U. OF OR., <http://pages.uoregon.edu/adoption/topics/AfricanAmerica>

By many accounts, most agencies denied blacks adoption services, and blacks were largely left out of the process.¹⁴¹ Accordingly, those adopting tended to be white parents seeking white children that looked like them. Black children available for adoption were considered to be “special needs,” or “hard-to-place;” most were never adopted.¹⁴² The black community simply took care of its own through relatives and kinship care rather than formal adoption processes.¹⁴³ Even as services slowly began to include the adoption of black children, or “Negro” adoptions, the process remained segregated, with children being matched only with adoptive parents of the same race.¹⁴⁴

Significant changes in the latter part of the twentieth century, such as the availability of contraceptives and abortion, led to a shortage of healthy white infants placed for adoption.¹⁴⁵ An industry that had operated on race-matching as in the best interests of the child suddenly found the supply of white children could not meet the demand. In 1967, after the Supreme Court struck down the prohibition of interracial marriage in *Loving v. Virginia*,¹⁴⁶ a small but definite trend emerged as white families began adopting black children.¹⁴⁷ However, the adoption of black children by whites garnered considerable negative attention and drew significant backlash from the black community, with some social workers calling such adoptions “the new slavery.”¹⁴⁸ The National

n.html (last updated Feb. 24, 2012).

141. *Id.*; QUIROZ, *supra* note 134, at 37.

142. Herman, *supra* note 140; Glaser, *supra* note 18.

143. Herman, *supra* note 140. The U.S. Children’s Bureau was created in 1912 by President Taft as the first federal agency tasked with improving the lives of children and families. *Children’s Bureau: CB Fact Sheet*, U.S. DEPT OF HEALTH & HUMAN SERVS., <http://www.acf.hhs.gov/programs/cb/fact-sheet-cb>. It began including race in its reporting system in 1948. Herman, *supra* note 140.

144. Herman, *supra* note 140.

145. Perry, *supra* note 133, at 41. Other factors, such as delayed family planning with increased infertility, the legalization of abortion, and the declining stigma of single motherhood, contributed as well. QUIROZ, *supra* note 134, at 40.

146. 388 U.S. 1, 12 (1967).

147. Ellen Herman, *The Adoption History Project: Transracial Adoptions*, U. OF OR., <http://pages.uoregon.edu/adoption/topics/transracialadoption.htm> (last updated Feb. 24, 2012) [hereinafter Herman, *Transracial*]; BARTHOLET, *FAMILY BONDS*, *supra* note 4, at 94.

148. Glaser, *supra* note 18; Perry, *supra* note 133, at 55 (“To some blacks, [the placement of black children in white homes by a white-dominated social worker industry] may suggest that the disempowerment of enslaved Blacks has

Association of Black Social Workers (NABSW) reacted and, in 1972, publicly opposed the practice of transracial adoption, claiming that the adoption of black children by whites was a form of “cultural genocide” that returned blacks to “chattel status.”¹⁴⁹ On the heels of a civil rights movement that was met by violence and white resistance to any form of black social advancement, the adoption of black children by whites was seen by many blacks as yet another attempt at disempowerment—and a further recasting of white domination and entitlement.¹⁵⁰

In the aftermath of the NABSW controversy, the adoption of black American children decreased by 39 percent.¹⁵¹ The decline was met with charges of racism against the black community and NABSW for laying claim to “their children,” instead of truly caring about the children’s best interests.¹⁵² Indeed, those who opposed such adoptions were “accused of wanting race-conscious policy that failed to benefit children.”¹⁵³ Opposition to race-matching increased, and scholars advanced that adoptions would never be colorblind until agencies assigned children to adoptive parents without regard to their race.¹⁵⁴ Harvard law professor Elizabeth Bartholet advocated that placing black children only in black homes was “inconsistent with an appropriate understanding of the role race should play in social ordering,” and advanced that racism could be eliminated through transracial adoption.¹⁵⁵ Particularly concerned with the effect of color-conscious matching policies on black children languishing in foster care, Bartholet suggested that color-blind policies would allow more children

continued in modern-day America.”).

149. Herman, *Transracial*, *supra* note 147; BARTHOLET, FAMILY BONDS, *supra* note 4, at 90; Perry, *supra* note 133, at 42.

150. See Perry, *supra* note 133, at 55; QUIROZ, *supra* note 134, at 3.

151. Maldonado, *supra* note 9, at 1455 & n.196. The Child Welfare League of America rewrote its adoption standards the next year to conform to the NABSW stance, resulting in a substantial chilling of the adoption of black American children. Herman, *Transracial*, *supra* note 147.

152. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Transracial Adoption*, 139 U. PA. L. REV. 1163, 1232–33 (1991) [hereinafter Bartholet, *Black Children*].

153. QUIROZ, *supra* note 134, at 41.

154. *Id.* at 3; Maldonado, *supra* note 9, at 1470 (citing Perry, *supra* note 133, at 104).

155. Bartholet, *Black Children*, *supra* note 152, at 1172.

to escape foster care through adoption.¹⁵⁶ Further, she advanced that the best interests of the child, i.e., finding a home, should be exercised without interference by the state¹⁵⁷ or even by the child's community of origin.¹⁵⁸

Congress responded to the NABSW controversy by enacting the Multiethnic Placement Act (MEPA).¹⁵⁹ Signed into law by President Clinton in 1994 as part of the Improving America's Schools Act, MEPA expressly prohibited agencies that received federal assistance from denying foster care or adoptive placements "solely on the basis of race."¹⁶⁰ Two years later, Congress amended MEPA to delete the word "solely" from the language of the Act, clarifying that race could not be a factor in placements, solely or otherwise.¹⁶¹ In other words, placements were to be colorblind—agencies that received federal funding could no longer use race to determine placements.¹⁶² This meant that prospective adoptive parents, most of whom were white and formerly denied children under race-matching policies, could no longer be denied the children they wanted due to the child's race.¹⁶³ Although these transracial adoptions never amounted to a significant

156. *Id.*

157. See *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (refusing to consider race in its review of a Florida child custody determination which involved a subsequent mixed marriage).

158. *Id.* at 1242, 1245–46, 1255; Perry, *supra* note 133, at 82–83. As colorblind discourse moved into the adoption arena, scholar Twila Perry termed Bartholet's position "color-blind individualism." Perry, *supra* note 133, at 43–45; see also QUIROZ, *supra* note 134, at 18 (citing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)); Bartholet, *Black Children*, *supra* note 152, at 1201–06, 1232–33; Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 *UMKC L. REV.* 487, 487–501 (1991).

159. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 553, 108 Stat. 3518 (1994) (repealed in 1996).

160. *Id.*

161. Small Business Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755 (codified at 42 U.S.C. § 1996b(1)(A) (2006)) (reenacting the pertinent portions of the MEPA under the Interethnic Adoption Provisions). Congress followed this legislation with the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

162. Maldonado, *supra* note 9, at 1457. Private agencies were not so constrained and encouraged adoptive parents to select preferences in race. *Id.* at 1470 n.276 (quoting Bartholet, *Black Children*, *supra* note 152, at 1186–87) ("[A]n initial order of business for most adoption agencies is the separation of children and prospective parents into racial classifications.").

163. Emily Upshur & Jack Demick, *Adoption and Identity in Social Context*, in *ADOPTIVE FAMILIES IN A DIVERSE SOCIETY* 99 (Katarina Wegar ed., 2006).

number,¹⁶⁴ what was previously taboo was now recast “as an altruistic effort toward social betterment” and a positive step toward the creation of a nonracist society.¹⁶⁵ Colorblindness, through “best interests,” had been co-opted to satisfy white demand.

B. International Adoption and the Hague Convention’s Subsidiarity Requirement

International adoption in the United States originated from a humanitarian desire to aid children orphaned by war.¹⁶⁶ It was not a common practice and the number of children adopted from outside of the United States remained relatively small.¹⁶⁷ Following the NABSW controversy, however, Americans increasingly looked to foreign markets for children.¹⁶⁸ By 1993, international adoption rates outpaced all other adoptions of unrelated children.¹⁶⁹ As American demand for infants grew, and American supply dwindled, the United States brought in nearly a quarter of a million children from other nations and became known as the largest “receiving country” for international adoptions.¹⁷⁰

Although the globalization of adoption has provided more adoption opportunities, it has also opened avenues for potential abuses.¹⁷¹ Evidence of corruption, including child abduction, surfaced in Guatemala.¹⁷² Similar problems arose in Vietnam, India, Cambodia, and other countries, where children were bought and sold for adoption.¹⁷³ Many who

164. Herman, *Transracial*, *supra* note 147 (estimating that only 2,500 adoptions were finalized even at their peak in 1970, and that no more than 12,000 black children were placed in white homes before 1975).

165. See QUIROZ, *supra* note 134, at 40; Perry, *supra* note 133, at 36, 45.

166. HOWELL, *supra* note 1, at 144, 171.

167. *Id.*

168. Maldonado, *supra* note 9, at 1455 & n.196.

169. Joan Heifetz Hollinger, *Adoption Law*, FUTURE CHILD: ADOPTION, Spring 1993, at 45.

170. Maldonado, *supra* note 9, at 1455 & n.196; *Intercountry Adoption: Statistics*, *supra* note 6.

171. Perry, *supra* note 133, at 178; Joanne Csete et al., *Rights as Recourse: Globalized Motherhood and Human Rights*, in THE GLOBALIZATION OF MOTHERHOOD: DECONSTRUCTIONS AND RECONSTRUCTIONS OF BIOLOGY AND CARE (Wendy Chavkin & JaneMaree Maher eds., 2010) (citing Brysk, *supra* note 17, at 1).

172. Roby et al., *supra* note 2, at 2. The United States issued a moratorium on adoptions from Guatemala in 2008, which is still in effect. *Id.*

173. See DeLeith Duke Gossett, *If Charity Begins at Home, Why Do We Go Searching Abroad? Why The Federal Adoption Tax Credit Should Not Subsidize*

adopted from Ethiopia later discovered that their children were relinquished because of promises made to biological parents that the children would go to America for a good education and return home afterwards; the children were neither orphans nor abandoned, but were relinquished based on misunderstandings of the permanency of Western adoption.¹⁷⁴ This narrative proved to be recursive.¹⁷⁵ As international adoption increasingly devolved into what amounted to little more than child trafficking, countries sought to curb abusive practices through international regulation.¹⁷⁶

Passed with the express purpose of curbing child trafficking and other abuses arising from the global adoption

International Adoptions, 17 LEWIS & CLARK L. REV. 839, 869–73 (2013).

174. See, e.g., Tarikuwa Lemma, *International Adoption: I Was Stolen From my Family*, CNN (Sept. 16, 2013), <http://edition.cnn.com/2013/09/16/opinion/international-adoption-tarikuwa-lemma-stolen-children/index.html> (detailing the story of a girl whose father was told she and her sisters were being sent to the United States on a study program); John Nicol, *Ethiopian Adoption: Canadian Parents Raise Concerns*, CBC NEWS (Mar. 19, 2009), www.cbc.ca/canada/story/2009/03/19/f-ethiopia-adoption.html.

175. See, e.g., David Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113 (2006); David Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 SETON HALL L. REV. 403 (2005); Jini L. Roby & Stephanie Matsumura, *If I Give You My Child, Aren't We Family? A Study of Birthmothers Participating in Marshall Island–U.S. Adoptions*, 5 ADOPTION QUARTERLY, no. 4, 2002, at 7; HOWELL, *supra* note 1, at 48–49.

176. See Convention on the Rights of the Child, G.A. Res. 44/25 (Nov. 20, 1989), *reprinted at* 28 I.L.M. 1448, 1464 art. 21(b) (1989). The first attempt, the Convention on the Rights of the Child (“CRC”), included language that prioritized for care of children “in any suitable manner” in the country of origin over intercountry adoption. *Id.* Even though the CRC included the “best interests of the child” tenet, the United States interpreted the “any suitable” language within the CRC to mean that foster care and institutionalization were preferred over international adoption. Elizabeth Bartholet, *International Adoption: The Human Rights Issues*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 95 (2010) [hereinafter Bartholet, *Human Rights*]; Barbara Yngvesson, *Transnational Adoption and the Transnationalization of Motherhood: Rethinking Abandonment, Adoption and Return*, in *THE GLOBALIZATION OF MOTHERHOOD: DECONSTRUCTIONS AND RECONSTRUCTIONS OF BIOLOGY AND CARE* 109 (Wendy Chavkin & JaneMaree Maher eds., 2010). Charging that the CRC reflected a bias against intercountry adoption, the United States refused to ratify the treaty. Somalia ratified the Convention earlier this year, leaving the United States as the only nation that has not ratified the CRC. Press Release, UNICEF, Government of Somalia Ratifies UN Convention on the Rights of the Child (Jan. 20, 2015), http://www.unicef.org/media/media_78732.html; Csete et al., *supra* note 171, at 214.

industry, the Hague Convention standardized the international adoption process between member countries and provided regulatory safeguards for member countries engaged in international adoption.¹⁷⁷ It incorporated the “best interests of the child” principle and, as part of its protocols, required member countries to establish a central authority, which decides whether a child is legally adoptable.¹⁷⁸ The Hague Convention also includes a proviso, known as the “subsidiarity principle,” which subordinates international adoption to domestic adoption.¹⁷⁹ It notes that international 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.”¹⁸⁰ But it is allowed only as a last resort, after local authorities give “due consideration” that all possibilities for placement of the child within the state of origin have been considered.¹⁸¹ That means that international adoption might still be considered to be in the best interests of the child, but only if all avenues to domestic adoptions have been exhausted and found wanting.¹⁸²

The United States signed the Hague Convention in 1993 and began the long process toward ratification.¹⁸³ The State

177. Hague Convention, *supra* note 3; Yngvesson, *supra* note 176. The Hague Convention was seen as “an important development” over the CRC, as it was not interpreted to require foster care or institutionalization over international adoption. Bartholet, *Human Rights*, *supra* note 176, at 95; Csete et al., *supra* note 171, at 214.

178. Hague Convention, *supra* note 3, at 1134–46. The central authority is charged with establishing protocols ensuring the voluntary relinquishment of the child by the mother. Yngvesson, *supra* note 176. Any money exchanged is only to be for the “cost and expenses, including reasonable professional fees of persons involved in the adoption.” Hague Convention, *supra* note 3, at arts. 6–9, 32. For “foundlings,” or abandonments, the central authority must establish that no kin are available or willing to claim the child. *Id.*

179. Hague Convention, *supra* note 3, at 1139–40 art. 4(b).

180. *Id.* at 1139.

181. *Id.* “This principle recognizes that when the birth family experiences a crisis, the respective systems—such as the extended family network, community resources, and domestic permanency options—are the natural lines of protection for the child. ICA is an option for a child whose birth family cannot provide care and after consideration has been given to families in the country of origin.” Roby et al., *supra* note 2, at 6.

182. Hague Convention, *supra* note 3; Csete et al., *supra* note 171, at 214.

183. Some claim the United States did not come into compliance with the Hague Convention sooner, because of its extensive adoption activity with Guatemala, a country marked by corruption and where, it was said, “every 100th baby born in Guatemala grows up as an adopted American.” Peter

Department publicly declared adherence to the Hague Convention to be the official position of the United States government and encouraged “all countries to take the necessary steps to join and implement The Hague Inter-Country Adoption Convention.”¹⁸⁴ Indeed, by the time the Hague Convention was ratified by the United States in 2008, many anticipated a gradual shift from international adoption towards domestic adoption programs, in line with the Hague Convention’s subsidiarity principle.¹⁸⁵ Soon after the regulations were promulgated and the treaty was finally implemented,¹⁸⁶ the State Department publicly stressed the “paramount position of the subsidiarity principle in international adoptions,” stating:

It’s a fundamental tenet of the convention that when a child cannot be reintegrated into his or her birth family, the first option should be adoption by a family in that child’s country of origin. When that domestic adoption in the child’s country of origin is not possible, then inter-country adoption opens another opportunity for a child to find the loving home that he or she deserves.¹⁸⁷

That is in line with U.S. obligations under international law. Article 18 of the Vienna Convention states that signatories to a treaty shall not defeat the purpose of a treaty.¹⁸⁸ In other words, once a country enters into an agreement, such as the Hague Convention, with another country, it must refrain from conduct that thwarts that

Selman, *The Movement of Children for International Adoption*, in *INTERNATIONAL ADOPTION: GLOBAL INEQUITIES AND THE CIRCULATION OF CHILDREN* 47 (Laura Briggs & Diana Marre eds., 2009) (quoting Juan Carlos Llorca, *Hague Treaty Likely to Slow Guatemala Adoptions*, ASSOCIATED PRESS (July 29, 2006)); see also Laura Briggs & Diana Marre, *Introduction: The Circulation of Children*, in *INTERNATIONAL ADOPTION: GLOBAL INEQUITIES AND THE CIRCULATION OF CHILDREN* 14 (Laura Briggs & Diana Marre eds., 2009). When the United States finally ratified the Hague Convention and it went into effect in 2008, the State Department admonished against initiating adoptions from Guatemala. Selman, *supra* note 6.

184. Press Release, Deputy Assistant Secretary of State for Consular Affairs Michele Bond, Briefing on National Adoption Day (Nov. 20, 2009), <http://www.state.gov/r/pa/prs/ps/2009/nov/132215.html> [hereinafter Press Release: Michele Bond].

185. Yngvesson, *supra* note 176, at 109; Glaser, *supra* note 18.

186. See Intercountry Adoption Act of 2000, Pub. L. 106–279, § 102(e), 114 Stat. 828 (codified as 42 U.S.C. § 14912(e)).

187. Press Release: Michele Bond, *supra* note 184.

188. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

agreement.¹⁸⁹

Eighteen months after the United States implemented the Hague Convention, the State Department admitted that some adoptions were still non-Hague compliant because they began before the Hague Convention was finally implemented.¹⁹⁰ However, the State Department suggested that prospective adoptions would be restricted to Hague countries, consistent with the subsidiarity principle's requirement that adoption agencies make every effort to place children domestically before seeking their placement abroad.¹⁹¹ Indeed, the number of international adoptions into the United States decreased as countries began to develop programs that emphasized domestic adoption.¹⁹²

Recently, Ambassador Susan Jacobs issued a press release that noted that "every child deserves to grow up in a loving family environment," but that is sometimes impossible in the child's home country.¹⁹³ In those cases, the United States supports "ethical, transparent intercountry adoptions as part of a fully developed child welfare system."¹⁹⁴ She stressed that, "[t]he Department of State works with eighty-nine partner countries under the 1993 Hague Convention to ensure that procedures are in place to protect the interests of children and families throughout the adoption process. The Hague Convention is a legal framework that ensures intercountry adoptions are transparent and ethical."¹⁹⁵ The implication was clear: the United States is a partner to the Hague Convention and works with other member countries to make sure international adoptions—when necessary—are

189. *See id.* Further, each party bound by the treaty must act in good faith. *Id.* at art. 26.

190. *Id.*

191. *Id.*

192. Miriam Jordan, *Foreign Adoptions by Americans Down to Lowest Level Since 1982*, THE WALL ST. J. (Mar. 31, 2015), available at <http://www.wsj.com/articles/foreign-adoptions-by-americans-drop-to-lowest-level-since-1982-1427837631>. The amount of children adopted internationally by U.S. citizens decreased from 17,456 children in 2008, when the Hague was implemented, to 6,441 in 2014. *Id.*; *Intercountry Adoption: Statistics*, *supra* note 6.

193. *Human Rights: U.S. Supports Intercountry Adoptions*, VOICE OF AMERICA (Nov. 25, 2013), <http://editorials.voa.gov/content/us-supports-intercountry-adoption/1797812.html>.

194. *Promoting Ethical, Transparent Adoptions*, U.S. DEPT OF STATE, http://adoption.state.gov/about_us/national_adoption_month.php (last visited Aug. 27, 2014).

195. *Human Rights: U.S. Supports Intercountry Adoptions*, *supra* note 193.

legal and ethical, and adherence to the Hague Convention facilitates those goals.

C. Co-opting International Adoption

Since the United States ratified the Hague Convention in 2008, and in line with the subsidiarity principle, many countries have increased the number of domestically-placed children and reduced the number of children made available for international adoption.¹⁹⁶ Despite its stated commitment to the Hague Convention, however, the United States routinely allows its own citizens to bypass Hague Convention requirements and protocols to adopt children from countries that are not Hague members. State Department records show that thousands of children, most from non-Hague countries, are still being brought into the United States each year for adoption.¹⁹⁷ Of the top sending countries in the last several years, four out of five were non-Hague members.¹⁹⁸ Indeed, current law creates “a strong incentive for American parents to adopt foreign children” by allowing generous tax credits without discriminating between adoptions from Hague and non-Hague countries.¹⁹⁹ These factors have created a two-tiered international adoption system: the United States, having ratified the agreement, encourages other countries to follow the Hague Convention—even shutting down adoptions from non-compliant countries²⁰⁰—but allows American citizens to bypass the Hague Convention and its espoused protections and adopt from non-Hague compliant countries.

1. Reframing Whose Interests?

International adoption involves a recurring theme: adopters from wealthy nations descend upon poor, developing nations and deliver them of their children.²⁰¹ Whereas

196. Jordan, *supra* note 192; *Intercountry Adoption: Statistics*, *supra* note 6.

197. *Id.*

198. *Id.*

199. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 366 (1997). The federal adoption tax credit, established to incentivize the adoption of children from foster care, is now being used to subsidize international adoptions at the expense of the intended beneficiaries. *See id.*; Gossett, *supra* note 173, at 886–88, 893–97.

200. Voigt, *supra* note 5.

201. BARTHOLET, FAMILY BONDS, *supra* note 4, at 142. Even international adoption proponent Bartholet recognizes that international adoption “can be

international adoption used to “find families for children,” today the practice is about “finding children for families.”²⁰² What has resulted, contrary to Hague intentions, is a “revolving door” of incoming and outgoing children, where the Hague subsidiarity requirement is overlooked and children are traded between countries to satisfy parental preferences. The response by developing countries has been much the same as NABSW’s 1972 response to the adoptions of black children by whites. Many sending countries charge that international adoption is another form of imperialism and cultural genocide.²⁰³ They argue that wealthy nations, which have already exploited labor and raw materials, now allow their white parents to steal their countries’ last, most precious resource—their children.²⁰⁴ And just as the black community and NABSW were vilified as being racist for laying claim to “their children,” developing nations that seek family unification efforts above international adoption by westerners are now portrayed as not caring about the “best interests” of their own children.²⁰⁵

understood as the ultimate form of exploitation . . . the taking by the rich and powerful of the children born to the poor and powerless. In international adoption, the privileged classes in the industrialized nations adopt the children of the least privileged groups in the poorest nations.” *Id.*

202. Kirsten Lovelock, *Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period*, 34 INT’L MIGRATION REV. 907, 908 (2000) (characterizing international adoptions after WWII and Korean War as “finding families for children” as opposed to international adoptions today which “find[] children for families.”); JOYCE MAGUIRE PAVAO, *THE FAMILY OF ADOPTION* 123 (1998) (coining the phrase that adoption should not be “about finding children for families, but about finding families for children.”).

203. Maldonado, *supra* note 9, at 1464–65 & n.248 (quoting HOWARD ALSTEIN & RITA SIMON, *INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE* 1 (1991) (“[W]hat the West has generally viewed as charitable, humane and even noble behavior, developing countries have come to define as imperialistic, self-serving and a return to a form of colonialism in which whites exploit and steal natural resources.”)); HOWELL, *supra* note 1, at 171; ADAM PERTMAN, *ADOPTION NATION* 23 (2000).

204. Maldonado, *supra* note 9, at 1464–65 & n.248 (quoting Jane Rowe, *Perspectives on Adoption*, in *ADOPTION: INTERNATIONAL PERSPECTIVES* 3, 6 (Euthymia Hibbs ed., 1991) (noting the “natural response” from poor, struggling countries is “[f]irst you want our labor and raw materials; now you want our children.”)).

205. See Bartholet, *Black Children*, *supra* note 152, at 1232–33. Akin to the cultural arguments made against black communities in the United States, Bartholet and others argue that these poor countries are more concerned with nationalism than the best interests of their children, who might have a better

To many, international adoption is an “amazing social program that changes people at no cost to the home country.”²⁰⁶ Indeed, modern proponents advance that the globalization of adoption presumably solves “adopting nations’ ‘need’ for children and children’s ‘need’ for ‘complete’ families.”²⁰⁷ But the number of “orphans” (reportedly as high as 200 million)²⁰⁸ has been grossly exaggerated; the actual number is less than a tenth of the number promoted.²⁰⁹ The change in orphan nomenclature is due in part to efforts of NGOs like the United Nations Children’s Fund (UNICEF), and Joint United Nations Programme on HIV and AIDS (UNAIDS), which label as “orphan,” for humanitarian aid purposes, those children who have lost a parent to death, separation, or abandonment.²¹⁰ “True orphans,” in the historical context, those who have lost both parents, are now referred to as “double orphans,” merely a subset of the larger “orphan” population.²¹¹ However, UNICEF explicitly warns against misinterpreting “this difference in terminology” to mean that these children are “in need of a new family, shelter, or care,” i.e., international adoption, and stresses that the focus should instead be on supporting their families and communities.²¹²

In reality, those working in developing countries stress that it is western demand that is actually increasing the number of “orphans.” Westerners begin to adopt, and the predictable pattern of supply and demand begins to emerge;

life with a family in a different country. *See id.*

206. *Id.*

207. Yngvesson, *supra* note 176, at 123.

208. *See infra* note 261 and accompanying text.

209. The actual number of orphans is between thirteen to eighteen million. Kevin Voigt & Sophie Brown, *International Adoptions in Decline as Number of Orphans Grows*, CNN.COM (Sept. 18, 2013), <http://www.cnn.com/2013/09/16/world/international-adoption-main-story-decline/?c=&page=1>; Press Release, UNICEF, UNICEF’s Position on Orphans (May 25, 2012), http://www.unicef.org/media/media_45279.html [hereinafter Press Release: UNICEF].

210. C.W. Gailey, *Race, Class and Gender in Inter-country Adoption in the USA*, in PETER SELMAN, *INTERCOUNTRY ADOPTION: DEVELOPMENT, TRENDS AND PERSPECTIVES* (Selman ed., 2000). Adoption is a legal transaction that allows “permitted family relations to be created artificially.” HOWELL, *supra* note 1, at 41–42, 142. To satisfy the legal fiction that a child made available for international adoption is an actual “orphan,” most children are registered as abandoned. Selman, *supra* note 6, at 85–86.

211. Press Release: UNICEF, *supra* note 209.

212. *Id.*

more orphanages are built, the orphanages seek more children, and the number of “orphans” increases to accommodate the demand.²¹³ The United States government even acknowledges that when adoptions were closed in a number of countries, the orphanages emptied out, and the children went home.²¹⁴ But the “convenient myth” that all adoptees from foreign nations are orphans allows those adopting to believe they are participants in a greater good even as they turn a blind eye to facts that do not support their purpose.²¹⁵

It used to be that international adoption played a limited role in the care of orphans. Twenty years ago, Professor Bartholet advocated for international adoption as “an opportunity to solve some of these problems for some children.”²¹⁶ But she also recognized that international adoption “can of course play only a very limited role. Long-term solutions lie in reallocating social and economic resources, both between countries and within countries, so that children can more generally be cared for by their birth families. But international adoption *can* play at least *some* role.”²¹⁷ Even in the last few years, she commented that “[i]nternational adoption is not a panacea. . . . The best solution, in any event, would be to solve the problems of social and economic injustice that prevent so many birth parents

213. Roby et al., *supra* note 2, at 5. Missionaries state, “If you want to increase the number of orphans in a community start an orphanage.” Dave Jenkins, *Missionary Reflections on Kathryn Joyce’s The Child Catchers: Rescue, Trafficking, and the New Gospel of Adoption*, HEKIMA: GREAT LAKES MESSENGER BLOG (Aug. 14, 2013), <http://hekimagreatlakesmessenger.blogspot.com/2013/08/missionary-reflections-on-kathryn.html>; Yngvesson, *supra* note 176, at 109. UNICEF’s Doug Webb stated, “If you build an orphanage, it will be filled with kids.” JOYCE, *supra* note 16, at 155. See also D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349, 363 (2005) (quoting the American ambassador to Cambodia who found that Western demand “resulted in new orphanages built expressly’ to accommodate American adoptions,” and were “filled with children who seem custom-ordered to suit American tastes.”).

214. See *Links for the Week*, INT’L ADOPTION READER BLOG (May 4, 2013), <http://readerinternationaladoption.wordpress.com/2013/05/04/links-for-the-week-5/> (recounting experiences in Vietnam, Cambodia, and Guatemala, where the number of institutionalized children decreased when international adoption was closed in those countries); *Conversations with America: Intercountry Adoption*, U.S. DEP’T OF STATE (Nov. 20, 2012), http://adoption.state.gov/about_us/conversation_with_america.php.

215. HOWELL, *supra* note 1, at 57–58.

216. BARTHOLET, FAMILY BONDS, *supra* note 4, at 151.

217. *Id.*

from being able to raise their children themselves.”²¹⁸

The problem is that the current role it is playing—the same role that she envisioned—is no longer enough. Long a proponent of intercountry adoption “at the most enthusiastic end of the spectrum of supporters,”²¹⁹ Professor Bartholet now takes an extreme position towards international adoption and proposes concurrent planning as part of her model to do away with the subsidiarity principle:

Ideally, in my view, there should be no in-country preference. Countries should simply place children as soon as possible in any available adoptive homes. But if countries institute such a preference, as, under the Hague Convention, they are required to, they should do so in a way designed to cause *no delay whatsoever* in placement for children. *Concurrent planning* is the term for the adoption program inside the United States that should serve as the model.²²⁰

The term “concurrent planning” refers to the practice in foster care where “adoption professionals work simultaneously to reunite children in foster care with their birth parents, while they work to prepare for adoption.”²²¹ It replaced the more traditional “sequential planning” where one permanency plan, such as reunification, is ruled out before an alternative plan is developed.²²² This came about as the result of the Adoption and Safe Families Act of 1997 and its subsequent amendments, which require courts and child welfare agencies “to work on a much faster timetable by mandating that a hearing must be held no later than twelve months after a child enters foster care.”²²³ Although not incorporated by every State, concurrent planning is an attempt to make sure that American children are placed earlier and do not languish in foster care.²²⁴ But importing

218. Bartholet, *Human Rights*, *supra* note 176, at 97.

219. *Id.*

220. *Id.* at 107.

221. *Id.*

222. U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD’S BUREAU, CHILD WELFARE INFO. GATEWAY 1–2 (2012), https://www.childwelfare.gov/systemwide/laws_policies/statutes/concurrent.cfm.

223. Adoption and Safe Families Act of 1997, *supra* note 161; Howe, *supra* note 1, at 89.

224. Bartholet, *Human Rights*, *supra* note 176, at 107. “At the point that a decision is reached not to reunite, the child can immediately move forward to adoption.” *Id.* More than half of the States do not require concurrent planning as part of their foster care permanency plan. CHILD WELFARE INFO. GATEWAY,

this concept into the international adoption framework is in contravention of the Hague Convention's subsidiarity principle, which follows sequential planning: "Adapted to international adoption, this model would mean that adoption officials in the sending country would plan simultaneously for the international adoption, while they checked to see if any domestic placement would be possible, rather than planning the international adoption only after exhausting the possibility of domestic adoption."²²⁵

The lack of regard for the Hague Convention protocols and protections has been increasingly overt. In the aftermath of the 2010 Haiti earthquake that left more than a million people homeless, U.S. relief efforts focused almost exclusively on the children of the ravaged country.²²⁶ Even as waiting adults were turned away, the State Department suspended protocol and implemented its "humanitarian parole" policy to expedite the adoption of Haitian children by Americans.²²⁷ In the rush, more than 1,150 Haitian "orphaned" children were taken to the United States and it was not discovered until later that many were, in fact, not orphans, but had family who were searching for them in the chaos after the earthquake.²²⁸ When UNICEF, Save the Children, and World Vision called for a halt to the exodus of Haitian children so the government could determine which children were actually orphaned, international adoption advocates charged that these groups were not "working for the good of the children," and that the Haitian children were being held hostage.²²⁹ Professor Bartholet criticized UNICEF, claiming it has played a "major role in recent attempts to restrict international adoption" because it takes the position that "permanent family" care in the country of origin is preferable to out-of-country adoption.²³⁰ Former Louisiana Senator Mary Landrieu²³¹ echoed that statement by warning that "[e]ither

supra note 222, at 2.

225. *Id.*

226. JOYCE, *supra* note 16, at 3.

227. *Id.*

228. *Id.* at 5, 10, 20.

229. *Id.* at 11.

230. Bartholet, *Human Rights*, *supra* note 176, at 95–96.

231. Landrieu was a former champion of the Hague Convention. On March 23, 1999, she and Senator Helms and other co-sponsors introduced the Inter-country Adoption Convention Implementation Act of 1999, which implemented the Hague Convention. S. 682, 106th Cong. 1st Sess. (1999).

UNICEF is going to change or have a very difficult time getting support from the U.S. Congress.”²³²

However, UNICEF’s position is consistent with the subsidiarity principle of the Hague Convention, the very agreement that Landrieu championed in 2000 when she sponsored the Intercountry Adoption Act, which implemented the Hague Convention.²³³ The problem for Landrieu, Bartholet, and other advocates is that the Hague Convention, with its preference for in-country adoption, no longer accommodates the increasing appetite for international adoption. Whitney Reitz, the State Department employee who orchestrated the expedited removal of children from Haiti, later reportedly stated of the operation, “[t]he idea was to help the kids. And if we overlooked Hague, I don’t think I’m going to apologize.”²³⁴ That attitude is common among adoption advocates. For example, Craig Juntunen adopted three children from Haiti following the earthquake and later established the Both Ends Burning campaign, which produced the documentary, *Stuck*.²³⁵ He has since proposed a clearinghouse model to circumvent Hague Convention safeguards to make international adoption speedier and more prevalent.²³⁶

The tension within international adoption comes in the framing of an issue that puts family rights on one side and benefits to orphans on the other.²³⁷ But tempering that is the fact that the courts do not recognize a prospective parent’s corresponding right to adopt as superior to the best interests of the child.²³⁸ In fact, the interests of the prospective adoptive parents have been held to be subordinate to the

232. *Id.*

233. Intercountry Adoption Act of 2000, Pub. L. 106–279, § 102(e), 114 Stat. 828 (Oct. 6, 2000) (codified as 42 U.S.C. § 14912(e)); JOYCE, *supra* note 16, at 221.

234. JOYCE, *supra* note 16, at 3.

235. Voigt, *supra* note 5. *Stuck* documented several adoption experiences in Vietnam, Ethiopia, and Haiti. *Id.*

236. *Id.* Juntunen seeks to raise levels of international adoptions in the United States to 50,000 children a year with a nine-month waiting time. *Id.*

237. QUIROZ, *supra* note 134, at 9.

238. Briggs & Marre, *supra* note 183, at 5; *see also* Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995) (“Whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest.”); Lindley for Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989) (“[W]e are constrained to conclude that there is no fundamental right to adopt.”).

state's interest.²³⁹ It is a process that comes with “messy contradictions,” in that the supposed client—the child, whose best interest is always to prevail—is not the paying client.²⁴⁰ Instead, as the current baby markets reflect, the needs of the adult prevail as the secondary client who gets to make the choices.²⁴¹

Nevertheless, prospective parents understand that adoption into homes cannot happen without them and thus equate their desire to adopt as the fulfillment of the child's right to the home they deserve. This leads to a sense of entitlement; Americans routinely refer to children in other countries as “their” children, as if they have a superior claim to them than the domestic state, and lament that the process takes so long to bring them “home.”²⁴² When the State Department shuts adoption in a country for reasons of fraud and corruption, Americans blame the United States for “interfering” with the adoption of the children on which they had set their sights, as if the United States is the bad actor for requiring a transparent process as called for by the Hague Convention.²⁴³

The reality is that international adoption helps only a handful of children, leaving the needs of the majority of children in sending nations unaddressed.²⁴⁴ What is happening is a continuing shift in the adoption paradigm from a focus on the best interests of the child to a demand from Western couples who seek children “for their own sense of fulfillment,”²⁴⁵ and who will go to great lengths and expense to “match the kind of family they're trying to

239. Maldonado, *supra* note 9, at 1468–69 & n.270 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“The State, of course, has a duty of the highest order to protect the interests of minor children.”)).

240. *Id.*

241. Sara Dorow, *Producing Kinship Through the Marketplaces of Transnational Adoption*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 73 (Michele Bratcher Goodwin ed., 2010) (citing Family Foundations Director Marjorie Sessions); MODELL, *supra* note 136, at 19 (“In the United States, adoption is presumed to be for the child's sake. Yet adoption is also a way of creating a family, and this other purpose complicates the application of ‘best interests.’”).

242. Voigt, *supra* note 5.

243. HOWELL, *supra* note 1, at 139.

244. QUIROZ, *supra* note 134, at 26.

245. Gill Haworth et al., *Infertility and Inter-Country Adoption*, in *ADOPTING AFTER INFERTILITY* 135 (Marilyn Crawshaw & Rachel Balen eds., 2010); Briggs & Marre, *supra* note 183, at 1, 5; HOWELL, *supra* note 1, at 17–18, 20–21, 138, 178.

create.”²⁴⁶ Statistics show that 95 percent of all orphans are over the age of five.²⁴⁷ Yet, Americans tend to adopt younger children, and prospective parents will spend over \$60,000, and years on waiting lists—all to “save” children who sometimes have yet to be born.²⁴⁸

2. *Children in Families First Legislation*

Abandoning their former position that children would better be served by solving “the problems of social and economic injustice that prevent so many birth parents from being able to raise their children themselves,”²⁴⁹ some advocates now argue that international adoption is the “most logical solution” to the “disparity between the number of abandoned and orphaned children in some countries and families and individuals wishing to adopt in others.”²⁵⁰ Indeed, they claim that the Hague protective protocols merely serve as a stumbling block to “saving” children.²⁵¹ Thus, international adoption proponents push for even less regulation, alleging that Hague restrictions ultimately hurt children and cause them to spend their lives in orphanages where the “results are more developmental problems, more kids on the street and more cost to the government to institutionalize these kids.”²⁵²

Viewing the reduced numbers of international adoption as a failure on the part of the government to meet the needs of children abroad,²⁵³ Senator Landrieu introduced legislation in the form of the Children in Families First Act of 2013²⁵⁴

246. Ko, *supra* note 16.

247. Press Release: UNICEF, *supra* note 209.

248. Goodwin, *supra* note 1, at 8; Ko, *supra* note 16. The United States Bureau of Consular Affairs reports that adoption service providers charged prospective parents up to \$64,357 for processing intercountry adoptions in 2014, with half costing more than \$31,120. *FY 2014 Annual Report on Intercountry Adoption*, U.S. DEP’T OF STATE (Mar. 31, 2015), http://travel.state.gov/content/dam/aa/pdfs/fy2014_annual_report.pdf [hereinafter *FY 2014 Annual Report*].

249. Bartholet, *Black Children*, *supra* note 152, at 97.

250. See Selman, *supra* note 6, at 97.

251. Voigt & Brown, *supra* note 209; Voigt, *supra* note 5.

252. Voigt, *supra* note 5; BARTHOLET, *FAMILY BONDS*, *supra* note 4, at 165. *But see supra* notes 213–14 regarding how demand for children is creating “orphans.”

253. *Children in Families First: FAQ’S*, <http://childreninfamiliesfirst.org/chif-f-faqs/> (last visited Aug. 27, 2014). “The sad reality is that [international adoption] is declining because international adoption has wrongly been forced off the table of appropriate permanency options for children.” *Id.*

254. Children in Families First Act of 2013 [hereinafter 2013 CHIFF], S.

and the Children in Families First Act of 2014²⁵⁵ (collectively, CHIFF). Drafted by Whitney Reitz, the former State Department employee who worked around the Hague Convention to bring the Haitian children to the United States,²⁵⁶ CHIFF focused on every child's "human right to a family," and promised to reclaim the role in international child welfare that it said the government had "effectively relinquished" to UNICEF.²⁵⁷ It proposed to create a new office within the State Department, along with a new Ambassador position,²⁵⁸ that it said would streamline the processing of inter-country adoption cases to "allow international adoptions to become a strong and important part of how we protect children."²⁵⁹ With growing bipartisan support and endorsements by groups such as Craig Juntunen's Both Ends Burning (BEB), Christian organizations like Saddleback Church, the Southern Baptist Convention (SBC), and Christian Alliance for Orphans (CAFO), and many adoption agencies,²⁶⁰ the bill sought to help improve the lives of the estimated "200 million orphans in the world."²⁶¹

But in reframing the practice of international adoption as

1530, 113th Cong. (2013); *see also* Children in Families First Act of 2013, H.R. 3323, 113th Cong. (2013).

255. Children in Families First Act of 2014 [hereinafter 2014 CHIFF], S. 2475, 113th Cong. (2014); *see also* Children in Families First Act of 2014, H.R. 4143, 113th Cong. (2014).

256. *See supra* note 234 and accompanying text. Reitz announced that she had been hired by Sen. Landrieu to draft the legislation. Whitney Reitz, Address at Pepperdine Law School, Nootbaar Institute on Intercountry Adoption: Orphan Rescue or Child Trafficking? (Feb. 8, 2013).

257. *Children in Families First: Messaging Points*, <http://childreninfamiliesfirst.org/wp-content/uploads/2013/08/CHIFF-Messaging-Points.pdf> (last visited Aug. 27, 2014) [hereinafter *CHIFF: Messaging Points*].

258. The 2013 CHIFF version established a Bureau of Vulnerable Children and Family Security, with an Assistant Secretary position. 2013 CHIFF, S. 1530. The 2014 CHIFF version changed the name to the Office of Vulnerable Children and Family Security. 2014 CHIFF, S. 2475.

259. *CHIFF: Messaging Points*, *supra* note 257.

260. *Children in Families First: Legislation*, <http://childreninfamiliesfirst.org/legislation-chiff/> (last visited Aug. 27, 2014) [hereinafter *CHIFF: Legislation*].

261. *Id.* Landrieu drastically reduced that number in May 2014. "By some estimates, there are over 150 million orphans in the world." *Children in Families First: One Pager*, <http://childreninfamiliesfirst.org/wp-content/uploads/2014/05/Children-in-Families-First-one-pager-2014-05-8.pdf> (last visited Aug. 27, 2014). *See also supra* notes 208–14 and accompanying text regarding the inflated number of orphans.

every child's right to have a permanent family, the proposed legislation operated to make more international children available for adoption to Americans.²⁶² CHIFF imported the "concurrent planning" concept championed by Professor Bartholet²⁶³ and put it on equal footing with the Hague subsidiarity principle:

The principle of subsidiarity, which gives preference to in-country solutions, should be implemented *within the context of a concurrent planning strategy, exploring in- and out-of-country options simultaneously*. If an in-country placement serving the child's best interest and providing appropriate, protective, and permanent care is not quickly available, and such an international home is available, *the child should be placed in that international home without delay*.²⁶⁴

In fact, just days before Senator Landrieu introduced CHIFF in the Senate, Prof. Bartholet advanced this same position:

[T]he United States could advocate for an appropriate definition of Hague subsidiarity, namely one that prefers in-country adoption only when it can be accomplished with *no delay* in placement. *Subsidiarity should be defined and limited by a Concurrent Planning strategy*, in which countries plan *simultaneously* both for domestic and international adoption, preferring domestic over international placement only when an equally qualified domestic home is immediately available.²⁶⁵

But this is not consistent with the Hague Convention's subsidiarity principle—which is sequential, *not* simultaneous—and looks to international adoption as a last resort, after all possibilities of domestic adoption and other forms of in-country care have been exhausted.²⁶⁶ Rather, it was an attempt to force concurrent planning as a best practice—what is not even required by half of U.S. states—into international adoption, so that more children would be

262. See 2014 CHIFF, S. 2475; 2013 CHIFF, S. 1530.

263. See *supra* note 220 and accompanying text.

264. 2014 CHIFF, S. 2475; 2013 CHIFF, S. 1530 (emphasis added).

265. Elizabeth Bartholet, *The Hague Convention: Pros, Cons and Potential*, at 5, Sept. 5, 2013, <http://www.law.harvard.edu/faculty/bartholet/PepperdineBkHagueTrack9-5-13.pdf> (emphasis added) (last visited Feb. 9, 2015). Bartholet suggested that proponents advocate that international adoption "trumps all in-country placement options save for adoption." *Id.*

266. See Hague Convention, *supra* note 3.

available for adoption.²⁶⁷

In many respects, CHIFF mimicked the failed Families for Orphans Act (FFAO).²⁶⁸ Introduced in 2009 by Senator Landrieu and Republican co-sponsor James Inhofe, and drafted by the Families for Orphans Coalition (most of whose members also serve as the CHIFF Executive Working Committee),²⁶⁹ the bill conditioned United States foreign aid on a country's willingness to allow the international adoption of its children as part of the effort to secure "permanent" homes for orphans.²⁷⁰ Under the guise that "all children belong in families,"²⁷¹ the bill provided a means to facilitate thousands of additional international adoptions through a new office that would be created within the State Department.²⁷² Countries receiving aid were required to conduct a biennial orphan census, and offered "additional financial incentives, including technical assistance, grants, trade, and debt relief" in exchange for sending "their children abroad for international adoption."²⁷³ Despite the bipartisan effort, the bill was not passed.²⁷⁴

Critics stated that CHIFF, much like its failed predecessor, actually aimed to tie foreign assistance to a country's willingness to participate in intercountry adoption for the benefit of Americans who want to adopt.²⁷⁵ As recently as 2012, as part of a CAFO Summit panel²⁷⁶ at Rick

267. CHILD WELFARE INFO. GATEWAY, *supra* note 222, at 2.

268. *See* Families for Orphans Act, S. 1458, 111th Cong. (2009).

269. *Id.* The Coalition was led by former Joint Council on International Children's Services President Tom DiFilipo, National Council for Adoption President Chuck Johnson, and America World Adoption agency founder Brian Luwis. *Id.* Some of these same members, including Joint Council on International Children's Services and National Council for Adoption, also served on the CHIFF Executive Working Committee, alongside Saddleback Church, Christian Alliance for Orphans, and Both Ends Burning, among others. *See CHIFF: Legislation, supra* note 260.

270. *See* Families for Orphans Act, S. 1458, 111th Cong. (2009). Specifically, the bill sought to "ensure that all aid efforts receiving funding from the United States recognize and support the need for the preservation and reunification of families and the provision of permanent parental care for orphans." *Id.*

271. *Id.*

272. *Id.* The bill created the Office for Orphan Policy, Diplomacy and Development. *Id.*

273. JOYCE, *supra* note 16, at 225–26 (quoting adoption reform group, Ethica).

274. *Id.* at 227.

275. *Id.* at 225–26.

276. The panel also included former FFOA drafters Chuck Johnson and Brian Luwis, as well as former Congressional Coalition on Adoption Institute

Warren's Saddleback Church, one of the former FFAO drafters, Tom DiFilipo, continued to herald the idea of tying foreign aid to international adoption.²⁷⁷ Suggesting that funding should be limited to countries that had an express policy that "all children belong in families," DiFilipo urged adopting families to "demand, not ask for or suggest, that the US government establish a policy that children belong in families. I'm talking about international aid money, whatever it is related to."²⁷⁸ He denigrated efforts to promote "family preservation . . . by building schools or putting in water wells"—work that enhanced domestic infrastructure and reduced the need for international adoption—as alternative forms of orphan care not based on permanency policy.²⁷⁹

However, tying federal aid to a country's willingness to deliver its children for adoption is treating children as a commodity. And reframing a country's desire to care for its own children, or to improve efforts to comply with the Hague Convention, as a failure to help children belies adoption proponents' true critique, that countries are cutting off the supply that we demand, and feeds the neocolonialist arguments that claim international adoption serves the interests of privileged families from wealthy nations at the expense of the poorest.²⁸⁰ While child abandonment arguably provides both a moral and legal basis for adoption, recent adoption narratives strongly suggest that international adoption increasingly involves the adoption of children procured from living parents, oftentimes by nefarious practices.²⁸¹ And it comes at a tremendous social cost to

Executive Director Kathleen Strottman, former staffer to Senator Landrieu. *Id.* at 224.

277. *Id.*

278. *Id.*

279. *Id.*

280. *See, e.g.,* Maldonado, *supra* note 9, at 1465 (citing Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 *YALE J.L. & FEMINISM* 101, 105 (1998) (urging advocates of international adoption to address history of colonialism, cultural imperialism, and economic exploitation that lead poor women in poor countries to give their children to privileged women in Western nations)).

281. E.J. Graff, *The Lie We Love*, *FOREIGN POL'Y* Nov.-Dec. 2008, at 58, 63 (detailing accounts of babies stolen from mothers, mothers forced into giving away their babies because they cannot pay inflated hospital bills, and child finders who purchased, defrauded, coerced, or stole children from their families).

women who do not have the means to care for their children in their own country.²⁸² If every child has a “right to a loving home,” as international advocates and policymakers insist, that should include the children’s right to live in their country of origin with their birth families, not just in the family that is willing to pay upwards of \$60,000 or more for them.²⁸³ Instead, poverty has caused thousands of poor unmarried women to abandon or relinquish their children for international adoption.²⁸⁴

A true social initiative should include “[s]upporting families and communities so that they can look after their children themselves [so that] not only are individual children more likely to thrive and go on to be better parents, they are more likely to contribute to their communities and to their country’s development.”²⁸⁵ For example, a mother in Addis Ababa, Ethiopia could remain united with her child for \$15 per month.²⁸⁶ Institutionalization would not be a concern, and Americans would not have to spend upwards of \$60,000 to “save” an “orphan.” Instead, poor mothers have become providers of children for parents in wealthier countries, as biological and community ties are forever severed and a billion dollar, unregulated adoption industry is fed, all in the “best interests” of the child and to fulfill “their right” to a loving home.²⁸⁷ Once again, the best interests standard has been co-opted to serve white interests through international adoption.²⁸⁸

282. Roby et al., *supra* note 2, at 4 (citing poverty as the leading cause of “rescue”—driven desire to adopt internationally).

283. See *supra* notes 244–48 and accompanying text.

284. Maureen McCauley Evans, *Poverty Alone Should Never Be a Reason for Adoption*, LIGHT OF DAY STORIES BLOG (July 14, 2014), <http://lightofdaystories.com/2014/07/14/poverty-alone-should-never-be-a-reason-for-adoption/>; Gossett, *supra* note 173, at 870, 872–73.

285. Harrop, *supra* note 15 (quoting Save the Children International Chief Executive Jasmine Whitbread).

286. *Id.*

287. Roby et al., *supra* note 2, at 3, 5–6; Voigt, *supra* note 5 (citing Susan Soonkeum Cox).

288. See O’Neill, *supra* note 8 (quoting Roots Adoption Agency CEO Toni Oliver). The high cost of adoption has left black families out of a process dominated by whites, so the children are being adopted into primarily white homes. *Id.*

III. STRUCTURAL RACISM AGAINST BLACK AMERICAN CHILDREN

Today, nearly twenty years after the Multiethnic Placement Act sought to eliminate race considerations in public placements, race still matters in adoption. As adoption expert Ellen Herman suggests, “Our history continues to plague us.”²⁸⁹ Even the language used to classify adoptions shows an ingrained preference that reflects historical traditions.²⁹⁰ The adoption of white children by white parents is still considered “traditional” while the adoption of any black child is dubbed a “minority” adoption.²⁹¹ Reminiscent of *Plessy*, biracial children and those with even “one drop” of black blood are considered legally black and therefore classified a minority.²⁹²

A. *The Plight of Black American Children in Foster Care*

It is indisputable that supply and demand drives the domestic adoption industry; the price depends on the child’s “market rating, with the cost for a white child being significantly higher than that for an American minority child.”²⁹³ Indeed, the “adoption hierarchy reflects our society” as many private agencies still operate under a shifting fee structure that follows “historical race-conscious indicators” and commands a higher premium for children that rank higher on the “desirability list.”²⁹⁴ Children are ranked—with corresponding monetary values—by racial and gender

289. Glaser, *supra* note 18; Jeff Gammage, *For Adoptees, Racial Divide Still Wide; Families May be Colorblind, but the World is Not. It’s a Painful Lesson for Many*, PHILLY.COM (May 8, 2006), http://articles.philly.com/2006-05-08/news/25400162_1_race-and-adoption-transracial-adoption-white-families.

290. Dawn Davenport, *Born in America, Adopted Abroad*, CHRISTIAN SCI. MONITOR (Oct. 27, 2004), <http://www.csmonitor.com/2004/1027/p11s01-lifp.html>.

291. Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents’ Perspective*, 20 HARV. BLACK LETTER L.J. 167, 179 (2004).

292. Howe, *supra* note 1, at 89 (citing Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592, 593 (2007)).

293. Goodwin, *supra* note 1, at 2 (citing Smolin, *Child Trafficking*, *supra* note 18, at 323); BARTHOLET, FAMILY BONDS, *supra* note 4, at xx.

294. *Six Words: Black Babies Cost Less To Adopt*, NPR (June 27, 2013), <http://www.npr.org/2013/06/27/195967886/six-words-black-babies-cost-less-to-adopt> [hereinafter *Six Words*]; O’Neill, *supra* note 8 (quoting Adoption-Link director Margaret Fleming); Davenport, *supra* note 290; Goodwin, *supra* note 1, at 6.

preference, with blonde, blue-eyed girls at the top, black boys at the bottom, and biracial children in between.²⁹⁵

Agencies claim that placing differing valuations on children of different races is not racism.²⁹⁶ Instead, they justify the inequitable practice by claiming that the reduced fees are necessary to incentivize the adoption of black children who otherwise might not be adopted.²⁹⁷ Agencies claim they “have to work much harder to find homes for our African-American babies.”²⁹⁸ But experts say this rationale is illogical. “If placing white children is far easier than placing black babies, it would seem that *less work* would result in *less pay* and lower fees.” And, if true, it sheds light on an American society that, despite its color-blind rhetoric, still values—and segregates—children according to their skin color, even before they are born.²⁹⁹

Nearly thirty-five years ago, Elisabeth Landes and Richard Posner performed an economic analysis of the then-contemporary “baby market” in the United States and found that the shortage of white babies was leading to “baby selling.”³⁰⁰ They compared foster children, many of whom were black, to the unwanted and unsold inventory in warehouses.³⁰¹ Even though their research was well-grounded in empirical statistics, it nevertheless received strong backlash because it referred to children in terms of supply and demand.³⁰² To many, using market terms to refer to children was seen as reducing their value to that of a mere commodity and was akin to “putting a child on an auction

295. *Six Words*, *supra* note 294. Adoption fees commonly range from \$35,000 to \$40,000 for white children, while the cost to adopt a black child is generally less than half that, anywhere from \$10,000 to \$18,000. Biracial children fall somewhere in between. *Id.*; see also Goodwin, *supra* note 1, at 6 (listing as little as \$4,000 for black children compared to \$50,000 for healthy white infants); QUIROZ, *supra* note 134, at 5 (describing a three-tier pricing system with whites at the top, “honorary whites” in between, and black at the bottom); O’Neill, *supra* note 8 (citing Adoption-Link agency director Margaret Fleming); Glaser, *supra* note 18.

296. *Six Words*, *supra* note 294.

297. *Id.*

298. Davenport, *supra* note 290.

299. *Id.*

300. Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

301. Martha Ertman, *The Upside of Baby Markets*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 27 (Michele Bratcher Goodwin ed., 2010).

302. Goodwin, *supra* note 1, at xi–xiii, 4–5.

block,” which renewed negative images of slavery.³⁰³

A “vast array of social policies going back to the institution of slavery can be characterized as responsible for the fact that it is black families whose children are disproportionately available for adoption and white families who are disproportionately in a position to seek adoption.”³⁰⁴ The growing income gap between white and black Americans³⁰⁵ ensures that, while no longer prohibited de jure,³⁰⁶ the majority of blacks are now de facto non-participant prospective parents in the adoption process, while whites dominate the adoption marketplace.³⁰⁷ But even as many whites employ the color-blind rhetoric of a post-racial society, and say race no longer matters, many choose not to adopt black American children, even though there is plenty of supply and the cost to adopt is less.³⁰⁸ Indeed, many purport to be colorblind in their approach to adoption simply because they adopt a child of color from another nation.³⁰⁹

The large Christian evangelical orphan care and adoption movement has emerged as the embodiment of a post-racial approach to adoption.³¹⁰ Many Christian evangelicals have heeded the Southern Baptist Convention’s (SBC) call to its 16 million members to become involved in some form of adoption.³¹¹ Committed to “defending the cause of the fatherless,” the movement sees international adoption as missional, *i.e.*, a means to fulfill the “Great Commission” of bringing the gospel to “all nations, tribes, peoples, and tongues,”³¹² as they save hundreds of millions of orphans.³¹³ The movement’s marriage of fundamentalism with the social

303. *Id.* at xi–xiii; Ertman, *supra* note 301, at 27.

304. Bartholet, *Black Children*, *supra* note 152, at 1232. “Taking all these perspectives together, transracial adoption can be characterized, and indeed has been by the NABSW and others, as one of the ultimate forms of exploitation by whites of the black community and the black family.” *Id.*

305. *See supra* note 122.

306. *See supra* note 141 and accompanying text.

307. Howe, *supra* note 1, at 88.

308. *See supra* notes 293–99 and accompanying text.

309. JOYCE, *supra* note 16, at 72–73; QUIROZ, *supra* note 134, at 79–80.

310. JOYCE, *supra* note 16, at 55–56, 72–73.

311. Russell Moore, *Reflections on Adopting for Life 2010*, MOORE TO THE POINT (Mar. 4, 2010 7:10 AM), <http://www.russellmoore.com/2010/03/04/reflections-on-adopting-for-life-2010/>.

312. Revelation 7:9–10 (New King James).

313. JOYCE, *supra* note 16, at 55–56, 72–73. *But see supra* notes 208–14 and accompanying text regarding the inflated number of orphans.

gospel has led to the mass adoption of children from developing nations, most recently from Africa (and from countries which are not members of the Hague Convention).³¹⁴

Preaching colorblindness and “a God who doesn’t see race,” the movement has led to the creation of “rainbow congregations,” such as SBC leader and *Adopted for Life* author Russell Moore’s former church, where members adopted 140 children from other nations.³¹⁵ The result is a unique diversification within the very churches that “defended segregation just over a generation ago.”³¹⁶ But as one political science scholar noted, it is not an integration based on participants of equal footing; rather, it is a noticeably white movement of “imported diversity,” where most of the color shows up in the black faces of children who have been adopted into white congregations.³¹⁷ However, by not “talking to black adults, who may have endured the effects of the church’s institutional bias [and] instead by adopting children from other races and cultures,”³¹⁸ the

314. JOYCE, *supra* note 16, at 136.

315. *Id.* at 42–43, 71, 136; RUSSELL MOORE, *ADOPTED FOR LIFE: THE PRIORITY OF ADOPTION FOR CHRISTIAN FAMILIES & CHURCHES* (2009).

316. JOYCE, *supra* note 16, at 69, 73; *see also* Russell D. Moore, *Black and White and Red All Over: Why Racial Justice Is a Gospel Issue*, MOORE TO THE POINT BLOG (June 12, 2012), <http://www.russellmoore.com/2012/06/12/black-and-white-and-red-all-over-why-racial-justice-is-a-gospel-issue/>. The SBC was actually founded by pro-slavery southern whites in 1845. Ingrid Norton, *The Changing Face of the Southern Baptist Convention*, Religion & Politics (June 22, 2012), <http://religionandpolitics.org/2012/06/22/the-changing-face-of-the-southern-baptist-convention/>.

317. JOYCE, *supra* note 16, at 69. Held May 2013, the 2500 attendees at CAFO’s Summit 9, the largest evangelical gathering for those committed to the cause of the orphan, broke previous Summit attendance records. However, almost all of the 2500 attendees were white, except for the black children in strollers and some black guest speakers. Moore, Juntunen, and Sen. Landrieu spoke at Summit 9, and it is where Sen. Landrieu first announced that she would be introducing the CHIFF legislation. Jedd Medefind, *Major Orphan Legislation Introduced in U.S. Senate*, CHRISTIAN ALLIANCE FOR ORPHANS (Sept. 19, 2013), <http://www.christianalliancefororphans.org/blog/2013/09/19/major-orphan-legislation-introduced-in-u-s-senate/>.

318. JOYCE, *supra* note 16, at 71, 73. “Through the civil rights period and beyond, sectors of the convention remained thickly entwined with white supremacy and segregation, though in recent years, it has made efforts to move past its history—for instance, drafting a 1995 resolution apologizing to all African-Americans for once espousing slavery. Still, the evangelical denomination remains quite white and Southern: 80 percent of its 16 million members are white and 90 percent are concentrated in the South and Texas.” Norton, *supra* note 316.

progress ensured is the continued subordination of blacks, as African children are ripped from their families and communities of origin to grow up in white families in a country with unsettled issues on the black race.³¹⁹ Yet, many white adoptive parents are seemingly not aware of or overlook this facet as they satisfy their own desires to adopt.

The problem with white privilege is that it leads to white normativity and entitlement under the status quo.³²⁰ White prospective parents believe they have a right to adopt whomever they choose from wherever they choose, even as children in the United States are overlooked and remain in foster care.³²¹ This is evidenced when parents routinely bypass the Hague and its subsidiarity principle, which requires parents to adopt children in need of homes in their own country before adopting internationally. As one agency director bluntly stated, “There is no shortage of American families willing to adopt. There is a shortage of American families willing to adopt these kids.”³²² Put bluntly, black American children are simply not in demand by white American parents. Despite current color-blind rhetoric, Americans attach social constructs to race. Some scholars have argued that white America still clings to “transnational racial imagery,” which has produced a perception in the American mindset of black American children with seemingly insurmountable childhoods.³²³ Thus, children from overseas

319. JOYCE, *supra* note 16, at 71, 73.

320. For example, Moore diminished the sometimes traumatic experiences that children adopted from different ethnicities and cultural backgrounds face when he drew comparisons to his own “trans-ethnic” spiritual adoption, saying, “[y]ears ago I was adopted into a family of a different ethnicity than my own, and it was traumatic. You should see how long it took me to learn Hebrew.” Russell D. Moore, *Transracial Adoption and the Gospel*, THE TOUCHSTONE BLOG (May 29, 2008, 12:17 pm), <http://touchstonemag.com/merecomments/2008/05/transracial-ado/>.

321. *See id.* Moore, for example, succumbed to the rhetoric of color-blind racism when he likened people with valid concerns of such adoptions to George Wallace’s “progressive . . . heirs . . . stand[ing] in the orphanage door.” *Id.*

322. Glaser, *supra* note 18.

323. Dorow, *supra* note 241, at 71. Additionally, the “vilification of poor mothers of color,” including the stereotype of foster care children as “crack babies,” black infants who were exposed in utero to crack cocaine, was fed by the media in the 1980s and 1990s and still exists today. *Id.* (citing Ana Ortiz & Laura Briggs, *The Culture of Poverty, Crack Babies, and Welfare Cheats: The Making of the “Healthy White Baby Crisis,”* 21 SOC. TEXT 39–57 (2003)); *see also* Glaser, *supra* note 18 (The “false assumptions about crack deepened white America’s reluctance to adopt black children” from foster care).

are seemingly more desirable to adopt than black American children in foster care.³²⁴ Even CAFO President Jedd Medefind suggested that it is sometimes seen as more “exotic” to adopt children from the other side of the world than “the other side of the tracks,”³²⁵ echoing the observation of one adoption scholar that, “[O]ur society is more open to international adoptions of other races than it is to domestic [transracial adoptions].”³²⁶ As one adoption attorney summed, “Americans like to think our society is colorblind, but it isn’t.”³²⁷ Indeed, many parents will wait years for a foreign child that sometimes has yet to be born rather than adopt a black child in American foster care that needs an immediate home.³²⁸

Even the most ardent proponents of international adoption cannot deny that black American children are not finding homes in this country.³²⁹ Professor Bartholet once championed interracial adoption as a means of reclaiming children from foster care.³³⁰ The fact is that black American children experience lower rates of adoption from foster care than other races and age out disproportionately.³³¹ The United States foster care system is home to 402,378 children, including 101,840 children who currently await adoption.³³² Although blacks make up only 14 percent of the total United States population,³³³ black children are disproportionately

324. Glaser, *supra* note 18 (citing Emory University’s Fetal Alcohol Center Director Claire Coles); Dorow, *supra* note 241, at 71; *see supra* notes 312–17 and accompanying text.

325. JOYCE, *supra* note 16, at 235; *see also* Gossett, *supra* note 173, at 858–62 (explaining how Angelina Jolie’s international adoptions inspired emulation and influenced current attitudes towards international adoptions).

326. Morrison, *supra* note 291, at 179 (citing telephone interview with University of Texas Professor and Associate Dean of Research Ruth G. McRoy).

327. Glaser, *supra* note 18 (quoting international adoption attorney Steven Kirsh).

328. Goodwin, *supra* note 1, at 8; Ko, *supra* note 16.

329. *See* Perry, *supra* note 133, at 82–83 (observing that even as advocates push for less regulation to allow more international adoptions, black American children are languishing in foster care and aging out at increased rates).

330. *See supra* notes 155–58 and accompanying text.

331. U.S. GOV’T ACCOUNTABILITY OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE 10, 17 (2008), *available at* <http://www.gao.gov/new.items/d081064t.pdf>.

332. 2014 AFCARS Report, *supra* note 10, at 1.

333. SONYA RASTOGI ET AL., U.S. DEPT OF COMMERCE, THE BLACK POPULATION: 2010, 2010 CENSUS BRIEFS 3 (2011), *available at* <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>. This figure includes black alone, or in combination with one or more other races. For black alone, the

overrepresented in foster care in nearly every state in the nation and remain in foster care longer than children of other races.³³⁴

Further, approximately 20,000 children emancipate each year from foster care unadopted.³³⁵ Even as recent headlines tout that the United States foster care population is shrinking, the number of children who age out of the system has steadily increased, from 3.1 percent in 1998 to the current rate of 10 percent.³³⁶ For example, in Delaware, a state with a total black population of just over 20 percent, 56.7 percent of the children aging out of foster care were black.³³⁷ Of those that age out of the system, many are unlikely to graduate high school or attain a college degree.³³⁸ Most face dismal futures of incarcerations, unplanned pregnancies, and homelessness.³³⁹ A recent study showed

population stands at thirteen percent. *Id.*

334. See ALICIA SUMMERS ET AL., PERMANENCY PLANNING FOR CHILD. DEP'T OF THE NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE 3–4, 8 (2012), available at <http://www.ncjfcj.org/sites/default/files/Disproportionality%20Rates%20for%20Children%20of%20Color%202010.pdf>; Cynthia Gordy, *The Root: Helping Kids After Foster Care Ends*, NPR (May 10, 2011), <http://www.npr.org/2011/05/10/136166653/the-root-helping-kids-after-foster-care-ends>. See also 2014 AFCARS Report, *supra* note 10, at 2, 4. Black children made up twenty-four percent both of the total foster care population and the children waiting for adoption in 2013. *Id.*

335. 2014 AFCARS Report, *supra* note 10, at 3 (showing 23,090 children aged out of foster care in 2013).

336. *Id.*; see also THE PEW CHARITABLE TRUSTS, TIME FOR REFORM: AGING OUT AND ON THEIR OWN; MORE TEENS LEAVING FOSTER CARE WITHOUT A PERMANENT FAMILY 1 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/Kids_are_Waiting_TimeforReform0307.pdf.

337. JULIA O'HANLON ET AL., U. DEL.'S INST. FOR PUB. ADMIN., "AGING OUT" OF FOSTER CARE: BACKGROUND AND RESOURCES BRIEF 1 (2012), available at http://www.ipa.udel.edu/publications/AgingOut_policybrief.pdf; 2010 Census Interactive Population Search: Delaware, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=10>.

338. MARK E. COURTNEY ET AL., CHAPIN HALL AT U. OF CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26 1 (2011), available at http://chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf.

339. *Id.*; SARA MCCARTHY & MARK GLADSTONE, CAL. SENATE OFFICE OF RESEARCH, POLICY MATTERS 7–8 (2011), available at http://www.sor.govoffice3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/Foster_Care_PDF_12-8-11.pdf. The California Senate Office of Research surveyed the California prison population and found that blacks made up the largest percentage of those who had previously been in foster care, even though blacks account for only six percent of the state's population. *Id.*; Dan Walters,

that, “on average, for every young person who ages out of foster care, taxpayers and communities pay \$300,000 in social costs like public assistance, incarceration, and lost wages to a community over that person’s lifetime . . . almost \$8 billion in social costs to the United States every year.”³⁴⁰

B. *The Exportation of Black American Children*

Even as international adoption proponents suggest that wealthy nations like the United States have the means to help children in underdeveloped countries through international adoption, many are unaware that the United States is also shipping its children abroad for adoption.³⁴¹ Most of the children are black or biracial, and most are being sent to Canada, although recent years have seen an increase in children being sent to the Netherlands and Ireland.³⁴² Many are private adoptions; adoption agencies also advertise programs specifically geared to the foreign adoption of children from U.S. foster care, noting that foreign parents will have an easier time adopting “children who are not Caucasian.”³⁴³ It is a trend that is not highlighted, with some fearing that drawing attention to the fact that black children are being adopted by white foreigners will trigger the same backlash that happened with NABSW and transracial adoption in the 1970s.³⁴⁴

California’s Black Population Shrinking Proportionately, SACRAMENTO BEE (Sept. 29, 2011), <http://blogs.sacbee.com/capitolalertlatest/2011/09/californias-black-population-shrinkjng-proportionately.html>; *2010 Census Interactive Population Search: California*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=10>.

340. Stangler, *supra* note 6; JIM CASEY YOUTH OPPORTUNITIES INITIATIVE, ISSUE BRIEF: COST AND AVOIDANCE, THE BUSINESS CASE FOR INVESTING IN YOUTH AGING OUT OF FOSTER CARE (2013), *available at* http://jimcaseyyouth.org/sites/default/files/Cost%20Avoidance%20Issue%20Brief_EMBARGOED%20until%20May%202013.pdf.

341. Mirah Riben, *American Babies Exported for Adoption*, DISSIDENT VOICE (Aug. 29, 2012), <http://dissentvoice.org/2012/08/american-babies-exported-for-adoption/>; QUIROZ, *supra* note 134, at 4.

342. Sophie Brown, *Overseas Adoptions Rise – for Black American Children*, CNN (Sept. 17, 2013), <http://www.cnn.com/2013/09/16/world/international-adoption-us-children-adopted-abroad/>.

343. *Adoption of US-Born Children By Non-US Citizens - Approved in France, Italy, and the Netherlands*, ILLIEN ADOPTIONS INT’L, http://www.illienadoptions.org/non-us_citizens.html (last visited Feb. 9, 2015).

344. Howe, *supra* note 1, at 88 (citing Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL’Y 131 (Spring 1995)); Sheila M. Poole, *Canadians Look South to Adopt Black Kids*, ATLANTA J.-CONST. (Aug. 24, 2004). According to Holt International Children’s Service

Official records show that 446 American children have been adopted abroad since the United States ratified the Hague Convention in 2008.³⁴⁵ Before then, the federal government did not track the number of American children adopted internationally,³⁴⁶ but investigative reports discovered that the United States was sending hundreds of children to Canada.³⁴⁷ Because the Hague's subsidiarity principle requires that every effort be made to place children domestically before resort to international adoption, it was expected that it would be harder to place American children abroad when the regulations were finally implemented.³⁴⁸ But official State Department figures show that the number of American children sent internationally for adoption has

spokeswoman, Susan Soonkeum Cox, "They are not in the sunshine." Glaser, *supra* note 18.

345. Although the Intercountry Adoption Act of 2000 (IAA) was enacted to implement the Hague Convention, the Hague Convention did not actually go into effect until regulations were finally promulgated in 2008. Intercountry Adoption Act of 2000, Pub. L. 106-279, § 102(e), 114 Stat. 828 (Oct. 6, 2000) (codified as 42 U.S.C. § 14912(e)). "The President shall not deposit the instrument of ratification for the Convention until such time as the Federal law implementing the Convention is enacted and the United States is able to carry out all the obligations of the Convention, as required by its implementing legislation." 146 Cong. Rec. S8866-04 (daily ed. Sept. 20, 2000). Official reports show that twenty-five American children were adopted abroad in 2008, twenty-six in 2009, forty-three in 2010, seventy-three in 2011, ninety-nine in 2012, eighty-four in 2013, and ninety-six in 2014. *See infra* notes 352-56 and accompanying text.

346. Glaser, *supra* note 18 (citing former National Council for Adoption President Tom Atwood and U.S. Department of State spokeswoman Kelly Shannon); Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records, 68 F. REG. 54064 (proposed Sept. 15, 2003). It was not until the Hague Convention was ratified and the central adoption authority was created, that the State Department was directed to establish a case registry and report each child that was sent or received through intercountry adoption, whether from a Convention country or not. IAA, § 102(e), 114 Stat. 828; 104(b)(2), 114 Stat. 829 (Oct. 6, 2000) (codified as 42 U.S.C. § 14914(b)(2)).

347. *See* Peter Selman, *Trends in Intercountry Adoption: Analysis of Data from 20 Receiving Countries, 1998-2004*, 23 J. POPULATION RES. 183 (2006); Lesley Stahl, *Black Babies "Exported?"*, 60 MINUTES (June 14, 2006), <http://www.cbsnews.com/video/watch?id=673611n>; Cheryl Corley, *Foreign Adoption of African-American Babies Grows*, NPR (July 17, 2005), <http://www.wbur.org/npr/4726046/foreign-adoption-of-african-american-babies-grows>; Lesley Stahl, *Born in USA; Adopted in Canada*, 60 MINUTES (Feb. 13, 2005), <http://www.cbsnews.com/news/born-in-usa-adopted-in-canada-11-02-2005/>.

348. O'Neill, *supra* note 8. As a result, parents from Europe and Canada adopted a large number of American black children just prior to 2008 in a rush to adopt before "the gates shut." *Id.*

actually increased nearly 300 percent in the years since Hague ratification.³⁴⁹ Other countries report that the increase is closer to 1,000 percent.³⁵⁰ According to Prof. Peter Selman, international adoption expert and statistical adviser to the Hague Convention, receiving countries report a much higher number of American children than the United States claims it sends, suggesting that the number of minority children sent abroad is underreported.³⁵¹

For example, official United States reports show that Canada has received only 179 American children since ratification.³⁵² However, Canada's central authority reports that it received 189 children from the United States in 2008, 253 children in 2009, and 220 children in 2011, a total of 662 children in just those three years, more than triple the reported six-year total of 179 children the United States claims it sent to Canada since 2008.³⁵³ Likewise, the United States reports that it sent 180 American children to the Netherlands in the last six years.³⁵⁴ Yet, the central

349. See *infra* notes 352–56.

350. Peter Selman, Address at Pepperdine Law School, Nootbaar Institute on Intercountry Adoption: Orphan Rescue or Child Trafficking? Adoption (Feb. 8, 2013) [hereinafter Selman, Pepperdine Address].

351. *Id.*

352. The United States reports that it sent one child to Canada in 2008, five children in 2009, nineteen in 2010, thirty-one in 2011, forty-one in 2012, thirty-five in 2013, and forty-seven in 2014. *FY 2008 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (May 2009), http://adoption.state.gov/content/pdf/Adoption_Report_v9_SM.pdf [hereinafter *FY 2008 Annual Report*]; *FY 2009 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (Nov. 2009), http://travel.state.gov/content/dam/aa/pdfs/Adoption_Report_v9_SM.pdf [hereinafter *FY 2009 Annual Report*]; *FY 2010 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (Dec. 2010), http://travel.state.gov/content/dam/aa/pdfs/fy2010_annual_report.pdf [hereinafter *FY 2010 Annual Report*]; *FY 2011 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (Nov. 2011), http://travel.state.gov/content/dam/aa/pdfs/fy2011_annual_report.pdf [hereinafter *FY 2011 Annual Report*]; *FY 2012 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (Jan. 2013), http://travel.state.gov/content/dam/aa/pdfs/fy2012_annual_report.pdf [hereinafter *FY 2012 Annual Report*]; *FY 2013 Annual Report on Intercountry Adoption*, U.S. DEP'T OF STATE (Mar. 2014), http://travel.state.gov/content/dam/aa/pdfs/fy2013_annual_report.pdf [hereinafter *FY 2013 Annual Report*]; *FY 2014 Annual Report*, *supra* note 248.

353. Selman, Pepperdine Address, *supra* note 350.

354. The United States reports that it sent twenty-one children to the Netherlands in 2008, seventeen children in 2009, eighteen in 2010, twenty-seven in 2011, twenty-eight in 2012, thirty-eight in 2013, and thirty-one in 2014. *FY 2008 Annual Report*, *supra* note 352; *FY 2009 Annual Report*, *supra* note 352; *FY 2010 Annual Report*, *supra* note 352; *FY 2011 Annual Report*, *supra* note 352; *FY 2012 Annual Report*, *supra* note 352; *FY 2013 Annual Report*, *supra* note 352; *FY 2014 Annual Report*, *supra* note 248.

authority of the Netherlands reports that it received fifty-six children from the United States in 2008, thirty-four children in 2009, and forty-three in 2011, a total of 133 children in just those three years and more than double the amount claimed by the United States.³⁵⁵ Similarly, Ireland reports receiving more American children than the number officially reported by the United States.³⁵⁶ As Professor Selman notes, it raises questions as to why the numbers are being underreported.³⁵⁷

Although the actual outbound numbers, by any calculation, are a fraction of the incoming number of children, the question remains why the United States, one of the more wealthy nations in the world, allows the intercountry adoption of its minority children.³⁵⁸ It is ironic, given the United States' position as one of the wealthiest nations in the world and its presumed commitment to domestic placement, that any of America's black children can only find a home abroad. The United States certainly does not fit the typical profile of a sending country. "The nations that send children abroad for adoption are generally Third World countries convulsed by poverty and violence," says Professor Bartholet.³⁵⁹ Twenty years ago, she suggested that:

[s]ending children abroad for adoption tends to highlight rather than hide the fact that there are problems at home. Indeed, opposition to foreign adoption is based in large part on embarrassment within the sending countries over having their domestic problems revealed by this public

355. Selman, Pepperdine Address, *supra* note 350.

356. The United States claimed it sent five children to Ireland in 2011, fourteen in 2012, five in 2013, and three in 2014. *FY 2011 Annual Report*, *supra* note 352; *FY 2012 Annual Report*, *supra* note 352; *FY 2013 Annual Report*, *supra* note 352; *FY 2014 Annual Report*, *supra* note 248. However, Ireland reports that it received seventeen children in the years prior to 2012, in addition to the fourteen children in 2012. Selman, Pepperdine Address, *supra* note 350.

357. Selman, Pepperdine Address, *supra* note 350; Selman, *supra* note 6; see also Stephanie Elam, *U.S. Children Being Adopted Overseas*, CNN.COM (Nov. 3, 2013), <http://edition.cnn.com/video/data/2.0/video/world/2013/11/04/pkg-elam-adopting-american-children.cnn.html>; Brown, *supra* note 342.

358. The Adoption Authority of Ireland has raised concerns that adoptions from the United States might not satisfy Hague Convention requirements, particularly that the subsidiarity principle is not being followed. *Adopting from the USA*, ADOPTION AUTHORITY IR. (Oct. 20, 2011), <http://www.aai.gov.ie/index.php/hague-countries/florida-usa.html> (referencing Ireland's Adoption Act 2010).

359. BARTHOLET, *FAMILY BONDS*, *supra* note 4, at 45. As one professional summarized, it is "an embarrassment . . . that we cannot place our own children." See Stahl, *supra* note 347.

confession of inability to take care of their own children.³⁶⁰

Racism is cited as the main reason that children in private adoptions are sent overseas, with some believing black or bi-racial children would be discriminated against in this country because of their race.³⁶¹ It is prevalent enough to lead Adam Pertman, former Executive Director of the Evan B. Donaldson Adoption Institute, to say, “In the United States, as much as Americans want to believe it’s not true, we are still a country where there is at least some degree of racial prejudice.”³⁶² “At the very least,” says one adoption professional, “the tiny exodus raises provocative questions in a nation used to seeing itself as a haven for international adoptees. Americans adopt children from other countries because of war, famine or because they are boarded in orphanages. Why would we be exporting our kids?”³⁶³ It cannot be said that there are no available homes here, not when thousands of children are being brought into the country for adoption.

CONCLUSION

Decades ago, scholars decried a system that placed a premium on white infants and thus reduced black children to a lesser value.³⁶⁴ While the “best interests of children” should “always prevail over the special interests of the adults seeking to adopt them,”³⁶⁵ that standard cannot but lose some of its meaning when a category of children is systematically devalued based solely on skin color. As one scholar noted, “If U.S. adoptions were primarily focused on child welfare and charity, rather than adult need and desire, the costs associated with adopting white children would not exceed that of black children,” and many more American children would find homes.³⁶⁶ And, whether the children are being imported into the country or exported out of it, the reality is that black children are “still commodities to be purchased and

360. BARTHOLET, FAMILY BONDS, *supra* note 4, at 152.

361. *Id.* As told by one birth mother, “[t]here’s too much prejudice over here.” See Brown, *supra* note 342.

362. Brown, *supra* note 342.

363. O’Neill, *supra* note 8 (quoting Roots Adoption Agency CEO Toni Oliver).

364. Perry, *supra* note 133, at 40–41.

365. Goodwin, *supra* note 1, at 10.

366. *Id.* at 8.

sold in a white-controlled marketplace.”³⁶⁷ Some adoption professionals have gone as far as to call the entire international adoption process “covert racism,” claiming that black families within the United States would like to adopt, but are once again left out of a process very much dominated by whites.³⁶⁸ And the debate boils down to whether adoption is really about the best interests of the child, “or is instead about the right of white people to parent whichever children they choose.”³⁶⁹ Exactly whose rights and which homes are being championed?

Professor Ronald Dworkin once wrote that a government must “show equal concern for the fate” of all its citizens, noting that “it is important, from an objective point of view, that human lives be successful rather than wasted”³⁷⁰ Black children in the American foster care system should not have to disproportionately age out because there are no available homes for them in this country. Nor should the United States, once a haven for discarded children, be sending its black children abroad for adoption, then replacing them with children—of any color—from other nations.³⁷¹

The United States government should not be pushing legislation like the Children in Families First Act that acts to facilitate even more international adoptions to the detriment of children in this nation. As a matter of public policy, the United States should abolish the current two-tiered system and not allow international adoptions from non-Hague countries. Further, as a Hague member, the United States should enforce for all adoptions the Hague Convention’s proviso that allows international adoption only if all avenues for intra-country adoption have been exhausted and there are no children available for adoption within the United States. That means, consistent with the Hague’s subsidiarity requirement, the United States should not allow any

367. Perry, *supra* note 133, at 55.

368. O’Neill, *supra* note 8 (quoting Roots Adoption Agency CEO Toni Oliver).

369. Perry, *supra* note 133, at 107.

370. RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 1, 5 (2000).

371. “As a country, we should examine if we’re doing everything we can to find homes for these children here.” Glaser, *supra* note 18 (quoting Adam Pertman). To encourage the adoption of United States-born children, one scholar proposed legislation that requires applicants to first seek to adopt a U.S. born child before being allowed to adopt internationally. Maldonado, *supra* note 9, at 1472–78.

international adoptions—whether to or from the United States—until all domestic placement efforts have been exhausted.

Structural racism does not need a bad actor; instead it is facilitated by actions that are “not directly discriminatory but [have] a discriminatory effect, whether intended or not.”³⁷² It is displayed in an adoption system that places a monetary premium on all other children but black American children and sends black children abroad for adoption so they can find a home outside of foster care. It is a problem that cannot be covered up with color-blind rhetoric and accepted post-racial theory, or even by bringing in children of color from other nations. It is time to take off the blinders. “[W]e have to develop a global consciousness about what it is we’re doing,” says Richard Sullivan, an associate professor of social work and family studies at the University of British Columbia in Vancouver, while asking, “Why are kids in our own countries not moving towards permanency? . . . Let’s be more honest about what this really is.”³⁷³ Otherwise, the status quo will continue and “[t]he problem of the twenty-first century will be the problem of the color line. . . . By any standard of measurement or evaluation, the problem has not been solved in the twentieth century and thus becomes a part of the legacy and burden of the next century.”³⁷⁴

372. Robert Slayton, *Institutional Racism*, HUFFINGTON POST BLOG (Dec. 9, 2009), http://www.huffingtonpost.com/robert-slayton/institutional-racism_b_384359.html (citing sociologist Earl Babbie).

373. Glaser, *supra* note 18.

374. PATTERSON, *supra* note 21, at xxix (quoting JOHN HOPE FRANKLIN, *THE COLOR LINE: LEGACY FOR THE TWENTY-FIRST CENTURY* 5 (1993)).