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The Effects of Intercountry Adoptions on Biological Parents' Rights

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I. INTRODUCTION

In recent years, state family law, international law and relations, and United States federal law, have come together for one purpose: to facilitate adoption of foreign children by United States citizens. This development is especially long awaited because of the difficulties that couples face when trying to adopt children in the United States. These prospective adoptive parents have many misconceptions about the inter-country adoption process, which, in reality is no simpler than the process of adoption in the United States. Inter-country adoptions are complicated because of the need to adhere to the laws of three separate jurisdictions: United States federal immigration law; laws governing adoption in the state in which the adoptive parents reside; and the laws regarding adoption in the foreign state. Difficulties arise when and if the foreign biological parents' rights become an issue. If such an issue arises, it may create the need to decide which laws should control, the laws of the adoptive parents' state, the laws of the foreign nation, or whether there is a need for international uniform laws. This dilemma is one of the perceived advantages to international adoptions, in that, adoptive parents may believe that foreign biological parents, by virtue of being overseas, will not sue for visitation rights or custody.

This Comment discusses inter-country adoptions in Hungary where United States couples, particularly from the State of

3. The terms "biological parents" and "birth parents" are used interchangeably herein in lieu of the term "natural parent," which is used in some of the quoted statutory and case material.
California, are often the adopting parents. This Comment focuses on the interrelationship between the three aforementioned areas of law: the California statutes and case law governing international adoptions, consent, and biological parents' relinquishment of parental rights; the Hungarian Republic's inter-country adoption procedures, and the applicable U.S. federal immigration law. Because under Hungarian law, the adoptive parent's country's laws determine the effect and the termination of any inter-country adoption, this Comment proffers that California and federal law are insufficient to protect the rights of Hungarian biological parents. These laws do not have adequate procedures for withdrawal of parental consent or relinquishment of parental rights for purposes of adoption, and do not sufficiently protect biological parents' future rights.

There is a definite need for change in the area of international adoptions, especially in light of the high demand for such adoptions in the United States. This need is even more significant considering the impact the complicated and drawn out adoption process has on peoples' lives. The people this process affects fall into three categories: (1) the adopting parents, who

6. See, e.g., PTK. Law-Decree No. 13, ch. VII, § 44.
8. The phrase "termination of the adoption," as used herein, means the adoption has been undone, voided, or nullified, and the child is returned to its birth parents.
9. See PTK. Law-Decree No. 13, ch. VII, § 44.
13. See Michael S. Serrill, Going Abroad to Find a Baby: The Laws of Supply and Demand Have Led to a Boom in Overseas Adoption, But the Quest Can be Lengthy, Expensive and Sometimes Morally Troubling, TIMES, Oct. 21, 1991, at 86 (stating that approximately twenty American couples adopt a child from other countries every day, and that the large demand for babies from overseas is due largely to the shrinking number of children available for adoption in the United States). The decrease in the birthrate in industrialized countries is partially due, in Serrill's opinion, to the legalization of abortion and the disintegration of the taboo of unwed motherhood. See id. In the United States, in the last twenty years, the number of children given up for adoption has decreased by 60 percent and in recent years, the ratio of couples wanting to adopt to children available for adoption has been twenty to one. See id.
usually tend to be quite desperate to adopt a child; (2) the innocent child whose entire future rests on the result of the adoption; and (3) the biological parent or parents, whose rights may be forfeited forever. There have been several attempts to create more uniformity in this area of the law. Such efforts have been made by various international organizations and conventions, such as the Hague Conference’s Tentative Draft Convention on Intercountry Adoption and the United Nations’ Adoption Declaration. These attempts, however, have not been effective. These organizations usually regard international adoption as a last resort to domestic adoption, and most countries are unwilling to give up their sovereignty in this area and adopt uniform international laws. Despite these problems, there is an urgent need for all nations to accept uniform laws and guidelines governing the legitimate relinquishment of parental rights and protecting the rights of the adoptive parents, the children involved, and the rights of the foreign biological parents.

Part II of this Comment describes the process that prospective adoptive parents endure, including an overview of the laws of the three jurisdictions involved. Part III discusses the rights, if any, of the foreign biological parent(s) under federal law, California statutes and cases, and Hungarian law. Part IV focuses


16. See id. at 1279.

17. See id.

18. See JAMES MAYALL, NATIONALISM AND INTERNATIONAL SOCIETY 145–152 (CAMBRIDGE UNIV. PRESS, 1990), reprinted in HERBERT M. LEVINE, WORLD POLITICS DEBAT ED: A READER IN CONTEMPORARY ISSUES 24 (4th ed. 1992) [hereinafter WORLD POLITICS DEBATED]. See also JOHN SPANIER, GAMES NATIONS PLAY 661–669 (6th ed., CQ Press 1987), reprinted in EVALUATION OF INTERDEPENDENCE: “NEW” COOPERATION OR “OLD” STRIFE?, in WORLD POLITICS DEBATED, supra, at 71, 73. For example, the Hague Convention is difficult to enforce and a country may choose not to follow the Convention if it conflicts with the country’s public policy. See generally Lippold, supra, note 1, at 497–498.

19. See Sackach, supra note 4, at 892–893 (noting that the Uniform Adoption Act, which has been approved by the American Bar Association, attempts to create uniformity in the area of adoption; the Act favors adoptive parents, which is a shift from the more traditional view that protects the biological unit, and only gives a biological mother eight days after the child’s birth to withdraw her consent).
on the efforts of international organizations, such as the United Nations, to create uniform standards to govern international adoptions. Part IV also examines whether these efforts have accomplished anything in terms of protecting biological parents' rights. Finally, Part IV recommends possible solutions and Part V concludes by reiterating the need for protection of foreign biological parents' parental rights.

II. AN OVERVIEW OF THE ADOPTION PROCESS

In order to comprehend the inadequate protection that the rights of biological parents receive, it is useful to review the tedious and expensive process involved in adopting a child from another country. This process incorporates the federal immigration statutes governing the adoption process, the laws of the foreign country (here, Hungary), and the adoption laws of the U.S. state involved (here, California). The intermingling of all three sets of laws can make the intercountry adoption process both complicated and lengthy; intercountry adoptions may take up to one year to complete. Although the process is tedious, there are still a large number of children adopted through international adoptions each year.

20. See Hester, supra note 14, at 1275 (noting that the cost of an intercountry adoption can range from $5,000.00 to $20,000.00, which is not always more than the cost of a domestic adoption; the cost of an intercountry adoption may include travel expenses, adoption agency's fees, and paying for a home study, as required by Immigration and Naturalization Services).


22. See PTK. Law-Decree No. 13, ch. VII, §§ 43-44 (Hung.).

23. See CAL. FAM. CODE § 8919 (Deering 1996) (providing procedures for readoption of a child in California after the child has been adopted by the California parents in the foreign country).


25. See Peter H. Pfund, Brigitte M. Bodenheimer Memorial Lecture on the Family: The Hague Intercountry Adoption Convention and Federal International Child Support Enforcement, 30 U.C. DAVIS L. REV. 647, 648 (1997). In 1996, the number of international adoptions was 11,340; these numbers mostly include children from countries such as China (3,333 children), Russia (2,454 children), and Korea (1,516 children). See id.
A. Hungary’s International Adoption Requirements

The first requirement that prospective U.S. parents must satisfy in undertaking the intercountry adoption of a child is complying with foreign country’s adoption laws.\(^{26}\) For example, Hungarian law provides in part:

1) The conditions of adoption shall be judged with the joint consideration of the personal law at the time of the adoption of both the adoptive parent and of the child to be adopted. . . .

2) . . .

3) A foreigner may adopt a Hungarian national only with the approval of the Hungarian guardianship authority.

4) The guardianship authority may extend its permission or approval to the adoption only if the conditions laid down by Hungarian law are met as well.\(^{27}\)

Another section of the Hungarian law governing international adoptions provides that the laws of the adoptive parents’ country govern the effect or termination of an intercountry adoption that took place in Hungary.\(^{28}\)

The Hungarian Republic designed the aforementioned sections of Hungarian law with international adoptions in mind.\(^{29}\) Therefore, they take into consideration the law of the adoptive parents’ country, which, here, is both California law and the Immigration and Naturalization Service’s (I.N.S.) requirements.\(^{30}\)

In order for the Hungarian Guardianship Authority to approve the potential adoptive parents, the Authority must examine all three sets of laws.\(^{31}\) It would be fair to the adoptive parents to incorporate the laws of both countries, but aside from concerns with fairness, conflicts may arise wherein the two sets of laws disagree. This is because although Hungarian law directs the

\(^{26}\) See generally PTK. Law-Decree No. 13, ch. VII, § 43.

\(^{27}\) Id.

\(^{28}\) See PTK. Law-Decree No. 13, ch. VII, § 44 ("To the legal effects of the adoption, to its termination and to the legal effects of the latter the personal law of the adoptive parent valid at the time of the adoption or of its cessation shall apply.").

\(^{29}\) See generally id. §§ 43–44 (applying specifically to international adoptions (i.e., when foreign parents adopt Hungarian children) and to Hungarian citizens adopting foreign children).


\(^{31}\) See PTK. Law-Decree No. 13, ch. VII, § 43(1), (3).
Guardianship Authority to look to both California and federal law, the Authority's primary duty is to ensure that foreign parents satisfy Hungary's laws. This may either create a disregard for the laws of the adoptive parents' country or entail only a token examination of those laws. Conversely, if the country is experiencing hard economic times and thus an increased number of children are available for adoption, the Guardianship Authority may have an incentive to be more lenient with and more accepting of the laws of the foreign jurisdiction so as to facilitate more adoptions. Both of these results are undesirable in an area of law where some stability is necessary for all parties involved to ascertain and predict their rights accurately.

B. I.N.S. Requirements

The second stage of the intercountry adoption process is satisfying the I.N.S. adoption and immigration requirements. This is the most complicated stage, considering the United States' concerns about the increasing flow of new immigrants into the United States. The general requirements for adopting children from a foreign country, to which prospective parents must strictly adhere, are enumerated in section 1101 of the United States

32. See id. § 43(4) (stating that couples must also satisfy the conditions of Hungarian law).


34. See generally REED UEDA, POSTWAR IMMIGRANT AMERICA: A SOCIAL HISTORY 1 (Niels Aaboe et al. eds., 1994). "Forty million of the sixty million immigrants since the founding of the country—two out of three newcomers—arrived in the twentieth century, making it the greatest era of immigration in national and world history." Id.

35. See generally In re Handley, 17 I. & N. Dec. 269 (1978) (denying an adoption and immigration petition because the adopting parents did not follow the procedural steps). See also Hester, supra note 14, at 1295–1296.
For a child to be eligible for adoption (i.e., be classified as an “immediate relative” for purposes of immigration into the United States), the child must be an orphan under the age of sixteen. An “orphan” is defined as a child who is parentless as a result of the “death or disappearance of, abandonment or desertion by, or separation or loss from, both parents, or from the sole or surviving parent who is incapable of providing the proper

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37. See id.
38. See id. § 1101(b)(1)(F).
39. See 8 C.F.R. § 204.2(d)(1)(viii) (1992). Although section 101 does not define abandonment, the meaning of the word is clarified in the Code of Federal Regulations:

A child who has been unconditionally abandoned to an orphanage shall be considered as having no parents. However, a child shall not be considered as having been abandoned when he/she has been placed temporarily in an orphanage, if the parent or parents intend to retrieve the child, . . . or the parent or parents otherwise exhibit that they have not terminated their parental obligations to the child.

Id. See also Hester, supra note 14, at 1285; Goldsmith, supra note 24, at 1783 n.48 (stating that voluntary relinquishment of a child, for the purposes of adoption, cannot be considered abandonment).

40. See 8 C.F.R. § 204.3 (b) (1995). Section 101 also fails to define “sole parent,” but the term is defined (as is abandonment) in section 204.3 of the Code of Federal Regulations as:

Sole parent means the mother when it is established that the child is illegitimate. . . . An illegitimate child shall be considered to have a sole parent if his or her father has severed all parental ties, rights, duties, and obligations to the child, or if his or her father has, in writing, irrevocably released the child for emigration and adoption. This definition is not applicable to children born in countries which make no distinction between a child born in or out of wedlock, since all such children are considered to be legitimate.

Id. See also Goldsmith, supra note 24, at 1784–1785 n.55; 8 U.S.C. § 1101(b)(2). Section 1101’s definition of “parent” is similar to the Code of Federal Regulations' definition of “sole parent.” Section 1101 defines parent as not including “the natural father of the child if the father has disappeared or abandoned or deserted the child or if the father has in writing irrevocably released the child for emigration and adoption.” 8 U.S.C. § 1101(b)(2). This definition could have been interpreted as either replacing the C.F.R. definition or being read together with the C.F.R. definition. President Clinton, however, signed into law Public Law No. 104-51, which changed the above statutes, to a limited extent, by replacing the legitimacy/illegitimacy distinction with a distinction between a child born in wedlock and one born out of wedlock; as a result, the I.N.S. no longer has to determine whether a child is legitimate or illegitimate. See Pub. L. No. 104-51, 1995 U.S.C.C.A.N (109 Stat.) 467. The new law changes the immigration laws so as to provide that a child may be considered as having a “sole parent” for purposes of the section 1101 “orphan” classification if:

1) The child is born out of wedlock; and 2) The child has not been legitimated under the law of the child’s residence or domicile or under the law of the natural (birth) father’s residence or domicile while the child was in the legal custody of the legitimating parent or parents; and 3) The child has not acquired a
care, and has in writing irrevocably released the child for emigration and adoption . . . .”

This definition of a child eligible for adoption makes it much more difficult for a large number of children to find good homes. This is especially true in Eastern European countries where the fall of communism created turmoil and poverty, in turn making it harder for many parents to take care of their children. Thus, if a married couple wishes to give their child an opportunity for a better life in the United States, they cannot simply give the child up for adoption voluntarily. In most cases, parents must abandon or desert their children completely, without any further indication or knowledge as to the children’s future wellbeing.

In the majority of cases, the voluntary release of a child by a married couple would not make the child eligible for adoption; however, there is a very narrow exception created by an I.N.S. decision that may allow for the adoption of a “legitimate” child or a child born in wedlock. Application of this exception is essentially confined to the facts of the case in which the exception was created. In re Del Conte involved a mother who was married

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stepparent; and 4) The natural or birth father has disappeared or abandoned or deserted the child or if the natural birth father has in writing irrevocably released the child for emigration and adoption.


42. See Serrill, supra note 13, at 86–87 (quoting Chris Hammond, director of a British association of government and nonprofit adoption agencies, as stating that, “we’re exploiting poor countries’ resources [children] the same as we have exploited other resources” and noting that “poor parents see foreign adoption as one of the few ways to give their children a decent life.”).

43. See Hester, supra note 14, at 1284.

44. See generally 8 U.S.C. § 1101 (1994 & Supp. IV 1998); 8 C.F.R. § 204.2 (1992); 8 C.F.R. § 204.3 (1995) (establishing, as a prerequisite for eligibility for adoption, that a child be classified as “abandoned” or an “orphan”—thus creating an inference that the biological parents may never see the child again).

45. “Legitimate,” as used herein, means a child who is not born out of wedlock, irrespective of whether the child is the biological offspring of the mother’s husband, and is used in reference to adoptions occurring before Public Law 104-51 eliminated the legitimate/illegitimate distinction. See Pub. L. No. 104-51, 1995 U.S.C.C.A.N. (109 Stat.) 467.

and had an adulterous relationship.\textsuperscript{47} The legal, but not biological father, refused to support the children resulting from his wife’s affair or have anything to do with them.\textsuperscript{48} As a result, both parents (the mother and her husband) decided to give the children up for adoption.\textsuperscript{49} In \textit{Del Conte}, the I.N.S. limited the holding to its facts by specifically mentioning that the circumstances of the children’s birth exhibited an intent of both “parents,” (the married couple), to reject them,\textsuperscript{50} thus allowing “abandonment” in a case where the children were not \textit{legally} illegitimate.\textsuperscript{51}

In 1994, the I.N.S. created another narrow exception to accommodate international adoptions and deal with the problems created by the legitimate/illegitimate distinction. The I.N.S. implemented a very short-term policy allowing foreign children born out of wedlock, whether considered illegitimate or not, to be adopted and immigrate to the United States if the prospective adoptive parents made a showing that they established a tie to the child prior to 1994.\textsuperscript{52} Thus, a child may immigrate to the United States even if the child’s country did not deem the child “illegitimate.”\textsuperscript{53}

By looking at the controlling federal statutes and I.N.S. decisions, it is evident that the narrow definitions of such terms as “parent,” “sole parent,” and “orphan” create a very small category of children that can be accepted into the United States for purposes of adoption by American parents. Basically, children eligible for adoption must be illegitimate.\textsuperscript{54} These are usually children born to unwed women, and with whom the biological

\textsuperscript{47} See id. at 761–762.
\textsuperscript{48} See id.
\textsuperscript{49} See id. See also Hester, supra note 14, at 1286.
\textsuperscript{50} See \textit{Del Conte}, 10 I. & N. Dec. at 763 (stating that the children were “cast from the family circle because of the circumstances of their birth [and] . . . surrendering them for adoption 3,000 miles away [wa]s in itself evidence of the finality of their rejection.”).
\textsuperscript{51} See id. See also 8 C.F.R. § 204.3(b) (1995) (requiring that a child be “illegitimate” to be considered as having a sole parent for purposes of adoption in and immigration to the United States).
\textsuperscript{53} See id.
\textsuperscript{54} See generally 8 U.S.C. § 1101 (1994 & Supp. IV 1998). See also 8 C.F.R. § 204.2(d)(1) (1992). These children would also have been eligible if they were abandoned, because then it would be impossible to ascertain whether or not they were legitimate. See id.
fathers have no contact. As a result, the U.S. statutes governing intercountry adoptions promulgated certain stereotypes regarding illegitimacy, thus stigmatizing one of the two groups of children allowed to be adopted in and immigrate to the United States. Additionally, it is arguable that the above requirements encourage out-of-wedlock births and create incentive for parents wishing to voluntarily give their children up for adoption to simply abandon them instead.

Because of the stigma attached to the name of a child born out of wedlock in most countries, some nations have completely removed the illegitimacy label and deem all children legitimate; this is done either by statute or by amending the country's constitution. Some of these countries include: China, which achieved this through its marriage law, Columbia, which enacted a law giving all children the same rights and obligations, Bolivia, which provides for this through a constitutional article, and Honduras and Panama, which also accomplished this goal through their respective constitutions. By eliminating the distinction between legitimate and illegitimate children, it became almost impossible for an American couple to adopt a child from these non-distinguishing countries because a biological mother, even if she had a child out of wedlock, was not considered the "sole parent" for purposes of U.S. international adoptions law.

The 1995 adoption of Public Law No. 104-51 replaced the distinction between legitimate and illegitimate children with a distinction between children born out of wedlock and children

55. See 8 C.F.R. § 204.3(b).
57. See 8 U.S.C. § 1101(b)(1)(F). One way for a child to be considered an "orphan" is if the child's sole parent relinquishes his or her rights to the child. Another way for a child to be considered an "orphan" is for the parent or parents to abandon the child. See id. See also 8 C.F.R. § 204.3(b).
58. Many times, the child's name may be simply replaced with a derogatory term such as "illegitimate," or the even more hurtful term "bastard."
59. See Hester, supra note 14, at 1284.
60. See, e.g., Goldsmith, supra note 24, at 1784 n.51.
61. See id. at 1784.
62. See id.
63. See id.
64. See id.
65. See 8 C.F.R. § 204.3(b) (explaining that even if the child is born out of wedlock, it is not considered illegitimate and thus may be ineligible for adoption).
66. See id. See also Hester, supra note 14, at 1284–1285.
born to married couples. Now, children born out of wedlock, but who are not necessarily illegitimate, are considered "orphans" for purpose of adoption and immigration to the United States.

Although eliminating the legitimate/illegitimate distinction resolved some of the problems associated with adopting children from countries that have removed the illegitimacy label from children born out of wedlock and allowed the United States to come in line with more progressive countries, the law may not necessarily resolve certain other issues. For example, a married couple who wish to have their child adopted in the United States still cannot voluntarily give up a child for adoption because the child was not born out of wedlock. Therefore, the wedlock/out-of-wedlock distinction may also create incentives for biological parents to abandon their children so that their children will be eligible for adoption.

Therefore the requirements of section 1101 may still not address the modern reality of adoption. Although most countries, including the United States, are moving towards eliminating the distinction between legitimate and illegitimate children, all countries should provide equal rights for all children, regardless of their birth status, to reflect the large population of unwed mothers in today's world.

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68. See 8 U.S.C. § 1101(b)(1)(F) (1994) (stating that a child must be an orphan to immigrate to the United States and that a child is deemed an "orphan" if the child is relinquished by the sole parent or abandoned). See also 8 C.F.R. § 204.3(b) (1995) (stating that a "sole parent" is the child's mother where the child is illegitimate); Pub. L. No. 104-51, 1995 U.S.C.C.A.N. (109 Stat.) 467 (removing the legitimacy/illegitimacy distinction).
70. See Hester, supra note 14, at 1284.
73. See Goldsmith, supra note 24, at 1785-1786.
75. See FED. NEWS SERVICE, Mar. 1, 1995, at 3, available in LEXIS, All News Library, All News Group File (describing the decline in marriages in the United States and the rise in the number of single parents). If the number of out-of-wedlock births has increased in the United States (an industrialized nation), the result in lesser developed nations may be more severe. But see Serrill, supra note 24, at 87 (discussing the disappearance of the stigma accompanying single motherhood in industrialized nations and noting that it, along with the availability of abortion, caused a decline in birthrates, especially among Caucasian single mothers). See also Margaret Liu, Comment, International Adoption: An Overview, 8 TEMP. INT'L & COMP. L.J. 187, 187-188 (1994) (discussing the problems that many countries face in dealing with unwanted children).
between children born in or out of wedlock must also be abandoned because even though the legitimate and illegitimate labels are no longer used, the inference that a child born out of wedlock is illegitimate, and the accompanying stigma, still exist.76 Therefore, by creating a distinction, the United States discriminates against illegitimate children, thereby denying them equal opportunities for adoption by American parents.77

Section 1101 also requires that "no natural parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status . . . ."78 The child will not be permitted to enter the United States if the possibility exists that the biological parent will try to come into the country by virtue of his or her relationship to the adopted child.79 This requirement may have been designed, in part, to avoid challenges by biological parents, but it does not necessarily work in that respect.80 Other requirements mandated under section 1101 of the United States Code are procedural in nature, do not relate to this Comment, and thus are not discussed herein.81

It is important to mention, however, another requirement with which potential adoptive parents must comply. The objective

76. See Goldsmith, supra note 24, at 1784–1785 n.51. See also Liu, supra note 75, at 187 (noting that some mothers give up their children because of the shame and stigma associated with having an illegitimate child); Serrill, supra note 24, at 87, 88 (discussing the taboos accompanying unwed motherhood and that many children may be "doomed to eternal stigma").

77. See Miller v. Albright, 118 S. Ct. 1428, 1431 (1998) (O'Connor, J. concurring.) (stating that a distinction in the law based on a child's legitimacy or illegitimacy receives heightened scrutiny by the Court). On the other hand, the federal government may distinguish between children based on their legitimacy status, because the United States Constitution does not give aliens/foreigners the full protection of the Fourteenth Amendment's Equal Protection Clause; in this area, the Supreme Court defers to Congress. See id. at 1431–1434. The principles of equality and fairness embedded in our Constitution should apply to children considered for immigration status who may, if adopted, become United States citizens.


79. See 8 U.S.C. § 1101(b)(1)(F). Because the child cannot be adopted if the biological sole parent has not relinquished her parental rights as required, the child will not be allowed to immigrate to the United States. See id.

80. For a discussion of the requirement's ineffectiveness, see infra Part III.A.

81. See, e.g., 8 U.S.C. § 1101(b)(1)(F) (providing, for example, that the child must be adopted by a U.S. citizen and the citizen's spouse, or by a single ("unmarried") U.S. citizen who is 25 years old or older).
of every adoption is to provide a good home for the adopted child.82 To facilitate this goal, the law requires that the U.S. Attorney General’s Office conduct a valid home study of the prospective parents’ home.83 Section 1154 of the United States Code requires that an agency authorized by the receiving state or licensed in the United States conduct the study.84

In determining whether a couple can proceed with an intercountry adoption, the U.S. Attorney General must ascertain if the potential parents would meet the receiving state’s home-study requirements.85 The need for this determination is apparent from the language of both section 1101, directing the Attorney General to determine if the child will receive “proper care,”86 and section 1154, requiring that a state-approved agency conduct a home study.87 State standards ultimately determine the potential adoptive parents’ eligibility because the right to govern the adoption process is vested in the states, as part of their traditional authority to regulate issues relating to public welfare88 and exercise police power.89

The usual factors considered in determining whether a valid home study has been conducted include assessments of: 1) interviews with the prospective parents and home visits; 2) determinations of whether the prospective parents are capable of caring for an orphan, including assessing the prospective parents’ mental and physical capacities, histories of abuse (physical or mental), financial capabilities, criminal histories, and any previous

82. See id. The Attorney General must be “satisfied that proper care will be furnished the child if admitted to the United States...” Id.
84. See id. Section 1154(d) provides:
   Notwithstanding the provisions of subsections (a) and (b) of this section no petition may be approved on behalf of a child defined in section 1101(b)(1)(F) of this title unless a valid home study has been favorably recommended by an agency of the State of the child’s proposed residence, or by an agency authorized by that State to conduct such a study, or, in the case of a child adopted abroad, by an appropriate public or private adoption agency which is licensed in the United States.
Id.
85. See id.
88. See Lippold, supra note 1, at 470. “Thus, adoption is a state-created statutory status.” Id.
89. See United States Trust Co. v. New Jersey, 431 U.S. 1, 3 (1977).
rejections for adoption; 3) the prospective parents' living arrangements; 4) pre and post-adoption counseling; and 5) the "age" of the home-study—if the study is "older" than six months, it must be updated. 90 In addition to these factors, others may be considered, depending on the specific circumstances of each case. 91

C. California Requirements

After the immigration process is complete, the receiving state, which is the adoptive parent's state, may review the adoption. 92 State law requires that a state court determine whether the adoption decree is valid; that is, whether the adoption is consistent with that state's laws and public policy; whether the requirements of the U.S. Constitution are met; and whether the foreign adoption is legal in the eyes of the adoptive parents' home state. 93 Different states have enacted specific statutes to govern such "readoption" proceedings. 94 Many state courts, however, are willing to acknowledge foreign adoptions. 95 One reason for this may be the tedious process the prospective parents have already endured by the time the child is brought to their home state. 96 Many states, however, have either tried to regulate independent adoptions or have completely outlawed them because of concerns with "baby selling." 97 Furthermore, many states require that the adoption process be conducted through a licensed adoption agency. 98

California does not prohibit independent adoptions, neither through private adoption agencies, nor in situations where the parents handle the entire adoption process themselves. 99

90. See Goldsmith, supra note 24, at 1778 n.28. See also Liu, supra note 75, at 207.
91. See Goldsmith, supra note 24, at 1778 n.28.
92. See CAL. FAM. CODE § 8919 (Deering 1996).
93. See Hester, supra note 14, at 1278.
94. See id. at 1300-1306 (describing the Louisiana foreign adoption validation process, and the different statutes governing the process). The term, "readoption," as used herein, refers to the process involved in making a foreign adoption, conducted in a foreign country, valid under state law.
95. See id. at 1301 n.209.
96. See id. at 1275.
97. Lippold, supra note 1, at 473, 473 nn.50-51 (listing states prohibiting independent adoptions including, Connecticut, Massachusetts, Delaware, Michigan, and Minnesota).
98. See id. at 473.
99. See 8 U.S.C. § 1154(d) (1994). If a couple utilizes the section 1101 adoption process, independent adoptions may not be allowed because section 1154 requires that an agency conduct a valid home study. As a result of that requirement, a private party will not be able to complete the entire process without the interference an agency. See id.
California has a specific statute governing the readoption process.\textsuperscript{100} Section 8919 of the California Family Code outlines the requirements and procedures that a couple must follow before readopting a child in California.\textsuperscript{101}

By requiring subsequent home visits and examination of the prospective parents’ financial records,\textsuperscript{102} the California statute may require a new valid home study. Not all states require such a study, and some may be satisfied with a home study completed as much as two years prior to the adoption.\textsuperscript{103} Once the prospective parents clear the legal obstacles of all three jurisdictions involved, these prospective parents have completed the adoption process and legally become the child’s new parents.\textsuperscript{104} At this point, issues arise as to the rights, if any, of the biological parents under the laws of the three jurisdictions listed above.

\begin{enumerate}
\item See \textsc{cal. fam. code} § 8919 (Deering 1996).
\item See id. California Family Code section 8919 provides:
\begin{enumerate}
\item Each state resident who adopts a child through an intercountry adoption that is finalized in a foreign country shall readopt the child in this state if it is required by the Immigration and Naturalization Service. The readoption shall include, but is not limited to, at least one postplacement in-home visit, the filing of the adoption petition pursuant to Section 8912, the intercountry adoption court report, accounting reports, and the final adoption order. No readoption order shall be granted unless the court receives a report from an adoption agency authorized to provide intercountry adoption services pursuant to Section 8900.
\item Each state resident who adopts a child through an intercountry adoption that is finalized in a foreign country may readopt the child in this state. The readoption shall meet the standards described in subdivision (a).
\end{enumerate}
\textit{id.} § 8919(a)–(b).
\item See id.
\item See Hester, supra note 14, at 1301. Under Louisiana law, a home study conducted by a licensed Louisiana adoption agency, is valid for a minimum of two years. \textit{See id.} at 1301. Considering the length of the international adoption process, it is arguable that the Louisiana rule governing the validity of home studies is advantageous for adoptive parents because, by not requiring that home studies be renewed every six months, it provides them some relief from the tedious process.
\item For California’s legal requirements for completing an intercountry adoption see, 8 U.S.C. § 1101 (1994 & Supp. IV 1998); \textsc{cal. fam. code} § 8919. For Hungary’s requirements see, PTK. Law-Decree No. 13, ch. VII, § 43 (Hung.).
\end{enumerate}
III. WHAT RIGHTS DO BIOLOGICAL PARENTS HAVE AND ARE THE RIGHTS ADEQUATELY PROTECTED?

The child's welfare is the primary concern of most adoption legislation and case law, which accords with public policy and human decency. Nevertheless, there is some concern for the rights of the biological parents, who may either change their minds about the adoption, or may not have intended to relinquish their rights to the child in the first place. Even though the foreign biological parents are not United States residents or citizens, and most couples who adopt children outside the United States do not expect biological parents to approach them, there is still a need, to some extent, to protect the biological parents' rights. This need is especially strong when the adoption process is particularly lengthy, requires the involvement of three jurisdictions, and sometimes takes place across great distances. The possibility of mistake or misunderstanding is great under such circumstances. Even if there is no error, foreign biological parents should receive an opportunity, as do biological parents in the United States under certain limited circumstances, to change their minds and withdraw their consent or relinquishment of their rights, before the adoption is finalized in the United States.

105. For example, the California Supreme Court adheres to the principle that, with regard to the adoption process, the Court is to be guided solely by the "best interest of the child in respect to its temporal and mental and moral welfare." San Diego County Dep't of Pub. Welfare v. Superior Ct., 7 Cal. 3d 1, 13 (1972).
108. See Lippold, supra note 1, at 466 (discussing a situation wherein a biological mother changed her mind and decided to keep the baby after the adoptive parents already paid for her medical expenses).
109. See id. at 467.
110. See, e.g., Michael H. v. Mark K., 10 Cal. 4th 1043, 1043, 1051 (1995) (holding that "an unwed father has no constitutional right to withhold his consent to an at-birth, third party adoption unless he promptly demonstrated a full commitment to parenthood during the pregnancy and within a short time after he discovered or reasonably should have discovered that the biological mother was pregnant . . ."). See also Sackach, supra note 4, at 894.
111. A biological parent in California can withdraw their consent at any time before the decree for adoption is granted and this process may take a long time, thus giving biological parents ample opportunity to change their minds. See McDonnell v. Holt, 77 Cal. App. 2d 805, 812 (1947). For example, a biological presumed father can, in certain
This Part focuses on how the laws of the United States, California, and Hungary affect the rights of biological parents. The discussion of California's procedures focuses on two areas: California statutory and case law, and United States Supreme Court cases dealing with biological parents' rights under both California law and the Due Process Clause of the U.S. Constitution. Further, this Part discusses the contradictions and deficiencies in these laws, specifically, the inadequacies in California's laws protecting foreign biological parents' rights.

A. Biological Parents' Rights Under Federal Law

Section 1101 of the United States Code creates guidelines under which United States citizens can adopt foreign-born children. This statute appears to exhibit a strong inclination towards protecting U.S. parents against claims by foreign parents. This is not surprising because U.S. laws are promulgated primarily for the purpose of protecting U.S. citizens. Section 1101 forecloses on biological parent rights as much as possible by creating stringent requirements for the immigration of an adopted foreign child, even though it does not directly control the rights of the biological parents themselves.

limited circumstances, veto an adoption where proper consent was not given. See Michael H., 10 Cal. 4th at 1051 (recognizing that adoptive parents cannot adopt a child unless both mother and presumed father have consented, even though in this particular case, the father was unable to successfully veto the adoption).


114. See, e.g., PTK. Law-Decree No. 13, ch. VII, § 43 (Hung.).

115. There are no California cases dealing with the rights of biological parents from foreign jurisdictions, but there are cases dealing with the rights of U.S. biological parents, and biological parents in general. See, e.g., Michael H., 10 Cal. 4th 1043 (1995).

116. Although the U.S. Constitution is briefly discussed under Part III.B of this Comment, it is necessary to also include it in the discussion of California law because of frequency with which the California courts refer to the U.S. Constitution.


120. See id. (requiring that the child to be adopted was either abandoned, orphaned, or irrevocably released, and thereby reducing the possibility that a biological parent will challenge the adoption).


For example, for an adoption to be permissible under I.N.S. standards, section 1101 requires that the U.S. Attorney General make a finding that "no birth parent or prior adoptive parent of any such child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act." This blatant and express provision directly forecloses any possibility for foreign biological parents to assert rights to immigration through their parentage, in that, they are precluded from immigrating to the United States and asserting citizenship by virtue of their biological relationship to the adopted child.

Conversely, examination of the statute's plain language reveals that it does not appear to affect biological parents' rights to challenge an adoption. First, the statute seems to create requirements only for the purpose of establishing the child's eligibility to be adopted in and immigrate to the United States, and does not control the determination of the foreign parents' rights. This is especially true because federal law only requires a simple determination to the Attorney General's satisfaction, without establishing any standards for making that determination.

Also, a review of section 1101, as a whole, evidences that the section's purpose is to establish standards for admission into the United States. It is an immigration law, and not a law determining the collateral rights of biological parents who do not intend to immigrate to the United States. If this section foreclosed on biological parents' rights, it would deprive them of adequate process and preclude their claims, no matter how meritorious, from being heard. The best reading of the statute, from the foreign biological parents' perspective, is that it is merely an immigration prerequisite. This requires a determination that the biological

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123. Id. § 1101(b)(1)(F).
124. See generally id. § 1101.
125. See id. § 1101(b)(1)(F) (requiring only that the Attorney General "is satisfied" that no such claims will be brought in the future).
126. See generally id. § 1101.
127. See id.
128. For a discussion on foreign parents' due process rights under the U.S. Constitution, see infra Part III.B.2.
129. See 8 U.S.C. § 1101(b)(1)(F). That is, the child can be deemed an immediate relative of the U.S. citizen parents, rather than be classified as an immigrant who falls under the quota system. See id. See also generally UEDA, supra note 34, at 20–23, 42–48 (describing the quota system's history and its effect on different nationalities, as well as the numbers of immigrants allowed into the United States from different countries).
parents will not assert any parental rights in the future. An accurate reading of the section, however, reveals that its purpose is to prevent biological parents from immigrating to the United States by virtue of their children’s new status as citizens. If read any other way, the section is a travesty to the democratic system, which demands at least basic respect for an individual’s rights and choices.

Even if the section is read to preclude foreign biological parents’ from demanding that their parental rights be honored, these parents still may have an avenue available to seek redress of their problem. The biological parents may attempt to assert rights under the laws of the state where the child is domiciled, or they may attempt to adjudicate the issue in their homeland. If the statute is read as it is above, it only precludes foreign biological parents from asserting rights under the statute itself. The language of the statute makes this argument possible, but its acceptance is not probable.\(^\text{130}\)

Therefore, it appears that section 1101 does not literally destroy a biological parent’s substantive rights to establish or maintain a relationship with his or her child. The effect of the section, however, may actually be detrimental to biological parents’ rights. If they try to re-establish a relationship with their child, the adoptive parents will likely use the Attorney General’s determination as evidence that the biological parents severed ties with the child.\(^\text{131}\) This is especially true because in determining whether a child is an orphan,\(^\text{132}\) the Attorney General makes certain factual conclusions about abandonment or desertion by the biological parents that may weaken their claims.

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Unfortunately, such a reading of the statute is unlikely because if the adoptive parents do not follow the adoption procedures in section 1101(b)(1)(F), they must meet the two-year custody requirement in section 1101(b)(1)(E) for purposes of immigration. \textit{See} 8 U.S.C. § 1101(b)(1)(E).

130. \textit{See generally} 8 U.S.C.S. § 1101 note (LEXIS through 160–170, approved 12/27/99) (History; Ancillary Laws and Directives). This reading would not likely be accepted because the statute is primarily an immigration law and because issues of federalism arise when the federal government interferes in the realm of the state’s authority.

131. \textit{See} Lippold, \textit{supra} note 1, at 473 (discussing the fact that one of the goals in every state, with respect to the adoption process, is that the adoption is incontestable by the biological parents).

Section 1101 was apparently designed to sever any links that foreign children adopted by U.S. parents have to their biological parents. This is accomplished by requiring that a child be an orphan.\textsuperscript{133} Although this section attempts to prevent the possibility that foreign biological parents will establish a relationship with their children, it does preclude the possibility entirely. This is especially true in the international context, where the possibilities of fraudulent or coerced adoptions increase because of factors such as poverty, distance, etc.\textsuperscript{134} Consequently, section 1101 is procedurally inadequate to protect both the child and the biological parents from any such illegal and atrocious acts because it does not provide procedures for a hearing, or similar forum, to be conducted within a certain period of time wherein the biological parents may raise their claims. It fails to consider the great distances involved and the likelihood of fraudulent adoptions (during which time claims that the adoption is illegitimate may be made), or that the biological parents may change their minds. Recommendations as to possible changes in the federal laws are discussed in Part IV of this Comment.

B. Biological Parents' Rights Under California Law

As mentioned above, if foreign biological parents wish to establish a legal relationship with their child, they may turn to the laws of the adoptive parents' state, which, for purposes of this discussion, would be California. This Part examines the substantive rights available to biological parents under California statutes,\textsuperscript{135} case law, and the U.S. Constitution,\textsuperscript{136} and discusses the inadequacies of the relevant laws with respect to protecting foreign biological parents' rights.


\textsuperscript{134} See Serrill, supra note 13, at 86, 88 (discussing how the huge increase of overseas adoptions created an increase in black market babies—where "brokers" obtain children under very questionable circumstances—as a result, some countries, such as Romania, completely prohibit all foreign adoptions).

\textsuperscript{135} See In re Adoption of Cozza, 163 Cal. 514, 522 (1912) (announcing that parental consent is necessary in order to confer jurisdiction upon the courts, as well as that "consent . . . lies at the foundation of the statutes of adoption"), disapproved of by Barnett v. Los Angeles County Bureau of Adoptions, 54 Cal. 2d. 370, 378 (1960) (disagreeing with the rule of strict construction of adoption statutes in favor of birth parents, as stated in Cozza).

\textsuperscript{136} See, e.g., U.S. CONST. amends. V, XIV.
1. Biological Parents’ Rights Under the California Family Code

Section 8919 of the California Family Code is specifically designed to address the readoption of children adopted via intercountry adoptions. Nevertheless, there are no specific provisions in the Family Code governing either the rights of foreign biological parents or the process through which they may acceptably relinquish their parental rights. The California Family Code’s provisions only govern these issues as to parents in general. It is as if California law turns a blind eye to the issue of obtaining proper consent from foreign biological parents, as long as the adoption was finalized in the country of origin. Application of these statutes to foreign biological parents is therefore unsuitable because of the extenuating circumstances involved in intercountry adoptions, such as, the distance between California and Hungary; the difficulties foreign parents experience in securing means of travel; the difficulties involved in discovering the details of an adoption (for example, when it is fraudulent or initiated by one parent only) or in challenging an adoption because the biological parents change their minds, wherein issues of the time period allowed for withdrawal of consent arise. Because of these unique circumstances, there may be a need for statutes specifically designed with foreign biological parents in mind.

The existence of such a statute, controlling only the adoption process, evidences the concern with ensuring that adoptions are facilitated properly. The California statute also demonstrates a lack of concern for protecting foreign biological parents, which is something U.S. federal law also lacks. Although protecting U.S. citizens (the adoptive parents) is a legitimate concern, legislatures must realize the nature of today’s very interdependent world, which is becoming increasingly close knit. The United States is not isolated from the rest of the world; therefore it must respect the rights of all persons, not only the rights of U.S. or California citizens.

137. See CAL. FAM. CODE § 8919 (Deering 1996). For the text of this statute, see supra note 101.
139. See San Diego County Dep’t of Pub. Welfare v. Superior Ct., 7 Cal. 3d 1, 14–16 (1972) (recognizing that the primary goal of adoption statutes is promoting the welfare of children and facilitating adoptions). See also CAL. FAM. CODE § 8605 note (Deering 1996) (Notes of Decisions).
140. See supra Part III.A.
There are several potentially useful avenues for foreign biological parents to utilize in challenging an intercountry adoption. One method to challenge an adoption is to establish that the "sole" parent did not actually give his or her consent, that the consent was not properly obtained under the statute, or that he or she did not properly relinquish his or her rights to the child. There are two ways for a biological parent to challenge the validity of consent: arguing that the consent was obtained fraudulently or under duress or arguing that the statute's requirements governing consent were not properly followed. In California, as well as in most other states, the second argument is extremely difficult to make because most state courts only require "substantial compliance" with adoption statutes. Additionally, in California, both case law and adoption statutes, which demand liberal construction in order to facilitate adoptions, reflect the "substantial compliance" trend.

Section 1101 of the United States Code requires, as an alternative to abandonment, that the "sole or surviving parent . . . has in writing irrevocably released the child for immigration and adoption." Section 1101 does not specify procedural requirements for this release by the biological parents. Thus, for purposes of challenging an adoption in a California court, biological parents may argue that the California statutes governing relinquishing parental rights or consent should control.

141. See Sackach, supra note 4, at 887–888.
142. See id.
143. See id.
146. This is especially true because federal law requires that the adopting state's preadoption requirements be met. See id.
147. See CAL. FAM. CODE §§ 8604–8605. Section 8604 provides in part:
(a) Except as provided in subdivision (b), a child having a presumed father under Section 7611 may not be adopted without the consent of the child's birth parents, if living.
(b) If one birth parent has been awarded custody by judicial order, or has custody by agreement of both parents, and the other birth parent for a period of one year willfully fails to communicate with and to pay for the care, support, and education of the child when able to do so, then the birth parent having sole custody may consent to the adoption . . . .
(c) Failure of a birth parent to pay for the care, support, and education of the child for the period of one year or failure of a birth parent to communicate with the child for the period of one year is prima facie evidence that the failure was
Section 8700 of the California Family Code, which controls the relinquishment of parental rights, applies in situations wherein a biological parent has given up a child, for adoption purposes, to an adoption agency.  

Sub-section (c) of section 8700 speaks of relinquishment of parental rights by non-Californian biological parents, thus it presumably applies to foreign biological parents. It is arguable, however, that this section of the statute only applies to adoptions that take place within the United States (i.e., to parents residing in a state other than California). At first look, this statute appears very carefully structured by requiring that biological parents voluntarily give up the child because relinquishment of parental rights must be in the form of a written statement signed in the presence of witnesses. Applying this statute to foreign parents relinquishing parental rights might not be wise or equitable because California will thereby be imposing its statutory standards on another country; thus the possibility of a sovereignty conflict may arise. Also, just because a notarized document is deemed valid in the United States, it is not necessarily valid in all foreign

willful and without lawful excuse.

Id. § 8604(a)–(c). Section 8605 provides that “A child not having a presumed father under Section 7611 may not be adopted without the consent of the child’s mother, if living.” Id. § 8605.

148. See CAL. FAM. CODE § 8700 (Deering Supp. 1999), which provides in part:

(a) Either birth parent may relinquish a child to the department or a licensed adoption agency for adoption by a written statement signed before two subscribing witnesses and acknowledged before an authorized official of the department or agency. The relinquishment, when reciting that the person making it is entitled to the sole custody of the child and acknowledged before the officer, is prima facie evidence of the right of the person making it to the sole custody of the child and the person’s sole right to relinquish.

(c) If a relinquishing parent resides outside this state and the child is being cared for and is or will be placed for adoption by the department or a licensed adoption agency, the relinquishing parent may relinquish the child to the department or agency by a written statement signed by the relinquishing parent before a notary on a form prescribed by the department, and previously signed by an authorized official of the department or agency, that signifies the willingness of the department or agency to accept the relinquishment.

Id. § 8700(a), (c).

149. See id. § 8700(c).

150. See Burton v. Burton, 147 Cal. App. 2d 125, 135–136 (1956) (holding that the fact that the parties involved were residents of another state did not prevent application of California law).

151. See CAL. FAM. CODE § 8700(a).
countries. This could be especially true in a former communist country where chaos and corruption may be common and where many of the laws, if not the constitutions, are quite new and not always enforced. Therefore, it may be a mistake to assume that the notary system in Hungary, or any other country, functions the same way as does California's notary system.

Under sub-section (a) of section 8700, the relinquishment statement a biological parent signs creates a presumption that the parent has sole custody of the child to be adopted. Although this provision provides the other biological parent with the opportunity to rebut the presumption of sole parenthood, it is not very helpful to a foreign biological parent who is thousands of miles away from his or her child. By the time the foreign birth parent challenges the relinquishment, a court may conclude that the birth parent abandoned the child or that it is in the child's best interest not to invalidate the adoption. Therefore, if applied to foreign biological parents, this provision's main flaw is that it does not take into consideration that the circumstances affecting a foreign biological parent differ from those affecting one living in the United States. This defect further exhibits the need for legislation specifically designed to address international adoptions, especially in light of the great demand for such adoptions.

When a couple elects to go through an independent adoption, where the biological parent gives up the child to the adoptive parents or their representative directly, California courts require that the biological parent consent to the adoption. The California Family Code, however, lists some instances where such consent is not required, such as:

b) Where the birth parent has, in a judicial proceeding in another jurisdiction, voluntarily surrendered the right to the

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154. See id. note (Notes of Decisions) (noting that courts were unsympathetic to biological parents who had no contact or minimum contact with their children for one year or more).
155. See Cal. Fam. Code §§ 8604–8605 (Deering 1996). See also Michael H. v. Mark K., 10 Cal. 4th 1043, 1051 (1995) ("The mother's consent is still required in most cases . . ."); San Diego County Dep't of Pub. Welfare v. Superior Ct., 7 Cal. 3d 1, 9–10 (1972) ("The consent to adoption, which waives important statutory rights, such as the rights of natural parents to raise their children, 'must be voluntary and knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" (internal quotation marks and citations omitted)); In re Hannie, 3 Cal. 3d 520, 526 (1970).
custody and control of the child pursuant to a law of that jurisdiction providing for the surrender.

e) Where the birth parent has relinquished the child for adoption to a licensed or authorized child-placing agency in another jurisdiction pursuant to the law of that jurisdiction.\textsuperscript{156}

Aside from making certain exceptions for informed consent,\textsuperscript{157} this statute does not adequately protect foreign biological parents' rights. Sub-section (b) allows a foreign court's finding that the biological parent voluntarily gave up his or her child to substitute for consent.\textsuperscript{158} This provision gives too much deference to foreign courts. A foreign country's courts might not be as sympathetic to foreign birth parents as are California's or other states' courts. For example, a foreign country's procedures ensuring that the surrender of a child is voluntary and informed may not sufficiently protect biological parents. Sub-section (b) allows a California court to accept a foreign court's decision, even if the decision does not meet the basic requirements for surrendering a child under California law. This sub-section appears to inadequately protect certain basic rights of biological parents, namely their right to withhold or grant consent to the adoption of their child. Therefore, the statute should require that California courts further examine the laws of the foreign jurisdiction.\textsuperscript{159} This is especially true with Hungarian law, which provides that the law of the adoptive parents' country applies to the adoption and its termination.\textsuperscript{160} This further exemplifies that even if biological parents "voluntarily" surrendered their child, a court should still look to the relevant foreign law for guidance, even if it is only to ascertain whether the foreign jurisdiction's laws should apply instead of California's law.

No matter how the above mentioned statutes are interpreted, this issue contributes to the further confusion created when too

\textsuperscript{156} CAL. FAM. CODE § 8606(b), (e) (Deering Supp. 1999).

\textsuperscript{157} For a discussion on biological parents’ consent, see infra Part III.B.

\textsuperscript{158} See CAL. FAM. CODE § 8606(b).

\textsuperscript{159} See CAL. FAM. CODE § 8605 note (Deering 1996) (Notes of Decisions) (noting that, in reviewing an adoption order, a court will only overturn the order if there is a very clear case of abuse of discretion—accordingly, a U.S. court reviewing a foreign court's adoption order may be just as lenient).

\textsuperscript{160} See PTK. Law Decree No. 13. ch. VII, § 44 (Hung.).
many laws and too many jurisdictions are involved. There is a definite need for statutes governing the intercountry readoption process. These statutes should further provide standards as to the types of consent or relinquishment by foreign biological parents that satisfy due process. Such statutes would not only protect foreign biological parents’ rights, but may also deter adoptions wherein consent is wrongfully obtained.

In a situation where abandonment is the basis for determining a child is an orphan, the biological parents may additionally argue that they never, in fact, abandoned the child. Section 1101 of the United States Code requires that, to be eligible for immigration into the United States, for adoption purposes, a child must be abandoned or relinquished by his or her sole parent.\[161\] Section 1101, however, does not define abandonment.\[162\] Section 7822 of the California Family Code provides a plausible definition of abandonment;\[163\] abandonment occurs where the biological parent has no contact with and provides no support to the child for a period of either six months or one year.\[164\] Section 7822 also clearly describes what actions by the biological parents constitute abandonment.

Section 1101 of the United States Code\[165\] has no such requirement. Under this provision, the Attorney General determines whether there is abandonment; the section provides no specific guidelines for making this finding. In California, a biological parent may be able to invalidate an adoption if the

\[162\] See generally 8 U.S.C. § 1101 (1994 & Supp. IV 1998). Although the U.S. Code does not define abandonment, it is defined in section 204.3 of the C.F.R., as occurring where the “parents have willfully forsaken all parental rights, obligations, and claims to the child...” 8 C.F.R. § 204.3 (1995). It is not clear whether this C.F.R. definition controls for purposes of deciding a child’s eligibility under section 1101, especially because section 1101 was enacted three years after section 204.3, and therefore it may supersede the latter.

\[163\] See CAL. FAM. CODE § 7822(a) (Deering 1996), which provides:
A proceeding under this part may be brought where the child has been left without provision for the child’s identification by the child’s parent or parents or by others or has been left by both parents or the sole parent in the care and custody of another for a period of six months or by one parent in the care and custody of the other parent for a period of one year without any provision for the child’s support, or without communication from the parent or parents, with the intent on the part of the parent or parents to abandon the child.

\[164\] See id.

desertion is of insufficient duration to constitute abandonment under California law. This disparity between state and federal law further exhibits the confusion that dealing with the laws of three separate jurisdictions creates and exemplifies the need for uniform procedures and laws.

Section 7822 of the California Family Code appears to create a more stringent standard for a finding of abandonment than does the section 1101 abandonment provision, and hence provides biological parents' rights greater protection. Unlike federal law, California law also provides guidelines as to the requisite time needed for an abandonment determination. This length of time is usually six months, but there is no guarantee that California law will apply in any given case. Quite possibly, section 7822 only applies to adoptions within California's borders and only to Californian biological parents. On the other hand, the statute's plain language speaks only of abandonment by parents in general, and there are no decisions addressing whether it applies to foreign parents as well.

2. Case Law Governing Biological Parents' Rights

Before deferring to case law to determine the biological parents' rights, a court must first decide whether the foreign biological parents should be allowed to assert any rights under the laws of the United States or, alternatively, the receiving U.S. state. The United States Supreme Court addressed this issue in several cases and held that the U.S. Constitution protects the due process rights of non-residents who are within the United States' borders. The Court also held that due process rights apply to both lawful and unlawful aliens, including those aliens whose

166. See CAL. FAM. CODE § 7822(a).
167. See id. note (Notes of Decisions) (enumerating the most important decisions relating to section § 7822 and other sections dealing with issues of adoption and consent—none of the cases listed discuss foreign parents who are non-residents).

The Fourteenth Amendment provides that '[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.' . . . [A]n alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments.

Id.
presence in the United States is transient or involuntary.\textsuperscript{169} It is evident from these decisions that foreign biological parents who come to the United States temporarily to initiate a suit to void an adoption may avail themselves of the due process guarantees in the United States Constitution.\textsuperscript{170}

California courts have not directly addressed the issue of the rights of biological parents domiciled in other countries. Cases relating to biological parents’ rights in general, however, may help in analyzing how a California court will view and decide this issue. The California Supreme Court recognizes that the purpose of California adoption statutes is to promote and protect children’s best interests and welfare.\textsuperscript{171} As a result of this central and powerful goal and in an effort to protect biological parents’ rights, the Court held that both the adoption and the consent statutes must not be strictly construed.\textsuperscript{172} Instead, these statutes must be construed in a liberal fashion that promotes justice and furthers the goal of protecting the child’s best interest.\textsuperscript{173} California Supreme Court decisions illustrate the Court’s unwillingness to disrupt adoptions and its desire to place children in the best possible homes. This protective trend is exemplified in \textit{San Diego County Department of Public Welfare v. Superior Court}, where the Court held that a social worker was “a little overzealous in an attempt to \textit{induce} the natural mother . . . to relinquish the child to [the] Department . . . .”\textsuperscript{174} Nevertheless, the Court decided that the biological parents had given valid consent.\textsuperscript{175} Even though consent must be voluntary, knowing, and intelligent, the Court

\begin{itemize}
\item \textsuperscript{170} See Miller v. Albright, 118 S. Ct. 1428, 1437 (1998). With federal immigration law, the U.S. Supreme Court usually defers to Congress, especially in the area of equal protection. See \textit{id.} at 1437 n.11. See also Mathews, 426 U.S. at 68. Thus, with regard to section 1101, the Court will most likely defer to the immigration authorities’ determination as to the applicability of federal law.
\item \textsuperscript{171} See, e.g., Barnett v. Los Angeles County Bureau of Adoptions, 54 Cal. 2d 370, 377 (1960); Santos v. Santos, 185 Cal. 127, 130 (1921); San Diego County Dept’ of Pub. Welfare v. Superior Ct., 7 Cal. 3d 1, 15 (1972).
\item \textsuperscript{172} See, e.g., \textit{Barnett}, 54 Cal. 2d at 377; Santos, 185 Cal. at 130; \textit{San Diego County Dept’ of Pub. Welfare}, 7 Cal. 3d at 15–16; McDonald v. Holy Family Adoption Serv., 43 Cal. 2d, 447, 452 (1954).
\item \textsuperscript{173} See \textit{Barnett}, 54 Cal. 2d at 377.
\item \textsuperscript{174} \textit{San Diego County Dept’ of Pub. Welfare}, 7 Cal. 3d at 10 (emphasis added).
\item \textsuperscript{175} See \textit{id.}.
\end{itemize}
deemed the biological mother’s *induced* consent as falling within that definition.176

Courts also tend to focus on the rights of children who may become innocent victims in the battles between adoptive and biological parents. This protective trend may be the result of the recent increase in biological (mostly surrogate) mothers attempting to assert parental rights when it is not in the best interest of the children involved.177 Of course, this trend may also cause backlash against truly deserving and innocent biological parents, especially foreign biological parents who may themselves be victims of deceit, poverty, ignorance, or laws that do not adequately protect their rights.

Certain socioeconomic factors further exacerbate the problems that foreign biological parents face. Most international adoptions are initiated in countries that are not economically stable or are poverty-stricken, or in third world countries that are in both economic and political trouble.178 An adoption from these countries might be easier for U.S. parents because the indigent foreign biological parents may be unable to afford to support their children and accordingly, want better lives for them. Some foreign biological parents may be illiterate and thus unable to understand the consequences of giving up their children, or they may be unable to afford to fight the adoption, regardless of whether it is legitimate or accomplished through fraudulent means.179 The California Supreme Court’s construction of the adoption statutes limits biological parents’ rights in California, and is even more detrimental to foreign biological parents’ rights. Foreign biological parents must thus face both very strict case law and the added obstacles involved with time pressures, travel expenses, obtaining visas, and dealing with foreign languages and potentially foreign laws as well.180 The above obstacles are especially troublesome for indigent foreign biological parents.

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176. See id.
177. See Lippold, *supra* note 1, at 466. See also Sackach, *supra* note 4, at 894.
178. See Serrill, *supra* note 13, at 86 (listing some of the economically unstable, poverty-stricken, and politically and economically troubled thirds world countries, such as Honduras, Bolivia, and Ecuador).
179. See id. (stating that a large number of intercountry adoptions take place in third world countries).
180. See Lippold, *supra* note 1, at 467.
The U.S. Supreme Court placed another obstacle in foreign biological parents' paths. The Court acknowledged that aliens are members of a suspect class and therefore discrimination thereagainst violates the Equal Protection Clause of the Fourteenth Amendment.\textsuperscript{181} The Equal Protection Clause applies when the state discriminates against aliens through state action.\textsuperscript{182} When the federal government acts, however, the Court is not as strict.\textsuperscript{183}

Although aliens are deemed "equal" to U.S. citizens under the United States Constitution with respect to certain personal liberties,\textsuperscript{184} this does not necessarily mean that foreign biological parents will prevail in challenging an adoption order. American biological parents do not even receive the courts' full protection. Recent Supreme Court decisions evidence that the Court is unwilling to acknowledge new fundamental rights\textsuperscript{185} aside from the already-established due process rights.\textsuperscript{186} To establish a new fundamental right, the Supreme Court requires that the right be stated narrowly.\textsuperscript{187} Then, the Court ascertains whether the right has been specifically protected in the past.\textsuperscript{188} Foreign biological parents' rights are more narrowly defined than the broad right of a parent to either be with or maintain contact with their child.

\textsuperscript{182} See Lugar v. Edmonson Oil Co., 457 U.S. 922, 923–924, 942 (1982) (establishing that a violation of Fourteenth Amendment requires a showing of state action because the Fourteenth Amendment applies only when the "state" acts).
\textsuperscript{185} See, e.g., Bowers v. Hardwick, 478 U.S. 186, 190–191 (1986) (refusing to recognize homosexuals' right to engage in certain sexual activity as a fundamental right—narrowly wording this right allowed the Court to find that the right to engage in a particular sexual act has not been traditionally protected); Michael H. v. Gerald D., 491 U.S. 110, 122–126 (1989) (refusing to recognize an illegitimate father's paternity and visitation rights as fundamental because such rights, of an "illegitimate" father, have not been historically protected).
\textsuperscript{186} See, e.g., Roe v. Wade, 410 U.S. 113, 152 (1973) (recognizing a woman's right, under specified circumstances, to have an abortion). Since recognizing the new right in Roe, the Court has been unwilling to help out other groups that have not been traditionally protected, such as homosexuals in Bowers, and illegitimate fathers in Michael H. See Bowers, 478 U.S. at 190–191; Michael H., 491 U.S. at 122–126.
\textsuperscript{187} See, e.g., Michael H., 491 U.S. at 121–126 (referring to a biological father's rights as the rights of an "illegitimate" father, and not as the more broadly defined right to engage in familial relationships, which has been traditionally protected).
\textsuperscript{188} See, e.g., Bowers, 478 U.S. at 190–191; Michael H., 491 U.S. at 122–126.
Foreign biological parents may need to state their rights more narrowly; for example, as the right of biological parents who gave their child up for adoption to attempt to void the adoption or to establish visitation rights with the child. If the foreign biological parents' rights are stated more specifically, it is unlikely that the United States Supreme Court will recognize any such rights as having been protected in the past.\textsuperscript{189} For example, the Supreme Court required that an "illegitimate" father attempting to assert constitutional paternity rights to his children establish that he maintained his parental responsibilities.\textsuperscript{190} Considering that federal authorities require that a child be abandoned prior to adoption,\textsuperscript{191} it will be very difficult for a foreign biological parent to perform certain parental obligations, and thus establish a sufficient link with the child in the eyes of the Court.

Realistically, it will be extremely difficult for a biological parent, especially a foreigner, to fight a seemingly legal adoption.\textsuperscript{192} This difficulty begs the question: if American biological parents can rarely successfully challenge adoptions, why should foreigners be able to raise such challenges? The answer is simple; foreign biological parents face many obstacles, (e.g., economic, cultural, legal, etc.), that parents living in the United States may not. As a result of these hurdles, foreign biological parents should receive more leeway. Foreign parents should not necessarily receive more rights than do American parents, but they should be able to avail themselves to certain procedures to better protect their rights.\textsuperscript{193}

\textbf{C. Biological Parents' Rights Under Hungarian Law}

Biological parents may also sue to establish parental rights under the laws of their own nation.\textsuperscript{194} Hungarian law, however, is

\textsuperscript{189} See, e.g., \textit{Bowers}, 478 U.S. at 190-191; \textit{Michael H.}, 491 U.S. at 122-126.

\textsuperscript{190} See Lehr v. Robertson, 463 U.S. 248, 261-263 (1983). See also \textit{Michael H.} v. Mark K., 10 Cal. 4th 1043, 1052 (1995) (quoting the following excerpt from \textit{Lehr}: "the mere existence of a biological link does not merit ... constitutional protection").


\textsuperscript{192} See Serrill, supra note 13, at 86, 88 (discussing how most countries successfully combat black market infiltration in the area of adoption—as a result, it appears that most adoptions from foreign countries are, in fact, legal and are not either the result of coercion or products of black market).

\textsuperscript{193} For a discussion of possible solutions to this problem, see infra Part IV.

\textsuperscript{194} See PTK. Law-Decree No. 13, ch. VII, § 46 (Hung.). See also Serrill, supra note
replete with uncertainties as to biological parents' rights. For instance, Hungarian law allows California law to govern both the effect and termination of an adoption.\textsuperscript{195} At the same time, Hungarian law provides that to complete the adoption process, potential adoptive parents must first satisfy Hungary's laws.\textsuperscript{196} Hungarian law, however, does not account for problems that may arise if Hungarian law and the adoptive parents' state law conflict. This omission in Hungarian law,\textsuperscript{197} to provide for such a conflict, exemplifies the possibilities of confusion resulting from adoptions wherein more than one body of law is involved.\textsuperscript{198} This creates dilemmas for biological parents with respect to challenging an adoption in their own country, the laws of which may be unpredictable.

Section 617 of the Hungarian Civil Code presents another inconsistency, which results in further unfairness for biological parents. Section 617 provides, in pertinent part, "[a]doption does not affect the right to intestate succession of the adoptee from his blood relatives."\textsuperscript{199} This law allows an adopted child to return to Hungary, most likely after the death of his or her biological parents, and inherit under his or her biological parents' will, or even challenge such a will with respect to his or her biological sibling's inheritances. Thus, the biological parents may be denied almost all rights to challenge an adoption or engage in visitation,\textsuperscript{200} while, at the same time, a child they may have never had a chance to be with is allowed to inherit from those biological parents after their deaths. Some may argue that the purpose of this contradiction is to protect the innocent child who had no choice in the adoption; but, this argument does not consider the detriment to the child's siblings who may need protection as well. And what

\textsuperscript{13, at 88 (providing an example of a situation involving foreign biological grandparents, who, after raising children later adopted by a couple from the United States, initiated a suit to have the adoption nullified).}

\textsuperscript{195. See PTK. Law-Decree No. 13, ch. VII, § 43.}

\textsuperscript{196. See id. (providing that the Hungarian Guardianship Authority may consider the laws of the adoptive parents' state).}

\textsuperscript{197. See id.}

\textsuperscript{198. See id. § 44.}

\textsuperscript{199. PTK. Act IV of 1977 on the Amendment and Consolidated Text of Act IV of 1959, ch. LII, § 617 (Hung.).}

\textsuperscript{200. It is possible that visitation may be legally denied. Even if visitation is legally allowed, a biological parent and child who live in different countries are not likely to see each other very often because of the great distances involved.}
about the biological parents’ rights? Just because they may not be as innocent\textsuperscript{201} as the baby they gave up for adoption, because they had a choice, and chose to give up the child, they still may be deserving of protection.

Consequently, as this Comment points out, a foreign biological parent’s position is a difficult one. Their opportunities to challenge an adoption are limited. It is important to protect the child involved; but is it necessarily true that a child is always better off without having known his or her biological parents? In some circumstances, the child may actually be better off living with his or her biological parents, or at least by having some contact with them. Furthermore, in this author’s opinion, a child is entitled to learn about his or her cultural background and ethnicity. Thus, there is a definite need to address the issue of protecting biological parents’ rights. Public policy may favor either allowing the child to live with his or her biological or adoptive parents. Because many obstacles already impede the adoption process, it is arguable that providing more protection for biological parents may deter the adoption of so many children needing homes. In the context of international adoptions, with the higher probabilities of fraudulent adoptions, there is a need to establish certain procedural safeguards, if not to change the substantive law.

IV. RECOMMENDATIONS

With the end of the Cold War and increasing globalization, society faces issues it has not encountered before.\textsuperscript{202} This is especially true for the United States, which has historically been isolationist in nature.\textsuperscript{203} Today, many businesses and individuals face issues involving international relations.\textsuperscript{204} It seems that international relations issues, such as international adoptions, will continue to infiltrate most aspects of modern life.

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\textsuperscript{201} The biological parents may be completely “innocent” in cases involving fraud. For example, after the fall of the communist regime in Romania, the country was in turmoil and without law enforcement, thus allowing for the abduction and fraudulent adoptions of many children. See Pfund, supra note 25, at 651.

\textsuperscript{202} See Levine, supra note 18, at 2.

\textsuperscript{203} See Defense Monitor, The U.S. as the World Policeman? Ten Reason to Find a Different Role, Defense Monitor, Jan. 1991, at 1–7, reprinted in World Politics Debated, supra note 18, at 348, 350 (quoting George Washington, who warned Americans to “steer clear of permanent alliances” and noting that for the larger part of U.S. history, this advice has been followed).

\textsuperscript{204} See Levine, supra note 18, at 7.
International adoptions implicate different concerns than do domestic adoptions, including the distances involved, the different laws and authorities that must be consulted, the problems with black markets for children, as well as cultural issues, which sometimes play a very large role. As a result, there is a need for a body of international law governing all aspects of intercountry adoptions that will be uniformly enforced throughout the world. This international body of law must also address issues arising after adoption, especially those involving safeguarding the rights of biological parents.

There have been efforts to create some uniformity in laws governing intercountry adoptions. The Hague Conference on Private International Law has been working since 1980 in an effort to create more uniformity and legitimacy in the intercountry adoption process. In 1993, the Hague Convention was adopted, and its main goal was to protect children by eliminating fraudulent adoptions and ending the illegal coercion of biological parents to give their children up for adoption. The Convention set minimum standards guiding intercountry adoptions applicable to ratifying member states. These procedures include: requiring that state authorities (of both the sending and receiving nations) "supervise" the adoption process and ensure no illegal transactions occur, prohibiting direct contact between the biological and adoptive parents, and supervising private adoptions. The Convention is a commendable step towards creating international

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206. See Pfund, supra note 24, at 647.


law to deal with an international problem. Unfortunately, the Convention faces many obstacles.

These obstacles are a result of the structure of most international organizations and most nations' unwillingness and apprehension to take steps toward creating a more interdependent world. Twenty-one-six countries negotiated and created the 1993 Hague Convention, which is a great step towards globalizing the area of adoption law, but more nations must get involved to achieve a more interconnected and cooperative global adoption process. Furthermore, for the Convention to take effect, only three member states needed to ratify it. Therefore, because there is no need for a large number of members to ratify the Convention for it to take effect, the Convention will take some time and effort before it becomes an effective international body of law. The United States, for example, was involved in the negotiation process, but has been reluctant to ratify and implement the Convention's procedures. The Convention's biggest problem is the difficulty of enforcement, because there is no specific mechanism created to enforce its rules. This lack of enforcement allows old problems to resurface, especially in nations that close their eyes to certain types of adoptions, or allow, through lack of supervision, bribery of the officials in charge of the adoption process. Another problem with the Convention's effectiveness is the availability, or lack thereof, of adequate funds


The ever-tightening, thickening web of complete interdependence draws all the sovereignties great and small, kicking and screaming, into a single planetary system. But the institutions to express this unity are so frail, so dependent upon sovereign vetoes of unsovereign states that they gave little more than the tribute of hypocrisy which vice pays to virtue, recognizing its necessity but giving it the widest berth.

Id. at 19 & n.11 (quoting Barbara Ward, The First International Nation, in CANADA: A GUIDE TO THE PEACEABLE KINGDOM 45 (William Kilbourn ed. 1970)).

212. See Pfund, supra note 25, at 655. “More countries had participated in the negotiation of this Hague Convention... than any previous one...” Id.

213. See id. (noting that the first three countries to ratify the Convention were Mexico, Romania, and Sri Lanka).

214. See id. at 654-658.

215. See Lippold, supra note 1, at 497. See also Pfund, supra note 25, at 659 (explaining that one woman, Gloria DeHart, who is a Deputy Attorney General for the State of California, has made efforts to allow for reciprocity in enforcement and noting that one woman's efforts are not enough to institute world wide enforcement).
to finance enforcement.\textsuperscript{216} This will be especially problematic in developing and ex-communist countries, where most intercountry adoptions occur.\textsuperscript{217}

If enforced, the Convention, to a limited extent, protects biological parents by ensuring they are not coerced or induced to give their children up for adoption by requiring that the member states' governments supervise intercountry adoptions. Protecting biological parents, however, is only incidental to the Convention's primary purpose, which is protecting the children involved.\textsuperscript{218} Both of these goals are extremely important because innocent children, who represent the future of society, and biological parents, whose interests often go unrecognized, are both deserving of protection.

The Convention must be expanded to explicitly address these issues. For example, the Convention should contain procedures for biological parents to follow if they choose to challenge an adoption. Such procedures should account for the distances and time factors involved, as well as other factors that are not implicated in domestic adoptions. The substance of the law does not necessarily need change—that is too much to ask, especially because such a change may deter adoption, which is a socially valuable activity\textsuperscript{219}—but there is need to implement specific procedures, as well as for organizations to enforce the laws and assist biological parents in taking advantage of the procedures. Such rules will further the goal of fighting fraudulent adoptions and provide an additional safeguard against such transactions, especially where certain governments cannot, or will not, enforce the Convention.

Another way to ensure adequate protection for foreign biological parents' rights is for the individual U.S. states to adopt laws establishing the type of consent necessary for a foreign adoption order to be honored. This will ensure that a court in the United States will review the intercountry adoption and ascertain

\textsuperscript{216} See Serrill, supra note 13, at 86–87 (noting that most intercountry adoptions take place in poverty-stricken or third world countries).
\textsuperscript{217} See Pfund, supra note 25, at 648.
\textsuperscript{218} See id. at 651.
\textsuperscript{219} See, e.g., Santos v. Santos, 185 Cal. 127, 130 (1921) (“The main purpose of adoption statutes is the promotion of the welfare of children . . . by the legal recognition and regulation of the consummation of the closest conceivable counterpart of the relationship of parent and child[,] . . . which is attainable through actual adoption . . . .”).
whether the biological parents' consent to the adoption or relinquishment of their parental rights was proper. By establishing such standards, states will avoid many of the problems involved with enforcing international adoption law. Unfortunately, because each individual state must pass such a law, accomplishing this goal may involve a very lengthy process.

V. CONCLUSION

There is an abundance of literature and legislation concerning the effect of international adoptions on children—it is a wonderful effort to bring public attention to the socially desirable practice of intercountry adoptions. But the international community must concern itself with protecting biological parents as well. It is time for society to stop viewing biological parents as unloving, irresponsible, or as lacking parental instincts. It is important to realize that biological parents may have valid reasons for giving up their children, and that they may do so for their children's wellbeing. Biological parents, in some circumstances, may deserve an opportunity to change their minds. Especially when foreign parents and fraud are concerned, there is a need to provide special channels through which biological parents can attempt to withdraw their consent or establish some contact with their children.

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* J.D. candidate, Loyola Law School, 2000; B.A., University of California, Los Angeles, 1996. I dedicate this Comment to my father, Peter Simov, without whom I would not have been able to come to the United States and enjoy all the opportunities and freedoms this country has to offer. I would like to thank both my parents for teaching me to be strong, but also to care for and respect others. I am also thankful to Sam Landis for trying to teach me how to relax. I am very grateful to the editors and staff of the Law Review for all their hard work in preparing this Comment for publication.