Owning Laura Silsby's Shame:
How the Haitian Child Trafficking Scheme
Embodies the Western Disregard for
the Integrity of Poor Families

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Introduction

In January 2010, an earthquake in Haiti left hundreds of thousands of people dead, injured, and displaced, and over a million homeless.[1] Three weeks after the earthquake, Haitian authorities arrested a group of Idaho missionaries for attempting to cross the border into the Dominican Republic with 33 children, without papers or proper authorization.[2] The missionaries claimed they had the good intentions to set up an orphanage,[3] but investigations showed that none of the children were orphans and that the missionaries may have been attempting to smuggle the children out of Haiti to be adopted internationally.[4] Despite evidence of association with child

1. République d'Haïti, Séisme 2010, Bulletin d'Information du Gouvernement Haïtien 2 (2010), http://haiti.org/files/BULLETIN%20du%2021%20au%2023.pdf (noting the devastating impact of the earthquake on the Haitian population).

2. Anthony L. Hall, *Missionaries Charged with Kidnapping Haitian Babies*, Caribbean Net News, Feb. 5, 2010; *Ten U.S. Missionaries Charged over Attempt to Kidnap and Smuggle Haiti 'Orphans'*, Mail Online (U.K.) (Feb. 5, 2010), http://www.dailymail.co.uk/news/worldnews/article-1248671/Ten-U-S-missionaries-charged-attempt-kidnap-smuggle-Haiti-orphans.html [hereinafter *Ten U.S. Missionaries Charged*].

3. New Life Children's Refuge, Haitian Orphan Rescue Mission, http://www.esbctwinfalls.com/clientimages/24453/pdffiles/haiti/nlcrhaitianorphanrescuemission.pdf; *see also* Ysabel Bilbao, *Missionaries' Plan for Rescued Haitian Children*, Idaho's NewsChannel 7 (Feb. 4, 2010), http://www.ktvb.com/news/Missionaries-plan-for-orphanage-for-Haitian-children-83600197.html.

4. *See* Bilbao, *supra* note 3 (stating that the children found with the missionaries were handed over by parents who wanted them to have a better life); *see also Haitian Judge Weighs New Charge for Silsby*, Baptist Press (Mar. 15, 2010), http://www.bpnews.net/BPnews.asp?ID=32497 [hereinafter *Judge*

traffickers,[5] the Haitian justice system—prodded in part by President Clinton's diplomatic efforts on behalf of the missionaries[6]—determined that none of the missionaries were guilty of illegal activities, except the leader Laura Silsby, who faced a lesser charge of organizing illegal travel.[7]

Along with the Haitian justice system, some observers excused the missionaries' actions,[8] even though they rose to the level of child trafficking. They did so essentially because we place such little value on the integrity of poor families; the idea that the missionaries were acting to "save" these children justified the damage they would have caused to the children and their families.[9] In this way, the Silsby case offers a window into international and domestic child placement schemes that disrupt poor families and disregard traditional forms of child placement.[10] In the international context, the demand for intercountry adoption ("ICA") is driven by Westerners who wish to have children and who desire to save poor children.[11] While relying on good intentions, ICA as it currently operates perpetuates a system of child placement that destroys the integrity of poor families and feeds

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Weighs New Charge] (explaining that missionaries were arrested for trying to take children out of Haiti to a "makeshift orphanage in the Dominican Republic").

5. *Adviser to Missionaries in Haiti Kidnap Case is Arrested*, CNN (Mar. 19, 2010), http://www.cnn.com/2010/CRIME/03/19/haiti.baptists.adviser/index.html.

6. Tony Allen-Mills, *Clinton Brokers Deal over Haiti Orphan Abductions*, SUNDAY TIMES (U.K.), Feb. 7, 2010, *available at* Factiva, Doc. No. ST00000020100207e627000xx.

7. Jonathan M. Katz, *Laura Silsby, U.S. Missionary Leader, Convicted in Haiti, but Free to Go*, HUFFINGTON POST (May 17, 2010), http://www.huffingtonpost.com/2010/05/17/laura-silsby-us-missionar_n_579644.html; *see also* Evens Sanon, *Haiti Frees U.S. Missionary; Group Leader Still Held*, THE VIRGINIAN-PILOT, Mar. 9, 2010, at A5.

8. *Haiti Tosses Kidnapping Charges Against Americans*, SYRACUSE POST-STANDARD (Apr. 26, 2010), http://www.syracuse.com/news/index.ssf/2010/04/haiti_tosses_kidnapping_charge.html (stating that supporters of Silsby's group argued that the group was trying to help the Haitian children and did not understand Haiti's adoption laws).

9. Throughout this Article I use the term "poor families." When I use this term in the context of the United States, I refer loosely to the terminology of the 2011 U.S. Department of Health and Human Services (HHS) Poverty Guidelines. *See* Annual Update of the HHS Poverty Guidelines, 76 Fed. Reg. 3637–38 (Jan. 20, 2011). When I use this term regarding families in Haiti or other countries besides the United States, I refer to the international poverty threshold as defined by the World Bank. *See* The World Bank, *Data: Poverty* (Nov. 11, 2011), http://data.worldbank.org/topic/poverty (providing data on poverty indicators).

10. *See* Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, 28 FLETCHER F. WORLD AFF. 181, 185 (2004) (citing poverty as a leading factor for parents who give up their children to be adopted internationally); *see also* Jodi Kim, *An "Orphan" with Two Mothers: Transnational and Transracial Adoption, the Cold War, and Contemporary Asian American Cultural Politics*, 61 AM. Q. 855, 856–57 (2009) (describing international adoptees as "social orphans" who are placed for adoptions as orphans despite having living parents).

11. *See* Robert A. Saunders, *Transnational Reproduction and its Discontents: The Politics of Intercountry Adoption in a Global Society*, 1 J. GLOB. CHANGE & GOVERNANCE 1, 8 (2007) (describing both humanitarian and self-serving motives of Westerners seeking to adopt internationally); Nicole Bartner Graff, *Intercountry Adoption and the Convention on the Rights of the Child: Can the Free Market in Children Be Controlled?*, 27 SYRACUSE J. INT'L L. & COM. 405, 407 (2000) (describing the effect on international adoption by Westerners' capitalistic demand for children).

illicit child trafficking schemes like the one devised by Laura Silsby.[12] In the domestic context, the American foster care system also disrupts poor families.[13] Children are funneled into a system that can be as harmful as the homes from which they are removed;[14] yet the system still appears to remove the children with too little regard for the integrity of their families.

The U.S. foster care system and ICA are both premised on rescuing children from unfortunate life circumstances, stemming mainly from poverty.[15] In both systems, instead of providing resources to enable families to take care of their children, these resources are used to remove children from their families and communities.[16] Inadequate family reunification planning and services in the foster care system undermine parents' attempts to regain custody of their children, and in ICA, adoptive parents pay substantial sums to complete the ICA process, while birth families typically receive no assistance that would enable them to better provide for the children who will be adopted.[17] Ultimately, both the domestic and international systems disrupt the lives of poor families, but not always because it is necessary for the child's well-being.[18]

This Article does not suggest that it is necessary to end foster care or ICA. On the contrary, recognizing the need for systems that ensure children are raised in safe and loving homes, I seek to show that the current systems need to be improved so they do not continue to systemically and unnecessarily damage the integrity of poor families. Movement towards this type of improvement will not happen, however, without acknowledgment that the problem exists.

Commentators generally accept that poor families are more likely to be involved in, and thus disadvantaged by, both the intercountry adoption

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12. David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnapping, and Stealing Children*, 52 WAYNE L. REV. 113, 117–24 (2006) (linking intercountry adoption to child trafficking).

13. *See* Sandra Bass, Margie K. Shields, & Richard E. Behrman, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 FUT. CHILD. 4, 6, 14 (2004) (arguing that poor children are more likely to enter the foster care system because poverty is associated with multiple life challenges).

14. *See* Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 FUT. CHILD. 30, 40 (2004) (showing that some foster children suffer maltreatment in their foster homes).

15. *See* Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO ST. L.J. 575, 610–11 & n.171 (2011) (discussing the U.S. child welfare system's historical roots in child rescuing); *see also* David M. Smolin, *Child Laundering as Exploitation: Applying Anti-Trafficking Norms to Intercountry Adoption Under the Coming Hague Regime*, 32 VT. L. REV. 1, 36–37 (2007) (discussing the argument that adopting children internationally is justified because the children end up in better material circumstances).

16. *See* King, *supra* note 15, at 612–14 & nn.179 & 182 (discussing the U.S. child welfare system's diversion of funds away from family reunification towards foster care); *see also* Smolin, *supra* note 12, at 127 (discussing the significant amount of money spent to arrange an intercountry adoption).

17. *See* King, *supra* note 15, at 612–14 (discussing the U.S. child welfare system's failure to promote family reunification and preservation); *see also* Smolin, *supra* note 12, at 127 (discussing the intercountry adoption system's failure to provide birth families with aid that would preserve their families).

18. *See* King, *supra* note 15, at 613; *see also* Smolin, *supra* note 12, at 127.

system and the U.S. foster care system.[19] In my previous work, I have explored the scholarship in both contexts.[20] The current Article makes three broad contributions. First, it focuses on a gap in the existing literature by offering a clear theoretical conception of the genesis of this disregard for poor families. In my previous work, I have defined this genesis in the context of intercountry adoption as *MonoHumanism*.[21]

MonoHumanism describes a process of "Othering" in the context of intercountry adoption.[22] This term is a collective notion identifying "us" as Westerners and everyone else as "the other."[23] The narrative of identity I have previously described that accompanies *MonoHumanism* subscribes both universality and superiority to Western knowledge and discourse, which effectively results in the exclusion and displacement of the knowledge and discourse of historically oppressed peoples.[24] In the context of ICA, *MonoHumanism* means that children are not seen in the context of their family, community and culture, but rather, narrowly as the potential children of Western adults.[25] In this Article, therefore, I argue that *MonoHumanism* is an unstated theoretical justification for the disrespect that society shows for the integrity of poor families. In this context, it is not only the West vs. East juxtaposition that is important, but the poor vs. rich juxtaposition as well. In other words, it is the exclusion and displacement of knowledge and discourse about poor families—the failure to see children

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19. *See* Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 Yale J.L. & Feminism 101, 133–34 (1998) (citing poverty as a reason for intercountry adoption to the detriment of mothers who relinquish their children); *see also* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System, An Essay*, 48 S.C. L. Rev. 577, 578 (1997) (discussing the disproportionate involvement of poor mothers in the U.S. child welfare system); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 Fam. Ct. Rev. 453 (2002) (noting the class disparities in the U.S. child welfare system and the system's roots in intervening into poor families); Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 Law & Soc'y Rev. 461, 462 (2002) (stating that class is a significant factor for intervention by the U.S. child welfare system); Andrea Charlow, *Race, Poverty, and Neglect*, 28 Wm. Mitchell L. Rev. 763, 764–65 (2002) (discussing the disproportionate removal of poor children from their homes to be placed into foster care); Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423, 433–38 (1983) (tracing the development of the U.S. child welfare system to colonial laws that intervened into poor families); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 Buff. Hum. Rts. L. Rev. 71, 107 (2008) (discussing how dire poverty can drive the procurement of children for the intercountry adoption system); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. Ill. L. Rev. 171, 172 (2003) (concluding that the U.S. child welfare system is "an institution designed primarily to monitor, regulate, and punish poor black families"); David M. Smolin, *Intercountry Adoption and Poverty: A Human Rights Analysis*, 36 Cap. U. L. Rev. 413, 413–14 (2007) (describing extreme poverty as an impetus for intercountry adoption); Smolin, *supra* note 12, at 127 (discussing poverty as a grounds for families to surrender their children to be adopted internationally).

20. *See* Shani King, *Challenging MonoHumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 Mich. J. Int'l L. 413 (2009) (exploring scholarship on intercountry adoption); *see also* King, *supra* note 15 (critiquing family law scholarship on issues such as foster care).

21. *See generally* King, *supra* note 20.

22. *Id.* at 414.

23. *Id.*

24. *Id.* at 414–15.

25. *Id.* at 415.

in the context of their family, community and culture—or a slightly broadened version of *MonoHumanism*, that explains our failure to respect the integrity of poor families in the United States and abroad.[26]

MonoHumanism may at first blush seem inclusive rather than ethnocentric or myopic.[27] I have chosen this phrase purposefully due to the strength of the inversion of the inclusive ideal accompanying this language.[28] The phrase *MonoHumanism* was chosen because of the juxtaposition of "Mono" with the word "Humanism" to underscore the ethnocentric and myopic failure to include discourses that have their origins in the lives, cultures, and vocabulary of historically oppressed peoples, in areas that are often conceived of as a "win-win" for all parties involved and as the most humanitarian of endeavors.[29] Even more fundamentally, the term "Mono" seems to exclude other possibilities and is commonly used that way, for example, with the terms "monotheistic" and "monolilthic."[30]

While there are terms from post-colonial theory such as "ethnocentrism" and "Self/Other" that have informed my choice of this term,[31] I offer this new label to specifically identify our approach towards poor children. My sense is that having a specific target will make it much easier to hit that target. To use a slightly imperfect analogy, instead of dismantling discrimination, we dismantle "Jim Crow laws" or the "separate but equal" doctrine.[32] Or, instead of stopping law enforcement officers from discriminating against people of color, we have taken a stand against "racial profiling."[33] In part, because previous terms have not captured our collective consciousness in a way that has resulted in the dismantling of our approach to poor families, as I have argued before, I think it is time for a new and very specific term that captures that approach. The term I have chosen is *MonoHumanism*.[34]

The second broad contribution is to show how this theoretical justification becomes a narrative that determines how we report on, read, think

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26. *See id.*
27. *Id.* at 414.
28. *Id.*
29. *Id.*
30. *Id.*
31. *See* Diana Kendall, Sociology in Our Times 90 (4th ed. 2003) (defining "ethnocentrism" as the practice of using one's culture as the standard by which to judge other cultures and stating that "[e]thnocentrism is based on the assumption that one's way of life is superior to all others"); Sankaran Krishna, Globalization & Postcolonialism: Hegemony and Resistance in the Twenty-first Century 73–74 (2009) (describing Edward Said's seminal work Orientalism which advanced a postcolonialism framework of understanding how the Western "self" developed as a binary opposite to the Oriental "other").
32. *See* Lee Epstein & C.K. Rowland, *Interest Groups in the Courts: Do Groups Fare Better?*, *in* Interest Group Politics 275, 278 (Allan J. Cigler & Burdett A. Loomis eds., 2nd ed. 1986) (stating that "[w]hen the NAACP was formed, one of its major goals was to eradicate 'separate but equal' policies").
33. Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 Colum. L. Rev. 1413, 1413 (2002) (describing a universal opposition to "racial profiling" prior to 9/11, and continued opposition and ambivalence about the practice afterward).
34. *See* King, *supra* note 20, at 415, 470 (discussing the goal of dismantling *MonoHumanism*).

about, and interact with poor families both in the United States and abroad. I do this using the Silsby case,[35] through which I explore how the ideas of child saving and rescuing poor Haitian children became the narrative that ultimately excused the U.S. missionaries' actions in a clear case of child trafficking.

The third broad contribution is to show how customary child placement schemes, typically used by poor families as a creative adaptation to poverty, are not only displaced by structures set in motion by *MonoHumanism*, but are, in certain circumstances, more protective of the integrity of poor families than systems which may reflect classism, racism, sexism, ethnocentrism, and basic fundamental unfairness that permeates both international and U.S. child care systems. I do this by exploring one customary system of child placement in Haiti, *timoun*, and analogous child placement systems by poor families in the United States.

Taking into consideration these three broad contributions, the ultimate goal of this Article is to call attention to the fact that we continue, on a basic conceptual and theoretical level, to fail to respect the integrity of poor families. As such, it is currently unrealistic to expect the United States to create structures that protect these families. Frankly, creating structures that protect poor families would be fundamentally incongruous with who we are as a society (whether we admit it to ourselves or not) as it would be fundamentally at odds with the concept of *MonoHumanism*. It will only be when we turn a critical eye on U.S. society and interrogate our conceptual and theoretical understandings of the poor that we will develop the will to protect all families' integrity. This Article hopes to be a spark that does just that.

Using the Silsby case as a window into the *MonoHumanistic* child placement schemes that affect poor families, this Article proceeds in several parts. Part I tells the story of the Silsby case and shows how the idea of rescuing poor Haitian children became the narrative that ultimately excused the missionaries' actions. As I will explain, this is a rescue narrative that has its genesis in *MonoHumanism*. Part II describes the development of ICA as a means of "saving" poor children and explains how the strength of this rescue narrative feeds illicit child trafficking schemes. Part II also explores the international community's response to ICA and its focus on protecting the birth family's unity. Part III describes one customary system of child placement in Haiti, *timoun* or *restavèk*, and explains how this system, unlike ICA, does not permanently sever the child's relationship with his or her parents and may sometimes be preferable to ICA. This part also considers the problems with *timoun*, including its potential for exploitation. Part IV exposes the current U.S. child welfare system as one that disrupts traditional forms of child placement in the United States, much like ICA dis-

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35. *See supra* notes 2–8 and accompanying text.

rupts the customary systems of child placement in other countries. In Parts V and VI, the Article concludes that ICA markets and U.S. foster care systems reflect a theoretical and conceptual approach, one I refer to as *MonoHumanism*, that too often disserves the interests of children who may be better served by systems that respect their familial and cultural ties. The Article further concludes that the answer is not necessarily to outlaw ICA or dismantle the domestic foster care system. But by acknowledging and eventually overcoming our failure to respect the integrity of poor families, and the fact that both systems suffer from unfounded biases that feed illicit schemes or unnecessarily disrupt poor families, both systems can function as they should—by minimizing the disruption of family unity and traditional caregiving patterns, while fostering the well-being of every child who is impacted by the system.

I.   The Silsby Child Abduction Scandal

On January 12, 2010, a magnitude 7.0 earthquake struck 15 miles west of Port-au-Prince, Haiti.[36] The earthquake was the strongest to hit the Caribbean in 200 years.[37] Before the earthquake, Haiti was already considered the poorest country in the Western hemisphere.[38] After the earthquake, the Haitian government estimated that 217,366 people died and 300,572 were injured.[39] The earthquake damaged or destroyed 285,677 homes, leaving 1,237,032 people homeless, and 511,405 displaced.[40] The United Nations estimated that about 2 million people required food aid in the aftermath of the earthquake.[41] In response to the disaster, the U.N. issued an unprecedented call for 1.5 billion dollars in emergency and reconstruction aid to be sent to Haiti.[42]

In the first week of February, former President Bill Clinton accepted an expanded role as special envoy for Haiti, on behalf of the United Nations, to lead the coordination of international earthquake recovery and reconstruc-

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36. *Magnitude 7.0 – Haiti Region*, U.S. Geological Surv. (Jan. 12, 2010, 9:53 PM), http://earthquake.usgs.gov/earthquakes/recenteqsww/Quakes/us2010rja6.php.

37. Ker Than, *Haiti Earthquake "Strange," Strongest in 200 Years*, Nat'l Geographic, Jan. 13, 2010, *available at* http://news.nationalgeographic.com/news/2010/01/100113-haiti-earthquake-red-cross/.

38. *Haiti, Background*, CIA World Factbook, https://www.cia.gov/library/publications/the-world-factbook/geos/ha.html (last visited Mar. 4, 2010) [hereinafter CIA Factbook]. In 2007, the average person in Haiti had an income of less than $1.25 a day. *At a Glance: Haiti - Statistics*, UNICEF, http://www.unicef.org/infobycountry/haiti_statistics.html (last visited Apr. 21, 2010).

39. République d'Haïti, *supra* note 1, at 2.

40. *Id.*

41. *Haiti: UN Launches Largest-ever Appeal for Natural Disaster*, U.N. News Centre (Feb. 18, 2010), http://www.un.org/apps/news/story.asp?NewsID=33815&Cr=haiti&Cr1=&Kw1=haiti&Kw2=clinton&Kw3.

42. *Id.*

tion efforts.[43] One of Clinton's first tasks in Haiti, however, was to put out the fire of a child abduction scandal involving American citizens.[44]

On January 29, 2010, less than three weeks after the earthquake, Haitian authorities arrested ten U.S. Baptist missionaries for attempting to take 33 children by bus across the border into the Dominican Republic without proper documentation.[45] A week later, the missionaries were charged with child kidnapping and criminal association.[46] While the missionaries claimed good intentions and ignorance of Haitian laws, Haitian prosecutors argued that there had been intentional wrongdoing.[47] In the course of a month, President Clinton brokered the release of all the missionaries, except for the group leader, Laura Silsby.[48]

While Laura Silsby awaited trial, the press brought to light several facts that raised serious suspicions about her intent to traffic or smuggle the children as part of a grey adoption scheme.[49] In 2009, Silsby visited Haiti with the stated intent to establish an orphanage.[50] At the time, Silsby faced numerous court cases in the U.S. for bad debt and unpaid wages.[51] In November 2009, she registered her New Life Children's Refuge charity at an address in Boise, Idaho, and a month later the house was repossessed for lack of payment.[52]

In the midst of her personal debt crisis, the January earthquake struck Haiti, and Silsby organized a mission to "gather 100 orphans from the

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43. *Former President Clinton to Lead International Haiti Coordination*, U.S. Fed. News, Feb. 5, 2010, *available at* 2010 WLNR 2490284. Former U.S. President Bill Clinton was the acting U.N. envoy for Haiti since May 2009. *Id.*

44. Allen-Mills, *supra* note 6.

45. Hall, *supra* note 2; *Ten U.S. Missionaries Charged*, *supra* note 2.

46. *US Missionaries Charged with Child Kidnapping in Haiti*, Guardian (U.K.), Feb. 4, 2010, *available at* Factiva, Doc. No. GRULTD0020100204e625006sh.

47. *US Missionaries 'Knew They Were Doing Wrong' in Haiti*, BBC News (Feb. 2, 2010), http://news.bbc.co.uk/2/hi/8491996.stm.

48. *See* Allen-Mills, *supra* note 6 (describing Clinton's expected intervention); *see also* Sanon, *supra* note 7 (stating that all of the missionaries except Silsby were released).

49. In the context of international adoption, the grey adoption market has been defined as "a network of 'baby brokers' and orphanage practices of contested legitimacy" that facilitates "the legal and government-sanctioned transnational shuttling of children." J.M. Weimer, *Media and Migration: International Adoption, Globalization, and the Internet*, Globalization and Media, New School University, http://homepage.newschool.edu/~chakravs/Media_migration.html. A journalist described one grey adoption scheme discovered in Vietnam by the U.S. State Department as "a network of adoption agency representatives, village officials, orphanage directors, nurses, hospital administrators, police officers, and government officials who were profiting by paying for, defrauding, coercing, or even simply stealing Vietnamese children from their families to sell them to unsuspecting Americans." E.J. Graff, *Anatomy of an Adoption Crisis*, Foreign Pol'y (Sept. 12, 2010), http://www.foreignpolicy.com/articles/2010/09/07/anatomy_of_an_adoption_crisis?page=full.

50. *See* James Leasure, *Eight of Ten Baptist Missionaries Back from Haitian Detention*, Examiner.com (Feb. 18, 2010), http://www.examiner.com/evangelical-in-richmond/eight-of-ten-baptist-missionaries-back-from-haitian-detention-video.

51. Guy Adams, *Baptist Laura Silsby Who Set Off to 'Rescue' Orphans Left Behind Debts and Bad Wages*, The Independent (U.K.), Feb. 6, 2010, at 28; *see also* Katy Moeller, *Eviction Hearing Scheduled for Laura Silsby's Company, Personal Shopper Inc.*, Idaho Statesman, Mar. 10, 2010, *available at* 2010 WL 5015921 (discussing specific amounts owed).

52. Adams, *supra* note 51; Moeller, *supra* note 51.

streets" of Haiti and take them to a shelter in the Dominican Republic.[53] The children would be housed in a leased hotel because Silsby's purported charity did not yet manage an orphanage or own any property in the Dominican Republic.[54] U.S. authorities later stated that New Life Children's Refuge was not listed as a U.S. nonprofit or as a U.S. international adoption agency.[55]

In March, after her arrest, evidence was introduced in Silsby's case showing that on January 26, 2010, she had previously attempted to take a different group of 40 children across the border.[56] Haitian and Dominican authorities turned her away for lack of authorizing documents.[57] Three days later she attempted to cross over with the second group—the 33 children—again without proper documentation.[58]

After the earthquake, the Haitian government tried to crack down on unauthorized adoptions to avoid child trafficking.[59] In addition, the Dominican consul in Haiti had personally warned Silsby that she lacked the necessary paperwork to take children out of the country and risked arrest.[60]

On March 17, 2010, after careful verification of identities by the Social Welfare Ministry of Haiti, 32 out of the 33 children were returned to their families (the last one being returned shortly thereafter),[61] thus confirming that none of the children were orphans.

Previously, Silsby had told an Associated Press reporter that the children were delivered to the missionaries by "distant relatives" or "orphanages that had collapsed in the quake," adding that "'[t]hey are very precious kids that have lost their homes and families and are so deeply in need of, most of all, God's love and his compassion.'"[62] But an AP reporter revealed that Silsby had engaged an Atlanta-based Haitian minister, Reverend Jean

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53. HAITIAN ORPHAN RESCUE MISSION, *supra* note 3.

54. *Id.*; Bilbao, *supra* note 3.

55. Bilbao, *supra* note 3.

56. *Judge Weighs New Charge*, *supra* note 4; *see also New Kidnapping Charge Added to Jailed U.S. Missionary's Case*, DESERET NEWS (Mar. 13, 2010), http://www.deseretnews.com/article/700016208/New-kidnapping-charge-added-to-jailed-US-missionarys-case.html.

57. Karl Penhaul, *Americans Jailed in Haiti Tried Taking Other Kids, Officer Says*, CNN (Feb. 8, 2010), http://articles.cnn.com/2010-02-08/justice/haiti.border.arrests_1_dominican-republic-haitian-missionaries?_s=PM:CRIME.

58. *Judge Weighs New Charge*, *supra* note 4; *New Kidnapping Charge Added to Jailed U.S. Missionary's Case*, *supra* note 56.

59. *Ninth U.S. Missionary Freed in Haiti: Charisa Coulter Returns Home as Group Leader Remains in Jail*, N.Y. DAILY NEWS (Mar. 9, 2010), http://www.nydailynews.com/news/world/2010/03/09/2010-03-09_ninth_us_missionary_freed_in_haiti_charisa_coulter_returns_home_with_leade.html.

60. *Id.*

61. The identity of the last child was undergoing verification, which is why he was not released at the time. Michelle Faul, *Haiti Parents Take Back Kids Given to Missionaries*, DESERET NEWS, Mar. 18, 2010, at A04, *available at* Factiva, Doc. No. DN0000020100318e63i0001v.

62. *Americans Charged with Haiti Child Kidnap*, CBS NEWS (Feb. 5, 2010), http://www.cbsnews.com/stories/2010/02/04/world/main6174535.shtml.

Sainvil, and a local orphanage worker, Isaac Adrien, to find "homeless" children for her shelter.[63]

Parents of some of the children confirmed to the press and testified in court that they gave up their children to the missionaries after being promised by the recruiters and the group of Baptists that "the kids would be educated and relatives could visit them."[64] Reverend Sainvil convinced one parent to hand over his children to the missionaries for their better care, pointing out "that dead bodies buried under rubble in his El Citron neighborhood would breed disease."[65] Reverend Sainvil told reporters that:

> Everybody agreed that they knew where the children were going.
> The parents were told, and we confirmed they would be allowed
> to see the children and even take them back if need be.[66]

Adrien—the orphanage worker—stated that parents jumped at the offer, while a mother who handed over her daughter observed that it was "only because the bus was full that more children didn't go."[67]

The parents gave their consent to the missionaries to take their children under the impression that Silsby and her group were providing shelter and education; the parents' understanding was not that they were permanently parting with their children.[68] Contrary to the parents' expectations, Silsby's express intent—according to her online action plan—was to place the children for adoption.[69]

Suspicions about Silsby's intent to smuggle or traffic the children to the Dominican Republic further increased, when on March 19, 2010, Silsby's legal advisor—Jorge Torres-Puello, an American-Dominican living in the Dominican Republic as a fugitive—was arrested and accused of human trafficking.[70] U.S. authorities revealed that Torres-Puello was "linked to a network that trafficked in Haitian and Central American children and [was] wanted in the United States, El Salvador and Costa Rica."[71] His wife was

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63. *Parents Willingly Gave Children to U.S. Baptists, Who Are Mostly from Idaho*, OREGONLIVE.COM (Feb. 3, 2010), http://www.oregonlive.com/news/index.ssf/2010/02/parents_willingly_gave_childre. html [hereinafter *Parents Willingly Gave Children*]; *see also* Faul, *supra* note 61; *Americans Charged with Haiti Child Kidnap*, *supra* note 62.

64. Kirsten Johnson, *Haiti Parents Testify They Gave Kids to Americans*, ASSOCIATED PRESS, Feb. 9, 2010, *available at* Factiva, Doc. No. APRS000020100209e62900005l.

65. Faul, *supra* note 61.

66. *Americans Charged with Haiti Child Kidnap*, *supra* note 62.

67. *Parents Willingly Gave Children*, *supra* note 63; *see also Americans Charged with Haiti Child Kidnap*, *supra* note 62.

68. *Parents Willingly Gave Children*, *supra* note 63.

69. "We will strive to also equip each child with a solid education and vocational skills as well as opportunities for adoption into a loving Christian family." HAITIAN ORPHAN RESCUE MISSION, *supra* note 3, at 3.

70. *Adviser to Missionaries in Haiti Kidnap Case is Arrested*, *supra* note 5.

71. *Id.*

already imprisoned in El Salvador and "faced charges of presumed sexual exploitation of minors and women."[72]

Despite Silsby's stated intent to take the children over the border to an unauthorized orphanage and her connections to human traffickers such as Torres-Puello, the courts eventually dropped the kidnapping and criminal association charges against her.[73] Silsby was instead convicted under the additional charge of organizing illegal travel, sentenced to time served (3 months and 8 days), and released on May 17, 2010.[74] In the end, her sentence was based on the least polemic charge against her. The pressing issue—whether Silsby intended to deliver the children into trafficking rings or grey adoption markets—was not addressed or resolved.

Rather than turning on Silsby's actions, the decision in her case appeared to turn on the actions of the parents. Judge Bernard Saint-Vil explained that his decision was based on the Haitian parents' testimony that they had "[given] their kids away voluntarily."[75] Similarly, defense lawyer Jorge Puello stated that the missionaries "willingly accepted kids they knew were not orphans because the parents said they would starve otherwise."[76] Another trial attorney for the missionaries, Aviol Fleurant, argued that "[t]he parents' testimony means no law was broken and 'we can't talk any more about trafficking of human beings.'"[77] Essentially, the Haitian children are described as victims of the incapacity and poverty of their parents and country; their parents are portrayed as childlike because they are incapable of taking care of themselves or their children. In other words, the Baptist missionaries were justified in their actions because they were "rescuing" the children from incapacitated parents.

II.   The Development of ICA as a Means of "Saving" Poor Children

A.   A Brief History of ICA

Since the mid-20th century, adoption rates in the U.S. have increased dramatically.[78] The increase is generally attributed to "an increased incidence of infertility among married couples and an absolute decrease in the

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72. *Id.*

73. Katz, *supra* note 7. As of the date of this writing, the status of the case against Jean Sainvil, who faced the same charges as Silsby, was not clear.

74. *Id.*

75. David Fischer & Frank Bajak, *Missionaries Freed by Haitian Judge Land in U.S.*, News J. (Wilmington, D.E.), Feb. 18, 2010.

76. *Parents Willingly Gave Children*, *supra* note 63.

77. Johnson, *supra* note 64; *cf. infra* note 197 (UNICEF's definition of "trafficking"). Trafficking implies the movement of children across borders with the intent of labor exploitation. The fact that the parents gave their consent does not mean that Silsby did not intend to traffic the children.

78. The number of adoptions has increased

   [. . .f]rom less than 20 per 1,000 births in the early 1950s to over 45 per 1,000 births in 1968-1973. Adoption rates then declined sharply in the 1970s and possibly in the 1980s. As

numbers of infants placed for adoption."[79] The decrease in the numbers of infants placed for adoption does not mean that children are not available for adoption in the United States. On the contrary, as of September 30, 2009, there were approximately 115,000 children waiting for adoption from foster care.[80] There has been a decrease in infants placed for adoption, in large part, because the population of "preferred" adoptable infants (white and non-special needs) has decreased since the 1950s.[81] Several factors have contributed to the decrease in preferred adoptable infants in the U.S. since the 1950s, including an increase in the use of contraception and abortion, a decrease in the rate of relinquishment of children born to unwed mothers (particularly women who have greater resources), and more women entering the workforce and delaying having children.[82]

During the same period, ICA has increasingly served as a "substitute" for domestic adoptions.[83] While it represented only 1% of all adoptions in the United States in 1965, in 2002 ICA represented 13.9% of all adoptions.[84] Scholars offer several reasons for the increase in ICA, including a perceived lack of adoptable children in the United States (manifested as a preference for healthy light skinned infants),[85] the ineligibility of adoptive

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a result, adoption rates in 2002 (32.4 to 37.6 per 1,000 births) are still substantially lower than the historical peak reached in 1971 (47.5 per 1,000 births).

Raquel Bernal et al., Child Adoption in the United States: Historical Trends and the Determinants of Adoption Demand and Supply, 1951-2002, at 7 (Dec. 2007) (unpublished paper), *available at* http://faculty.wcas.northwestern.edu/~cmo938/adoptAEA.pdf.

79. Burton Z. Sokoloff, *Antecedents of American Adoption*, 3 Fut. Child. 17, 23 (1993).

80. U.S. Dep't of Health & Human Servs., Admin. for Child. & Families, The AFCARS Report: Preliminary FY 2009 Estimates 5 (July 17, 2009), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.pdf.

81. Sokoloff*, supra* note 79, at 23 (describing the decrease in infants placed for adoption and the trends which may have contributed); *see also* Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community*, 26 B.C. Third World L.J. 25, 28–29 (2006) (citing the "shortage of adoptable white infants result[ing] from, among other factors, the increased availability of abortion and contraception and from a growing tendency of unmarried white mothers to keep their babies" beginning in the 1960s).

82. Sokoloff, *supra* note 79, at 23; Bernal et al., *supra* note 78, at 9–13, 20–21; *see also* Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. Rev. 59, 61–64 (1987) (discussing the impact of societal trends on supply and demand in adoption markets).

83. Bernal et al., *supra* note 78, at 15.

84. *Id.* at 35 tbl.1. The authors also point out that domestic private agency adoptions, foster care adoptions, and intercountry adoptions need to be better understood in terms of the very different populations of adoptive and relinquishing parents that they serve.

85. The complex reasons for adoption preferences around race are discussed in the section below on foster care. Remarkably the United States was the third largest sending country of children to Canada in 2005, with the majority of such children being African American. Galit Avitan, *Protecting Our Children or Our Pride? Regulating the Intercountry Adoption of American Children*, 40 Cornell Int'l L.J. 489, 499 (2007). The following authors discuss the preference for white babies: Kirsten Lovelock, *Intercountry Adoption as a Migratory Practice: A Comparative Analysis of Intercountry Adoption and Immigration Policy and Practice in the United States, Canada and New Zealand in the Post W.W. II Period*, 34 Int'l Migration Rev. 907, 933 (2000); Amy Grillo Kales, *The Intercountry Adoption Act of 2000: Are Its Laudable Goals Worth Its Potential Impact on Small Adoption Agencies, Independent Intercountry Adoptions, and Ethical Independent Adoption Professionals?*, 36 Geo. Wash. Int'l L. Rev. 477, 479–80 (2004). Forty-four percent of unrelated adoptions in the United States are from foster care, and most of these adoptions are

parents in their own countries (age, marriage status, etc.),[86] and the rise of open adoptions in the United States.[87] Humanitarian concerns[88] and lower costs have also been cited as reasons for the rise of ICA.[89]

Today, the United States is the country with the largest absolute number of intercountry adoptions per year, though that number has decreased to 12,753 in 2009 from an all-time high of 22,990 in 2004.[90] Several European countries surpass the U.S. demand for children from abroad with greater per capita ICA than the United States, specifically Norway, Sweden, Denmark, Switzerland, France, and the Netherlands.[91] Together these Western nations are spending billions of dollars to form families.[92] In the United States, domestic adoption costs range from $0 to $2,500 for foster care adoptions and $5,000 to over $40,000 for domestic private adoptions while intercountry adoptions range between $7,000 and $30,000.[93] The total number of children that were moved through ICA to developed na-

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of older children, children with disabilities, a sibling group, or children of color. Bernal et al., *supra* note 78, at 8–9.

86. Saunders, *supra* note 11, at 4.

87. An "open adoption" is an arrangement in which birth parents select their child's adoptive parents and "can negotiate a mutually agreeable level of involvement in the child's life after his or her birth, not unlike visitation arrangements of a divorce." Jack Darcher, *Market Forces in Domestic Adoptions: Advocating a Quantitative Limit on Private Agency Adoption Fees*, 8 SEATTLE J. SOC. JUST. 729, 739 (2010). There have been high-profile cases in the United States of birth parents reclaiming their children successfully in courts. Saunders, *supra* note 11, at 8.

88. Humanitarian concern is the historical reason given for the start of intercountry adoption in the United States with the first waves of children arriving to the country after World War II, followed by war orphans from the Korean and Vietnam Wars. The problematic narrative of humanitarian concern for the start of U.S. intercountry adoption is discussed in King, *supra* note 20, at 429–35.

89. For a discussion on costs (monetary and non-monetary) of adoption from foster care that act as incentives to seek a "substitute" (either traditional conception, private domestic or intercountry agency adoption, foster care, etc.), see Mary Eschelbach Hansen & Bradley A. Hansen, *The Economics of Adoption of Children from Foster Care* (Am. Univ., Dep't of Econ., Working Paper Series, No. 2005-10, 2005).

90. In the United States, "the number of immigrant-orphans soared from 6,000 (or 1.6 per 1,000 births) in 1992 to over 20,000 (or 5.6 per 1,000 births) in 2004." Bernal et al., *supra* note 78, at 7. The latest figures show that during the last years of economic recession the number of annual intercountry adoptions dropped from an all-time high of 22,991 in 2004 to 19,608 in 2007, 17,456 in 2008, and 12,744 in 2009. U.S. DEP'T OF STATE, BUREAU OF CONSULAR AFFAIRS, INTERCOUNTRY ADOPTION: STATISTICS, http://adoption.state.gov/about_us/statistics.php (click on "Adoptions by Year").

91. Saunders notes that:

Although the US is the largest receiving country in total adoptions, on average accounting for half of all ICA, Norway is the leader in per capita intercountry adoptions with 11.2 international adoptions for every 1,000 births. Other European countries with a higher ratio of per capita intercountry adoptions than the US include Sweden, Denmark, Switzerland, France, and the Netherlands.

Saunders, *supra* note 11, at 5.

92. *See id.* at 8 (stating that the United States' market alone for intercountry adoption is over one billion dollars).

93. Bernal et al., *supra* note 78, at 4; *see also* CHILD WELFARE INFO. GATEWAY, COSTS OF ADOPTING 2 (2011), http://www.childwelfare.gov/pubs/s_cost/s_costs.pdf (estimating ranges for the cost of different types of adoption).

tions was approximately 30,000 in the late 1990s.[94] And, in 2004, over 45,000 children were moved through ICA worldwide.[95]

On the opposite end of the ICA market are the sending countries. For 2009, the top twenty sending countries to the U.S. (in descending order) were China, Ethiopia, Russia, South Korea, Guatemala, Ukraine, Vietnam, Haiti, India, Kazakhstan, Philippines, China-Taiwan, Colombia, Nigeria, Ghana, Mexico, Uganda, Thailand, Jamaica, and Poland.[96] Countries often emerge as "sending countries" in the wake of political, economic, social, military, or natural upheaval.[97] The first wave of ICA en masse to the United States came after World War II from countries affected by war such as Germany, Greece, Italy, Poland, Czechoslovakia, and Hungary, and continued from Korea and Vietnam after the respective wars in which the United States participated.[98] After the 1970s, in the years of economic collapse and political regime transformation, Latin American and Asian countries became the focus of ICA.[99] Successive regulatory changes at an international level during this period also facilitated ICA to the United States.[100] A third wave of adoptions followed after the fall of the Iron Curtain in the 1990s, with countries such as Romania, Russia, and China becoming major sending countries.[101]

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94. *See* Peter Selman, *Intercountry Adoption in the New Millennium; The "Quiet Migration" Revisited*, 21 POPULATION RES. & POL'Y REV. 205, 209–10 (2002).

95. Peter Selman, *The Rise and Fall of Intercountry Adoption in the 21st Century*, 52 INT'L SOC. WORK 575, 575 (2009).

96. U.S. DEP'T OF STATE, FISCAL YEAR 2009 ANNUAL REPORT ON INTERCOUNTRY ADOPTIONS (Nov. 2009), http://adoption.state.gov/content/pdf/fy2009_annual_report.pdf.

97. Ethan B. Kapstein, *The Baby Trade*, 82 FOREIGN AFF. 115, 116 (2003). Selman mentions that sending countries decrease the number of adoptees sent abroad as countries move away from crisis, or change policies towards internal adoption to counter ICA, or suspend ICA in order to control trafficking, as has been the case in the past of Romania, Vietnam and Guatemala. Selman, *supra* note 94, at 216; *see also* Laura Briggs & Diana Marre, *Defining Reproduction: Law, Strangers, Family, Kin, in* INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 29 (Diana Marre & Laura Briggs eds., 2009) (stating that the "advent [of intercountry adoption] is intimately related to conflicts that arose from colonialism, international warfare, and civil conflicts, and its current patterns are profoundly shaped by global, racial-ethnic, and class inequalities within and between nation-states").

98. Selman, *supra* note 94, at 212; *see also* Lovelock, *supra* note 85, at 911–26.

99. Lovelock, *supra* note 85, at 927–30; Selman, *supra* note 94, at 212–13 (mentioning Colombia, India, and Korea as major sending countries in the early 1980s).

100. *See* Mary E. Hansen & Daniel Pollack, *The Regulation of Intercountry Adoption* 7–8 (Berkeley Electronic Press, Working Paper No. 1385, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=6337&context=expresso&sei-redir=1#search=%22intercounty%20adoption%20regulations%201980s%22 (describing the genesis of international regulation of intercountry adoption in the late 1980s through the adoption provisions of the 1989 U.N. Convention on the Rights of the Child and the work of the 1988 Hague Conference on Private International Law).

101. Lovelock, *supra* note 85, at 930–37. Selman mentions that in the early 1990s, Romania became the largest single source of ICA children, with as many as 10,000 ICA adoptees between March 1990 and June 1991, after which the adoptions were halted. By 1995, China and Russia had taken over as major sending nations. Selman, *supra* note 94, at 213–14.

B. ICA's Rescue Narrative: Saving Poor Children

The rescue narrative surrounding the Silsby case is consistent with that surrounding ICA generally.[102] This narrative places the Western "rescuers" at a moral and normative center to justify foreign intervention as goodwill and can be very dangerous in the context of ICA because it encourages and facilitates the adoption of children who are not orphans. In fact, very few children who are adopted internationally are *actual orphans.*[103] Instead, they may be deemed "social orphans" because their parents or relatives are impoverished and disempowered individuals who live in underdeveloped nations that do not have the social infrastructure to support economically disadvantaged families.[104] By conceptualizing these children as victims of poverty, Westerners tend to justify paternalistic interventions, including ICA.

Post-colonial theorists might describe the rescue justification as a process of "Othering,"[105] in which colonizers create narratives about the moral inferiority or helplessness of the people they subjugate (the "Others"[106]). In my previous work, I have described Othering in the context of ICA as *MonoHumanism.*[107] In the context of ICA, *MonoHumanism* means that children are not viewed in the context of their family, community and culture, but instead as the potential children of Westerners.

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102. *See* King, *supra* note 20, at 432.

103. *See* Bhabha, *supra* note 10, at 185 (noting that "[t]oday . . . parental destitution and social and political pressure, rather than death or disappearance, appear to be the prime factors motivating relinquishment [for adoption]").

104. *See* Kim, *supra* note 10, at 856–57 (describing adoptees with "at least one living birth parent" as "'social orphans,' who are legally produced and made available for adoption as such").

105. Edward Said's *Orientalism* is generally acknowledged as the founding work of postcolonial studies. Said developed the argument that the Occident needed to create the Orient as the Other, to define itself at the "center." By accepting the self-referential framework of the West, the post-colonial "Other" remains subordinated to Western paradigms. The West then feels morally validated—if not obligated—to exercise a dominant role in guiding the lesser "Other." *See generally* EDWARD W. SAID, ORIENTALISM (1978); EDWARD W. SAID, CULTURE AND IMPERIALISM (1993). Other theorists are also part of the postcolonial tradition, including Frantz Fanon, Ngugi wa Thiong'o, Chinua Achebe, Haunani-Kay Trask, Trinh Minh-Ha, and Albert Memmi. *See generally* FRANTZ FANON, A DYING COLONIALISM (1965); FRANTZ FANON, BLACK SKIN, WHITE MASKS (1967); FRANTZ FANON, THE WRETCHED OF THE EARTH (1963); FRANTZ FANON, TOWARD THE AFRICAN REVOLUTION (1967); Ngugi wa Thiong'o, *Moving the Center: An Interview with Charles Cantalupo*, *in* THE WORLD OF NGUGI WA THIONG'O 219–20 (Charles Cantalupo ed., 1993); NGUGI WA THIONG'O, DECOLONISING THE MIND: THE POLITICS OF LANGUAGE IN AFRICAN LITERATURE 4 (1986); CHINUA ACHEBE, THINGS FALL APART (1952); CHINUA ACHEBE, ANTHILLS OF THE SAVANNAH (1987); HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAII 3, 21 (1993); TRINH T. MINH-HA, WOMAN, NATIVE, OTHER 47–76 (1989); ALBERT MEMMI, THE COLONIZER AND THE COLONIZED (1965).

106. The salient features of "Otherness" as summarized by Kenneth B. Nunn are:
  (1) the other is a means of defining the self; (2) the other is an abstraction; (3) the other cannot define itself; and (4) the other is to be feared and controlled.
Kenneth B. Nunn, *The Child as Other: Race and Differential Treatment in the Juvenile Justice System*, 51 DEPAUL L. REV. 679, 698 (2002).

107. King, *supra* note 20, at 414.

Ratna Kapur identified a similar process involving women; she has shown how women in developing countries are portrayed as victims of their culture, thereby reinforcing stereotypical representations and subordinating those cultures to the presumably enlightened or more civilized culture of the West. Kapur explains how this process not only reinforces the notion that women in developing countries are perpetually marginalized and underprivileged, but encourages interventions into their lives that are "reminiscent of imperial interventions in the lives of the native subjects and which represent the 'Eastern' woman as a victim of a 'backward' and 'uncivilized' culture." Kapur's work provides a useful framework for understanding how conceptualizing children as victims of poverty invites paternalistic interventions under the banner of aid, when in reality, such interventions may cause more harm than good by disrupting local social networks of self-aid.[108]

Along these lines, Smolin questions the moral underpinning of child rescue narratives, noting that the cost of one intercountry adoption could support an entire family in an impoverished country, instead of separating a child from his or her family.[109] Moreover, Saunders explains that while hu-

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108. Ratna Kapur writes:

Women in the Third World are portrayed as victims of their culture, which reinforces stereotyped and racist representations of that culture and privileges the culture of the West. In the end, the focus on the victim subject reinforces the depiction of women in the Third World as perpetually marginalized and underprivileged, and has serious implications for the strategies subsequently adopted to remedy the harms that women experience. It encourages some feminists in the international arena to propose strategies which are reminiscent of imperial interventions in the lives of the native subject and which represent the "Eastern" woman as a victim of a "backward" and "uncivilized" culture.

Finally, the victim subject and the focus on violence invite remedies and responses from states that have little to do with promoting women's rights. Thus, a related concern is that the victim subject position has invited protectionist, and even conservative, responses from states. The construction of women exclusively through the lens of violence has triggered a spate of domestic and international reforms focused on the criminal law, which are used to justify state restrictions on women's rights – for the protection of women. The anti-trafficking campaign, with its focus on violence and victimization, is but one example.

Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 Harv. Hum. Rts. J. 1, 6 (2002).

109. Smolin notes that:

Americans who are overwhelmed by the poverty and apparent degradation experienced by masses of people in India somehow seem to feel it a noble response to spend between $10,000 and $20,000 adopting an individual child, while leaving behind, in the orphanages, on the streets, and in the villages, tens of millions of similarly situated children. The arbitrariness of selecting an individual child for such rescue, while doing little or nothing for those left behind, does not seem to bother most. The odd effect might be compared to responding to a massive famine by selecting one starving individual for a donated diet of caviar and champagne. Obviously, the cost-effective, rational response to a famine is to erect a feeding station for the masses with low-cost, basic nutrition, not helicopter a few individuals out of the country so they can dine in ethnic restaurants in America.

David M. Smolin, *The Two Faces of Intercountry Adoption: The Significance of the Indian Adoption Scandals*, 35 Seton Hall L. Rev. 403, 484–85 (2005); *see also* Briggs & Marre, *supra* note 97, at 1 (stating that the contemporary form of intercountry adoption "has been marked by the geographies of unequal power, as children move from poorer countries and families to wealthier ones").

manitarian narratives are often used to explain demand for ICA, self-serving and personalized motivations are driving a profitable market.[110] For the most part, humanitarian or rescue narratives serve as a cover for the intense demand for adoptable children from developing nations to counter Western infertility. Western parents seeking to adopt can ultimately overcome obstacles to acquiring a child with their wealth, and the combination of their demand and resources makes for an inevitable capitalist dynamic.[111] As Nicole Bartner Graff states:

> Any area with such large amounts of capital flowing into it, when guided by a free market economy, such as the one in place in the U.S., will be driven by the demands and expectations of that market. International adoption has, in effect, become a market driven avenue to child acquisition.[112]

These market demands, justified in part by the rescue narrative, continue not only to drive lawful ICA but also, as in the Silsby case, to temper the response to potential trafficking cases.

C. The Link Between ICA and Child Trafficking

UNICEF defines "child trafficking" as "the act of recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation regardless of the use of illicit means, either within or outside a country."[113] "Illicit means" include "coercion, abduction, fraud, deception, the abuse of power or of a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person."[114] And "exploitation" includes illicit adoption.[115] Thus, the Silsby case, apparently involving illicit means to facilitate ICA—namely fraud, deception, and the abuse of the families' position of vulnerability after the earthquake—would fit the definition of child trafficking.

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110. Saunders, *supra* note 11, at 8.

111. *See supra* note 93 and accompanying text (referring to the costs of adoption).

112. Graff, *supra* note 11, at 407.

113. UNICEF, GUIDELINES ON THE PROTECTION OF CHILD VICTIMS OF TRAFFICKING 9 (2006), http://www.unicef.org/ceecis/0610-Unicef_Victims_Guidelines_en.pdf (citing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, art. 3., Dec. 15, 2000, T.I.A.S. No. 13127 and Council of Europe Convention on Action against Trafficking in Human Beings, art. 4, Feb. 2, 2008, C.E.T.S. No. 197).

114. *Id.* (citing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supra* note 113, at art. 3).

115. *Id.* (citing Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, *supra* note 113, at art. 3; Convention on the Rights of the Child, art. 34. Nov. 20, 1989, 1577 U.N.T.S. 3.; Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, art. 3, Nov. 19, 2000, 2133 U.N.T.S. 161; and Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 1, May 29, 1993, 32 I.L.M. 1134).

But is the logical conclusion that ICA is generally linked to child trafficking? After all, the vast majority of parents who adopt internationally do not have nefarious intentions, and the vast majority of ICA does not involve abduction, fraud, or deception. But what of the abuse of power and vulnerability? Even in cases where good intentions drive ICA, the transaction overwhelmingly occurs between families that are at opposite ends of the power spectrum—the birth families are undeniably vulnerable, and the adoptive families are undeniably powerful.

Because of this power imbalance, the needs of the adoptive families are predisposed to drive ICA. And, because of a conceptual and theoretical displacement of the lives of poor people and concomitant failure to see children in the context of their society, family, and culture, the needs and worldview of Western families drive ICA. As early as 1978, in "The Economics of the Baby Shortage," Richard Posner and Dr. Elisabeth Landes[116] discuss "the pros and cons of using the market to equilibrate the demand for and supply of babies for adoption."[117] Posner argues for partial deregulation of the baby market so that the supply of babies will meet demand. He also states that, "some unknown fraction of adoptions is of babies bought in the black market, and the part of the demand for a good that is satisfied in a black market reflects the shortage in the lawful market."[118]

Although Posner was writing decades before the surge in ICA, his analysis can be used to show how supply and demand drive ICA today and open the door to illicit trafficking. As the demand for children has increased, child traffickers who operate in the black or grey adoption markets have infiltrated some sending countries.[119] In particular, child trafficking has plagued countries that were unprepared to handle a sharp rise in the demand for children and unable to effectively regulate ICA.[120]

The reality is that even countries that have handled ICA well thus far are susceptible to child trafficking. China, for example, is known for its tightly controlled adoption market.[121] Even so, recent accounts of child trafficking in China's adoption system suggest that high demand has led to the exhaustion of "babies and toddlers who are legally available for adoption, [thereby] causing the temptation to illicitly launder and traffic children for purposes of [ICA]."[122]

Western demand for children may even drive the development of child trafficking in the adoption markets of countries already plagued by child

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

117. Posner, *supra* note 82, at 59, 59–60.

118. *Id.* at 69.

119. *See* Smolin, *supra* note 12, at 127–45.

120. *See id.* at 127–31, 135–45 (suggesting that poor sending countries begin to face child laundering issues as their intercountry adoption markets grow and citing as an example the child trafficking in Cambodia's adoption market).

121. *Id.* at 131.

122. *Id.* at 128.

trafficking for other purposes.[123] The prospect of Western money invites corrupt actors who "develop systems that can deliver" children "as quickly and as young as possible" to meet the desires of Western adoptive parents.[124] As Smolin has found, "[s]ocieties in which children can be bought and sold for sex and labor for a few hundred dollars or less, with police and public officials bought off, easily transition into the business of supplying paper-adoptable 'orphans.'"[125]

Ultimately, for child traffickers involved in ICA markets, Western demand means Western money. Child traffickers exploit the demand for children for financial gain. Smolin and others have highlighted the corrupting influence of the large amounts of wealth from Western countries pouring into the adoption markets of sending countries.[126] In short, "[l]arge amounts of money, relative to the economy of the sending country, create a temptation to launder children."[127]

Thus, Smolin suggests that ICA can provide cover for illegal practices because it is a mechanism for "laundering" (legitimizing) children who are made available for adoption through trafficking, kidnapping, buying, and selling, but shuffled through licensed agencies for placement.[128] In a case of history repeating itself, solutions to these problems are mostly brought up as questions of regulatory "design."[129] However, as Smolin points out, the problem is money:

> Money is the primary motivation in most cases of child laundering in the intercountry adoption system. The transfer of Western wealth into sending nations is the primary vulnerability of the intercountry adoption system. Western funds provide an incentive to engage in child laundering which attracts unscrupulous persons the system while tempting even charitable child welfare institutions into unscrupulous conduct.[130]

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123. "Many poor nations also suffer from a high incidence of child trafficking, generally conducted for purposes of sex or labor. Thus, the commodification of children may already be endemic in some of these societies, making it easier for the adoption system to be utilized for such purposes." *Id.* at 130 (footnote omitted).

124. *See id.* at 134–35.

125. *Id.* at 135.

126. *See id.* at 175.

127. *Id.* at 128.

128. Smolin mentions several scenarios of illegality in the acquisition of children that are later legitimized by intercountry adoption, including (a) intermediaries buying children from poor families for amounts ranging from $2,000 to $20,000, (b) citizens directly buying children in poor countries, (c) luring parents into delivering their children under false pretenses to orphanages, hostels or schools (presumptively for their shelter) and processing the children as orphans available for adoption, (d) funneling lost children into trafficking rings instead of reunifying them with their families, and (e) diverse forms of kidnapping where a child is forcibly taken away from their family. *Id.* at 117–24.

129. As discussed in more detail in Part IV below, in the early 20th century, Western liberal governments adopted a new approach to governance, based on rationalization and research, to address social problems. "Design" or "purposeful social planning and management" became the ethos of Progressive and New Deal reformers and professionals.

130. Smolin, *supra* note 12, at 175.

Some have suggested eliminating and diminishing money transfers in all ICA transactions to reduce the profit-seeking motives of intermediaries, reforming international and domestic legislation towards accountability and transparency of parties involved in ICA, and criminalizing trafficking.[131] However, as most law and economics experts would agree, the creation of regulatory obstacles to transactions in a profitable market simply heightens the positive incentives for black markets.[132] Furthermore, the only means to counter black markets is to lower the profit or increase the cost of illegality through enforcement, which in a world of porous borders and laws has proven impossible with respect to nearly every illegal trade.[133]

The instability of countries that suddenly become supply countries for ICA further invites the possibility of deplorable practices involving the buying, selling, "baby farming," and abuse of children. Countries such as Romania, Cambodia, and Guatemala that were socially, politically, economically, and legally unprepared to receive the onslaught of adults seeking children, have had to cease ICA altogether for long periods at a time due to corruption and the trafficking, selling, and abuse of children.[134] These odious practices are repeated on a global scale as a consequence of a global market in children.[135]

D. The International Community's Response to ICA

The international community has responded to ICA by seeking to protect the internationally recognized human rights of children and the birth family's right to unity, while facilitating the adoption of children for whom international adoption is the best solution. The international community as a whole, of course, is not tethered to the theoretical and conceptual construct of *MonoHumanism*. The first effort to address the surge in ICA and protect children's rights was the 1989 United Nations Convention on the Rights of the Child ("CRC").[136] The CRC "establishes a set of globally defined children's rights and provides that in all actions concerning chil-

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131. *Id.* at 174–200.

132. *See* Margaret Jane Radin, *What, If Anything, Is Wrong with Baby Selling?*, 26 Pac. L.J. 135, 139 (1995).

133. For a general discussion of booming illegal trade and its consequence to legal trade in the last decades, see Moises Naim, Illicit: How Smugglers, Traffickers and Copycats Are Hijacking the Global Economy (2007).

134. *See* Smolin, *supra* note 12, at 124–35.

135. Maskew comments on the rampant trafficking that has accompanied intercountry adoption from Cambodia. Trafficking rings usually involved baby recruiters, baby buyers (intermediaries such as orphanages or others), and false documentation for the child. Scandal in Cambodia led to a moratorium on adoptions from the country. Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 Cumb. L. Rev. 619, 633–35 (2005). Smolin comments on the Masha Allen case in which a girl was adopted from Russia for the purposes of sexual exploitation. Smolin, *supra* note 15, at 18–27. Smolin also covers trafficking scandals in Cambodia, India, and Guatemala related to the selling, buying, "baby farming," and kidnapping of children. Smolin, *supra* note 12, at 135–70.

136. Convention on the Rights of the Child, art. 21(d), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

dren, the best interests of the child shall be a primary consideration."[137] Although the CRC is one of the most widely adopted conventions, it resulted in controversy because its final language excluded an obligation for countries to take "appropriate measures to facilitate permanent adoption of the child."[138] The language was left out because of the idea that adoption was not the only way to provide children with stable homes and that it could sometimes work in opposition to the best interests of the child.[139] The exclusion of this language is one of the reasons the United States has refused to ratify the CRC.[140]

In partial response to conflict over the terms of the CRC, the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Convention") was produced by the Hague Conference on Private International Law in May 1993.[141] The purpose of the Hague Convention was to establish standards for ICA and a system of enforcement, as well as the means to address the worst ICA practices, such as corruption, kidnapping, sale of children, and falsification of documents.[142] The United States ratified the Hague Convention in 2000 and enacted the Intercountry Adoption Act of 2000 ("IAA")[143] to comply with the Hague Convention's mandate to create a Central Authority to oversee the implementation of the Hague Convention, among other obligations.

UNICEF is guided by the spirit of the CRC. As such, UNICEF believes "every child has the right to know and be cared for by his or her own parents," and that "families should receive support to care for their children."[144] In this sense, UNICEF supports ICA only if it facilitates the "best interests of the child," and thus considers the Hague Convention a positive

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137. Linda J. Olsen, *Live or Let Die: Could Intercountry Adoption Make The Difference?*, 22 PENN. ST. INT'L L. REV. 483, 507–08 (2004).

138. Kate O'Keeffe, *The Intercountry Adoption Act of 2000: The United States' Ratification of the Hague Convention on the Protection of Children, and its Meager Effect on International Adoption*, 40 VAND. J. TRANSNAT'L L. 1611, 1626 (2007).

139. *Id.*

140. *Id.*

141. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1139; *see also* O'Keeffe, *supra* note 138, at 1626.

142. O'Keeffe, *supra* note 138, at 1626–28.

143. Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–54 (2006).

144. UNICEF states:

The Convention on the Rights of the Child, which guides UNICEF's work, clearly states that every child has the right to know and be cared for by his or her own parents, whenever possible. Recognising this, and the value and importance of families in children's lives, UNICEF believes that families needing support to care for their children should receive it, and that alternative means of caring for a child should only be considered when, despite this assistance, a child's family is unavailable, unable or unwilling to care for him or her.

For children who cannot be raised by their own families, an appropriate alternative family environment should be sought in preference to institutional care which should be used only as a last resort and as a temporary measure. Inter-country adoption is one of a range of care options which may be open to children, and for individual children who cannot be placed in a permanent family setting in their countries of origin, it may indeed be the best solution. In

achievement towards improving conditions of ICA.[145] UNICEF also calls for more stringent protocols to be applied in the case of disasters and war to protect children without parental care, who may be temporarily separated from their parents or other family caregivers.[146]

International organizations including UNICEF, UNHCR, the International Confederation of the Red Cross, and international NGOs such as the Save the Children Alliance reject ICA in cases of disaster or war, and instead place priority on "family tracing."[147] Creating a national registry of children in disasters is a critical instrument for family tracing and reunification.[148] Ultimately, these efforts to regulate ICA may mitigate some of the harm that can come of ICA markets. But since ICA is tethered to *MonoHumanism* and driven by market forces, and because the interests of Western prospective adoptive parents drive the demand side of the market, ICA will continue to separate children from their birth families, communi-

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each case, the best interests of the individual child must be the guiding principle in making a decision regarding adoption.

UNICEF, *Statement: UNICEF's Position on Inter-country Adoption*, http://www.unicef.org/media/media_41118.html (last visited Mar. 12, 2012). Similarly, Article 7 of the CRC provides that "[t]he child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know and be cared for by his or her parents.*" CRC, *supra* note 136, at art. 7 (emphasis added). Article 18 provides, "[f]or the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall *render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities* and shall ensure the development of institutions, facilities and services for the care of children." *Id.* at art. 18 (emphasis added).

145. UNICEF, *supra* note 144. Interestingly, UNICEF's clear recognition of the importance of maintaining the connection between children and their biological family is also reflected in local Haitian law, which provides a legal obligation to keep all adopted children in connection with their biological family. *See* Patrice Brizard, *Entretien avec Marlene Hofstetter* [*Interview with Marlene Hofstetter*], UNICEF HAITI, http://www.unicef.org/haiti/french/protection_10388.htm (last visited Nov. 2, 2011) (noting that in Haiti "simple adoption," in which a child's ties to her biological parents and family are preserved, is in effect for domestic adoptions and national and international adoptions by Haitians living abroad).

146. *See* UNICEF, *supra* note 144 (calling for a prohibition on the inter-country adoption of and for family-tracing efforts for children separated from their families during times of disaster and war).

147. UNICEF states:

The case of children separated from their parents and communities during war or natural disasters merits special mention. It cannot be assumed that such children have neither living parents nor relatives. Even if both their parents are dead, the chances of finding living relatives, a community and home to return to after the conflict subsides exist. Thus, such children should not be considered for inter-country adoption, and family tracing should be the priority. This position is shared by UNICEF, UNHCR, the International Confederation of the Red Cross, and international NGOs such as the Save the Children Alliance.

Id. Without tracing efforts, children can be permanently separated from their family.

148. In the case of baby Jenny, she was found severely injured under the rubble of a house, and "assumed to be an orphan," even renamed by the paramedics and doctors as Patricia. She was immediately taken out of country to Miami for medical attention. Her parents, Nadine Devilme and Junior Alexis, were informed of her removal because she was placed in a registry system. Although her parents had lost all paperwork to prove their parenthood, with the help of pro bono attorneys in the U.S., they were able to provide DNA to show that they were her parents, and were ultimately reunited. *Haitian Couple Await Baby's Return*, CNN (Mar. 8, 2010), http://www.cnn.com/2010/HEALTH/03/08/haiti.baby.couple.patricia/index.html?hpt=C1 Annie Butterworth Jones, *Attorneys Help Reunite 'Baby Jenny' with Her Haitian Family*, FLA. BAR NEWS, May 15, 2010.

ties, and countries. By contrast, poor communities in places like Haiti have developed their own systems of child placement, which do not sever these ties. The next section specifically focuses on the *timoun* or *restavèk* child placement system in Haiti.

III. *Timoun (Restavèk)*: Haitian Customs of Child Placement

In a country such as Haiti where 80% of the population lives below the international poverty line and 54% lives in abject poverty,[149] periods of conditioned monetary aid do not address the institutionalized poverty and extreme class stratification of the country. Instead, in the day-to-day, most Haitian people manage for themselves without foreign assistance. This section discusses a long-standing custom of child care arrangement used by poor parents in the poorest nation of the Western hemisphere—known as *timoun* or *restavèk*.

Some Haitian parents customarily place their children into boarding arrangements with wealthier extended family or acquaintances in cities, where a child earns his or her keep by providing unpaid domestic work. These children are known in Haitian Creole as "restavèks," meaning children who "stay with" or "reste avec" others.[150] The term "restavèk" is also used colloquially in a pejorative way to denote servile dependence.[151] To avoid humiliating a child who provides domestic services, Haitians use more socially acceptable terms such as "children who live with others" (*ti moun ki rete kay moun*) or "children who render services" (*timoun rann sèvis*), where *timoun* in Creole simply means "little one."[152]

Like ICA, the *timoun* system has also been abused, raising widespread concern about the exploitation of children, including forced labor. But the fact that some actors exploit this custom should not completely overshadow the benefits it provides poor families and poor children, when it works as intended. The point of this section is to recognize that some of the benefits of *timoun*—such as maintaining family relationships—must inform child placement schemes.

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149. CIA Factbook, *supra* note 38, at Haiti Economy section; *see also* Glenn R. Smucker & Gerald F. Murray, USAID/Haiti Mission, The Uses Of Children: A Study of Trafficking In Haitian Children 14 (2004), *available at* http://pdf.usaid.gov/pdf_docs/PNADF061.pdf.

150. For a thorough analysis of *restavèk/timoun* in the context of child trafficking and smuggling, see Smucker & Murray, *supra* note 149.

151. *Id.* at 22.

152. *Id.* Many studies about Haitian children who live with others and render domestic services use the word "restavèk." George Eaton Simpson in his early sociological studies of Haiti likewise used the term "Ti Moune." George Eaton Simpson, *Haiti's Social Structure*, 6 Am. Soc. Rev. 640, 648 n.11 (1941) ("A *Ti-moune* is a peasant child who goes to live with a family in the elite and who performs various kinds of work in return for his meals, clothing, and a place to sleep."); Rocío G. Sumillera, *Postcolonialism and Translation*, 4 New Voices in Translation Stud. 26 (2008).

A. *Understanding* Timoun

Because of the informal nature of the practice, it has been difficult to determine precisely how many children in Haiti are affected by the *timoun* system. A 2010 U.S. Department of State report estimates that approximately 200,000 children in Haiti work in the *restavèk* system.[153] However, many statistics confuse the number of children living outside the unitary family model with *restavèk*.[154] According to anthropologists Smucker and Murray, a more reliable statistic is that one-fifth of children in Haiti are living away from both of their biological parents (over 650,000 children).[155] Perhaps 60% of such children, or maybe only 4%, are *restavèk*, as a recent 2000 article suggests.[156] Researchers know that most *restavèks* are in the age range of 5 to 14 (with a majority in the age range of 12 to 14), girls are twice as likely to be *restavèks*, and there is a higher incidence of this form of child placement in urban settings.[157] Yet, the true overall numbers remain unknown.[158]

Not all host household arrangements qualify as *restavèk*. For example, a parent might place a child in another's house during a crisis or as a temporary means to send a child to school.[159] Or a child might be sent to live with extended family, and though the child might help around the house without payment, the child very much remains a child of the house, not a servant.[160] Orphanages in Haiti are also places were a parent might send a child for a brief time as a means to make ends meet and provide temporary child care.[161] Many orphanages are not officially licensed, and though termed orphanages, function primarily as child boarding or group homes.[162]

The institution of *timoun* is old. In a 1942 article, Simpson claims that "*Ti-moune* . . . has been followed since the founding of the Republic of Haiti."[163] In a 1941 article, Simpson observes two primary classes in Haiti: "the members of the small privileged elite and the immense mass of barely subsisting peasants."[164] Explaining that they were "almost separate socie-

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153. Bureau of Democracy, Human Rights, & Labor, U.S. Dep't of State, 2010 Human Rights Report: Haiti 22, *available at* http://www.state.gov/g/drl/rls/hrrpt/2010/wha/154509.htm.

154. Smucker & Murray, *supra* note 149, at 16–17.

155. *Id.* at 17.

156. *Id.*

157. *Id.* For a discussion of the more precarious condition of girl *restavèks* and their higher vulnerability to sexual violence, *see* Benedetta Faedi, *The Double Weakness of Girls: Discrimination and Sexual Violence in Haiti*, 44 Stan. J. Int'l L. 147, 169–70 (2008).

158. Smucker & Murray, *supra* note 149, at 17–18.

159. *Id.* at 22.

160. *Id.* at 23.

161. *Id.* at 33.

162. *See* David Gauthier-Villars et al., *Earthquake Exposes Haiti's Faulty Adoption System*, Wall St. J., (Feb. 27, 2010), http://online.wsj.com/article/SB10001424052748704625004575089521195349384.html.

163. George Eaton Simpson, *Sexual and Familial Institutions in Northern Haiti*, 44 Am. Anthropologist 655, 666 (1942).

164. Simpson, *supra* note 152, at 640.

ties,"[165] Simpson points out ways in which the two classes integrated through "[p]atterns of dominance and deference inherited from the colonial period."[166]

One such pattern was the institution of *timoun*, which supported the relatively infrequent vertical mobility and integration of a child from the masses into the elite class.[167] In his 1942 article, Simpson explains that the custom of sending peasant children to live several years with well-landed estates was a means for "a peasant to have an influential [military or otherwise prominent] protector," or a means by which a poorer family gained favor and connection to a more influential family.[168] A child might be sent to live in another estate as a "token of friendship," and as such, *timoun* was also an established adoption practice.[169]

In a later 1952 article on affiliations through work in a rural region of Haiti, Metraux likewise notes that the transfer of people from poor households to wealthier households was common.[170] Both Simpson and Metraux see *timoun* as a form of familial and estate affiliation used to establish networks of support among landed or military estates, within an agriculture-based economy with extreme class stratification.

In a similar fashion, a 2004 article by Smucker and Murray confirms that "[r]elationships in Haiti often have a transactional character. Negotiations over the giving and taking of children are no exception. Decision making in child placement is based on a calculus of costs, benefits, and household needs."[171] The relationship between the sending and receiving family remains a fundamental part of the transaction:

> [P]lacement of a restavèk child has a long-term connotation whereby the receiving household assumes primary responsibility for 'taking care of the child' or rearing the child in return for the child's domestic services. The traditional arrangement for such restavèk children also assumes that the caretaker household will

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165. *Id.* at 645.

166. *Id.* at 647.

167. *Id.* at 648.

168. Simpson, *supra* note 163, at 667; *see also* Chantal Collard, *Triste terrain de jeu: À propos de l'adoption internationale* [*A Sad Playground: On International Adoptions*], 1 GRADHIVA 209, ¶ 14 (2005), *available at* http://gradhiva.revues.org/367#tocto1n1 (noting that historically the relationships formed through *timoun* have been key to the survival of poor families).

169. "Professor Herskovits bases his conclusion upon extensive field research in West Africa, Dutch Guiana, Haiti, and the United States, and is no doubt correct in maintaining that the tradition of adoption is an important part of the *Ti-moune* system." Simpson, *supra* note 163, at 666–67.

170. Rhoda Metraux, *Affiliations Through Work in Marbial, Haiti*, 25 PRIMITIVE MAN 1, 6 (1952).
  In well-to-do families [. . .] there is more work than the family, however large, can manage or is willing to undertake. In these households one finds collected younger and poorer kin, servants, assistants and hangers-on who contribute work for their keep; some work seasonally, some all year round. It is the heads of such households who are the notables of the neighborhood and who are the employers of larger groups of workers outside the family.
Id.

171. SMUCKER & MURRAY, *supra* note 149, at 26.

> send restavèk children to school and cover the costs for doing so.[172]

Employers of *restavèk* children generally wish to show sending parents that, true to the expectations, their children are being treated well and receive care and education in exchange for their labor.[173] From the point of view of Haitian parents, sending children to live with others is a means of instilling values, such as responsiveness to family needs, generosity, a good work ethic, and a fierce pride in schooled education.[174]

The practice of *timoun* also transfers children from poor rural families to poor urban families, to assist in daily survival activities such as carrying water to the home.[175] From this point of view, the practice of *timoun* is a means by which the poor support the poor in an extremely stratified society. The custom of *timoun* is a creative adaptation to poverty, which allows poor parents to provide alternative care for their children, including education.

B.   Benefits of Timoun

Despite its vulnerability to exploitation, the practice of *timoun* can be mutually beneficial to Haitian parents, children, and host families. For example, parents benefit by "loan[ing] children to gain sociopolitical and commercial contacts in village and urban areas and to attain educational opportunities for their children."[176] Generally, *timoun* placements are a solution to difficult circumstances faced by the child's family.[177] It is a response to parents' inability to support a child, whereby the host family provides

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172. *Id.* at 22.

173. *Id.* at 26–27.

174. *See id.* at 13 (noting the importance of these values). One of the primary reasons to send children to cities is the lack of adequate schools in rural areas. *Id.* at 13–14, 26, 31.

175. The practice is mostly rejected as outdated and inhumane by the country's elite. *Id.* at 29–30. The need for household labor among the poor is hardly frivolous. Less than 30 percent of households in the Port-au-Prince metropolitan area have running water. In the city's teeming slums, water is sold by the bucket, and the unit cost of water is far higher in poor neighborhoods than more affluent areas. Throughout Haiti the traditional carriers of water are women and children, especially children. In Haiti's urban slums, water from public fountains or broken pipes is supplied by a veritable army of young children, including large numbers of timoun servant children.
Id. at 29.

176. Timothy T. Schwartz, *Subsistence Songs: Haitian* Téat *Performances, Gendered Capital, and Livelihood Strategies in Jean Makout, Haiti*, 81 NEW W. INDIAN GUIDE 6, 25 (2007); *see also* Collard, *supra* note 168, ¶ 14 (noting the formation of alliances between the wealthier families that sponsor *restavèk* children and the poor families who provide those children).

177. *See* TONE SOMMERFELT ET AL., FAFO INST. FOR APPLIED INT'L STUDIES, CHILD DOMESTIC LABOUR IN HAITI: CHARACTERISTICS, CONTEXTS AND ORGANISATION OF CHILDREN'S RESIDENCE, RELOCATION AND WORK 64, 75, 88 (Tone Sommerfelt ed., 2002), *available at* http://www.fafo.no/ais/other/haiti/childlabour/EEDH_Report_draft_english.pdf.

care when the child's family cannot.[178] Consequently, parents no longer face the burden of providing for the expenses of that child's care.[179]

Timoun can also benefit children by allowing them to live in a more stable environment. The host family provides for the child's basic needs, and the boarding arrangement tends to offer an improved living environment and better material conditions.[180] The child receives "better care, better clothes, and better schooling."[181] *Timoun* also fosters opportunities for upward social mobility for the child and her parents.[182] A principal advantage of the practice is that it addresses Haitian parents' strong desire for their children to obtain a formal education, since there are better schools in towns and cities.[183] Parents have an expectation that the child will be sent to school under the boarding arrangement.[184] Because parents believe that their child will encounter better life opportunities in cities and towns, the expectation is that the child's placement with the host family will allow the child to secure some advantage for the child or her parents.[185] Similarly, the expectation is that the child's school attendance will enable her to develop contacts that will lead to a good paying job, so the child will be able to assist her parents.[186]

On a more fundamental level, in some circumstances, *timoun* facilitates Haitian children's development by equipping them with life skills and aids their maturation by building character. It has been found that both parents and children find that *timoun* placements make children more disciplined and give them a sense of competence.[187] School attendance leads to the child's literacy, and having responsibilities cultivates in the child "being well-mannered" and developing "new habits."[188] Similarly, parents also appreciate the informal training and guidance that the child obtains from working in another household.[189] Perhaps most importantly, the child/parent relationship is not severed.[190]

Claudia Fonseca describes similar local community-based practices of "child circulation and adoçao à brasileira [adoption Brazilian-style]" in

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178. *See id.* at 58, 65.
179. *See id.* at 69.
180. *See id.* at 44, 58–62.
181. Timothy T. Schwartz, Fewer Men, More Babies: Sex, Family, and Fertility in Haiti 165 (2009).
182. *See id.*; Sommerfelt et al., *supra* note 177, at 88.
183. *See* Sommerfelt et al., *supra* note 177, at 71–72.
184. *Id.* at 65; Schwartz, *supra* note 181, at 165.
185. Sommerfelt et al., *supra* note 177, at 68, 71–73, 75–76.
186. *Id.* at 63, 75–76.
187. *See id.* at 60.
188. *See id.* at 60, 62.
189. Id. at 72.
190. *See id.* at 46–47 (providing an account of a former Haitian child domestic who has maintained ties to her mother and other relatives); *id.* at 70–71 (relating the personal account of a Haitian mother who placed her daughters into a *timoun* arrangement and visits them occasionally taking food provisions).

poor *favelas* in Brazil.[191] Fonseca argues that these local customs are functional for both temporary and permanent child placement, based on community support and open relationships. But Cardarello cautions that today, these forms of child placement face pressure by legal authorities to place Brazilian children for international adoption as a preference over local child placement customs.[192] Nevertheless, Fonseca believes that poor parents from the *favelas* will continue to find creative ways to evade interventionist government adoption policies, which increasingly reflect international and foreign standards of child rights, and which *favela* mothers are legally disempowered to contest in the grand scheme of inequalities between the South/Third World countries and the North/Western countries.[193]

Like "adoption Brazilian style," the practices of *timoun* or *restavèk* do not fit the idealized model for Western child care or the idealized Western family, whereby parents raise their children in a self-sufficient nuclear family. These caregiving practices do not correspond with our unacknowledged *MonoHumanistic* approach to the world. As I have said elsewhere, this Western definition of family "fails to reflect the cultural diversity and realities of many children" and negates other prevalent family configurations which make up functional families, such as single-parent households, grandparent-grandchild households, same-sex couples, and extended family arrangements, even within the United States.[194]

C.   Timoun*'s Vulnerability to Exploitation*

Despite the benefit and opportunity a child may derive from an arrangement of *timoun*, the practice has also long been questioned, due to abuses and denial of promised opportunities that children living in host households may encounter.[195] The debate has changed very little over time. Specifically, *timoun* is highly criticized by many humanitarian aid and religious organizations as a form of child slavery.[196]

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191. Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 36 Law & Soc'y Rev. 397, 404–12 (2002); *see also* Andréa Cardarello, *The Movement of the Mothers of the Courthouse Square: "Legal Child Trafficking," Adoption and Poverty in Brazil*, 14 J. Latin Am. & Caribb. Anthrop. 140, 146 (2009) (describing child circulation customs among poor Brazilian communities).

192. Cardarello, *supra* note 191, at 146–51.

193. Fonseca*, supra* note 191, at 423–27.

194. Shani M. King, *U.S. Immigration Law and the Traditional Nuclear Conception of Family: Toward a Functional Definition of Family That Protects Children's Fundamental Human Rights*, 41 Colum. Hum. Rts. L. Rev. 509, 515 (2010). For a broader discussion, see *id.* at 515–25.

195. Simpson, *supra* note 163, at 667. The author concludes that:

> The value or harm in the institution of the *Ti-moune* would seem to depend upon the character of the adopting families. Some of these persons treat the children who come to live with them in an exemplary manner, others get the maximum profit from their *Ti-mounes* and handle them as if they were beasts of burden.

Id.

196. References to *restavèk* are merged into a general discussion of the worst forms of child labor, which also includes sex exploitation and indentured work. U.S. Dep't of Labor, 2008 Findings on the Worst Forms of Child Labor – Haiti (2009), *available at* http://www.unhcr.org/refworld/docid/

UNICEF is concerned about situations in which *timoun* becomes child labor exploitation, and the ways in which it may become child trafficking.[197] The organization also notes that there are worse forms of labor to which children can be trafficked, such as physically hazardous work, sexual work, and illicit (drug courier) labor that may affect the development of a child, including her physical and mental integrity.[198] The practical concern around *timoun* is the lack of means to supervise whether a child's rights are being respected. UNICEF reports that each year approximately 2,000 children are trafficked to the Dominican Republic from Haiti, often with the apparent support of their parents.[199] The Silsby case is an example of how this can happen.

4aba3edac.html. For another interpretation of *restavèk* as an exploitative form of child labor, see *Campaign Against Child Slavery in Haiti*, Beyond Borders, http://www.beyondborders.net/WhatWeDo/EndingChildSlavery.aspx (last visited Oct. 29, 2011); *see also* Marian Wright Edelman, *Haiti's Restavèk Children: The Child Servitude Crisis*, Change.org (Mar. 29, 2011), http://humantrafficking.change.org/blog/view/haitis_restavk_children_the_child_servitude_crisis; Carmen Russell & Dane Liu, *20/20: Restavèks: Child Slaves of Haiti* (ABC television broadcast Jan. 15, 2010), *available at* http://www.pulitzercenter.org/video/restaveks-child-slaves-haiti; Jean Cadet Restavèk Found., Mission Statement, http://www.restavèkfreedom.org/index.cfm?fuseaction=cms.page&id=1026 (last visited Oct. 29, 2011) (characterizing the *restavèk* system as "child slavery" in the organization's mission statement).

197. The intention of exploitation need not be of the parent, but of the smuggler or trafficker. UNICEF acknowledges that children in the developing world work at home or in family businesses, or outside the home as apprentices, which may imply a commercial benefit or exposure to hazards. The greatest concern is over situations in which children lack a protective social or legal network as workers in exploitative conditions. Mike Dottridge & Liz Stuart, UNICEF, End Child Exploitation: Child Labour Today 26–27 (2005). To that effect, UNICEF defines child trafficking in the following way:

> Child trafficking happens when a child is moved from one place to another—within a country or across a border—into a situation in which they are exploited, and this exploitation can take many different forms.
>
> The movement part of the trafficking 'event' accompanied by the action of someone who intends to exploit the child for profit is essential to the difference between child trafficking and migration into child labour. The movement away from home, local community, support and safety mechanisms into an environment where the child is isolated and manipulated by others greatly increases the child's vulnerability and makes child trafficking a particularly despicable crime and a violation of their rights.
>
> Where legal migration channels are closed, difficult to take or not known to people who want to migrate for work, then illegal migration, people smuggling and human trafficking are more likely to happen. Keeping migration channels open and helping people to use them in a regular, safe and easy way is an important step in preventing illegal migration, smuggling and trafficking.
>
> Exploitation is the other essential part of child trafficking. Trafficking is always made up of both movement and (the intention of) exploitation. If there is only movement and no (intent of) exploitation, then this is not trafficking. If there is exploitation but no movement, then this is not trafficking either.

June Kane & Hans Van de Glind, UNICEF, Training Manual to Fight Trafficking in Children for Labour, Sexual and Other Forms of Exploitation: Understanding Child Trafficking 16–17 (2010).

198. Dottridge & Stuart, *supra* note 197, at 26–27.

199. *See* UNICEF, *At a Glance: Haiti - Background*, http://www.unicef.org/infobycountry/haiti_2014.html (last visited Oct. 29, 2011).

In studying *timoun*, Smucker and Murray find no evidence of "literal" child slaves in Haiti, but do find cases in which *restavèk* children are abused as unpaid domestic workers and other cases in which parents might be deceived and their children diverted into trafficking circles for exploitative work or sexual purposes.[200] The authors insist on the need to use operationally precise language to differentiate a culturally sanctioned practice of foster care or even smuggling where there might not be any abuse involved, from child abuse and child trafficking.[201]

Timoun and other forms of placement outside the home are generally instigated by necessity.[202] However, UNICEF indicates that poverty alone does not often trigger the movement of a child towards a possible exploitative work condition. The organization identifies several additional points of risk and vulnerability that decrease the capacity of parents to take care of their children, and which result in sending children away to work or children themselves moving away from home to find work. The organization refers to these factors as "poverty plus" and notes that they may include "individual, family, community or institutional-level risk" factors.[203] Factors may include domestic violence, illness of parents (e.g., AIDS), war, community violence (e.g., gangs), lack of institutional support for education or health services, unemployment, and the breakdown of systems of livelihood due to disasters (e.g., ecological disaster that ruins fishing or farming communities).[204] Such factors aggravate the conditions of poverty that may trigger a child's movement away from home towards possible exploitation.

UNICEF's examples for why a child may become a victim of trafficking do not apply to all *timoun* or other cases of placement outside the home, either because there is no work exploitation or there is no cross border travel. But UNICEF's analysis is very useful when contemplating why *timoun* in Haiti has survived into the 21st century as an option for child

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200. SMUCKER & MURRAY, *supra* note 149, at 5, 24. Specifically, Smucker and Murray found [N]o literal evidence of child enslavement, defined in terms of buying and selling children as private property; however, there is ample evidence of systematic child abuse in the recruitment and use of restavèk children as domestic servants. Some reports angrily label these arrangements as slavery. Those who describe the restavèk child as a slave child are doubtless demonstrating human concern for the welfare of the child; however, such children are not literally slaves. The Haitian restavèk child can legally run away or be taken back by his or her parents without payment of ransom or manumission. The term slavery is perhaps useful as an inflammatory metaphor for purposes of advocacy, but it fails to capture the Haitian meaning of the word even when used as an epithet. When Haitians say the restavèk child is like a ti esklav, they are using the word slave in a metaphorical sense, similar to calling a demanding foreman a "slave driver" in English. The restavèk child is an abused child but not a slave child. The concept of "unpaid domestic servant" is less dramatic but captures the reality much more accurately.
Id. at 24.
201. *Id.* at 5.
202. *Id.* at 28.
203. KANE & VAN DE GLIND, *supra* note 197, at 23.
204. *Id.* at 23–25 (listing various "poverty plus" factors).

placement, when the risks of exploitation are known. Specific to Haiti, we must ask how *timoun* continues to fill an indispensable social need for child placement services in the face of cumulative histories of violent conflict, lack of institutional support for education, health and income, foreign intervention, and a growing youthful population in Haiti.[205] Ultimately, the problem is not the best efforts made by impoverished Haitian parents or their children to find work-placement arrangements, but the complex conditions of "poverty plus" that institutionalize *timoun* and other forms of child placement outside the home, as a means to secure basic housing, food and education for children.

Ultimately, *timoun* is a form of foster care, but never a permanent separation of children from their parents. ICA, on the other hand, while also making children vulnerable to exploitation, severs the relationship between children and their families and communities and disrupts the support networks that poor families use to help themselves. Below, I tell a similar story of disruption regarding foster care in the United States.

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205. A demographic article about Haiti states the following:

A country earlier renowned for the beauty of its landscape, Haiti has faced fierce exploitation of natural resources by successive foreign occupations and predatory dictatorships. Ongoing political instability has contributed to a sharp decline of agricultural productivity and widespread poverty. In addition, the impact of climate change is particularly salient in Haiti, exacerbated by deforestation and severe soil erosion throughout the country. The destruction caused by the 2010 earthquake adds to that of major storms and hurricanes in 2004 and 2008. These events had already caused huge infrastructural damages in other parts of Haiti and deeply affected the country's economy.

BEATRICE DAUMERIE & KAREN HARDEE, POPULATION ACTION INT'L, THE EFFECTS OF A VERY YOUNG AGE STRUCTURE ON HAITI: COUNTRY CASE STUDY 2 (2010), *available at* http://www.populationaction. org/Publications/Report/The_Shape_of_Things_to_Come_Haiti/SOTC_Haiti.pdf.

In 2004, youth gangs played a major role in the violent revolt that forced Jean-Bertrand Aristide, the first democratically elected president of Haiti since the dictatorship, into exile. After that, despite the presence of UN peacekeeping troops and an improved security situation, state institutions remained fragile and armed violence was still widespread in some parts of the capital. Some have described it as a "war" of confrontations between rival gangs as well as between gangs and the UN stabilization forces, with civilians as innocent targets. In Port-au-Prince, particularly in the slums, more than 30 different gangs were trying to control different parts of the city, using kidnapping and drug trafficking as sources of revenue. . . . After 30 years of dictatorship, Haiti experienced three coups d'état and fifteen changes of government in the eight years between 1986 and 1994. Since then, Haiti has witnessed a succession of political crises, and as recently as spring 2008, hunger riots caused by the rise in global food prices led to the collapse of the government.

Id. at 6–7.

The median age of the population is 20 years, and almost 70 percent of Haiti's people are under age 30. [. . .] In a 30-year historical analysis, the report found that countries with very young and youthful age structures—those in which 60 percent or more of the population is younger than age 30—are the most likely to face outbreaks of civil conflict and autocratic governance. While the relationship between age structure and instability is not one of simple cause and effect, demographics can play an important role in mitigating or exacerbating a country's prospects for development and the well-being of its people.

Id. at 2.

IV.   FOSTER CARE AS A DISRUPTION OF TRADITIONAL FORMS OF CHILD
PLACEMENT IN THE UNITED STATES

The history of foster care in the United States, like the history of ICA, is the history of an interventionist policy that overwhelmingly affects poor families. Through the foster care system, the State is placed in a position to "know best" how poor children should be raised away from their families. Like ICA, foster care has institutionalized early child separation from parents and families for generations. The history of foster care is rooted in a belief that people cannot be left to their own devices to design their own families. At one point, the foster care system became the means for transferring poor children to rich families, until the civil rights movement ended the practice. But the foster care system still devalues family integrity and too often unnecessarily separates children from their families. As is the case with ICA, the U.S. approach is *MonoHumanistic*: one that excludes and displaces the knowledge and discourse of poor families and fails to see children in the context of their family, community, and culture. The critical question here is how to balance the protection of children with family integrity. Part of the solution seems to lie in acknowledging agency exercised by poor families who can find alternative solutions in their extended family and within their own cultural domains that are healthier for child development. This would take self-reflection, introspection, and a dismantling of *MonoHumanism*.

A.   *Traditional Forms of Child Placement in the United States*

Private forms of child placement—like *timoun*—were pervasive in the United States in the late nineteenth and early twentieth centuries.[206] Herman notes that "[a]t the dawn of the twentieth century, many methods—formal and informal, commercial and sentimental, deliberate and impulsive—existed to acquire children."[207] She mentions that "foundlings (abandoned infants), illegitimate children (born to unmarried parents), and orphans (most of whom were 'half' orphans with one living parent rather than 'true' orphans with none) continued to be placed in orphanages because of poverty."[208] By 1910, there were over 1,000 orphanages in the

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206. Sokoloff states that the institutions of placing out were brought by the Puritans to the new continent, introducing concepts such as the almshouse and indenture as means of raising children. "These means of caring for dependent children, however, became inadequate to meet the need by the beginning of the nineteenth century. The industrial revolution and massive immigration produced numbers of dependent children which overwhelmed the existing system." Sokoloff, *supra* note 79, at 18.

207. ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 2 (2008). This section relies heavily on Herman's research. However, for a briefer work covering the same history of adoption, see Sokoloff, *supra* note 79. For a more specific discussion of adoption acts in the early nineteenth century, see Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 AM. J. LEGAL HIST. 235 (1999).

208. HERMAN, *supra* note 207, at 23.

United States, some of them housing over 1,000 children.[209] In addition to orphanages, there were *timoun*-like practices of "placing out" children. Herman describes these practices in the following way:

> "Placing out" was the term that designated all noninstitutional arrangements to care for dependent children. . . . Agencies paid families to care for children in boarding homes, whereas in working homes, children earned their keep. Traditional indentures were still used in many states well into the twentieth century. These contracts secured children's services for a period of years in exchange for food, shelter, and basic education. . . . Although many indentures amounted to apprenticeships, a study of 827 indentures in Wisconsin between 1913 and 1917 suggests that indenture was not an unusual means of securing children for adoption.[210]

Most placing out arrangements were instigated by necessity "to survive economic hard times and family catastrophes, such as death, serious illness, or desertion, and to provide their children with practical job skills and entry into the labor market."[211] They were also meant to be temporary, but if they did lead to adoption, relationships with the biological families were not closed. Despite the benefits of these placing out arrangements, as with *timoun*, reports of child abuse and profit seeking schemes led to the condemnation of certain practices, particularly "baby farming" (paid care centers for infants primarily used by poor working mothers) and other boarding arrangements that sometimes provided unsanitary and neglectful care.[212]

Leading up to the 1920s, Western liberal governments adopted a new approach to governance based on rationalization and research ("a literal science of statecraft") to address social problems.[213] "Design," or "purposeful

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209. *Id.* at 22.

210. *Id.* at 23. "36 percent [of indentured children] were eventually adopted, and those children indentured at young ages were far more likely to become legal members of the families in which they were placed. More than half of the adoptees had been indentured before age one." There were also (rare) "free homes" which provided care without charge. *Id.* For further discussion of private contracts resulting in adoption practices, see also Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263 (2002).

211. HERMAN, *supra* note 207, at 24. Herman reports that the "[t]ypical reasons that mothers offered for needing placement included 'got to go work,' 'salary too small to keep house & care for them properly,' and 'have no one to take care of children while I am working,'" *id.* at 25, or "so to bridge over this rough place in . . . life," *id.* at 24.

212. "Baby farming" or the "boarding of infants for money and their transfer and sale for profit" reflected "informal child care networks of single mothers and other laboring women," such as "unwed mothers, prostitutes, domestic servants, and destitute or deserted wives forced to work for wages." "Baby farming" was widely critiqued for being conducive to abusive conditions of child care driven by profit. However, "baby farming" comprised the child care networks available to the poorest of women. *Id.* at 32–39.

213. *Id.* at 9–10.

social planning and management" such as "intelligent child rearing," became the ethos of Progressive and New Deal reformers and professionals.[214]

By the 1930s, applying psychoanalytical research, social work was redefined as casework, and private and public agencies became fully involved in "how Americans raised their children."[215] Caseworkers (within the government or specialized agencies) claimed to minimize differences between the adoptee and adoptive parents to create families that were as "natural" as possible.[216] Regulation, interpretation, standardization, and naturalization were the key concepts behind this design that aimed to prevent, protect, instruct, and help the population against "risk" in creating families.[217] In this cultural shift, adoptive families were seen as "different, fragile and prone to difficulty,"[218] and thus professionals were sought to help citizens make a "normal," "natural," or "ideal" family.[219] Adults seeking to take in a child through such public or private agencies underwent a process of inquiry and education in the stages of application, home study, placement, and supervision.[220]

"Matching" became the technique by which caseworkers placed children into homes based on physical resemblance, religious likeness, racial sameness, and emotional and purported intellectual fitness.[221] However, as professionals sought to make "natural" families, they implicitly (and sometimes explicitly) sent the message that adoption and foster care were not natural, and concluded by emphasizing racist or discriminatory perceptions of who belonged where.[222] In this process, adoption also "departed from earlier methods of child transfer, sharing and exchange,"[223] towards long-term permanent family arrangements that were closed adoptions rather than open.[224]

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214. *Id.* at 9–11.

215. *Id.* at 87. "Designing American kinship was tantamount to managing American communities and culture because 'the child is the bridge—biologically and socially—to the future.'" *Id.* "All American families were involved in the awesome project of social progress and reconstruction, whether they knew it or not." *Id.*

216. *Id.* at 121. "Kinship by design promised that a combination of expanded state power, professional oversight, psychological interpretation, and empirical research would lessen the dangers of adoption and make it more secure and authentic." *Id.*

217. *See id.* at 10–14.

218. *Id.* at 285.

219. *Id.* at 15.

220. *Id.* at 108–09.

221. *See id.* at 121–38.

222. *Id.* at 15, 94–95.

223. *Id.* at 14.

224. *Id.* The difference between open and closed adoptions has been described in the following terms:

> In some jurisdictions, in what is sometimes known as an "open" adoption, the natural mother may select the adoptive parents for her child. In the case of a "closed" adoption, the relinquishing parent surrenders his or her rights to unknown parties. "Open" adoptions have also been described as adoptions in which the court supplements an order of adoption with a provision directing that the adopted child have continuing contacts and visitation with mem-

Design and matching were not without opposition due to "the investigations and delays that were trademarks of kinship by design."[225] Likewise, people seeking alternative family formation through adoption were comfortable in accepting risk and difference, claiming that nurturing rather than sameness was the key to a successful adoption.[226] Furthermore, black markets, grey markets, and other profit-driven schemes for acquiring children that circumvented the standardization process, continued to exist without abate.[227] Ironically, commercial forms of adoption fueled reports of child abuse and trafficking that kept standardized governance of adoption alive.[228]

By the late 1950s, practices that circumvented standardization and critiques of matching as a discriminatory practice pushed government and private agencies to establish more flexible standards for child placement, particularly with regard to age, race, and disability.[229] Leading into the 1970s, there was a shift in adoption that saw "difference" rather than "sameness" as "natural" in adoption.[230] Until then, minority children were rarely placed through the system, and even actively excluded as too difficult to place.[231]

Before the 1960s, black children in need of placement were adopted within their communities through means similar to those described by Fonseca as adoption Brazilian style.[232] By the 1970s, the adoption of transracial,

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bers of his or her biological family; such adoptions have been specifically rejected by some courts, in the absence of legislative authority thereof.

2 AM. JUR. 2d *Adoption* § 2 (2004); *see also* Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L.J. 1077, 1151 ("Only recently have states begun to recognize the validity and enforceability of open-adoption agreements."). Sokoloff mentions that the 1917 Minnesota Act began the sealing of records, at first to protect the adoption procedure from scrutiny, and later, at the insistence of caseworkers to protect the identity of the parties in consideration that many children placed for adoption were illegitimate, which carried a high negative social stigma. Not until after 1950, with the surge of activism against closed records, did open adoptions reemerge. Sokoloff, *supra* note 79, at 21–22, 24.

225. HERMAN, *supra* note 207, at 139.

226. This became a debate known as "nature or nurture." *Id.*

227. *Id.* at 139–143.

228. *Id.* at 139 (stating that the advantages of standardization were highlighted by baby-selling scandals).

229. Standardization never succeeded fully because of (1) too few agencies, (2) regulatory loopholes that allowed parents to shop jurisdictions, (3) alternative market-based practices abounded, based also on a belief in privacy, and (4) the regulating professionals themselves began to doubt the value of standardization. *Id.* at 153; *see generally id.* at 147–53. Commercial operations of adoption thrived in the face of standardization. *Id.* at 222–27. The standard of adoptability of children was expanded across race, age, and disability lines. *Id.* at 196–201. Eligibility standards for parents changed quickly after the 1950s. *Id.* at 202–05.

230. *Id.* at 246–52.

231. *See id.* at 196–204.

232. For example, Herman describes a practice of *de facto* informal adoption where
 African Americans . . . routinely took in the children of friends and relatives because of divorce, separation, desertion, illegitimacy, death, migration, and the fact that childless couples lacked the social standing that came only with children. . . . At midcentury Mildred Arnold of the USBC wrote that "there are many Negro families who have 'adopted' children for all intents and purposes but who have not taken any legal steps to accomplish this."

"special needs" (children with disabilities), older children and intercountry adoptions became widely accepted. These adoptions directly challenged the dominance of the ideology behind "matching."[233] Ironically, this period coincided with the rise of civil rights movements that made transracial adoption controversial, particularly those of black children into white families.[234] Minority populations claimed that minority children should be placed within their same social group to maintain their cultural heritage and integrity, including the skills to survive a racist society. In yet another instance of irony, the transracial controversy within the United States, alongside adult preferences that aimed to circumvent standardization, led to a decline of adoption after 1972 across transracial lines and a spike in ICA (initially of non-black children).[235] Herman concludes that by its own ambitions of standardization "kinship by design" failed, but also revolutionized the boundaries between public and private life by allowing government interference into decisions "previously considered beyond the legitimate reach of state power."[236]

Bringing private behavior into the public light has increased a desire for oversight and protection against child abuse and exploitation. It has also reflected the imposition of a certain conception of family not nuanced enough to reflect the racial, ethnic, and socioeconomic diversity of families both domestically and internationally. More concretely, it has resulted in

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Clearly, African Americans responded to children in need. In large families where membership was fluid, distinctions between natural and adopted kin were not accentuated."
Id. at 231.

233. *Id.* at 204–15, 230–46.

234. Herman gives the following example:

In the case of race, and especially blackness, the era of openness to difference that dawned in the adoption world of the late 1960s coincided with a powerful force moving in the opposite direction: a turn toward nationalism in the civil rights movement and an embrace of "roots" that reaffirmed the naturalness of sameness and continuity of identity. In 1972 the National Association of Black Social Workers (NABSW) issued a strongly worded statement that took "a vehement stand against the placements of black children in white homes for any reason," calling transracial adoption "unnatural," "artificial," "unnecessary," and proof that African Americans continued to be assigned to "chattel status" . . . . It was, according to an NABSW position paper, "a form of genocide" comparable to the slave trade.

Id. at 249; *see also* Patricia K. Jennings, *The Trouble with the Multiethnic Placement Act: An Empirical Look at Transracial Adoption*, 49 Soc. Persp. 559 (2006). Likewise, the Indian Adoption Project (1958-1967), which placed Native American children into white families, simultaneously faced outrage from white racists and accusations as a genocidal policy. Herman, *supra* note 207, at 239–42.

235. Herman cites studies from 1947 that reveal that the "success" rate in adoptions in terms of child adjustment remained unchanged since the 1920s despite the major systemic overhaul. Herman, *supra* note 207, at 190–91.

236. *Id.* at 154.

Measured against historical traditions that sheltered personal decisions from public interference and elevated idiosyncratic preferences over expert evaluations, kinship by design appears as part of a profound intellectual and cultural revolution in private life. By moving childhood and kinship into the public sphere, prying a significant measure of power away from parents, and transferring decisions previously considered beyond the legitimate reach of state power to representatives of government and allied helping professionals, kinship by design altered how children were acquired and families made.

Id.

the displacement of cultural traditions by new, supposedly more scientific schemes, to meet the needs of a certain narrow slice of the U.S. populace. And because this displacement is based on the rule of law, we fail to interrogate our assumptions while promoting a demagogy of equalitarianism and liberalism.[237] We should, however, question whether children who are subjected to this system of design are really better off. In other words, is "kinship by design" better for children than nineteenth-century placing out, adoption Brazilian-style, *timoun*, or the placement practices of African-American communities in the United States prior to their incorporation into placement by design? Are these placement systems simply cultural manifestations, with more or less government intervention, that serve the same purpose with no better results?[238] We should also consider whether the Silsby case is an aberration or the inevitable consequence of our history of displacing and ignoring forms of child rearing with what we have determined to be scientific and legally sanctioned.

The next section shows how international adoption is like U.S. domestic adoption in that both systems impose a unitary and plenary concept of family that fails to reflect and often disregards the cultural and socio-economic reality of families, sometimes resulting in the transfer of children from marginalized populations to more affluent "consumers," while failing to respect the cultures and traditions from which these children come. Both systems reflect an unstated theoretical justification for the disrespect we show for the integrity of poor families as a society. In this context, it is not primarily the West vs. East juxtaposition that is important, but rather, the poor vs. rich juxtaposition. In other words, it is the exclusion and displacement of the knowledge and discourse of poor families and the failure to see children in the context of their birth family, community, and culture—or a slightly broadened version of *MonoHumanism*—that explains our failure to respect the integrity of poor families, not only abroad, but domestically in the context of the U.S. foster care system.

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237. *See, e.g.*, Elizabeth Kolsky, *A Note on the Study of Indian Legal History*, 23 Law & Hist. Rev. 703, 704–05 (2005) (connecting the rule of law's discriminatory and exclusionary operation in colonial India to similar phenomena in contemporary liberal states and discussing the "idea that different groups of people can be legally differentiated and thereby granted greater and lesser legal privileges even by a liberal state founded on the rule of law"); Robert W. Gordon, *Morton Horwitz and His Critics: A Conflict of Narratives*, 37 Tulsa L. Rev. 915, 922 (2002) (countering the perspective that the rule of law is an "unqualified human good" and "a great western institution that limits the rulers as well as the ruled" with the opposing argument that "[t]he formalist view of the rule of law . . . always conceals inequalities of wealth and power under a façade of formal equality, and delegitimates attempts to remedy such inequalities"); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 Fordham L. Rev. 1753, 1762 (2001) (stating that law in the United States "indirectly structured racial identities through the 'rule of law' of the liberal polity where the values of neutrality and objectivity were enshrined more broadly and racial inequality was rationalized and legitimated").

238. Herman notes that "[t]he adoption research enterprise had been transformed since 1924. Outcomes had not." Herman, *supra* note 207, at 189–90.

B.   Disruptive Foster Care Policies in the United States

Foster care in the United States is the system for temporary placement of children. One major difference between the U.S. foster care system and traditional forms of child placement is that foster care in the United States is a highly regulated, professionalized, and bureaucratized form of child placement.[239] Foster care includes "all out-of-home placements for children who," according to the state, "cannot remain with their parents. Children may be placed with nonrelative foster families, with relatives, in a therapeutic or treatment foster care home, or in some form of congregate care, such as an institution or a group home."[240]

According to Jones, maltreatment is the principal reason that children enter U.S. foster care.[241] Maltreatment is defined as a deliberate or intentional act by a caregiver that causes harm to a child.[242] Harm may include

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239. The following description is helpful:

When entering foster care, or the "child welfare system," a child does not enter a single system, but rather multiple systems that intersect and interact to create a safety net for children who cannot remain with their birth parents. State and local child welfare agencies, courts, private service providers, and public agencies that administer other government programs (such as public assistance or welfare, mental health counseling, substance abuse treatment), and Medicaid all play critical roles in providing supports and services to children and families involved with foster care. Indeed, families often find themselves juggling the requirements and paperwork of multiple systems.

Child welfare agencies are central to the system, but their policies and practices vary significantly from state to state. . . . The organization of child welfare agencies also varies significantly across states. . . .

In every state, the courts also play a significant role in child welfare cases, from the initial decision to remove a child to the development of a permanency plan to the decision to return a child home or terminate parental rights and make the child available for adoption. . . . Each party involved in a foster care case—the birth parents, the child, and the government—is represented by a different attorney. . . . [T]he adversarial nature of legal advocacy can at times sharpen conflict between the various parties. Many jurisdictions rely on volunteer court appointed special advocates (CASAs) to ensure that children in foster care have a voice in the legal decision-making process. . . . Currently more than 900 CASA programs operate in 45 states, and more than 250,000 children have been assigned CASAs.

Private agencies, typically through contracts with public agencies, provide a significant proportion of foster care services to children and families. The use of private agencies to provide services such as family-based foster care goes back to the very origins of child welfare in the United States. Some states, such as Kansas, have privatized nearly all of their foster care services, whereas others rely on a mix of public and private service providers. . . .

To assure the best outcomes for children, all of the agencies in the system must work together. Each must rely on the others to provide the necessary information and resources. . . . But currently no overarching mechanism for governing the system or managing resources exists. Instead, most agencies have established either formal or informal cooperative agreements.

Bass et al., *supra* note 13, at 7–8.

240. *Id.* at 6. On the placement of children with kin, see Rob Geen, *The Evolution of Kinship Care Policy and Practice*, 14 FUT. CHILD. 130 (2004).

241. Jones provides a brief discussion of developmental problems associated with child "maltreatment." Jones, *supra* note 14, at 34.

242. Centers for Disease Control and Prevention ("CDC") defines maltreatment as "[a]ny act or series of acts of commission or omission by a parent or other caregiver that results in harm, potential for

abuse (physical, sexual or psychological) or neglect (physical, emotional, medical, or educational neglect, or inadequate supervision or exposure to violent environments).[243] In 2009, neglect (not including medical neglect) represented 78.3 percent of the child maltreatment cases across 50 states, the District of Columbia, and Puerto Rico.[244]

In the United States, conditions of poverty translate into an overrepresentation of children from poor families in the foster care population:

> Although most poor families do not abuse their children, poor children are more likely to enter the foster care system, in part because poverty is associated with a number of life challenges, such as economic instability and high-stress living environments, which increase the likelihood of involvement with the child welfare system. Poor families are also more likely to have contact with individuals who are mandated by law to report child maltreatment, so questionable parenting practices are more likely to be discovered.[245]

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harm, or threat of harm to a child." Ctrs. for Disease Control & Prevention, Child Maltreatment Surveillance: Uniform Definitions for Public Health and Recommended Data Elements, Version 1.0, at 11 (2008) (emphasis omitted). In this definition, *commission* refers to deliberate or intentional words or actions that have the consequence of causing harm to a child. *Id. Omissions* are "[t]he failure to provide for a child's basic physical, emotional, or educational needs or to protect a child from harm or potential harm." *Id. Caregiver* is "a person, or people, who at the time of the maltreatment is in a permanent (primary caregiver) or temporary (substitute caregiver) custodial role. In a custodial role, the person is responsible for care and control of the child and for the child's overall health and welfare." *Id.* at 12 (emphasis omitted).

243. *Harm* is defined as:

[a]ny acute disruption caused by the threatened or actual acts of commission or omission to a child's physical or emotional health (ISPCAN 2003). Disruptions can affect the child's physical, cognitive, or emotional development.

Threat of harm occurs when a parent or caregiver expresses an intention or gives signs or warnings through the use of words, gestures, or weapons to communicate the likelihood of inflicting harm to the child. Threat of harm can be explicit or implicit. Explicit threats would include such acts as pointing a gun at the child or raising a hand as if to strike the child. Implicit threats would include such acts as kicking holes in walls or breaking down doors.

Disruption of physical health includes, but is not exclusive to, physical injuries, avoidable illnesses, and inadequate nutrition.

Id. at 12.

244. 17.8 percent was the median for physical abuse, 9.5 percent was the median for sexual abuse, 7.6 percent was the median for psychological maltreatment, and 2.4 percent was the median for medical neglect; these percentages add up to more than 100 percent "because a child may have suffered more than one type of maltreatment." U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Children's Bureau, Child Maltreatment 2009, at 23 (2010), *available at* http://www. acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf#page=13. Neglect can exist alongside other forms of maltreatment. It is the principal form of maltreatment. Recurrence of child maltreatment is also more likely to involve neglect rather than physical or sexual abuse. Bass et al., *supra* note 13, at 6.

245. Bass et al., *supra* note 13, at 14. In a context of poverty in the United States, parents face a heightened "multitude of complex and interrelated life challenges such as mental illness, unemployment, substance abuse, and domestic violence." *Id.* at 6, 14. On this issue, see also Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. Rev. L. & Soc. Change 33, 56 n.97 (1993).

Furthermore, poverty and poverty-related factors result in "children of color" being overrepresented in the foster care population.[246] In 2003, African-American, American-Indian/Native Alaskan, and Hispanic families composed 55% of the foster care population, even though these minorities represented only 33% of the national population.[247] Data from 2006 shows that minority children continue to be overrepresented in the child welfare system.[248] And research shows that a mother's income also has a significant impact on the speed of reunification with her children; the greater her income (including welfare assistance), the greater the speed of reunification.[249]

Like elsewhere in the world where there is poverty, the moment when a child leaves his or her family for placement through the U.S. foster care system seems to be determined by "poverty plus" factors.[250] In the mid-1980s, the foster care population in the U.S. spiked due to an aggravation in the conditions of poverty:

> The crack epidemic, homelessness, the rapidly growing incarceration rate, and HIV/AIDS proved devastating for poor families and communities. In turn, families contending with multiple problems were unable to appropriately care for their children, and the number of children entering foster care rose. In 1980

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246. Bass et al., *supra* note 13, at 14. For more on the relationship between poverty and racial overrepresentation in the child welfare system, see also Susan Chibnall et al., Children of Color in Child Welfare: Perspectives from the Child Welfare Community 19–24 (2003), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/respon_coc/index.html.

247. In 2003, African-American children were reported as being overrepresented in foster care at nearly three times their numbers in the population, with some states as high as five times the population rate. Bass et al., *supra* note 13, at 14. American-Indian children were represented at nearly double their rate in the general population, and Latino children slightly underrepresented, "but the number of Latino children in foster care has nearly doubled over the last decade." *Id.* In 2006, the disproportionate representation of children from the same minorities continued. U.S. Dep't of Health & Human Servs., Admin. for Children & Families, Children's Bureau, Child Welfare Outcomes: 2003–2006, at ii, 5–8, *available at* www.acf.hhs.gov/programs/cb/pubs/cwo03-06.

248. In 2006, overrepresentation of African-American children was one and one-half times greater than their numbers in the population of 31 states, with this percentage being two and one-half times greater in five states (Iowa, Minnesota, North Dakota, Utah, and Wyoming). U.S. Dep't of Health & Human Servs., *supra* note 247, at 7–8. In seven states (Connecticut, Massachusetts, Minnesota, New Hampshire, North Dakota, South Dakota, and Utah), Hispanic children were overrepresented by one and one-half times their numbers in the child population. *Id.*

> In 16 States, the percentage of American Indian/Alaska Native child victims was at least one and one-half times greater than the percentage of these children in the State's population. . . .
> In 6 of these 16 States, the percentage of American Indian/Alaska Native child victims was more than three times greater than the percentage of these children in the State's population (Idaho, Minnesota, Nebraska, Oregon, South Dakota, and Washington).

Id. at ii, 8. In no states were white children overrepresented. *Id.* at 12.

249. *E.g.*, Kathleen Wells & Shenyang Guo, *Reunification of Foster Children Before and After Welfare Reform*, 78 Soc. Serv. Rev. 74, 90–91 (2004).

250. *Cf. supra* notes 203–204 and accompanying text (discussing how UNICEF articulates the relationship between "poverty plus" factors and child placement).

approximately 300,000 children were in foster care; by 1998 that
number had climbed to an unprecedented 568,000.[251]

Swann and Sylvester likewise attribute the spike in the foster care
caseload from 1985 to 2000 to similar factors, emphasizing that "increases
in female incarcerations and reductions in cash welfare benefits played dom-
inant roles in explaining the growth in foster care caseloads over this pe-
riod" and "highlight the need for child welfare policies designed
specifically for the children of incarcerated parents and parents who are fac-
ing less generous welfare programs."[252] Given the strong associations be-
tween foster care populations, race, poverty, and poverty-related issues,
Jennings suggests that any welfare policy that aims to decrease the severing
of ties between mothers and children and also increase placement options in
families "must be coupled with economic strategies that aim to strengthen
low-income families of all races."[253]

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251. Bass et al., *supra* note 13, at 8. By 2001, 540,000 children were in foster care at any one time.
Id. at 6. For a discussion of figures from 2006, see U.S. Dep't of Health & Human Servs., *supra* note 247, at ii.

252. Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 Demography 309, 309 (2006).

> [O]ur findings clearly identify a strong association between female incarcerations and foster care caseloads. This result is important because, although child welfare administrators are aware of increases in the number of children of incarcerated parents needing out-of-home placement, few have specific policies for dealing with the special needs of this growing cohort of foster children. It is likely that much of the growth in incarcerations is due to the 1986 Anti-Drug Abuse Act, which imposed mandatory minimum sentences and shifted sentencing power from federal judges to prosecutors. Following this legislation, the number of women incarcerated for drug offenses rose by 888% between 1986 and 1996, compared with a 129% increase in non-drug-related offenses during the same. Moreover, the average imposed prison term for those convicted of a drug-related offense increased from 62 months in 1986 to 74 months in 1999, and actual time served increased from 30 months to 66 months over the same period. . . .
>
> Turning to the role of welfare policy, consistent with previous literature, our results suggest that AFDC/TANF benefit levels are significantly associated with foster care caseloads. Lower welfare benefit levels may increase foster care caseloads for three reasons. First, to the extent that recipients are not working, lower welfare benefits decrease family income and increase the likelihood that children are maltreated and/or reported to child welfare officials. Second, lower welfare payments may induce relative caregivers to become formally involved with the foster care system in order to qualify for foster care maintenance payments. Finally, foster care may be a direct substitute for welfare. There is evidence of substantial movement from the AFDC/TANF program to out-of-home care. Using data from California, Illinois, and North Carolina, Goerge found that the majority (60%) of entrants into foster care come from AFDC. Similarly, Bitler, Gelbach, and Hoynes found that welfare reform is associated with a large increase in the probability that black children live in households with neither parent present, and Johnson and Waldfogel showed that children with incarcerated mothers are more likely to be in foster care if their mothers received public assistance prior to being incarcerated.

Id. at 329 (citations omitted).

253. Jennings, *supra* note 234, at 578. Jennings observes, "advocates and opponents alike down-played the way that race intersects with gender and class to shape dominant adoption policies and practices." *Id.* at 563. She also suggests that where transracial adoption is the best option, adoption policy must include educational strategies to overcome racial privilege. *See id.* at 578.

Unfortunately, this is not the approach the U.S. foster care system takes. On the contrary, the Adoption and Safe Families Act ("ASFA") restricts poor people's—and in particular African Americans'—choices over the structure and composition of their families.[254] ASFA weakens the requirement that child services agencies make "reasonable efforts" to reunify families by providing exceptions to the requirement of such efforts, speeding up the time frame for the termination of parental rights, and providing states financial incentives to terminate parental rights in the process of freeing children for adoption.[255]

More specifically, states must make "reasonable efforts" to provide birth parents with the services and supports they need to regain custody of their children."[256] But if a child is in foster care for "15 out of the previous 22 months, states are to recommend that parental rights be terminated and the child be made available for adoption."[257] While a caseworker may waive termination if parents are making progress towards reunification or if there are alternative placement options in the interests of the child that do not require termination of parental rights,[258] the typically inadequate family preservation services provided to poor families of color make the exercise of this waiver not nearly frequent enough.[259]

Moreover, as I have written elsewhere,

> as the norm for child welfare service agencies is to provide inadequate family preservation and reunification services, so-called concurrent permanency planning, in which children are placed simultaneously on an adoption track and a reunification track very early in the proceedings, is likely to serve as a fast track to adoption of black children.[260]

In a prescient statement that was meant to apply to ASFA in the context of domestic adoption, but could also apply to Haiti in the context of intercountry adoption, two well-known family law scholars have found, "[t]here is currently too much state disruption and supervision of poor minority families. Any innovations . . . should be aimed at minimizing coer-

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254. *See* Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 Nw. J.L. & Soc. Pol'y 303 (2006) (arguing that ASFA oppresses and devalues the autonomy of black families).

255. King, *supra* note 15, at 612; *see also* Judith S. Modell, A Sealed and Secret Kinship: The Culture of Policies and Practices in American Adoption 76 (2002) (stating that ASFA "transforms adoption . . . into a child-rescuing operation").

256. In the exceptional cases where reunification is not advised, the goal becomes to place the child through adoption or to assign a legal guardian. Bass et al., *supra* note 13, at 6.

257. *Id.* at 7.

258. *Id.*

259. *See* King, *supra* note 15, at 612–13; Modell, *supra* note 255, at 79, 96 (noting the class and racial biases implicit in ASFA and citing the financial costs of "rehabilitating collapsing birth families" as a basis for ASFA's emphasis on adoptions).

260. *Id.* (citations and internal quotation marks omitted).

cive intervention in families and at family preservation."[261] Bass et al. conclude that while "foster care is a necessary lifeline that undoubtedly saves thousands of maltreated children each year," it is also true that "placing children into state custody is an extremely invasive governmental intervention into family life."[262] These authors justify government intervention only if the behavior is guided by a policy of "do no harm."[263]

The reality is, however, that children occasionally encounter maltreatment in foster care families.[264] And many foster children are vulnerable to "poor developmental outcomes" due to (a) genetic factors, prenatal substance exposure, and other physical health issues, (b) trauma or maltreatment experienced prior to foster care entry, and/or (c) placement instability experience in foster care.[265] While the first two reasons may justify a child's entrance into foster care in the first place, displacement and associated instability are problems caused by the child welfare system.

Multiple displacements cause developmental problems in children, primarily "disordered attachment,"[266] and are also associated with "child behavioral and emotional problems, such as aggression, coping difficulties, poor home adjustment, and low self-concept."[267] Jones points out that most children in foster care will experience only one to two placements, but one-third to two-thirds of foster care placements will be disrupted within the first two years.[268] Also, the longer a child remains in foster care, the greater

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261. *Id.*; *see also* MODELL, *supra* note 255, at 96 (stating that ASFA "draws the state further into intervention in parent-child relationships").

262. Bass et al., *supra* note 13, at 9.

263. *Id.*

When the state assumes custody of a child, in effect the government is stating that it can do a better job of protecting and providing for this child than his or her birth parents can. When children are placed in foster care only to suffer additional harm, it undermines the rationale for government intervention and is an egregious violation of the public trust. For this reason, as Badeau writes in this journal issue, the first principle of the child welfare system should be to do no harm.

Id.

264. Jones notes that:

[R]esearch on foster care suggests that a significant proportion of foster families have parenting difficulties, which may hinder their capacity to provide stable experiences for foster children. Although the experience is not commonplace, foster children are also maltreated by their foster parents. The association between problematic parenting behaviors and the social-emotional maladjustment of foster children has been documented in several studies.

Jones, *supra* note 14, at 40.

265. *Id.* at 36–38.

266. *Id.* at 38.

Attachment disorders, which lead to the most problematic outcomes for children, include those in which children have disrupted attachments to their caregivers, display overly vigilant or overly compliant behaviors, show indiscriminate connection to every adult, or do not demonstrate attachment behaviors to any adult. Children with insecure, "disordered" or "disorganized" attachments may also have many other adverse outcomes that persist throughout childhood, such as poor peer relationships, behavioral problems, or other mental health difficulties.

Id. at 34.

267. *Id.* at 39.

268. *Id.* at 38.

the likelihood that she will experience multiple placements.[269] In 2006, the majority of children (approximately 68%) who had been in foster care for at least 24 months had experienced more than two placements.[270] It is worth pausing for a moment to consider why we disrupt and then fail to support poor families. Why are we systematically failing to respect the care-giving patterns of traditionally marginalized communities if we provide such a poor substitute?

In essence, the U.S. foster care system intervenes in the lives of poor families and families of color much the same way that ICA intervenes in the lives of families in other countries around the globe. The analogical similarities are undeniable. Both systems intervene in family structures in ways that are painful, catastrophic and destabilizing for individual families and communities. And in both systems, children often suffer for the satisfaction of other interests.

V. Discussion and Implications

As discussed above, commentators generally accept that poor families, both in the context of intercountry adoption and the U.S. foster care system, are more likely to be involved in these systems, and, thus, are more likely to be disadvantaged by them.[271] My intent here is not to re-state what has been said before, but to offer three important contributions to the literature. First, I seek to focus on a gap in the existing literature by offering a clear theoretical conception of the genesis for this disregard of poor families. This theory I have previously described as *MonoHumanism*.[272] It is this unstated theoretical justification for the disrespect we show for poor families as a society that severely hinders the extent to which we approach poor families on their own terms.

The second broad contribution is showing how this theoretical justification has become a narrative that determines our perception of and interaction with poor families both domestically and abroad. To that end, the Silsby case and the discussion of the U.S. foster care system are key examples highlighting the theoretical justification.[273]

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269. The average time a child stays in foster care is 33 months, with variations on both ends: 38 percent of the foster care children who exited in 2001 stayed 11 months or less in the system, while 32 percent had been in the system for 3 years or more. Bass et al., *supra* note 13, at 7. Jones also notes that displacement or disruption rates are related, besides time in foster care, to "the age of the foster child, and the functioning of the foster child (for example, mental health)." Jones, *supra* note 14, at 38.

270. U.S. Dep't of Health & Human Servs, *supra* note 247, at 29.

271. *See* Bhahba, *supra* note 10, at 185 (describing poverty as a principal reason that parents relinquish their children for international adoption); Bass et al., *supra* note 13, at 5–6, 14 (citing poverty as the main cause of children being placed into foster care).

272. *See generally* King, *supra* note 20.

273. For the discussion of the Silsby case, see *supra* Introduction, Part I. For the discussion of U.S. foster care, see *supra* Part IV.

The third broad contribution is to show how customary child placement schemes have not only been replaced by structures set in motion by *MonoHumanism,* but may actually provide a better safeguard for the integrity of poor families than systems which may contain inherent unfairness and cultural biases.[274] The discussion of *timoun,* so-called kinship by design and analogous child placement systems by poor families in the United States demonstrates the displacement.[275] These three contributions convene in the ultimate goal of this Article, which is to highlight the fact that as a society, we fail to respect the integrity of poor families to such a degree that it is currently unrealistic to expect the United States to create structures that protect these families.

For Westerners who have financial privilege, the fundamental question is whether we can meet families who are not like us, on their own terms. As a general matter this means we should do more to prioritize community and family assistance abroad and at home.[276] We need to approach children as if they are our own children and do everything we can (as we would) if someone tried to take them away from us. We must admit that to remove children from their families is *always* second best if the families have the means and the will to take care of them, and not accept that we do not have the resources to provide families with such means—particularly when we are funding structures to make separation of children and families possible. To support the integrity of poor families, our social structures must change, and we must be honest about the classism, racism, sexism, ethnocentrism, and basic fundamental unfairness that permeates our international and domestic child care systems. In adopting children, we should lose the "rescue narratives" that I have discussed here and elsewhere. Only when we do so will we be able to evaluate honestly whether there are alternatives to international adoption and domestic foster care that support family integrity. In doing so, we must ask whether we need to forgo intervention and focus on bottom-up community organizing, whether there is sufficient transparency in our international adoption processes, and whether we are truly promoting the best interests of poor children.[277] We have a moral imperative to understand the theory, its manifestation, and the family formations that we break up by our failure to turn a critical eye back towards U.S. society and policies.

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274. *See* Cardarello, *supra* note 191, at 146 (discussing child placement customs that address the circumstances of the Brazilian poor).

275. *See supra* Part III (discussing *timoun*); *supra* Part IV.A (discussing kinship by design and customary child placement practices in the United States).

276. *See* Smolin, *supra* note 12, at 127 (discussing the need for the intercountry adoption system to provide birth families with aid that can preserve their families); King, *supra* note 15, at 612–14 (discussing the need for the U.S. child welfare system to promote family reunification and preservation).

277. *See* Smolin, *supra* note 12, at 175 (stating that the intercountry adoption system lacks transparency and accountability); Smolin, *supra* note 15, at 27 (challenging the perception that international adoption is "an inherent and essential good that always saves and never harms . . . children").

VI. Conclusion

A collaborative report by Haitian, U.S., and international organizations showed that eight months after the earthquake in Haiti, 1.3 million Haitians continued to live in makeshift camps in living conditions defying basic human rights to water, food, health, physical integrity, safety, housing, education, self-sufficiency, and political participation.[278] In October 2010, an outbreak of cholera began to claim lives in Haiti, bringing to the public eye once again the failure of promises to reconstruct and improve the quality of life in that country.[279] Yet, the aid that is often offered is the extraction of individual Haitian children through adoption, resulting in the severance of familial ties. In this situation, ICA disrupts traditional forms of child placement that would otherwise maintain familial and cultural ties. And while the answer is not necessarily to outlaw ICA, it may instead be to manage ICA in a way that minimizes the disruption of family unity. One way to do this is to first consider whether it is possible to support the child in a domestic placement, preferably with her own family.

The same is true for child placement in the United States. Analyzing "kinship by design" from a post-colonial perspective, one can conclude that the Western standardization and regulation of foster care and adoption is a unique cultural manifestation of a U.S. regulatory stance. Compared to social practices of placing out that are pervasive around the developing world, government intervention into family arrangements may even seem unnatural or unwarranted. In terms of law and economics, we may also describe "kinship by design" as "inefficient" compared to how people in poor countries solve child placement problems by themselves (at lesser cost to themselves and society). Nevertheless, despite its shortcomings, there is a continued domestic and international push to design more "efficient" regulatory systems to place children who need placement, satisfy adults who want children, and regulate the undesired consequences of exploitation and abuse and Otherness in ways that reflect Western preferences.

In the end, recognizing society's failure to respect the integrity of poor families presents a first step in seeking a solution. With this understanding,

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278. The LAMP for Haiti Found. et al., "We've Been Forgotten": Conditions In Haiti's Displacement Camps Eight Months After the Earthquake 2 (2010), http://ijdh.org/wordpress/wp-content/uploads/2010/09/IDP-Report-09.23.10-compressed.pdf.

279. *Haiti Cholera Outbreak Spreads: Aid Groups Fighting to Keep Cholera from Reaching Camps of Haiti Earthquake Survivors in Port-au-Prince*, Guardian (U.K.) (Oct. 24, 2010), http://www.guardian.co.uk/world/2010/oct/24/haiti-cholera-outbreak-spreads. Scientists posit that the cholera outbreak has less to do with sanitation conditions post earthquake, and more to do with the rising sea temperatures, increased water salinity, and an algae bloom in Haiti that provides optimum conditions for cholera bacteria to thrive. *See* Richard Knox, *Earthquake Not to Blame for Cholera Outbreak in Haiti*, Nat'l Pub. Radio, Oct. 26, 2010, http://www.npr.org/blogs/health/2010/10/26/130832317/earthquake-had-nothing-to-do-with-cholera-outbreak-haiti. However, alternative explanations are also offered. *See* Jonathan M. Katz, *UN Probes Base as Source of Haiti Cholera Outbreak*, Seattle Times (Oct. 27, 2010), http://seattletimes.nwsource.com/html/health/2013276274_apcbhaitidiseaseoutbreak.html.

the next time we see an international adoption scandal, hear about the many children in the U.S. foster care system, or otherwise learn of pieces of a poor family puzzle that have been broken apart, the question is whether we will step back and ask ourselves: What would we do if these "other" families were exactly the same as us? What if they weren't poor? What would we do then?