

# ADOPTION ADVOCATE

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July 2017

NO.  
109

## Advocating for the Child's Human Right to Family

BY ELIZABETH BARTHOLET

Important legislation has recently been introduced in Congress designed to transform the understanding of the rights of unparented children and relatedly of international adoption.<sup>1</sup> This legislation amends the law governing the U.S. Department of State's (DOS) annual reports on human rights violations. It requires that DOS consider for inclusion in future reports the violation of unparented children's rights involved in shutting down international adoption and thus condemning children to ongoing institutionalization. For more information about this legislation, see <http://cap.law.harvard.edu/current-legislation/>.

All those who believe in children's rights to family, all those who decry the restrictions on international adoption that have denied many tens of thousands of children the nurturing parents they need, should devote their best efforts to supporting this proposed legislation. It represents an extraordinary opportunity to transform the understanding of child rights in ways that are essential to transforming policy – policy that has been enormously destructive of child rights and interests.

<sup>1</sup> S.1177 introduced by Senator Roy Blunt in the Senate, and H.R.2643 introduced by Representatives Tom Marino and David Cicilline in the House (amending the Foreign Assistance Act of 1961 "to require the annual human rights reports to include information on the institutionalization of children and the subjection of children to cruel, inhuman, or degrading treatment, unnecessary detention, and denial of the right to life, liberty, and the security of persons").



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## The Basic Idea: Changing the Ideological Framework for Child Rights and International Adoption

On a pragmatic level, this proposed legislation simply requires the DOS to do what it should have been doing all along. Existing legislation requires the publication of annual reports which list countries responsible for serious human rights violations, violations involving all humans including children. Past annual reports have occasionally cited countries for violations of certain child rights but only a select few, and have never included the very serious violations involved in deliberately confining children into institutions, denying them the nurturing homes available through international adoption. This makes no sense from a child human rights perspective. The annual reports regularly include violations of adult rights based on unfair institutionalization as well as on harmful institutional conditions – rights directly comparable to the unnecessary institutionalization of innocent children. Children’s right to parenting is perhaps their most fundamental right, short of their right to life itself. Institutions have been definitively shown to impose devastating harm to children’s physical, emotional and mental development, destroying their life potential and their ability to enjoy all other human rights. The current institutionalization of some 10–14 million children is the greatest human rights disaster involving children in the world today. The fact that it is deliberate manmade policy that denies children available adoptive homes makes this disaster especially shameful.

This legislation would simply require that DOS stop engaging in an extreme form of discrimination against children by refusing to consider for inclusion in the annual reports the most serious human rights violations involving children in today’s world. It would leave DOS with discretion to decide which violations of unparented child rights were serious enough to warrant inclusion. It would require no new bureaucracy and no new resources.

On a theoretical level, this proposed legislation would be transformative. It would treat child rights as of equivalent value as adult rights. This principle is at the heart of the Convention on the Rights of the Child, but is regularly ignored in the discourse surrounding unparented children and international adoption. This legislation would also prioritize the child’s right to parenting over other rights less central to child well-being which are today regularly given priority. This legislation would make this new vision of child rights and international adoption the official policy of the DOS and of the United States. It would represent a huge step forward in changing international discourse and related policy.

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## The Significance: Why Changing the Dominant Ideological Framework is Essential

The dominant ideological framework of the day prioritizes parent rights over child rights, and child “heritage” rights over rights to grow up with a nurturing parent.

Nobody quite admits to prioritizing parent rights, but this is the net of positions taken by key organizations opposing international adoption and urging restrictions that shut it down. For example, UNICEF and others regularly argue that the vast majority of the children in institutions are not true orphans since they have at least one biological parent, and accordingly should not be considered adoptable. They argue that since many of the children in institutions are there because of parental poverty, rather than abusive treatment, they should not be considered adoptable. The underlying assumption of these arguments is that parent rights to hold onto their children, at least legally, come first. If parents exist, and can't be proven unfit, then the children must be denied the rights to new parents, even if their existing parents will never be able to actually provide nurturing care, and even if that means ongoing institutionalization with all the destruction of the child's life potential that is involved. The child is seen to have no right to actual parenting that can even be considered so long as a legal parent exists.

As another example, such opponents of international adoption argue that violations of law that allegedly interfere with birth parent rights justify shutting down such adoption altogether, at least until and unless such violations can be eliminated entirely. Any unlawful taking of a child, whether by improper representation of the facts to the birth parent or by offering money to the birth parent as an inducement to surrender, is used as reason for a temporary or permanent moratorium on international adoption. The underlying assumption of these arguments is again that parent rights come first. Any violation of parent rights justifies the shutdown, even if only relatively few parents are involved, and even if the shutdown will result in the systematic violation of untold thousands of children's rights to parenting. There is no overall cost-benefit analysis. All that counts in the first instance are parent rights, so they are not weighed against the child rights at issue.

Opponents of international adoption are happy to admit to prioritizing child heritage rights over other child rights. They regularly argue that the overwhelming emphasis should be placed on keeping children in the nations and birth family groups into which they were born. They claim that this serves the child's best interests.

But this claim flies in the face of reality. Children growing up in institutions rarely have any option to truly enjoy their birth or national heritage. Most of them will die in or age out of those institutions. The families that abandoned or surrendered them, or from whom they were removed, will rarely be able or willing to take them back home to raise. There are few adoptive families available in the countries where large numbers of children are institutionalized. Foster families are in limited supply in these countries also, and foster families don't work nearly as well for children as adoption, whether domestic or international. The social science demonstrates definitively that international adoption works extremely well for children, helping many recover significantly from damage suffered in their first months and years, and enabling those adopted early in life to thrive. There is no evidence that placing children across racial, ethnic or national lines has any negative impact whatsoever on children's well-being. Moreover, most international adoptive parents work hard to help their children understand and appreciate their birth and cultural heritage.

The dominant ideological framework drives current policy. National governments and leading NGOs regularly call for restrictions on international adoption based on arguments that it might violate parent rights to hold onto their children and/or violate children's heritage rights. Commentators and the media reinforce these arguments, regularly highlighting adoption abuses that take children from their parents and countries of origin, but rarely talking about the systematic violation of child rights that occur in the absence of adoption when children are condemned to live and die in institutions.

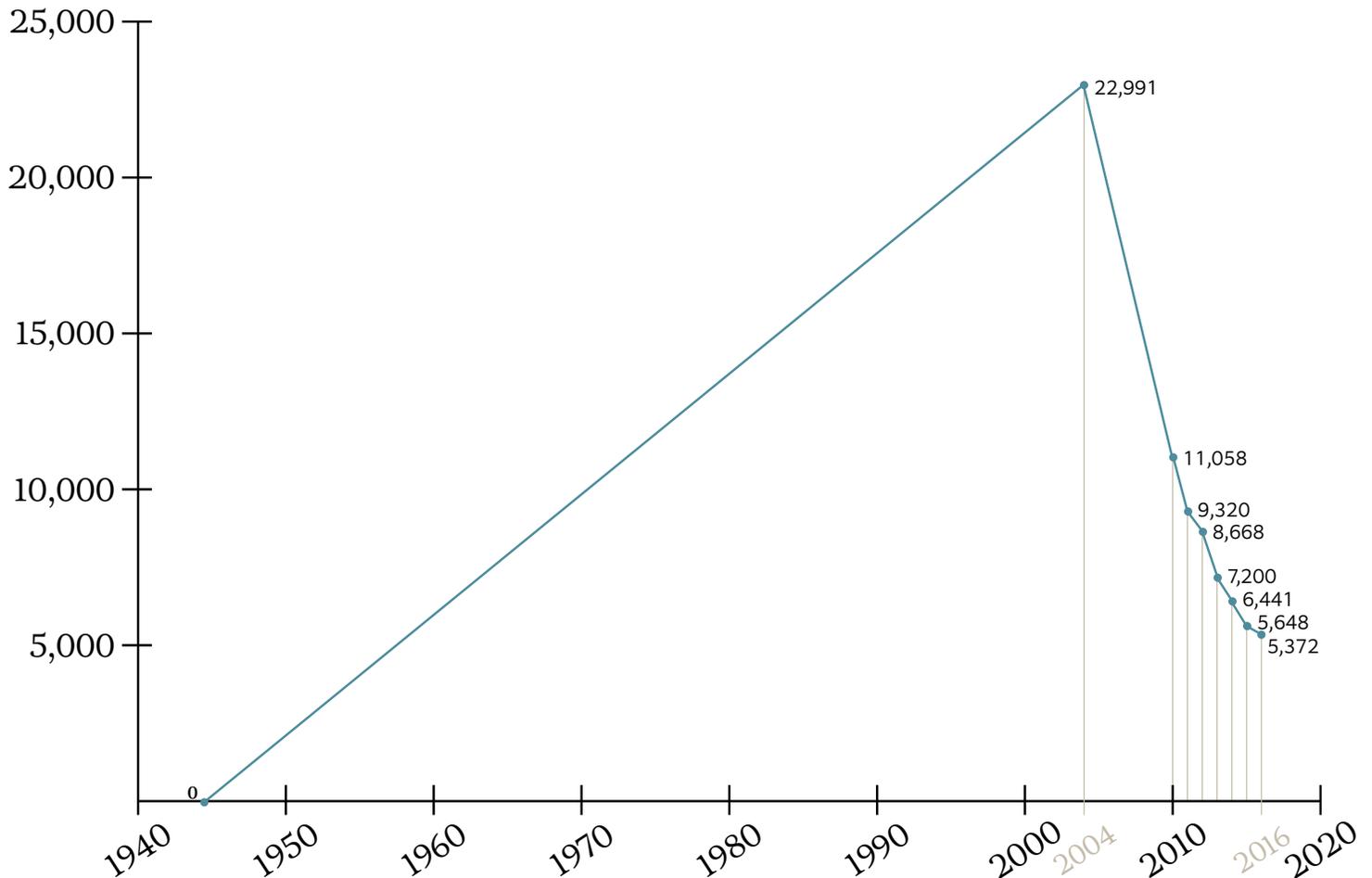
The net result of this ideological framework and the related policy is demonstrated by the following chart. International adoption has dropped precipitously since 2004, with the numbers down by over three-quarters for adoptions into the U.S., and down by over half worldwide. This means tens of thousands of children every year deliberately denied the nurturing homes they need.

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## INTERNATIONAL ADOPTION TREND 1944–2016: United States Immigrant Orphan Statistics



Sources: <https://travel.state.gov/content/adoptionsabroad/en/about-us/statistics.html>

### Arguments Against the Proposed Legislation

The DOS has adamantly opposed this legislation. This is one strong signal that the legislation is really needed – that it would make a major difference in terms of changing the DOS' standard operating procedure.

The DOS argues that the legislation would be too costly, requiring significant new resources to investigate the numbers of children being held unnecessarily in institutions throughout the world. This is a frivolous argument. The costs of truly implementing the obligation to count all the adult human rights violations that the DOS admits are within its jurisdiction are already overwhelming. They are only manageable because the DOS exercises discretion to decide which human rights violations are the most significant, and lists only a small fraction of existing violations. The DOS

would have that same discretion in deciding how best to implement the duty to consider for inclusion in its annual reports the violations of unparented child rights involved in unnecessary institutionalization.

The DOS also argues that the legislation would be counter-productive, causing countries to become more secretive about the fact that they harbor large numbers of institutionalized children, and creating resentment against the U.S. that would make negotiations to open up international adoption opportunities more difficult. This is similarly frivolous. The same argument could be made against listing any violations of human rights in its annual reports. But the international human rights community is in essential agreement that the annual reports do much more good than harm. They serve as an important naming and shaming device, stigmatizing nations that engage in serious human rights violations, and providing at least some pressure to reduce the level of such violations.

Finally the DOS argues that children simply don't have any human right to parenting. This argument seems to be the one that truly motivates the Department's position. And it demonstrates again why this legislation is so important. The DOS buys into today's dominant anti-international adoption ideology. This is a major reason why it regularly joins with other forces to shut down or unduly restrict international adoption. It buys into the idea that parent rights trump child rights, and that children should stay where they came from. This legislation would require that the DOS change its ideology and related policy to make the child's right to parenting a central value.

## Conclusion: The Winds of Change

This legislation provides an important opportunity to take a giant step in the direction of honoring the child's right to family, and the related right to adoption both domestic and international.

The precipitous decline of international adoption might lead some to despair that it can't be revived to serve children's needs. But such despair is unwarranted. The opposition to international adoption is based on retrograde ideas that children are defined by their group of origin, that they should stay where they came from, and that it's risky to cross racial and national lines of difference.

However, the world is moving in the direction of crossing those lines of difference, with the numbers emigrating and intermarrying up every year. International law increasingly demonstrates respect for child rights, at least in principle. Witness the world's historically enthusiastic endorsement of the Convention on the Rights of the Child, and the fact that recent national constitutions, such as that of South Africa, provide extensive protection for child rights.

Important laws passed in recent decades in the U.S. illustrate the move in the direction of honoring the child's right to family as compared to birth and racial heritage rights, and in the direction of limiting parent rights over children. The Multiethnic Placement Act of 1996 provides that race cannot be used as a factor denying or delaying adoptive placement, and indeed cannot be used at all in the placement decision, vindicating the importance of placing children as early as possible in a nurturing home regardless of their group of origin. The Adoption and Safe Families Act of 1997 insists that greater priority be given to child rights to a nurturing family, and that parent rights be accordingly limited. It mandates that children be moved promptly to nurturing families rather than held for extensive periods in state care, even if this move involves terminating parental rights so that the children are free for adoption. These federal laws required changes in law and policy throughout the 50 states. They were once seen as too radical to be enacted. The policies they overturned resemble in many ways the policies that have dominated in recent years in the international arena.

A final example of this move in a new direction is the proposed Vulnerable Children and Families legislation, which like the human rights report legislation, was just recently introduced in Congress.<sup>2</sup> This legislation also requires that DOS policy be guided by the principle that children have a fundamental human right to family. It requires that DOS policy facilitate rather than impede international adoption. And it redefines the principle of subsidiarity, insisting that permanent families, whether the original birth family or adoptive families, be the priority, and that children not be delayed in finding an adoptive home by any effort to keep them in the country of origin. For more information about this legislation, see <http://cap.law.harvard.edu/current-legislation/>.

The time for change is now. This proposed legislation represents the way forward.

## ABOUT THE AUTHOR

Elizabeth Bartholet is a Professor of Law and the Faculty Director of the Child Advocacy Program at Harvard Law School. Articles discussing in detail the claims made here, and providing related documentation, can be found at: <http://www.law.harvard.edu/faculty/bartholet/pubs.php>.



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<sup>2</sup> S.1178, introduced by Senators Roy Blunt and Amy Klobuchar, and H.2532, introduced by Representatives Kay Granger and Brenda Lawrence.