

**LOOKING BEYOND THE UNITED STATES:
HOW OTHER COUNTRIES HANDLE ISSUES RELATED TO
UNWED FATHERS IN THE ADOPTION PROCESS**

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INTRODUCTION

In the United States, nearly thirty-seven percent, or four in ten births, are unwed children.¹ A child's "biological father" is "the male who impregnated the biological mother resulting in the birth of the child."² Accordingly, a biological father is the man who has a genetic link to the child. A man who fathers a child when he is not married to the child's mother is considered an unwed father even if he is married to someone other than the child's mother when the child is conceived.³

Regardless of their marital status, both American biological parents have a right to the custody, care and nurture of their children. The United States Supreme Court ruled that this parental right is a fundamental liberty interest.⁴ The underlying policy that supports that principle is a presumption that "the natural bonds of affection lead parents to act in the best interests of their children."⁵

An unwed father in America who grasps his unique opportunity to establish a relationship with his child is entitled to notice that the child has been placed for adoption and, unless an exception applies, his consent is

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¹ National Center for Health Statistics, New Report Shows Teen Births Drop to Lowest Level Ever, <http://www.cdc.gov/nchs/pressroom/06facts/births05.htm> (last visited May 28, 2008) (reporting that the number of unmarried births rose from 35.8% to 36.8% in 2005).

² GA. CODE ANN. § 19-8-1(1) (2004). *Accord* Judgment In the Name of the Republic of Latvia, Case No.2004-02-0106, ¶ 13.2 (Lat. Const. Ct. Oct. 11, 2004), *available at* <http://www.satv.tiesa.gov.lv/upload/2004-02-0106E.rtf> (distinguishing between legal paternity and biological paternity).

³ CHRIS BARTON AND GILLIAN DOUGLAS, LAW AND PARENTING 49 (1995).

⁴ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

⁵ *Id.* at 68 (quoting *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (citations omitted)).

required before the child is adopted. Grasping that opportunity can be achieved in a number of ways including registering an interest through a state paternity registry.⁶ By comparison, lawmakers in some countries do not consider a biological father's rights before a child is placed for adoption. Unmarried fathers in those countries do not have automatic parental responsibility or parental authority.⁷ Other countries have implemented laws and procedures that recognize unwed biological fathers' rights.⁸

Because intercountry adoptions involve a complex system that requires application of national and international laws, this Article conducts a comparative analysis of United States laws regarding unwed biological father's rights, provisions from relevant international laws and Conventions, and specific laws from other selected countries such as China, Guatemala, Russia, Canada, the United Kingdom, and South Africa. Part I synthesizes laws in the United States that affect biological fathers' rights. Part II discusses the history of intercountry adoption in the United States and the development of international laws governing the adoption process. Part III provides a background concerning adoption practices that affect birth fathers in other countries and compares and contrasts Convention and national laws in other countries to United States laws. Part IV concludes that in the best interests of children who are placed for adoption around the world, the United States and other country officials must implement or amend laws and policies to further protect unwed fathers' rights and to enforce laws that are designed to protect those rights. In sum, in adoption proceedings, when a man's parentage is established, it is a fundamental right that deserves the same protection as a mother's rights.

⁶ See, e.g., ARK. CODE ANN. § 20-18-702(a) (2007). But see Laurence C. Nolan, *Preventing Fatherlessness Through Adoption while Protecting the Parental Rights of Unwed Fathers: How Effective Are Paternity Registries?*, 4 WHITTIER J. CHILD AND FAM. ADVOC. 289, 309–22 (2005) (declaring the benefits of registries and recommending changes for more efficacy in protecting fathers' rights).

⁷ See, e.g., Children Act 1989, pt.1, § 2(2) (a) and (b) (requiring fathers to obtain an order of parental responsibility), [hereinafter *Children Act*], available at http://www.opsi.gov.uk/acts/acts1989/ukpga_19890041_en_1.

⁸ See, e.g., Republic of South Africa, Children's Bill, 2003, ch. 15, § 232(1), (B 70B-2003) [hereinafter *Children's Bill*], available at http://www.centroreinasofia.es/admin/leyes/1/childrensbill_04_August_2003.pdf.

I. TREATMENT OF BIOLOGICAL FATHERS FOR ADOPTION PURPOSES IN THE UNITED STATES

According to United States laws, unless one or more circumstances exist to warrant exercise of an exception, both parents have a fundamental right to the “companionship, care, custody, and management”⁹ of their biological children regardless of whether the parents are married to each other and regardless of whether they live together. They also have the right to make major decisions for their children regarding their medical care, education, and religious upbringing and whether they may be adopted. In four pivotal opinions,¹⁰ the United States Supreme Court recognized biological fathers’ rights.¹¹ As revealed in this Section, three of those opinions involved a father’s rights when his child was considered for adoption.

A. *United States Supreme Court*

In a trilogy of stepparent adoption cases, during a five-year period, the United States Supreme Court carved out rules affecting a biological father’s right to notice about an adoption proceeding and his right to object to his child’s adoption. In 1978, in *Quilloin v. Walcott*, the Supreme Court ruled that a Georgia statute which limited a birth father’s right to veto an adoption and treated him differently from married fathers did not violate the Due Process Clause or the Equal Protection Clause. The Court reaffirmed its rulings from previous opinions that “the relationship between parent and child is constitutionally protected. . . . It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”¹²

The Court further held that “the Due Process Clause would be offended “[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.”¹³ In its rationale, however, the Court

⁹ *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

¹⁰ *Id.*; *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1982).

¹¹ *But see Michael H. v. Gerald D.*, 491 U.S. 110, 129 (1989).

¹² *Quilloin*, 434 U.S. at 255 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)).

¹³ *Id.*

determined that application of the best interests of the child standard would not offend Mr. Quilloin's constitutional rights. After all, Mr. Quilloin had "never exercised actual or legal custody over his child, and thus ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child."¹⁴

A year later, Abdiel Caban's attorney was before the Supreme Court contesting his two biological children's adoption by their stepfather. Unlike Mr. Quilloin, Mr. Caban had lived with the children's mother for a period of time before and after they were born. Not only had Mr. Caban actively supported the mother when they were together and while she was pregnant, but also he supported the children after the separation. He actually had custody of them for a short period after he and their mother separated. When the children were not living with Mr. Caban, he developed a strong bond with the children through frequent visits and communication until the children's mother sent them to live in Puerto Rico with their maternal grandmother.¹⁵

At issue in *Caban* was section 111 of the New York Domestic Relations Law which allowed unwed mothers to veto an adoption simply by withholding their consent but required unwed fathers to do much more to block an adoption. Under section 111, unwed fathers were required to show that under the best interests of the child standard, a petitioner should not be allowed to adopt the child.¹⁶ The state argued that because of the "fundamental difference between maternal and paternal relations," birth mothers should receive special treatment because they were innately closer to their children than birth fathers.¹⁷ In finding that the New York statute was unconstitutional, the *Caban* Court ruled that

the distinction in § 111 between unmarried mothers and unmarried fathers, . . . does not bear a substantial relation to the State's interest in providing adoptive homes for its [unwed] children. It may be that, given the opportunity, some unwed fathers would prevent the adoption of their [unwed] children. This impediment to adoption usually is the result of a natural parental interest shared by both genders alike; it is not a manifestation of any profound difference between the affection and concern of mothers

¹⁴ *Id.* at 256.

¹⁵ *Caban*, 441 U.S. at 382–83.

¹⁶ *Id.* at 386–87.

¹⁷ *Id.* at 388.

and fathers for their children. Neither the State nor the appellees have argued that unwed fathers are more likely to object to the adoption of their children than are unwed mothers; nor is there any self-evident reason why as a class they would be.

The New York Court of Appeals in *In re Malpica-Orsini*, suggested that the requiring of unmarried fathers' consent for adoption would pose a strong impediment for adoption because often it is impossible to locate unwed fathers when adoption proceedings are brought, whereas mothers are more likely to remain with their children. Even if the special difficulties attendant upon locating and identifying unwed fathers at birth would justify a legislative distinction between mothers and fathers of newborns, these difficulties need not persist past infancy. When the adoption of an older child is sought, the State's interest in proceeding with adoption cases can be protected by means that do not draw such an inflexible gender-based distinction as that made in § 111. In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child. Indeed, under the statute as it now stands the surrogate may proceed in the absence of consent when the parent whose consent otherwise would be required never has come forward or has abandoned the child. But in cases such as this, where the father has established a substantial relationship with the child and has admitted his paternity, a State should have no difficulty in identifying the father even of children born out of wedlock

In sum, we believe that § 111 is another example of "overbroad generalizations" in gender-based classifications. The effect of New York's classification is to discriminate against unwed fathers even when their

identity is known and they have manifested a significant paternal interest in the child.¹⁸

In *Stanley v. Illinois*,¹⁹ a case that did not involve adoption, the Supreme Court analyzed an Illinois statute that stated a presumption that biological fathers of unwed children were unfit to rear their children when the custodial mother died.²⁰ As a result, unwed children became wards of the state upon a custodial mother's death regardless of whether a biological father like Mr. Stanley had developed a substantial parent-child relationship with his children.²¹ The Court concluded that because married parents were allowed to present evidence of their fitness and the State of Illinois did not allow unwed fathers to submit the same evidence, the statute was unconstitutional under the Due Process Clause and the Equal Protection Clause.²² In recognizing the biological father's right to a fitness hearing before the children were removed from their father's custody, the Court reasoned that Mr. Stanley had lived with the children's mother for eighteen years and he had actively participated in caring for the children.²³

Then in 1983, the Supreme Court resolved another stepparent adoption dispute involving a biological father who had had some interaction with his child but he had not established a significant relationship like Mr. Caban had established with his children. In *Lehr v. Robertson*,²⁴ the unwed biological father alleged that his constitutional rights under the Equal Protection Clause of the Fourteenth Amendment had been violated by implementation of another New York statute.²⁵ That statute required unwed birth fathers to demonstrate their intent to claim paternity by registering with the state's putative father registry.²⁶

At that time, in the State of New York, unwed fathers who did not register were not entitled to notice of an adoption proceeding involving their child.²⁷ The law further provided that an unwed father was entitled to

¹⁸ *Id.* at 391–94. *See also Stanley*, 405 U.S. at 649 (holding that illegitimate children have a right to have a relationship with their unwed father).

¹⁹ 405 U.S. 645 (1972).

²⁰ *Id.* at 649–50.

²¹ *Id.* at 646.

²² *Id.* at 649.

²³ *Id.* at 649, 657–59.

²⁴ 463 U.S. 248 (1983).

²⁵ *Id.* at 250, 255.

²⁶ *Id.* at 250–51.

²⁷ *Id.*

notice of the impending adoption only when: (1) there had been an adjudication of paternity, (2) his name appeared on the child's birth certificate, (3) he lived with the child and the child's mother and held himself out as the child's parent, (4) the child's mother identified him in a sworn statement as the father, or (5) he married the mother within six months of the child's birth.²⁸

The Supreme Court justices concluded that although Mr. Lehr lived with the child's mother before she was born and he visited the mother in the hospital after the child was born, he did not live with them after the child was born.²⁹ He provided no financial support for them.³⁰ Moreover, his name was not on the child's birth certificate; he never sought to marry the child's mother; and, he did not register with the state's paternity registry.³¹

Therefore, the Court considered the related cases that it had decided up to that point and ruled that neither of Mr. Lehr's constitutional rights had been violated because he had not established a relationship with his child:

The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection. The actions of judges neither create nor sever genetic bonds. "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in

²⁸ *Id.* at 251.

²⁹ *Id.* at 252.

³⁰ *Id.*

³¹ *Id.* at 251–52, 268–69 (White, J., dissenting) (stating more facts to demonstrate that the mother frustrated Mr. Lehr's attempts to establish a parent-child relationship with frequent moves without informing him of their whereabouts).

‘promot[ing] a way of life’ through the instruction of children as well as from the fact of blood relationship.”³²

Courts and commentators discussing unwed fathers’ rights widely quote the Court’s rationale in *Lehr*. For the majority, Justice Stevens wrote:

The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child’s future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child’s development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child’s best interests lie.³³

Because certain exceptions to the general principle regarding parents’ ability to rear their own children have been announced, not all birth fathers will have a right to care and custody of their children. In *Michael H. v. Gerald D.*,³⁴ for example, the child’s birth father was an unwed father who had an affair with a married woman.³⁵ The birth father was willing and able to care for the child and established a bond with the child on at least two occasions when the mother and child lived with him for months.³⁶ However, when the birth father asserted his right to access to the child, the Court ruled that because the child’s mother was married at the time of conception, there was a presumption that the mother’s husband was the child’s legal father.³⁷ It held that when “[t]he child is born into an extant marital family, the [biological] father’s unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage; and it is not unconstitutional for the State to give categorical preference to the latter.”³⁸

³² *Id.* at 261 (citation omitted).

³³ *Id.* at 262 (footnote omitted).

³⁴ 491 U.S. 110 (1989).

³⁵ *Id.* at 113.

³⁶ *Id.* at 114.

³⁷ *Id.* at 115.

³⁸ *Id.* at 129.

B. Examples of Statutes and Cases in the United States

After the Supreme Court published its opinions, state legislatures enacted legislation that followed the Supreme Court's holdings.³⁹ Generally, fit birth fathers who have established a parent-child relationship with a child are entitled to notice and must provide consent to the child's adoption. Before an unwed father could participate in an adoption proceeding or to veto an adoption, he must be identified and he must receive notice of the adoption. To illustrate, section 111-a of New York's Domestic Relations Law identifies unwed fathers who are entitled to notice of adoption proceedings:

(a) any person adjudicated by a court in this state to be the father of the child;

(b) any person adjudicated by a court of another state or territory of the United States to be the father of the child, when a certified copy of the court order has been filed with the putative father registry, . . . ;

(c) any person who has timely filed an unrevoked notice of intent to claim paternity of the child, . . . ;

(d) any person who is recorded on the child's birth certificate as the child's father;

(e) any person who is openly living with the child and the child's mother at the time the proceeding is initiated and who is holding himself out to be the child's father;

(f) any person who has been identified as the child's father by the mother in a written, sworn statement;

(g) any person who was married to the child's mother within six months subsequent to the birth of the child and prior to the execution of a surrender instrument or the initiation of a proceeding . . . ; and

³⁹ See, e.g., Alison S. Pally, Note, *Father by Newspaper Ad: The Impact of In re The Adoption of Minor Child on the Definition of Fatherhood*, 13 COLUM. J. GENDER & L. 169, 177-91 (2004) (discussing states' legislative responses to the Supreme Court's decisions in *Stanley*, *Quilloin*, *Caban*, *Lehr*, and *Michael H.*).

(h) any person who has filed with the putative father registry an instrument acknowledging paternity of the child,⁴⁰

Some American birth mothers, sometimes with the assistance of attorneys, have attempted to thwart a birth father's participation in the adoption process by identifying the wrong man as the father, lying about the child's birth, or otherwise depriving the father of notice of her adoption plans.⁴¹ In two prominent cases, children were returned to their birth fathers even after the adoption was finalized because the fathers did not receive notice of the adoption.⁴² Some states may assess huge fines or order imprisonment for failure to provide accurate paternity information.⁴³ Other legislatures require that agencies make diligent efforts to locate birth fathers.⁴⁴

On the other hand, although state statutes generally require a biological father's consent, there are exceptions to that general proposition. As the California Family Code illustrates, a birth father's consent will not be required for adoption when the following situations arise:

(a) [H]e [did not become] a presumed father . . . before the mother's relinquishment or consent becomes irrevocable or before the mother's parental rights have been terminated.

(b) If one birth parent has been awarded custody by judicial order, or has custody by agreement of both parents, and the other birth parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so, then the birth parent having sole custody may consent to

⁴⁰ N.Y. DOM. REL. LAW § 111-a (McKinney 2007).

⁴¹ See ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 121–23 (2000) (discussing ways that American birth mothers and others thwart a father's opportunity to participate in the adoption process); see also Jeffrey A. Parness, *Adoption Notices to Genetic Fathers: No to Scarlet Letters, Yes to Good-Faith Cooperation*, 36 CUMB. L. REV. 63, 64–68 (2006) (explaining the facts in *Lehr*).

⁴² *In re Baby Girl Clausen*, 502 N.W.2d 649 (Mich. 1993); *In re Doe*, 638 N.E.2d 181, 181–82 (Ill. 1994). See also *Kessel v. Leavitt*, 511 S.E.2d 720 (W. Va. 1998).

⁴³ See, e.g., LA. CHILD. CODE ANN. art. 1122(B)(10) (2004); LA. REV. STAT. ANN. § 14:125.2(B) (2007) (assessing fines up to \$10,000 or imprisonment for five years or both for making false statement regarding a child's paternity).

⁴⁴ See, e.g., TEX. FAM. CODE ANN. § 161.107 (Vernon Supp. 2007).

the adoption, but only after the birth parent not having custody has been served with a copy of a citation in the manner provided by law for the service of a summons in a civil action that requires the birth parent not having custody to appear at the time and place set for the appearance in court

(c) Failure of a birth parent to pay for the care, support, and education of the child for the period of one year or failure of a birth parent to communicate with the child for the period of one year is prima facie evidence that the failure was willful and without lawful excuse.⁴⁵

State courts also have followed the *Stanley*, *Quillion*, *Caban* and *Lehr* holdings and state statutes that announced fathers' obligations and rights.⁴⁶ In a recent Louisiana case, *Doe v. A.B.*, for example, the Court of Appeal for the Third Circuit applied Article 1138 of the Louisiana Children's Code and terminated a young birth father's rights.⁴⁷ Article 1138 provides that the "father must establish his parental rights by acknowledging that he is the father of the child and by proving that he has manifested a substantial commitment to his parental responsibilities and that he is a fit parent of his child."⁴⁸

In *Doe v. A.B.*,⁴⁹ the teenage mother (C.D.) and father (A.B.) dated for approximately eight months.⁵⁰ When C.D. discovered that she was four to

⁴⁵ CAL. FAM. CODE § 8604 (West Supp. 2007). Federal law provides that biological parents' rights must be protected in the termination process:

Separation from both parents means the involuntary severance of the child from his or her parents by action of a competent authority for good cause and in accordance with the laws of the foreign-sending country. The parents must have been properly notified and granted the opportunity to contest such action. The termination of all parental rights and obligations must be permanent and unconditional.

8 C.F.R. § 204.3(b) (2007).

⁴⁶ See *Stanley*, 405 U.S. at 658; *Quilloin*, 434 U.S. at 256; *Caban*, 441 U.S. at 382; *Lehr*, 463 U.S. at 267–68.

⁴⁷ *Doe v. A.B.*, 940 So. 2d 602, 603–09 (La. Ct. App. 2007).

⁴⁸ LA. CHILD. CODE. ANN. art. 1138(A) (2004).

⁴⁹ 940 So. 2d 602.

⁵⁰ *Id.* at 605.

five months pregnant, the couple was no longer together.⁵¹ C.D. telephoned him and told him that she was pregnant but then called back, with her mother's urging, and recanted her statement.⁵²

One of A.B.'s friends saw C.D. when she was seven or eight months pregnant and told A.B. that his ex-girlfriend was pregnant.⁵³ One of his relatives also told him that C.D. was pregnant.⁵⁴ A.B. never attempted to confirm the pregnancy when he "heard" about it or for four months after he received the Intent to Surrender documents from the court.⁵⁵ He testified that he tried to contact C.D. before the child was born but that she did not answer the telephone, and that he telephoned her after his friend saw her and told her that his friend had seen her.⁵⁶ During that conversation, C.D. testified that she told A.B. that she intended to place the child for adoption.⁵⁷

A.B.'s mother offered C.D. a place to live at her home while C.D. was pregnant and after the baby was born.⁵⁸ C.D. and the baby would live in the home with A.B.'s mother, father and his eight-year-old brother.⁵⁹ His mother had outstanding court charges, which she could afford to pay but did not.⁶⁰ She continued to drive although her license had been suspended.⁶¹ A.B.'s father, who had been arrested multiple times, was on five years probation for distribution of marijuana.⁶² Among other notations on his lengthy criminal record, he had been convicted of exposing himself to a juvenile.⁶³ A.B.'s younger brother suffered from ADHD with aggression.⁶⁴

A.B. believed that he was the child's father but he did not offer any support, financial or otherwise, to C.D. during her pregnancy.⁶⁵ He did not

⁵¹ *Id.* at 606.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 605.

⁵⁵ *Id.*

⁵⁶ *Id.* at 605–06.

⁵⁷ *Id.* at 606.

⁵⁸ *Id.* at 606–07.

⁵⁹ *Id.* at 606.

⁶⁰ *Id.* at 608.

⁶¹ *Id.*

⁶² *Id.* at 606, 608.

⁶³ *Id.* at 606.

⁶⁴ *Id.* at 608.

⁶⁵ *Id.* at 605–06.

know the child's sex or the child's birthday, but C.D. admitted that she never provided that information.⁶⁶ He never visited the child and never offered any support for the child.⁶⁷

Regarding his fitness, A.B. was eighteen at the time of trial,⁶⁸ but he could not write well⁶⁹ because he quit going to school in the fourth grade.⁷⁰ A.B. rarely worked, was fired from one job because of frequent absences, and was unemployed when he appeared before the court.⁷¹ He lived at home with his mother who paid all of his living expenses.⁷² Although A.B. denied using drugs, C.D. testified that he associated with people who ingested drugs and that he may have used Ecstasy and crystal methamphetamine.⁷³ He admitted patronizing bars and drinking alcohol even though he was underage.⁷⁴

When he received the Intent to Surrender documents, A.B. objected to the adoption.⁷⁵ The trial court ruled that A.B. had established his parental rights,⁷⁶ and that those rights should not be terminated because of his "educational background, his economic status and *his ability to care for his child.*"⁷⁷ As a result, the trial court ruled that the adoption could not be granted without his consent.⁷⁸

On appeal, the Court of Appeal ruled that under Article 1138(A), an unwed father must prove a substantial commitment to parent his child, and that he is a fit parent of his child.⁷⁹ More specifically, an unwed father must prove he supported the child, visited the child, and he had the present ability to care for the child.⁸⁰ When an unwed father's efforts to establish a relationship are thwarted, he must prove that he was willing to make a substantial commitment and that he made reasonable attempts to

⁶⁶ *Id.* at 605–07.

⁶⁷ *Id.* at 606–07.

⁶⁸ *Id.* at 605.

⁶⁹ *Id.* at 606.

⁷⁰ *Id.* at 605–06.

⁷¹ *Id.* at 605.

⁷² *Id.* at 605–06.

⁷³ *Id.* at 605, 607.

⁷⁴ *Id.* at 606.

⁷⁵ *Id.* at 605.

⁷⁶ *Id.* at 607.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 603, 607.

⁸⁰ *Id.*

demonstrate that commitment.⁸¹ At trial, he must also show that “he is now willing and able to assume legal and physical care of the child.”⁸²

The Court of Appeal decided that A.B. had not manifested the requisite “substantial commitment.”⁸³ He had indirect knowledge of the pregnancy but made no attempts to verify it.⁸⁴ He did not make attempts to visit the child or to pay expenses even after he was served with the Intent to Surrender.⁸⁵

Furthermore, the Court of Appeal decided that A.B. was unfit.⁸⁶ A.B. had no employment history, and he was unemployed at the time of trial.⁸⁷ “Nothing in [his] background shows the necessary responsibility and commitment required to raise an infant. His lack of an appropriate education further hinders his ability to gain stable employment. There [is] no indication that A.B. could independently provide a suitable home for the child.”⁸⁸ His current living situation did not constitute “appropriate shelter” for a child.⁸⁹

Finally, the court concluded that it would not be in the child’s best interests to be in A.B.’s legal and physical care and that his parental rights should be terminated.⁹⁰

II. INTERCOUNTRY ADOPTION HISTORY AND STATISTICS

Considering the number of intercountry adoptions involving United States citizens, the number of unwed fathers in other countries who may be affected by intercountry adoption laws is substantial. The number of intercountry adoptions by United States citizens has increased from 7,000 in 1990 to more than 20,000 annually in 2006.⁹¹ Americans began to adopt children internationally when they learned that children were abandoned in

⁸¹ *Id.* at 607.

⁸² *Id.*

⁸³ *Id.* at 607–08.

⁸⁴ *Id.* at 608.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.* at 605–08.

⁸⁸ *Id.* at 608.

⁸⁹ *Id.*

⁹⁰ *Id.* at 608–09.

⁹¹ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., *Immigrant Visas Issued to Orphans Coming to U.S.*, http://travel.state.gov/family/adoption/stats/stats_451.html (last visited May 28, 2008) [hereinafter *Immigrant Visas*].

Europe and Japan after World War II.⁹² Americans adopted more than 3,000 Vietnamese children during and after the Vietnam War.⁹³ More than 38,000 Korean children were adopted between 1953 and 1981 due to the Korean War.⁹⁴

Today, most intercountry adoptions in the United States involve adoptees who are descendants of China, Russia, and Guatemala.⁹⁵ Prospective adoptive parents who are United States citizens choose to adopt children from other countries for several reasons. Some of those reasons reflect difficulties or frustrations with the American adoption system such as rigid age limitations for prospective parents and lengthy waiting periods before finalization of the adoption process.⁹⁶

In addition, changes in societal norms have had a direct effect on the number of young children and the characteristics of children who are available for adoption in the United States. For example, a limited number of healthy infants are available in the United States because fewer teenagers are giving birth to children and older unmarried women who have children are choosing to rear their children rather than place them for adoption.⁹⁷ Some prospective parents choose not to adopt children from the child welfare system who are available in larger numbers in the United States. Those children usually wait longer to be adopted because they are older than eight years old and many of them are designated as special needs children. Special needs children are children in the child welfare system who are older, children of color, children sibling groups, and children who have significant medical, psychological or physical needs.⁹⁸

Many prospective parents continue to adopt children from other countries for other social reasons. They are “motivated by a desire to raise children whose lives would otherwise be profoundly marred by poverty,

⁹² Cynthia Ellen Szejner, Note, *Intercountry Adoptions: Are the Biological Parents' Rights Protected?*, 5 WASH. U. GLOBAL STUD. L. REV. 211, 211 (2006).

⁹³ *Id.*

⁹⁴ *Id.* at n.5; see also CULTURES OF TRANSNATIONAL ADOPTION 81 (Toby Alice Volkman ed., 2005) (referring to a “quiet migration” of Korean children) [hereinafter Volkman].

⁹⁵ Szejner, *supra* note 92, at 212–13; CYNTHIA R. MABRY & LISA KELLY, ADOPTION LAW: THEORY, POLICY AND PRACTICE 458 (2006).

⁹⁶ See Szejner, *supra* note 92, at 212.

⁹⁷ MABRY & KELLY, *supra* note 95, at 113.

⁹⁸ LAURA BEAUVAIS-GODWIN & RAYMOND GODWIN, THE COMPLETE ADOPTION BOOK, THIRD EDITION: EVERYTHING YOU NEED TO KNOW TO ADOPT A CHILD 255–57 (3d ed. 2000).

disease, homelessness, or discrimination in their countries of origin based on their ethn racial background or religion.”⁹⁹

Other prospective adoptive parents adopt internationally to appease their own concerns. They fear that a United States birth parent, usually the birth mother, may attempt to reclaim the child;¹⁰⁰ whereas, a birth parent who lives in another country and who has limited financial resources is less likely to come to the United States to take the child back.¹⁰¹

A. Identifying Children who are Eligible for Intercountry Adoption

The United States Bureau of Citizenship and Immigration Services (BCIS) determines which foreign-born children Americans may adopt.¹⁰² Because most of the children who enter into the U.S. as adoptees or prospective adoptees are classified as orphans under 8 U.S.C. § 1101(b)(1)(F)(i), those children will be the focus of this Section. The BCIS defines orphans as children who under sixteen years old and are parentless “because of the death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or for whom the sole or surviving parent is incapable of providing proper care and has in writing irrevocably released the child for emigration and adoption”¹⁰³

The United States Code also defines “parent” in the adoption context. The term “parent” does not include biological fathers who have disappeared, abandoned, or deserted a child.¹⁰⁴ Also, birth fathers are not considered parents when they submit written and irrevocable releases for the child’s emigration and adoption.¹⁰⁵ BCIS regulations further provide that unwed fathers be not considered parents when the children are classified under 8 U.S.C. § 1101(b)(1)(F)(i), unless the fathers established

⁹⁹ FAMILIES BY LAW: AN ADOPTION READER 215 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

¹⁰⁰ See Szejner, *supra* note 92, at 212.

¹⁰¹ See *id.*

¹⁰² Hollinger, *supra* note 99, at 217.

¹⁰³ 8 U.S.C. § 1101(b)(1)(F)(i) (2000). See 8 C.F.R. § 204.3(b) (2007), for a definition of abandonment for purposes of determining whether a child is an immigrant orphan. For an argument that the narrow “abandonment” definition forces parents to desert their children if they want to give them a better life, see Jordana P. Simov, Comment, *The Effects of Intercountry Adoptions on Biological Parents’ Rights*, 22 LOY. L.A. INT’L & COMP. L. REV. 251, 258–61 (1999).

¹⁰⁴ 8 C.F.R. § 204.3(b)(2).

¹⁰⁵ *Id.*

a parental relationship with the child or executed an irrevocable consent for the child's emigration for adoption.¹⁰⁶

For BCIS purposes, in a country that continues to distinguish between unwed children and marital children, a child who has not been "legitimated," has a sole parent—his or her mother—unless the child has or had a "bona fide relationship" with the father.¹⁰⁷ In countries where all children are legitimated and a child's paternity has been established, the child does not have a sole parent if the father has acknowledged the child.¹⁰⁸ When a child is legitimated, he or she is not considered an orphan unless either only one parent is alive or both parents abandon him or her.¹⁰⁹ Since a significant number of children who are eligible for adoption do not have a relationship with their father, in many instances, fathers are ignored.

Through documentary evidence, for the child's protection, prospective or adoptive parents have the burden of proving that a particular child is an orphan,¹¹⁰ but there are not any comparable procedures or standards set forth for the birth parents' protection.¹¹¹ Actually, § 1101 appears to discourage birth parents' efforts to reclaim their children with its provision that after the child is admitted to the United States, "no natural parent . . . of any [child] provided immigrant status . . . shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status . . ."¹¹² In any event, most foreign birth parents' lack of economic resources and inability to speak English severely hinder their ability to challenge an adoption.¹¹³

¹⁰⁶ *Id.*

¹⁰⁷ U.S. DEP'T OF JUSTICE IMMIGR. & NATURALIZATION SERV., THE IMMIGRATION OF ADOPTED AND PROSPECTIVE ADOPTIVE CHILDREN 27 (2000), http://www.uscis.gov/files/article/adopt_book.pdf.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 28.

¹¹⁰ *Id.* at 30.

¹¹¹ See Simov, *supra* note 103, at 270 (concluding that birth parents and children's rights are not adequately protected).

¹¹² 8 U.S.C. § 1101(a)(27)(J)(iii)(II) (2000). See Simov, *supra* note 103, at 277–79 (arguing that birth parent's poverty and illiteracy may be huge obstacles to their ability to challenge an adoption).

¹¹³ See Simov, *supra* note 103, at 279 (arguing that "certain socioeconomic factors further exacerbate the problems that foreign biological parents face when challenging the adoption of their child).

In some countries, only selected children—often those who are parentless or abandoned—are eligible for adoption internationally.¹¹⁴ In China (where Americans adopt the most children internationally¹¹⁵), three categories of children may be adopted: (a) orphans, (b) abandoned children whose parents cannot be identified or located; and (c) children whose parents are experiencing “unusual difficulties” and are unable to care for the children.¹¹⁶ In South Africa, the group of children who are adoptable has been expanded to include children who have been abused and neglected, and children who need a “permanent alternative placement,” as well as children whose parents’ whereabouts are unknown, and children who have been abandoned or orphaned.¹¹⁷

Unfortunately, however, many children who are adopted internationally are not orphans. The commoditization of children by Americans and citizens from other countries is disturbing. Many children have been bought voluntarily from destitute, desperate and uneducated parents.¹¹⁸ Some birth parents are coerced to place their children for adoption and are paid a small sum while the child is sold at a huge profit for thousands for dollars.¹¹⁹ Other children are stolen or kidnapped from their parents.¹²⁰ For example, some birth parents temporarily have placed their children in orphanages because they were unable to care for them but intended to return to reclaim the child later. When they returned to the orphanage, they discovered that their children were adopted without their consent.¹²¹ Others have been adopted after their parents have been misled to believe that the children will be returned to them after a certain period or that the parents will continue to maintain their parental rights despite the adoption.¹²²

¹¹⁴ See Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1450 (2006).

¹¹⁵ U.S. DEP’T OF COMMERCE, ADOPTED CHILDREN AND STEPCHILDREN: 2000, 12–13 (2003), <http://www.census.gov/prod/2003pubs/censr-6.pdf>.

¹¹⁶ Adoption Law of the People’s Republic of China, *available at* http://www.china-ccaa.org/frames/index_unlogin_en.jsp (follow “Adoptive Law of the People’s Republic of China” hyperlink under “Policies and Regulations”).

¹¹⁷ *Children’s Bill*, *supra* note 8, at ch. 15, § 234(1)(b).

¹¹⁸ See Maldonado, *supra* note 114, at 1450.

¹¹⁹ *Id.* at 1448–50.

¹²⁰ *Id.* at 1449.

¹²¹ *Id.* at 1448.

¹²² *Id.* at 1449.

B. International Conventions and Laws on Adoption

Many countries have responded to the increased popularity of international adoptions by signing and ratifying conventions and enacting national laws to regulate the intercountry adoption process. This Section discusses four important conventions and other international laws that govern intercountry adoptions with special emphasis on unwed fathers' rights.

1. Conventions

a. United Nations Convention on the Rights of the Child

The General Assembly of the United Nations adopted this convention on November 20, 1989.¹²³ In the preamble, the Convention on the Rights of the Child (CRC) enumerates several rights that a child has, so it is child-centered. It provides that in "all actions concerning children, . . . courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."¹²⁴

A few articles of the CRC also demonstrate respect for the child's relationship with his or her birth parents. Regarding the child's parents, the CRC provides that contracting states should "undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents . . ."¹²⁵ Article 2 states that contracting states "shall respect and ensure the rights set forth in the present Convention to each child . . . without discrimination of any kind, irrespective of the child's or his or her parents' . . . status."¹²⁶ This provision impliedly encompasses unmarried parents and perhaps their economic status—a serious issue in intercountry adoptions. Article 7, in particular, provides that "[t]he child . . . as far as possible, [shall have] the right to know and be cared for by his or her parents."¹²⁷

Article 9 of the CRC, another important provision, provides that contracting states

shall ensure that a child not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in

¹²³ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹²⁴ *Id.* art. 3(1).

¹²⁵ *Id.* art. 3(2).

¹²⁶ *Id.* art. 2(1).

¹²⁷ *Id.* art. 7(1).

accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.¹²⁸

Finally, in the adoption context, the oft-cited Article 21 of the CRC provides that

[s]tate Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall: (a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counseling as may be necessary;¹²⁹

b. Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions

This convention became effective on November 15, 1965. It was written "to establish common provisions on jurisdiction, applicable law and recognition of decrees relating to adoption . . ."¹³⁰ It also focuses on the integrity of the consent to adopt that the child's guardian or parent provides. Article 5 of the Convention on Jurisdiction provides that "the national law of the child relating to consents and consultations, other than those with respect to an adopter, his family or his or her spouse" must be applied.¹³¹ Additionally, Article 17 provides that "[w]ith a view to the application of Article 5, each contracting State shall inform the Ministry of

¹²⁸ *Id.* art. 9.

¹²⁹ *Id.* art. 21(a).

¹³⁰ Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions pmb1, Oct. 28, 1964, 4 I.L.M. 338, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=75.

¹³¹ *Id.* art. 5.

Foreign Affairs of the Netherlands of the provisions of its internal law relating to consents and consultations.”¹³² No specific information regarding the content of the consent, how consents to adopt should be presented to parents (*i.e.*, written in their native language and read to them if they are illiterate), or how the consent provisions will be enforced are noted. Leaving promulgation of laws consistent with the Hague Convention and other conventions to each nation without any specific and detailed guidance invites lack of uniformity in the intercountry adoption process.

c. The Convention for the Protection of Human Rights and Fundamental Freedoms (also called the European Convention on Human Rights)

Article 8 of the European Convention on Human Rights¹³³ is often cited when international children’s rights are considered. The caption for Article 8 is “Right to respect for private and family life.”¹³⁴ It provides that:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.¹³⁵

Courts have cited this provision in rulings regarding whether birth parents’ parental rights have been respected when their children are placed for adoption.¹³⁶

¹³² *Id.* art. 17.

¹³³ Convention for the Protection of Human Rights and Fundamental Freedom art. 8, Sept. 3, 1953, 213 U.N.T.S. 222, available at <http://conventions.coe.int/treaty/en/Treaties/html/005.htm>.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ See, e.g., *L Teaching Hosps. NHS Trust v. A.*, 2003 WL 270761 (analyzing whether Article 8 applied to a birth father whose child was placed for adoption).

d. *The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (“Hague Convention”)

The Hague Convention was signed in May 1993.¹³⁷ It sets forth standards and procedures for intercountry adoptions. Its child-centered goal is “to establish safeguards to ensure that intercountry adoptions take place in the best interests of the child”¹³⁸ Although the preamble admonishes each ratifying state to “take, as a matter of priority, appropriate measures to enable the child to remain in the care of his or family of origin,”¹³⁹ the Hague Convention sets forth only limited rights for birth parents. Note that only a few sections mention biological parents’ rights.¹⁴⁰

To ensure that intercountry adoptions are validated, the Hague Convention mandates that competent authorities shall ensure that “the persons, institutions and authorities whose consent is necessary for adoption, have been counseled as may be necessary and duly informed of the effects of their consent,”¹⁴¹ Under the Hague Convention, birth parents must be informed of the consequences of the adoption, such as, “whether or not an adoption will result in the termination of the legal relationship between the child and his or her family of origin,”¹⁴² The Hague Convention further emphasizes the need that those who provide consent for the child’s adoption must give their “consent freely, in the required legal form, and expressed or evidenced in writing,”¹⁴³ Moreover, the contracting State must ensure that the consents were not induced by payment and that they have not been withdrawn.¹⁴⁴ Although there is no specific reference to a birth father’s consent, there is a separate article in the Hague Convention that expressly prohibits obtaining a mother’s consent to an adoption before the child is born.¹⁴⁵

¹³⁷ Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 1870 U.N.T.S. 167 [hereinafter Hague Convention].

¹³⁸ *Id.* art. 1.

¹³⁹ *Id.* pmb1.

¹⁴⁰ *See id.* art. 4(c), 16(1)(c), 16(2), 29.

¹⁴¹ *Id.* art. 4(c)(1).

¹⁴² *Id.*

¹⁴³ *Id.* art. 4(c)(2). *See also* art. 16 (requiring a report that, among other things, includes proof of consent).

¹⁴⁴ *Id.* art. 4(c)(3).

¹⁴⁵ *Id.* art. 4(c)(4).

Finally, with regard to parental rights, the Hague Convention includes provisions regarding legal consequences of adoption. First, “the legal parent-child relationship between the child and his or her adoptive parents” is created and the parent-child relationship with the biological parents is terminated.¹⁴⁶ Second,

[i]n the case of an adoption having the effect of terminating a pre-existing legal parent-child relationship, the child shall enjoy in the receiving State, and in any other Contracting State where the adoption is recognized, rights equivalent to those resulting from adoptions having effect in each such State.¹⁴⁷

Third, the Hague Convention provides that “[w]here an adoption granted in the State of origin does not have the effect of terminating a pre-existing legal parent-child relationship, it may . . . be converted into an adoption having such an effect”¹⁴⁸ All of these provisions indicate the Hague Convention drafters’ intent to permanently sever the parent-child relationship between the child and his or her biological father. This is similar to many United States statutes that summarily declare that after an adoption, the child becomes a stranger to her biological parents.¹⁴⁹

The Hague Convention also attempts to eliminate baby selling and child trafficking. At Article 29, contact between the prospective adoptive parents and the child’s parents is forbidden until specified requirements are satisfied.¹⁵⁰ In addition, the Hague Convention forbids anyone who is involved in the adoption process to realize an improper financial gain or to charge or pay unreasonable costs, fees or expenses.¹⁵¹ No enforcement measures are offered.¹⁵²

¹⁴⁶ *Id.* art. 26(1).

¹⁴⁷ *Id.* art. 26(2).

¹⁴⁸ *Id.* art. 27(1).

¹⁴⁹ *See, e.g.*, ALASKA STAT. § 25.23.130(a)(1) (2006); GA. CODE ANN. § 19-8-19(a)(1) (2004).

¹⁵⁰ Hague Convention, *supra* note 137, art. 29 (requiring, inter alia, a finding that the child is adoptable, that proper consents have been executed, and that the child will be allowed to reside permanently in the receiving state).

¹⁵¹ *Id.* art. 32.

¹⁵² *Id.* art. 33 (stating that when a contracting State has violated or is at risk of violating a provision of the Convention, the Central Authority of the State, upon notification, shall be responsible for taking *appropriate* measures).

2. *The United States' Implementation of the Hague Convention*

More than seventy countries have joined the Hague Convention. For the United States, President Bill Clinton signed the Hague Convention in 1994.¹⁵³ Thus, the United States became a signatory that demonstrated its agreement with the intercountry adoption principles set forth in the Hague Convention and that it intended to become a party to the Convention.¹⁵⁴ However, signatories are not obligated to comply with the terms of the Convention until ratification.¹⁵⁵

The United States finally became a full member of the Hague Convention on April 1, 2008.¹⁵⁶ In 2000, Congress enacted the Intercountry Adoption Act of 2000 (IAA) to implement the Hague Convention.¹⁵⁷ Like the Hague Convention, the IAA emphasizes the child's best interests as paramount, but *inter alia*, the IAA was enacted to "protect the rights of, and prevent abuses against, children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the [Hague] Convention, and to ensure that such adoptions are in the children's best interests . . ." ¹⁵⁸ Unlike the Hague Convention, however, the IAA provides more protection for biological parents' rights in general.¹⁵⁹ Specific references to biological father's rights, however, still are limited.

Before a Certificate of Recognition will be issued for a child, the Central Authority in the United States (the United States Department of State) must be assured that certain procedural requirements have been satisfied.¹⁶⁰ BCIS procedures also list consent requirements.¹⁶¹ To ensure

¹⁵³ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *Hague Convention on Intercountry Adoption and the Intercountry Adoption Act of 2000: Background*, http://travel.state.gov/family/adoption/convention/convention_2290.html (last visited May 28, 2008).

¹⁵⁴ Sarah Sargent, *Suspended Animation: The Implementation of the Hague Convention on Intercountry Adoption in the United States and Romania*, 10 TEX. WESLEYAN L. REV. 351, 354 (2004).

¹⁵⁵ *Id.*

¹⁵⁶ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *U.S. Hague Convention Ratification*, Dec. 12, 2007, http://www.travel.state.gov/family/adoption/convention/convention_3900.html.

¹⁵⁷ 42 U.S.C. §§ 14901–54 (2000).

¹⁵⁸ *Id.* § 14901(b)(2).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* § 14931(a)(1).

¹⁶¹ 8 U.S.C. § 1101(G)(i) (2000).

that proper procedures are followed and that the members of the adoption triad are not subject to abuses, the IAA mandates that, with only a few exceptions, all persons who offer or provide adoption services must be properly accredited or approved.¹⁶² Alternatively, the person must provide adoption services under the supervision of or through an accredited agency or person.¹⁶³ After a person is accredited, suspension, cancellation or debarment may be imposed for failure to comply with Hague Convention provisions and other applicable adoption laws and regulations.¹⁶⁴

Interestingly enough, though, unlike the Conventions discussed in this Section, the IAA includes a substantial penalty for violations of birth parents' rights. Section 14944 provides that anyone who makes a false statement or commits fraud or misrepresentation

with respect to a material fact, or offers, gives, solicits, or accepts inducement by way of compensation, intended to influence or affect in the United States or a foreign country . . . (B) the relinquishment of parental rights or the giving of parental consent relating to the adoption of a child in a case subject to the Convention

shall be subject to a mandatory penalty.¹⁶⁵ "In addition to any other penalty that may be prescribed by law, [the person may be ordered to pay a civil money penalty] of not more than \$50,000 for a first violation, and not more than \$100,000 for each succeeding violation."¹⁶⁶ Anyone who willfully and knowingly violates the aforementioned provision shall be subject to criminal penalties of a "fine of not more than \$250,000, imprisonment for not more than 5 years, or both."¹⁶⁷ These provisions address some critical issues associated with intercountry adoptions such as exploitation of birth parents and child trafficking. Some agencies already have been investigated and shut down under this statutory provision.¹⁶⁸

¹⁶² 42 U.S.C. § 14921(a)(1).

¹⁶³ *Id.* § 14921(a)(1), (2).

¹⁶⁴ *Id.* § 14924(b)(1), (c)(1).

¹⁶⁵ *Id.* § 14944(a)(2).

¹⁶⁶ *Id.* § 14944(a).

¹⁶⁷ *Id.* § 14944(c).

¹⁶⁸ *See, e.g.*, U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *Guatemala Status of Intercountry Adoptions and the Hague Convention*, June 13, 2007, http://travel.state.gov/family/adoption/convention/convention_3257.html [hereinafter *Guatemalan Adoptions*].

III. UNWED BIOLOGICAL FATHERS' RIGHTS IN SPECIFIC COUNTRIES OUTSIDE OF THE UNITED STATES

The level of respect that unwed fathers receive in other countries differs from country to country. Whereas a few countries require a birth father's consent and assurances from parties that the birth father's rights are protected, many countries do not mention birth fathers in the process. This Section looks at treatment of birth fathers in a few representative countries with emphasis on the three countries—China, Russia and Guatemala—from which most Americans adopt children.

A. *The People's Republic of China*

In 1998, the Standing Committee of the National People's Congress amended its Adoption Law of the People's Republic of China (China's Adoption Law).¹⁶⁹ The stated purpose of China's Adoption Law is to "protect the lawful adoptive relationship and to safeguard the rights of parties involved in the adoptive relationship."¹⁷⁰ Parents may place their children for adoption if they have "unusual difficulties" that render them unable to care for the children.¹⁷¹

The standard that is applied in adoption proceedings in China is very similar to the best interests of the child standard that American courts apply. In China, the announced standard is the "interest of the upbringing and growth of adopted minors"¹⁷² Note, however, that although China's Adoption Law expressly includes safeguards for the lawful rights and interests of both adoptees and adopters it does not offer the same safeguards for birth parents.

Perhaps Chinese birth fathers receive little consideration because many children who have been adopted from China were abandoned at birth because they are females.¹⁷³ In an effort to control its population, in the 1970s, China adopted a one-child policy that penalizes families that have more than one child with huge fines, sterilization and the threat of forced abortion.¹⁷⁴ Chinese culture favors male children because sons are

¹⁶⁹ Adoption Law of the People's Republic of China (1999), http://fwcc.org/China_adoption_law_98.htm [hereinafter *China's Adoption Law*].

¹⁷⁰ *Id.* art. 1.

¹⁷¹ *Id.* art. 5.

¹⁷² *Id.* art. 2.

¹⁷³ See, e.g., Nili Luo & David M. Smolin, *Intercountry Adoption and China: Emerging Questions and Developing Chinese Perspectives*, 35 CUMB. L. REV. 597, 604 (2004–06).

¹⁷⁴ Volkman, *supra* note 94, at 85–86.

expected to care for their elderly parents and sons continue the family lineage.¹⁷⁵ China is a patriarchal society. Sons are expected to care for their elderly parents so families rarely abandon a boy.¹⁷⁶ Yet, China's Adoption Law requires biological parents to "act in concert" when placing a child for adoption.¹⁷⁷ However, if one parent "cannot be ascertained or found, the other parent may place out the child for adoption alone."¹⁷⁸ For intercountry adoptions, China's Adoption Law requires a written agreement between the adoptive parent and the person who is placing the child for adoption.¹⁷⁹

As it is in America,¹⁸⁰ the parent who cannot be ascertained or found in China probably will be the child's birth father. China's Adoption Law further provides that a birth parent's consent must be sought when it provided that a guardian who places "an orphaned minor up for adoption . . . must obtain the consent of the person who has obligations to support the orphan."¹⁸¹ An additional protection for disabled parents was promulgated in Article 12. It provides that when both of the child's parents are "without full civil capacity," the child's guardians may not place the child for adoption unless the parents may seriously harm the child.¹⁸² Because so many female children are abandoned illegally in places where they are likely to be found and perhaps adopted by Chinese families, most Chinese adoptees' biological fathers as well as their mothers cannot be identified.¹⁸³

To prevent child trafficking, the Republic of China now requires that notices containing a child's photograph appear in local newspapers for

¹⁷⁵ See Luo & Smolin, *supra* note 173, at 601–04.

¹⁷⁶ *Id.* See also Jessica L. Singer, Note, *Intercountry Adoption Laws: How Can China's One-Child Policy Coincide with the 1993 Hague Convention on Adoption?*, 22 SUFFOLK TRANSNAT'L L. REV. 283, 294 (1998).

¹⁷⁷ *China's Adoption Law*, *supra* note 169, art. 10.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* art. 21.

¹⁸⁰ See e.g., EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 41–44 (2006), http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_All.pdf [hereinafter DONALDSON].

¹⁸¹ *China's Adoption Law*, *supra* note 169, art. 13.

¹⁸² *Id.* art. 12.

¹⁸³ Volkman, *supra* note 94, at 86.

three months before the child becomes eligible for adoption.¹⁸⁴ China also requires voluntary placement of children for adoption.¹⁸⁵ In addition, China's Adoption Law states in Article 20 that "[i]t is strictly forbidden to buy or sell a child or to do so under the cloak of adoption."¹⁸⁶ Criminal investigations and liability may be ordered for anyone who abducts or is engaged in the business of trafficking children.¹⁸⁷ A parent who sells his child will be fined and the illegal proceeds that he gains from the sale will be confiscated.¹⁸⁸ If a parent's conduct constitutes a criminal violation, he or she may be "investigated for criminal responsibility in accordance with the law."¹⁸⁹ The actual penalty or a range of penalties including imprisonment for a period of time is not stated but should be included in the law.

China's Adoption Law also lays out legal consequences of adoption. As in America and some other countries, when an adoption is finalized in China, the child becomes the child of the adoptive parents.¹⁹⁰ Unless a post-adoption agreement is entered, in America, the child's relationship with her biological parents is severed.¹⁹¹ The same result occurs in China.¹⁹² Interestingly, however, China includes other "close relatives" in its proviso regarding termination of rights: "[t]he rights and duties in the relationship between an adopted child and his or her parents and other close relatives shall terminate with the establishment of the adoptive relationship."¹⁹³

Another remarkable Chinese Adoption Law doctrine is that the laws regarding dissolution of adoption are very detailed and biological parents appear to have more rights at that stage of the adoption process. For example, one method of dissolution of an adoption in China is through agreement between the adoptive parents, the biological parents and the

¹⁸⁴ *China's Adoption Law*, *supra* note 169, art. 15; Renuka Rayasam, *Special Overseas Delivery: U.S. to Simplify Rules on Foreign Adoptions*, ATLANTA J. CONST., Dec. 3, 2003, at F1.

¹⁸⁵ *China's Adoption Law*, *supra* note 169, art. 11.

¹⁸⁶ *Id.* art. 20.

¹⁸⁷ *Id.* art. 31.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* art. 23.

¹⁹¹ Lisa A. Fuller, Note, *Intestate Succession Rights of Adopted Children: Should the Stepparent Exception Be Extended?*, 77 CORNELL L. REV. 1188, 1193-94 (1992).

¹⁹² *China's Adoption Law*, *supra* note 169, art. 23.

¹⁹³ *Id.*

child if the child is ten years old or older.¹⁹⁴ An adoption also may be dissolved under China's Adoption Law when the adoptive parents "fail[] to perform [their] duty of rearing the adoptee or commit[] maltreatment, abandonment, or other acts of encroachment upon the lawful rights of the minor adopted child"¹⁹⁵ As a consequence of the termination, the biological parents' "rights and duties in the relationship between the child and his or her parents and their close relatives shall be restored automatically."¹⁹⁶

Chinese birth parents who seek dissolution may be subject to obligations that arise from their request for dissolution.¹⁹⁷ The adoptive parents "may demand an appropriate compensation from the [child's] parents for the living and education expenses paid during the period of adoption, except if the adoptive relationship is terminated on account of the maltreatment or desertion of the adoption of the adopted child by the adoptive parents."¹⁹⁸ Unfortunately, however, there is no provision for terminating an adoption if the birth parent changes his mind after he has been deceived or coerced into placing the child for adoption.¹⁹⁹

B. Russia

In Russia, both biological parents' consent is required even if the parents are unmarried.²⁰⁰ Specific provisions regarding consent are stated.²⁰¹ Birth parents' right to veto adoption is absolute unless the parents abandoned the child,²⁰² their parental rights were terminated by a court (if six months have passed since the order was entered),²⁰³ their identity is unknown, or they legally are incapable of providing consent.²⁰⁴

¹⁹⁴ *China's Adoption Law*, *supra* note 169, art. 26.

¹⁹⁵ *Id.* Note that China's Adoption Law also allows an adult adoptee and the adoptive parents to agree to dissolve an adoption if their relationship "deteriorates to such a degree that their living together in the same household becomes impossible"). *See id.* art. 27.

¹⁹⁶ *Id.* art. 29.

¹⁹⁷ *Id.* art. 30.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* arts. 1–33.

²⁰⁰ Olga A. Khazova, *Russia: Inter-Country Adoption: Though a Large Amount of Law, Still a Lot of Uncertainty*, *THE INTERNATIONAL SURVEY OF FAMILY LAW* 433, 444 (Andrew Bainham ed., 2005).

²⁰¹ *Id.* at 445.

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

Parental consent may be written and notarized or expressed orally in court.²⁰⁵ The consent may not be provided until after the child is born.²⁰⁶

As in China and the United States, Russian birth parents also may veto an adoption.²⁰⁷ The parents' veto authority "totally excludes the possibility of adoption of the child."²⁰⁸ Consistent with United States laws, Russian birth parents may specify adoption by a particular person or issue a blanket consent that would allow any adult to adopt the child.²⁰⁹

Finally, in Russia, parents have the right to revoke their consent any time before the final decision on adoption is made.²¹⁰ In the United States, parents may also revoke their consent within a limited period—how much time a parent is allowed varies in accordance with state statutes.²¹¹

C. Guatemala

The country of Guatemala has become a favored place from which United States citizens adopt children. At present, the second highest sending country for American intercountry adoptions is Guatemala.²¹² In 2006, Guatemala edged out Russia, which is consistently a top sending country.²¹³ However, visas were issued to 4,135 Guatemalan children in 2006 versus only 3,706 Russian children.²¹⁴

Adoptions from Guatemala are popular because the waiting time of one to two or three months has been considerably shorter than it has been in other countries.²¹⁵ In addition, most of the children who are referred for

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 444–45.

²⁰⁸ *Id.* at 444.

²⁰⁹ *Id.* at 445.

²¹⁰ *Id.*

²¹¹ See, e.g., ALA. CODE § 26-10A-13 (1992) (allowing only five days or fourteen days if revocation is in the child's best interests); DEL. CODE ANN. tit. 13, § 909 (1999) (permitting revocation within sixty days of consent). But see ARIZ. REV. STAT. ANN. § 8-106(D) (2007) (providing that consent is final when it is signed and revocable only upon proof of duress or undue influence).

²¹² *Immigrant Visas*, *supra* note 91.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Wide Horizons for Children, <http://www.whfc.org/adoption/default.htm> (last visited May 28, 2008); Building Blocks Adoption Services, Inc., <http://www.bbbs.org/article/article.aspx> (follow "Guatemala Adoption" hyperlink) (last visited May 28, 2008) [hereinafter *Building Blocks*].

adoption are newborn infants.²¹⁶ Prospective parents need not take any trips to Guatemala, but if they do, the stay lasts approximately 4–5 days.²¹⁷ Moreover, the travel to Guatemala is not as exhausting as some trips to claim children because it is just over a two and one-half hour flight from Houston, Texas to Guatemala.²¹⁸ Reportedly, children who are referred for adoption are cared for in foster homes instead of orphanages and they receive excellent medical attention while they are awaiting adoption.²¹⁹

In 2003, Guatemala acceded to the Hague Convention.²²⁰ On the other hand, in June 2007, the United States Department of State issued a statement of caution to American prospective adoptive parents who were considering adopting a child from Guatemala.²²¹ The Department of State warns that the process of adopting a Guatemalan child will be slowed because adoption applications are going to be reviewed with “greater scrutiny” because of “ongoing problems in Guatemala’s intercountry adoption process.”²²² Because the Hague Convention only applies to countries that have ratified the Convention,²²³ Americans will not be able to adopt Guatemalan children unless the Congress of Guatemala corrects deficiencies in Guatemalan adoption procedures to protect all members of the adoption triad.²²⁴

Some adoptions of children from Guatemala already have been disrupted because the people who presented the children for adoption were unable to prove that they had authority to place the children for adoption.²²⁵ Prospective adoptive parents in the United States are in limbo

²¹⁶ *Building Blocks*, *supra* note 215.

²¹⁷ *Id.*

²¹⁸ See <http://www.exitotravel.com> (last visited May 28, 2008).

²¹⁹ See Los Niños International Adoption Center, *Guatemala Adoptions*, http://www.losninos.org/recent_guatemala.html (last visited May 28, 2008).

²²⁰ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., *Guatemala: Intercountry Adoptions and the Hague Adoption Convention*, Dec. 15, 2006, http://www.travel.state.gov/family/adoption/intercountry/intercountry_3102.html [hereinafter *Guatemalan Intercountry Adoptions*].

²²¹ *Guatemalan Adoptions*, *supra* note 168.

²²² *Id.*

²²³ *Guatemalan Intercountry Adoptions*, *supra* note 220.

²²⁴ *Id.* (expressing concern that children and prospective parents may be hurt as a result of Guatemala’s non-compliance with the Hague Convention and that some adoptions may be disrupted).

²²⁵ See, e.g., Steve Friess, *U.S. Government scrutinizes Guatemalan adoptions*, USA TODAY, Mar. 19, 2007, at 6D (discussing Guatemala’s fraudulent adoption practices).

until an investigation concerning whether the child is eligible for adoption is completed.²²⁶ Similarly, in *Guadarrama-Garcia v. Acosta*,²²⁷ the court refused to approve an adoption when a Mexican woman apparently smuggled a child into the United States for the purpose of adoption.²²⁸ In doing so, the court recognized the complexities of intercountry adoptions:

This Court recognizes that foreign adoptions are lengthy, complex, emotional, and often frustrating processes, involving legal proceedings in multiple jurisdictions. Added to these burdens are the exorbitant expenses and extensive time that frequently must be expended in legally securing such an adoption. The Court acknowledges the arduous task facing a couple who seeks to adopt a child internationally. However, the Court declines to condone smuggling or other unauthorized entry of a child into the United States to facilitate an adoption. In the instant case, not only did Guadarrama and her son enter the country illegally, but they did so with the assistance of the adoptive parent, who as a result is facing a federal criminal charge. Although the Court has compassion for Mr. and Mrs. Skafi and those in a similar position seeking to obtain an international adoption, the Court cannot effectuate a precedent that could, in effect, support illegal actions by prospective parents to bring a child into the United States or to attempt to obtain an adoption in the United States without first undergoing the appropriate and necessary legal proceedings in the child's country of origin. Such a precedent could conceivably impact the legal adoption process worldwide and might potentially encourage abuses and exploitation of children. Thus, the Court declines to intervene and disrupt the normal course of INS proceedings.

Notwithstanding the foregoing, this Court notes that the state family court was fully within its own jurisdiction to proceed with the custody issue on the record before it.

²²⁶ See, e.g., Juan Carlos Llorca, *Adopted babies feared stolen*, THE WASH. TIMES, Aug. 18, 2007, at A9.

²²⁷ 217 F. Supp. 2d 802 (S.D. Tex. 2002).

²²⁸ *Id.* at 803.

The state court correctly focused on the best interest of the child based upon the evidence and record before it as a state family court may only deal with the adoption matter brought within its statutory purview. The immigration status of Guadarrama and Aldo, however, is a separate and overriding federal issue.²²⁹

The United States Department of State and the Hague Conference on Private International Law are aware that unlawful adoption practices that violate the Hague Convention are occurring in Guatemala.²³⁰ Some Guatemalan police have extorted money from prospective adoptive parents by threatening to incarcerate birth mothers and children.²³¹ Particular concerns have arisen regarding imposter birth mothers and lack of “true relinquishment of parental rights.”²³² Because many women presented children for adoption and falsely represented that they were the mothers of those children and that they had authority to place them for adoption,²³³ new precautions such as two DNA tests are performed to ensure that the woman who places a child for adoption really is the child’s mother and to ensure that the child who is presented for a visa later in the adoption process is the same child whose paperwork had been submitted.²³⁴ However, no efforts to identify the child’s father specifically are made or required.

²²⁹ *Id.* at 805–06.

²³⁰ *Guatemalan Adoptions*, *supra* note 168.

²³¹ *Guatemalan Intercountry Adoptions*, *supra* note 220; Llorca, *supra* note 226 (discussing how Guatemalan police attempt “to extort money from adopting parents by threatening to take the birth mother or foster mother and the prospective or adopted child into custody”).

²³² *Guatemalan Adoptions*, *supra* note 168.

²³³ Maldonado, *supra* note 114, at 1448 n.156 (reporting that one woman relinquished thirty-three children in two-and-a-half years).

²³⁴ *Id.*; U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., *Intercountry Adoption: Guatemala*, Sept. 2007, http://travel.state.gov/family/adoption/country/country_389.html [hereinafter *Intercountry Adoption in Guatemala*]. *But see* Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on the Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 252 (2003) (declaring that DNA testing without addressing the financial incentives is not a worthwhile solution).

Private attorneys in Guatemala also have played a major role in the corrupt adoption process.²³⁵ Only birth mothers are required to provide their written consent and lawyers and notaries have the authority to execute that consent.²³⁶ Guatemalan law allows attorneys to represent the prospective parent and the birth parent simultaneously.²³⁷ In the United States, such representation would be considered a conflict of interest.²³⁸ Some unscrupulous and unethical attorneys have paid birth parents to dissuade them from relinquishing their children to an agency or orphanage, but rather seek a foreign adoptive parent.²³⁹ It was proven that even a magistrate judge was directly involved in child trafficking.²⁴⁰

In March 2007, the Congress of Guatemala published a “Manual of Good Practices” to protect Guatemalan children and their families.²⁴¹ Unfortunately, however, the Guatemalan government continues to fail to address essential Hague Convention requirements.²⁴² Unaddressed requirements include counseling birth parents, prohibiting parents from receiving “improper financial or other gain” from the process and allowing only certain acceptable expenses and costs, and setting up “a system for accrediting adoption service providers.”²⁴³

²³⁵ *Intercountry Adoption in Guatemala*, *supra* note 234 (explaining the adopting parents “are encouraged to research their options before selecting an attorney”).

²³⁶ U.N. Econ. & Soc. Council [ECOSOC], Comm. on Human Rights, Rights of the Child, *Report of the Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography: Addendum: Report on the Mission to Guatemala*, ¶ 25, U.N. Doc. E/CN.4/2000/73/Add.2 (Jan. 27, 2000) (prepared by Ofelia Calcetas-Santos) [hereinafter *Report of the Special Rapporteur*].

²³⁷ *Intercountry Adoption in Guatemala*, *supra* note 234.

²³⁸ MABRY & KELLY, *supra* note 95, at 218.

²³⁹ Maldonado, *supra* note 114, at 1449.

²⁴⁰ *Report of the Special Rapporteur*, *supra* note 236, ¶ 34.

²⁴¹ See U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., *Announcement of “Manual of Good Practices” in Guatemalan adoptions*, Mar. 2, 2007, http://travel.state.gov/family/adoption/intercountry/intercountry_3146.html. For the unofficial English translation of the “Manual of Good Practices” see http://www.adaguatemala.org/English/news/2007/03/manual_of_good_practice_of_loc.html (last visited May 28, 2008).

²⁴² *Guatemalan Adoptions*, *supra* note 168.

²⁴³ U.S. DEP’T OF STATE, BUREAU OF CONSULAR AFFS., *U.S. Law, The Hague Adoption Convention, and Guatemala*, May 2007, <http://travel.state.gov/pdf/T0440HagueAdoptionschart051607.pdf>.

D. Treatment of Unwed Fathers in Selected Foreign Courts and Legislative Bodies

Similar to the Conventions, foreign courts and legislatures treat unwed fathers differently. There are some similarities and some dissimilarities between laws that exist in these countries and those that exist in the United States. This Section looks at three venues: (1) Canada (because it shares a border with the United States); (2) the United Kingdom (because its legislatures and courts have dealt with this issue repeatedly); and, (3) the Republic of South Africa (because it recently issued a Children's Bill which references unwed father's rights).

1. Canada

Different provinces in Canada have enacted different and conflicting laws regarding an unwed birth father's role in the adoption process. For example, in Alberta, § 50 of the Domestic Relations Act provides that the father and the mother are joint guardians of children only if the father is married to the mother when the child is born or he lived with the mother at least for one year before the child was born.²⁴⁴ In a 2004 opinion, a Canadian judge concluded that differences exist in Ontario and British Columbia's laws regarding whether unwed fathers' consent was required.²⁴⁵ Specifically, the definitions of parent in Nova Scotia and in Ontario, for example, were broader than they were in Alberta.²⁴⁶ In a separate 2004 opinion, a court held that in Alberta, a mother's unwillingness to identify the child's biological father was impinging upon that father's rights when his children are being placed for adoption; thus, acknowledging that biological fathers do have rights concerning their children in adoption proceedings.²⁴⁷ The presiding judge cited a string of cases addressing that issue.²⁴⁸

²⁴⁴ J.F.M. v. V.P., 2003 ABQB 834 ¶ 23 (2003), available at <http://www.canlii.org/en/ab/abqb/doc/2003/2003abqb834/2003abqb834.pdf>.

²⁴⁵ J.M.F. v. V.P., 2004 ABQB 208, ¶ 50 (2004), available at <http://www.canlii.org/en/ab/abqb/doc/2004/2004abqb208/2004abqb208.pdf>.

²⁴⁶ See *id.* ¶¶ 53–54.

²⁴⁷ C.M.S. (Adoption), 2004 ABQB 567 ¶ 4–5 (2004), available at <http://www.canlii.org/en/ab/abqb/doc/2004/2004abqb567/2004abqb567.pdf>.

²⁴⁸ *Id.* ¶ 5.

In *J.W.M. (“J. (1)”) v. C.J.V. (“C. (1)”),*²⁴⁹ the Saskatchewan court reached a different conclusion. The biological father never was married to the mother.²⁵⁰ After the mother married another man, her husband sought to adopt the three-year-old child with the biological father’s consent.²⁵¹ The father who was seventeen years old when the child was born had not established a relationship with the child, but still he refused to consent to the adoption.²⁵² The mother and her husband (the child’s stepfather) requested that the court grant the adoption petition over the father’s objection.²⁵³

The court held that a judge

must consider all factors relevant to determining what is in the child’s best interests; a factor which must be considered in all cases is Parliament’s view that contact with each parent is to be maximized to the extent that this is compatible with the best interests of the child.

A court order dispensing with consent of the biological parent is a significant act. An adoption, following such an order, fundamentally changes the legal landscape for the child and for the parent. The court’s approach should always be cautious.²⁵⁴

It reasoned that although the biological father had not been a part of the child’s life, his absence could be excused because of his youth and inexperience.²⁵⁵ Thus, the court decided, “it is not in the best interest of [the child] to summarily order that [the father’s] consent to the adoption be dispensed with.”²⁵⁶ It is difficult to achieve uniformity among all countries that engage in intercountry adoption; but, when there are major discrepancies within one country like Canada, at a minimum, consistent laws throughout that country should be enacted.

²⁴⁹ 2005 SKQB 548 (2005), available at <http://www.canlii.org/en/sk/skqb/doc/2005/2005skqb548/2005skqb548.pdf>.

²⁵⁰ *Id.* ¶ 2.

²⁵¹ *Id.* ¶¶ 4–5.

²⁵² *Id.* ¶¶ 3–5.

²⁵³ *Id.* ¶¶ 6–7.

²⁵⁴ *Id.* ¶¶ 13–14.

²⁵⁵ *Id.* ¶ 15.

²⁵⁶ *Id.* ¶ 16.

2. *United Kingdom*

As in America, unwed birth fathers in England must do something to demonstrate their interest in parenting a child. Section 2(2) of the Children Act of 1989 (the Children Act) provides that “[w]here a child’s father and mother were not married to each other at the time of [the child’s] birth— (a) the mother shall have parental responsibility for the child; (b) the father shall not have parental responsibility for the child, unless he acquires it in accordance with the provisions of this Act.”²⁵⁷

Similar to the United States Supreme Court’s admonishment in *Lehr*, an unwed father in the United Kingdom must perform some affirmative act to acquire parental responsibility.²⁵⁸ The language in § 4(1) also provides that when a child’s mother and father are unmarried when the child is born, the court may enter an order of parental responsibility for the father if he applies for that order; or, he and the child’s mother agree that he shall have parental responsibility.²⁵⁹ Under the Children Act, parental responsibility denotes “all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.”²⁶⁰

An unwed birth father who has obtained a parental responsibility order is entitled to notice, to consent to the adoption, or to withhold consent.²⁶¹ He is “in the same legal position with regard to the child as if he had married the mother.”²⁶² Section 22 of the Children Act commands that if it is reasonably practicable, when a father has recognized authority, the father’s wishes concerning the child’s adoption should be ascertained and “due consideration” should be given his wishes in making decisions about the child.²⁶³ If the mother and the father disagree about the child’s permanent placement in another home, the best interests of the child will

²⁵⁷ *Children Act*, *supra* note 7, § 2(2).

²⁵⁸ *Id.* § 4.

²⁵⁹ *Id.*

²⁶⁰ *Id.* § 3(1).

²⁶¹ *Re H (A Child) (Adoption: Consultation of Unmarried Fathers)*, [2001] 1 F.L.R. 646, 651, 653, 655, 658 (describing an unmarried father’s rights depending upon whether he has an order).

²⁶² *G. v. G.*, (Children: Concurrent Applications) [1993] 2 F.L.R. 306, 253, 259.

²⁶³ *Re J (Adoption: Contacting Father)*, [2003] 1 F.L.R. 933, 939, ¶ 27 (requiring an assessment regarding rehabilitation or relative placement—including the father’s relatives—before adoption is considered).

prevail.²⁶⁴ In the United Kingdom, a father who has parental responsibility may even have the right to post-adoption contact with his child.²⁶⁵

In *Keegan v. Ireland*,²⁶⁶ the European Court of Human Rights (the “European Court”) reviewed a Republic of Ireland lower court’s decision that approved an infant’s adoption without the unwed father’s knowledge or consent.²⁶⁷ Mr. Keegan and the child’s mother were living together when they decided to have a child.²⁶⁸ They were engaged to be married but separated while the mother was still pregnant.²⁶⁹ Mr. Keegan visited the mother and the child the day after the child was born.²⁷⁰ When he attempted to visit them two weeks later, he was not allowed to see either the mother or his child.²⁷¹ When he received knowledge of the impending adoption,²⁷² Mr. Keegan instituted proceedings in order to contest the adoption.²⁷³ He alleged the state violated “his right to respect for [his] family life” under Article 8 of the European Convention on Human Rights when it facilitated his daughter’s placement for adoption without his knowledge or his consent.²⁷⁴

On appeal, the European Court concluded that

the notion of the “family” in [Article 8] “is not confined solely to marriage-based relationships and may encompass other *de facto* “family” ties . . . There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended.”²⁷⁵

Therefore, the European Court decided that Article 8 was violated:

²⁶⁴ *Id.* ¶ 29.

²⁶⁵ *Id.* (requiring an application for contact after the adoption order has been entered). *Cf.* *Re J (Adoption: Contacting Father)*, [2003] 1 F.L.R. 933 ¶ 19 (finding that the young father who had taken no interest in the child or the mother after he learned that she was pregnant was not a parent who was entitled to consent or object to the child’s adoption).

²⁶⁶ *Keegan v. Ireland*, 18 Eur. H.R. Rep. 342 (1994).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 345.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 352.

²⁷⁵ *Id.* at 360 (footnote omitted).

[t]he Government have advanced no reasons relevant to the welfare of the applicant's daughter to justify such a departure from the principles that govern respect for family ties. That being so, the Court cannot consider that the interference which it has found with the [father's] right to respect for family life, encompassing the full scope of the State's obligation, was necessary in a democratic society.²⁷⁶

The European Court also analyzed Article 7 of the CRC.²⁷⁷ In doing so, it ruled that:

where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be created that render possible as from the moment of birth the child's integration in his family. . . . [Moreover,] a child has, as far as possible, the right to be cared for by his or her parents. . . . The fact that Irish law permitted the secret placement of the child for adoption without the [father's] knowledge or consent, leading to the bonding of the child with the proposed adopters and to the subsequent making of an adoption order, amounted to an interference with his right to respect for family life.²⁷⁸

3. *South Africa*

South African law still considers unwed children to be "illegitimate."²⁷⁹ An unwed child is not legitimated until the biological parents marry.²⁸⁰ Without legitimacy, the biological mother is considered the child's only legal guardian and she will have custody of the child.²⁸¹ The unwed child's birth must be registered in her mother's surname unless the biological father formally acknowledged the child in the birth

²⁷⁶ *Id.* at 363–64.

²⁷⁷ *Id.* at 362.

²⁷⁸ *Id.* at 362. The court awarded the father 10,000 Irish pounds and legal costs.

²⁷⁹ U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFS., *U.S. Dep't of State: Intercountry Adoption: South Africa: June 2006*, Jan. 2008, http://travel.state.gov/family/adoption/country/country_443.html.

²⁸⁰ *Id.*

²⁸¹ *Id.*

register.²⁸² However, similar to American laws that recognize a birth father's right to exercise his opportunity to parent a child, South African law provides that an unmarried father may acknowledge his child.²⁸³ Methods of acknowledgement include submitting a written acknowledgement of fatherhood to the mother or the court clerk before the child reaches six months old; volunteering to pay child support; paying damages in accordance with customary law; or allowing his personal information to be included on the child's birth registration documents.²⁸⁴

On the other hand, in South Africa, unwed fathers do have certain designated rights in the adoption context.²⁸⁵ When they do not have guardianship rights, they may apply to adopt the child as a prospective adoptive parent.²⁸⁶ Also, South African fathers have a right to consent to a child's adoption "regardless of whether the parents are married or not."²⁸⁷ Additionally, before either parent's consent is approved, a social worker must counsel either parent.²⁸⁸

But there are exceptions to the consent requirements in South African law. Section 236 of South Africa's adoption law enumerates fifteen situations under which a parent's consent is not required.²⁸⁹ Some of the exceptions mirror those that courts rely upon in the United States.²⁹⁰ Two subparts of § 236 specifically address the question of whether a biological father's consent is mandatory.²⁹¹ His consent is not necessary, for example, when he is not and was not married to the child's mother before or after the child was conceived; the child is the offspring of an incestuous relationship; or, the mother has alleged rape and the court finds that the

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Children's Bill, supra* note 8, § 236(4).

²⁸⁵ *Id.* §§ 231(1)(d), 233(1).

²⁸⁶ *Id.* § 231(7).

²⁸⁷ *Id.* § 233(1).

²⁸⁸ *Id.* § 233(4). *See id.* § 235(1), (2) (requiring a freeing order be issued to absolve the consenting parent from parental responsibilities and rights).

²⁸⁹ *Id.* § 236.

²⁹⁰ *See, e.g.,* OHIO REV. CODE ANN. § 3107.07 (West 2007) (allowing adoption without the consent of the father where the father has willfully abandoned the child; failed to support the child for at least one year prior to the adoption; failed to respond in writing to request for consent within thirty days; or the child is conceived as a result of rape).

²⁹¹ *Children's Bill, supra* note 8, § 236(1), (3).

child probably was conceived as a result of the mother's rape.²⁹² In addition, a children's court may grant an adoption petition over the parent's objection if a parent unreasonably withholds his consent and adoption is in the child's best interests.²⁹³

If an adoption is granted without a parent's consent despite that parent's entitlement to provide his consent, the adoption order may be rescinded,²⁹⁴ but a statute of limitations is imposed on this right.²⁹⁵

As the Hague Convention mandates, the country of South Africa also promulgated legislation to curtail baby-selling, child trafficking and coercion of birth parents.²⁹⁶ Section 249(1) provides that "[n]o person may—(a) give or receive, or agree to give or receive, any consideration, in cash or in kind, for the adoption of a child . . . ; or (b) induce a person to give up a child for adoption"²⁹⁷ As in the United States, South African law enumerates allowable expenses for the birth mothers, lawyers, psychologists and other persons.²⁹⁸ Notwithstanding the comprehensiveness of the adoption section of the Children's Bill, no enforcement mechanism or penalties for noncompliance are revealed.

IV. THE CULTURE OF INTERCOUNTRY ADOPTIONS

In the United States, most intercountry adoptions involve white prospective adoptive parents who seek to adopt foreign-born children of a different race and/or culture.²⁹⁹ A few conventions and international laws emphasize the importance of culture in international adoptions. With respect to culture, the Hague Convention provides that "[i]f the Central Authority of the State of Origin is satisfied that the child is adoptable, it

²⁹² *Id.* § 236(3). *See id.* § 236(1) (listing other circumstances in which a parent's consent will not be required, such as incompetence, abuse, deliberate neglect, failure to consistently fulfill parental responsibilities, and the court's order that divests the parent's right to consent).

²⁹³ *Id.* § 241(1).

²⁹⁴ *Id.* § 243(3).

²⁹⁵ *Id.* § 243(2) (indicating that the parent must file a challenge to the adoption within two years of the date of the adoption).

²⁹⁶ *See id.* § 249 (mandating that no consideration be given with respect to an adoption except in a limited number of circumstances).

²⁹⁷ *Id.* § 249(1).

²⁹⁸ *Id.* § 249(2).

²⁹⁹ *See Luo & Smolin, supra* note 173, at 604.

shall . . . give due consideration to the child's upbringing and to his or her ethnic, religious and cultural background."³⁰⁰

Many advocates contend that children wrongfully are removed from their culture when they are adopted internationally; however, laws have been drafted to protect that interest. The United Nations Convention on the Rights of the Child (CRC) provides that when adoption is considered as a possible solution for a child who needs "alternative care," "due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background."³⁰¹ Finally, the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally that was adopted in December 1986 references culture.³⁰² It provides that "due regard shall be given to the child's cultural and religious background and interests."³⁰³

Regard for the child's culture is an integral part of the intercountry adoption process.³⁰⁴ The cultural emphasis is on the need for development of the child's identity after she is brought to the United States, cultural reasons that lead to placement in some countries, and the role that some birth fathers play in their children's lives. Because so many white Americans adopt children from countries such as China and Guatemala,³⁰⁵ culture is an important factor in intercountry adoptions.

The fact that the child and her new parents are members of different cultures should not be ignored. Adoptive parents should endeavor to ensure that the child knows her identity. There are many different ways that an adoptive family may ensure that the child receives information about her culture.³⁰⁶ Culture Days are planned in New York City for example.³⁰⁷ At these celebrations, children learn about their culture's music and food.³⁰⁸ They connect with role models who share their culture

³⁰⁰ Hague Convention, *supra* note 137, art. 16(b).

³⁰¹ *Children's Bill*, *supra* note 8, § 238(1)(a)(i).

³⁰² United Nations: General Assembly Resolution Adopting the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally art. 24, Dec. 3, 1986, 26 I.L.M. 1096.

³⁰³ *Id.*

³⁰⁴ *See Children's Bill*, *supra* note 8, § 238(1)(a)(i).

³⁰⁵ Szejner, *supra* note 92, at 230 n.126.

³⁰⁶ *See Volkman*, *supra* note 94, at 15.

³⁰⁷ *Id.* at 91.

³⁰⁸ *Id.*

and they have an opportunity to develop an appreciation for the art and language of their culture.³⁰⁹ When a child's parents cannot be located, she may long to connect with her country of origin through visiting her place of birth, searching for siblings, or reuniting with foster parents or orphanages where she lived.³¹⁰ Other means of teaching the child about her identity and culture include the Internet and organizations such as the Families with Children from China.³¹¹ In some countries such as South Africa, the child's religion also is considered a relevant factor in adoption proceedings.³¹²

A. Cultural Reasons that Cause Parents to Place Children for Intercountry Adoption

It is important to consider reasons that birth parents place their children for adoption internationally. Sometimes their choice benefits the child. Sometimes the parents are the beneficiaries. Cultural divides separate some birth parents' reasoning from that of other parents. Of course, placement also benefits the child's country of origin. In China, for example, prospective parents are obligated to pay hefty adoption fees and donate to the welfare system as a part of the adoption process.³¹³ Placing Chinese children—usually girls—in other countries also eases the economic burden of caring for hundreds of abandoned children.³¹⁴

In some countries such as Latin American countries, Korea, Japan, and Russia, birth parents place their children for adoption for economic or personal reasons. Some birth parents who live in abject poverty realize that they are unable to provide proper care for a child and they place the child for adoption because they want him or her to have a better life.³¹⁵ Forty-seven Haitian children were returned to their parents in August 2007 when their parents gave them to traffickers in exchange for economic

³⁰⁹ *Id.*

³¹⁰ *Id.* at 99, 101, 103.

³¹¹ *Id.* at 87.

³¹² *Children's Bill*, *supra* note 8, § 238(1)(a)(1) (including the child's religious and cultural background as relevant factors).

³¹³ Luo & Smolin, *supra* note 173, at 603.

³¹⁴ *Id.*

³¹⁵ MADELYN FREUNDLICH, ADOPTION AND ETHICS: THE IMPACT OF ADOPTION ON MEMBERS OF THE TRIAD 107, 110, 111, 112 (2001) (providing a profile of birth mothers).

assistance.³¹⁶ The International Organization for Migration (IOM) rescued the children after the parents complained that they had not received financial assistance as promised and they had learned that the children were not well cared for as they waited for adoption by rich Haitians or foreigners.³¹⁷ When the children were returned the IOM agreed to provide assistance for medical care and school fees.³¹⁸ Other birth parents are unable to parent their children because they suffer from personal problems such as chronic alcohol abuse that renders them unable to provide proper care for their children.³¹⁹

Other unwed birth mothers such as those in China, Japan and Korea, place their children for adoption because of the social stigma and shame attributed to unmarried women who become pregnant. In Korea, for example, single mothers routinely are terminated from their jobs and expelled from school.³²⁰ Some birth mothers including those in Korea are pressured into placing their children for adoption to increase their chances for marriage.³²¹ When other unwed mothers decide to marry, they are forced to place their children for adoption when they agree to marry a man who rejects the unwed child.³²²

In earlier times, some of the biracial children that were placed for adoption in foreign countries had American fathers. These men had relationships with women when they were stationed in the mother's homeland.³²³ Some Japanese and Korean birth mothers placed their children for adoption because the child was an interracial child who was subjected to racial discrimination in her country of origin.³²⁴

In addition to cultural pressures, there is evidence suggesting that parents and adoption agencies in Western countries exploit poor women in other countries to place their children for international adoption.

³¹⁶ *Haitian Children Saved from Rogue Adoption Center, Migration Group Says*, INT'L HERALD TRIB., Aug. 10, 2007, <http://www.iht.com/articles/ap/2007/08/10/europe/EU-GEN-Switzerland-Haiti-Trafficking.php>.

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ FREUNDLICH, *supra* note 315, at 112.

³²⁰ *Id.* at 109, 110.

³²¹ *Id.* at 110 (noting that the birth mother is coaxed to relinquish the child in order to marry a man who is chosen for her).

³²² *Id.* at 112.

³²³ *See id.* at 109.

³²⁴ *Id.* at 109, 111–12 (indicating that many of these children are adopted by Americans who are in the military).

Numerous women in Honduras, for example, allegedly have accepted payment for becoming pregnant solely for the purpose of placing the child for adoption.³²⁵ Likewise, there are claims that Guatemalan women are pressured to place their babies for adoption so that facilitators can meet the prospective parents' demands for young children to adopt.³²⁶ Women in other countries have acted as surrogates for prospective parents.³²⁷

B. The Role of the Birth Father in the Child's Life and the Adoption Process

As demonstrated in Part III, birth fathers are mentioned rarely in intercountry adoption laws. Similarly, most studies of American subjects usually focus on the birth mother but not the birth father. Yet, it is undisputed that fathers play a vital role in their children's lives regardless of culture.

Children need their father's love, his nurturing, his encouragement and support. Studies of American men and their children show that when their fathers are involved in their lives, children are "more cognitively and socially competent, less inclined toward gender stereotyping, more empathic, and psychologically better adjusted."³²⁸ Children who do not have a relationship with their fathers are more likely to engage in destructive behavior such as smoke cigarettes, drink alcoholic beverages, and ingest drugs than children who have more consistent contact with their father.³²⁹ Without measurable contact with their fathers, there also is a high probability that boys will drop out of school, spend some time in prison, and exhibit behavioral problems.³³⁰

Making an effort to identify and locate birth fathers is essential for adoptees' well-being. Adopted children fantasize about their birth parents.³³¹ They wonder who they are, where they are, what they are doing

³²⁵ *Id.* at 107.

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ Ronald P. Rohner & Robert A. Veneziano, *The Importance of Father Love: History and Contemporary Evidence*, 5 REV. GEN. PSYCHOL. 392 (2001) (citations omitted).

³²⁹ JAMES DOBSON, BRINGING UP BOYS 56 (2001).

³³⁰ *Id.* at 55–60 (finding that boys act out because they feel that their fathers rejected them); Cynthia R. Mabry, *Who Is The Baby's Daddy (And Why Is It Important For The Child To Know)?*, 34 U. BALT. L. REV. 211, 229 (2004) (citing DOBSON, *supra* note 329, at 55–56).

³³¹ SHERRIE ELDRIDGE, TWENTY THINGS ADOPTED KIDS WISH THEIR ADOPTIVE PARENTS KNEW 85 (1999).

and why they placed the child for adoption.³³² All or nearly all of them search for their birth parents at some point in their lives.³³³ When the father is located, he can provide information to answer some of the child's questions about his or her familial background.³³⁴ In short, "[t]he father is extremely important for the child's intellectual, emotional and social development."³³⁵ Birth mothers also agree that fathers "play vital, indispensable roles in the lives of [their] children."³³⁶ In some cultures like the Chinese culture, fathers are revered as the "official head of the household."³³⁷ Children are expected to be respectful, obedient and devoted to their fathers.³³⁸ In China's "patrilineal social system," Chinese fathers are not as emotionally involved in their children's lives as Chinese mothers. The fathers are the disciplinarians and they spend a nominal amount of time with their children but they play an important role in helping the child to develop socialization.³³⁹ Accordingly, many Chinese fathers play an essential role in intercountry adoption.³⁴⁰ Although Chinese birth fathers rarely are mentioned with respect to intercountry adoptions, some birth fathers are involved in the decision-making stage of placing a child for adoption.³⁴¹ In China, for example, because of the one-child policy, some married couples decide to abandon a female child with hopes that she will be found and adopted internationally, if not nationally.³⁴² In one study, one-half of the abandonment decisions were made by the married Chinese birth father.³⁴³ In a smaller percentage of families, the mother and the father made the decision together.³⁴⁴

³³² See *id.* at 86.

³³³ *Id.* at 111.

³³⁴ See DONALDSON, *supra* note 180, at 40.

³³⁵ HENRY B. BILLER, *FATHERS AND FAMILIES: PATERNAL FACTORS IN CHILD DEVELOPMENT* 1 (1993).

³³⁶ JAMES L. GRITTER, *LIFEGIVERS: FRAMING THE BIRTHPARENT EXPERIENCE IN OPEN ADOPTION* 20 (2000).

³³⁷ David Y. F. Ho, *Fatherhood in Chinese Culture*, in *THE FATHER'S ROLE: CROSS-CULTURAL PERSPECTIVES* 227 (Michael E. Lamb ed., 1987).

³³⁸ *Id.* at 228.

³³⁹ *Id.* at 241.

³⁴⁰ See Kay Johnson, Huang Banghan & Wang Liyao, *Infant Abandonment and Adoption in China*, 24 *POPULATION & DEV. REV.* 469, 474 (1998).

³⁴¹ *Id.* at 474.

³⁴² See *id.* at 491.

³⁴³ *Id.* at 474.

³⁴⁴ *Id.*

Although abandonment is a crime in China, many families that were caught were not prosecuted.³⁴⁵ Others are subjected to fines, sterilization and abortion.³⁴⁶

On the other hand, not all foreign-born fathers abandon their children. One father in Guatemala, for example, has been searching for his child for several months.³⁴⁷ The child was stolen from his shop when she was only six months old.³⁴⁸

CONCLUSION

Presently, most domestic laws and international adoption laws are child-centered.³⁴⁹ For that reason, they focus primarily on children's rights.³⁵⁰ In doing so, biological parents' rights in general, and biological father's rights in particular, are ignored or given short shrift.

Certainly, in adoption proceedings, the child's best interests are and should be paramount. However, protection of a child's interests includes due regard for the child's fit birth father's rights to ensure that that relationship is not terminated needlessly or improperly. The child's best interests necessarily envelop his or her relationship with fit birth parents' rights. One court ruled that "[e]ncouraging [] voluntary recognition of paternity . . . is in conformity with the rights and freedoms of the child . . . as it improves the status of children[] born out of wedlock"³⁵¹ When paternal rights must be terminated, they should be terminated with strict adherence to specific laws and procedures.

Neither national laws nor applicable Conventions provide adequate protection for birth fathers. Thus, uniform provisions regarding notice such as the content of the notice that a child is being placed, where the notices should be posted and how long they should be posted should be required. A greater burden should be placed on birth mothers when they

³⁴⁵ *Id.* at 479.

³⁴⁶ Volkman, *supra* note 94, at 118.

³⁴⁷ Juan Carlos Llorca, *Adopted babies feared stolen: Guatemalan facilities eyed*, THE WASH. TIMES, Aug. 18, 2007, at A9.

³⁴⁸ *Id.*

³⁴⁹ See MABRY & KELLY, *supra* note 95, at 462 (discussing the United Nations Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption).

³⁵⁰ *Id.* at 461–62.

³⁵¹ Judgment In the Name of the Republic of Latvia, Case No.2004-02-0106, ¶ 13.2 (Lat. Const. Ct. Oct. 11, 2004), available at <http://www.satv.tiesa.gov.lv/upload/2004-02-0106E.rtf>.

represent that a birth father is absent or that he is unknown. Whenever it is appropriate, mothers who offer a child for placement, should be encouraged to identify the child's father. If they are reluctant to do so, they should be counseled regarding the important role that father's play in a child's life and the father's right to notice and consent. Then reasonable efforts should be made to locate the father unless exceptions such as rape, incest or some other extraordinary circumstance is documented. Specific guidelines should be set in place so that an established standard would be met and greater effort to identify the child's birth father is made.

A mother who intentionally misrepresents the father's identity or refuses to identify the father without good cause should be penalized in accordance with the manner in which she disrupts the adoption process. For example, she may be fined and/or required to return any payments that she received in connection with the adoption (i.e., prenatal and hospital expenses). For more egregious infractions such as telling the father that the child is dead or hiding the child from the father, the mother may be imprisoned for an appropriate period of time. A few well-publicized punishments will decrease the number of abuses but complete elimination may not occur when mothers are desperate to find ways of ensuring their own survival and or the survival of other children and family members.

Most countries fail to set forth specific procedures for obtaining valid consents.³⁵² Procedures should be established and enforced to ensure that birth fathers have an opportunity to give consent and that decisions to relinquish a child are based on informed consent. Sample consent forms should be drafted and included in uniform laws. Laws should describe more succinctly what type of consent is required. For example, written consent should be a prerequisite whenever the biological father who has exercised his parental rights can be identified. In addition, just as DNA tests are performed on the mother, DNA tests should be performed on men who appear to give their consent. Express provisions should be established for birth parents who may want to revoke a valid consent or to contest an adoption because the child was wrongfully placed for adoption.

In addition, laws should be written to ensure that biological fathers are not forced to relinquish their parental rights under circumstances that constitute undue influence, duress or fraud. Also a basic script of questions that should be asked in the adoption process is a series of

³⁵² See, e.g., Sara Goldsmith, *A Critique of the Immigration and Naturalization Service's New Rule Governing Transnational Adoptions*, 73 WASH. U. L.Q. 1773, 1785-86 (1995).

questions that solicit detailed information designed to ensure that the birth father understands the finality of the adoption process.

Furthermore, prospective adoptive parents should be more accountable for their actions. They should be required to certify that they have not exploited a birth father by paying him to relinquish his parental rights. Although it is a harsh result, when a prospective parent intentionally is involved in exploiting a birth parent, smuggling a child into the United States, or falsely reporting information regarding the child's availability for adoption, the prospective parent should be subject to a fine, imprisonment or both and the child should be returned to her birth parents or surrendered for another prospective adoptive parent. The prospective parent should be punished harshly because of the immeasurable losses that he or she has caused the children including denying them the opportunity to know their birth parents.

The fact that a birth parent resorts to selling a child because the family is poverty-stricken is indicative of a grave social problem. Officials in countries like China that exact extravagant adoption fees from prospective parents should endeavor to provide support so that parents are not forced to make such heart wrenching decisions. For example, a portion of the adoption fees collected may be placed in a family support fund and used to offer other reasonable family services to help families who genuinely are destitute and who genuinely want to remain intact. Since its policy is a direct cause of abandonment of so many children, the Republic of China should abolish its one-child policy and consider other alternatives to control its population growth.

Finally, enforceability is a serious problem in other countries and in the United States. Thousands of Guatemalan children were admitted to the United States, for example, before the United States suddenly took notice and began to question certain adoption practices in that country.³⁵³ The Hague Convention provides some protection from all evils of intercountry adoption,³⁵⁴ but it only applies to countries that sign and ratify its provisions.

United States officials should urge and politically strong-arm, if necessary, any countries from which United States citizens adopt children

³⁵³ Elizabeth Larson, *The Adoption Quandary: Guatemala Overhauls a System that Needed Reform, but Will it Help Children?*, L.A. TIMES, Jan. 7, 2008, <http://www.latimes.com/news/opinion/la-oe-larsen7jan07,0,6819256.story>.

³⁵⁴ Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483, 520 (2004).

if they are not in substantial compliance with minimum requirements that the Hague Convention establishes. Moratoriums should be declared against countries that engage in illegal or unethical adoption practices against birth fathers until those practices are corrected. “The United States is not isolated from the rest of the world; therefore it must respect the rights of all persons, not only the rights of U.S. [] citizens.”³⁵⁵

The intercountry adoption process yields enormous benefits for children who need homes and prospective adoptive parents who have a loving and nurturing home to offer those children. Understandably, Hague Convention writers wanted to respect the sovereignty of its constituent states when it promulgated an outline of a framework for uniform laws and required states to adopt laws that are consistent with the Hague Convention.

Although uniformity among such a vast number of countries that have divergent views about fathers’ role is challenging and daunting in many respects, if the best interests of the children and their fathers are to be properly respected, national laws should incorporate certain minimum requirements everywhere in the world. Laws should expressly provide that *whenever* it is appropriate, birth fathers should be identified and located. They should receive proper notice and an opportunity to consent, to withhold consent, and to revoke consent. Current national and international laws do not adequately protect the fathers’ interests or respect their family life.

³⁵⁵ Simov, *supra* note 103, at 271.