

# Who is a “Suitable” Adoptive Parent?

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*“Most prospective adoptive parents find the [home] study invasive and stressful. And that’s putting it mildly. Why, they ask, do we have to put our lives under a microscope and prove our worthiness as parents when everyone else does whatever they like, without the slightest bit of scrutiny?”*

– *Canada Adopts, Canadian Adoption Agency*<sup>1</sup>

## INTRODUCTION

For thousands of years, governments have recognized their compelling interest in finding homes for orphaned, neglected, or abused children and in helping adults create non-biological families. This Essay demonstrates that these interests are not well met by current adoption regimes in the United States, in part due to an outdated and misguided approach to determining who is a “suitable”<sup>2</sup> adoptive parent. It critiques the prevailing emphasis on invasive interrogation to identify any and all potential risk factors. Instead, this Essay proposes a system of presumptive suitability coupled with extensive training and support to make the adoption process more efficient and successful, as well as to better serve the state interests in creating healthy families and finding homes for tens of thousands of parentless children.

The creation of family ties between persons not biologically related dates back to early Hindu, Egyptian, Hebrew, and Roman laws that recognized the legal fiction of adoption.<sup>3</sup> The first American adoption statute was passed (by Massachusetts) in 1851.<sup>4</sup> That statute required a judicial determination that (a) the prospective adoptive parent (PAP) was “suitable” and (b) the adoption was in the best interest of the child.<sup>5</sup> At the time, both assessments were based on the PAP’s financial capacity to support the child, and most adoptions were completed in a single day.<sup>6</sup> Today, all U.S. states and

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\* Berkeley Law J.D. 2011. The author thanks Joan Hollinger for her guidance and support for this Essay as well as for law school and life more generally, and the HLP staff for this opportunity and their expert editing. Most importantly, the author is grateful to her parents, sister, and fiancé for giving her “the ideal family” in the past, present, and future.

<sup>1</sup> Home Study, CANADA ADOPTS! (2001), <http://www.canadaadopts.com/adoptiveparents/homestudy.shtml> (on file with the Harvard Law School Library).

<sup>2</sup> “Suitable” has taken on legal and practical significance in the adoption field as the label indicating that an individual or couple has been vetted and found unobjectionable as an adoptive parent.

<sup>3</sup> Rosanne L. Romano, *Intercountry Adoption: An Overview for the Practitioner*, 7 TRANS-NAT’L LAW. 545, 548 (1994).

<sup>4</sup> Marja E. Selmann, *For the Sake of the Child: Moving Toward Uniformity in Adoption Law*, 69 WASH. L. REV. 841, 843 (1994).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

territories have laws that specify who is eligible to adopt based on intensive and invasive procedures that aim to define and discern suitable parents, which can take years and cost up to \$3,000.<sup>7</sup>

There is a “societal choice inherent in all decisions about parentage,” since governments depend heavily on parents for raising responsible, productive citizens.<sup>8</sup> However, most governments do not regulate private decisions to become a parent. Adoption is unique in that the state has a legal responsibility to find safe, nurturing homes for the children in its care. This task must be sufficiently responsive to the particularities of specific children and PAPs, but should also be guided by established criteria and procedures. Instead, certain adoption policies and practices, namely those concerning the suitability of PAPs, have become over-standardized, deterring some qualified potential parents from pursuing adoption and needlessly rejecting others in an effort to create “perfect” families.<sup>9</sup>

Similarly, adoption conventions, statutes, and agency policies consistently proclaim that the overriding principle is the children’s best interests. However, increasingly stringent suitability criteria seem at odds with this objective, since costly and time-consuming procedures, invasive home study criteria, and uncertainty throughout the process with little opportunity for redress deter or disqualify many would-be parents from adopting children who need permanent homes.<sup>10</sup> In this way, the current approach to suitability disserves PAPs (who must find other ways to build their families), the child welfare system (which is chronically short of good homes), and children seeking parents (who may be shuttled from one foster home to another while qualified PAPs are turned away). This is a serious concern, given that more than 100,000 American children are in state custody awaiting adoption at any given time.<sup>11</sup>

The suitability determination is neither the beginning nor the end of the adoption process, but it is the primary way that public and private agencies screen PAPs. In fact, PAPs are extremely vulnerable throughout the adoption process. They must undertake considerable time (finalizing an adoption takes an average of two years, but can take up to ten), expense (fees of up to

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<sup>7</sup> See 22 C.F.R. § 96.47 (2009); CHILD WELFARE INFO. GATEWAY, THE ADOPTION HOME STUDY PROCESS 7 (2004), available at [http://www.childwelfare.gov/pubs/f\\_homstu.pdf](http://www.childwelfare.gov/pubs/f_homstu.pdf).

<sup>8</sup> Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 323–24 (2004).

<sup>9</sup> See Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918–1965*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 160, 160–61 (E. Wayne Carp ed., 2002).

<sup>10</sup> See, e.g., Bartholet, *supra* note 8, at 336–37.

<sup>11</sup> ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *TRENDS IN FOSTER CARE AND ADOPTION* (2008), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends\\_02-07.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends_02-07.pdf); ADMIN. FOR CHILDREN AND FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., *THE AFCARS REPORT* (2009), available at [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/tar/report17.pdf](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.pdf). At the end of fiscal year 2008, there were 123,000 children awaiting adoption, and 114,556 as of September 30, 2009. Each of these children spends an average of three years in the child welfare system; more than 10% of them will never be placed in homes and will simply “age out.” These children suffer from an already overburdened child welfare system; in September 2009, there were 423,773 children in foster care nationwide.

\$10,000 if a private adoption agency is used), uncertainty (decisions are often subjective and frequently not accompanied by a detailed explanation), and invasion of privacy (home studies may require anything from a credit check to interviews with an ex-spouse to a mental health exam).<sup>12</sup> Yet PAPs have few rights since their interests in the adoption are subordinated to those of the child, the birth parents, and the state.

These drawbacks, along with a decline in U.S. infants available for adoption and persistent stigma against transracial adoption, have led growing numbers of American citizens to seek to adopt children from overseas.<sup>13</sup> The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter “Hague Convention”) came into force in the United States in April 2008.<sup>14</sup> The Hague Convention is implemented in the United States under the Intercountry Adoption Act of 2000 and accompanying federal regulations, which contain extensive procedures and criteria for determining the suitability of a U.S. applicant wishing to adopt from abroad.<sup>15</sup> Due primarily to political concerns and administrative complexities, this process often involves even greater expense, uncertainty, and invasion of privacy for PAPs than domestic adoption.

At present, the process by which a suitability determination is made, and the information on which it is based, varies by the agency or social worker conducting the assessment, the state in which the PAPs live, and whether they are adopting a child from the United States or abroad. This Essay will review some of these different standards and suggest a more consistent, inclusive approach to providing children with nurturing adoptive families. It begins by briefly tracing the evolution of suitability criteria, followed by a review of current assessment procedures to determine whether an individual or couple may adopt domestically or internationally.

Next, this Essay will consider whether these processes are effective in appraising parental suitability. The analysis will be informed by a brief consideration of an alternative framework for assessing PAPs, the Structured Analysis Family Evaluation (SAFE) model for psychosocial home studies, and a summary of adoptive parent suitability standards and protocols in Ireland and the United Kingdom. This Essay concludes that the United States should move away from the current model of suitability, which requires prospective adoptive parents to prove they are qualified to raise an adopted child. Instead, this Essay proposes that the U.S. government invest more resources in preparing presumptively eligible citizens to be nurturing adoptive parents.

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<sup>12</sup> See *infra* Parts II–III.

<sup>13</sup> Crystal J. Gates, *China’s Newly Enacted Intercountry Adoption Law: Friend or Foe?*, 7 IND. J. GLOBAL LEGAL STUD. 369, 372–73 (2000).

<sup>14</sup> Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134, 1870 U.N.T.S. 167, <http://www.unhcr.org/refworld/docid/3ddcb1794.html> [hereinafter Hague Convention].

<sup>15</sup> See Intercountry Adoption Act of 2000, 42 U.S.C. §§ 14901–14954; 8 C.F.R. § 204.3; and other implementing regulations.

## I. DEFINING SUITABILITY OF PROSPECTIVE ADOPTIVE PARENTS

The suitability determination is primarily based on information gathered during the home study. This process usually includes interviews with the PAPs and others who live with or are close to them, a visit to their home, and an investigation of the PAPs' personal, medical, financial, and criminal history.<sup>16</sup> Despite wide consensus on what factors are relevant to the suitability determination, there is wide variation in how this information is collected and used between states, among counties, and even from agency to agency.<sup>17</sup>

The home study is intended to identify any potential barriers to adoption early on and should also provide an opportunity for PAPs to reevaluate their commitment to adoption and decide what type of child they are willing and able to adopt.<sup>18</sup> In reality, however, agencies (both public and private) typically use the home study to rank and then match a certain "class" of PAPs with a particular group of children.<sup>19</sup> Rather than simply ascertaining their parental capabilities, social workers and other adoption officials evaluate PAPs' desirability using an array of factors such as age, marital status, sexual orientation, race or ethnicity, religion, education, physical and psychological health, and financial and social status.<sup>20</sup> The mix of factors considered, and the weight attached to each, has remained remarkably unchanged over time.<sup>21</sup>

Americans first began to adopt for non-economic reasons in the 1920s, and with a demand for adoptable children that exceeded the supply, agencies were able to be selective.<sup>22</sup> Agencies assumed that the "best" families were those that were the most "normal" by societal standards, and this assumption was not questioned.<sup>23</sup> Adoption agencies sought to create normal families by: 1) matching key characteristics (primarily intelligence, religion, and race) of the child to those of the PAPs to approximate a biological family as closely as possible; 2) excluding mentally or physically disabled children as not adoptable; and 3) examining PAPs' psychological health and motivations in search of "normal" role models for adopted children.<sup>24</sup> In the early years

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<sup>16</sup> 22 C.F.R. § 96.47; THE ADOPTION HOME STUDY PROCESS, *supra* note 7.

<sup>17</sup> Thomas M. Crea, Richard P. Barth & Laura K. Chintapalli, *Home Study Methods for Evaluating Prospective Resource Families: History, Current Challenges, and Promising Approaches*, 86 CHILD WELFARE 141, 142–43 (2007).

<sup>18</sup> JAMES B. BOSKEY & JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE § 3.03 (2010).

<sup>19</sup> Romano, *supra* note 3, at 550.

<sup>20</sup> Gill, *supra* note 9, at 163–65, 169–72.

<sup>21</sup> *Id.* at 164.

<sup>22</sup> Historians suggest that the increased interest in adoption was due to rising prosperity, earlier and more frequent diagnosis of infertility, and a sense that parenthood was a patriotic duty. Michelle Kahan, "Put Up" on Platforms: A History of Twentieth Century Adoption Policy in the United States, 33 J. SOC. & SOC. WELFARE 51, 59–61 (2006).

<sup>23</sup> Gill, *supra* note 9, at 161.

<sup>24</sup> *Id.* at 162.

of “stranger adoptions,” in which children are placed with biological strangers rather than relatives, leaving a child in foster care or an institution was often seen as preferable to a “mismatched” adoptive home.<sup>25</sup> American adoption agencies sought to create families that imitated the existing ideal. Typical adoptive parents were white, middle-class, infertile, church-going, psychologically well-adjusted, married (for the first time) couples in their mid-thirties with a professional husband and homemaker wife.<sup>26</sup> Although the profiles of Americans seeking to adopt has expanded significantly, this ideal continues to shape perceptions of parental suitability, even as a strong consensus has emerged in favor of permanency (adoption) over other child placement options.<sup>27</sup>

## II. SUITABILITY CRITERIA FOR DOMESTIC ADOPTIONS

State statutes vary widely regarding how and with what specificity they define a suitable adoptive parent.<sup>28</sup> Before considering this variation, however, it is important to distinguish suitability from eligibility to be an adoptive parent. In contrast to suitability criteria, eligibility can be determined by simple, objective factors. It is well established that there is no fundamental legal right to adopt;<sup>29</sup> however, in the absence of a statutory prohibition, any single citizen or a husband and wife jointly can be eligible to adopt.<sup>30</sup> Fifteen states have an age requirement for PAPs (either eighteen, twenty-one, or twenty-five years of age, or at least ten years older than the child to be adopted), and seventeen require state residency (for a period of 60 to 365 days).<sup>31</sup> In some states, adoption by unmarried couples—regardless of sexual orientation—is prohibited, while a few persist in prohibiting adoption by homosexuals.<sup>32</sup> There are no other factors that make an individual or a

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<sup>25</sup> BOSKEY & HOLLINGER, *supra* note 18, § 3.06.

<sup>26</sup> Kahan, *supra* note 21, at 61.

<sup>27</sup> In the Adoption Assistance and Child Welfare Act of 1980, the federal government made clear that permanency is the preeminent goal of child welfare law. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500. The Adoption and Safe Families Act of 1997 continued and further entrenched this consensus favoring permanent placements. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115. The 1997 Act amended the Social Security Act to require “documentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child . . . .” *Id.* at 2121.

<sup>28</sup> Thomas M. Crea, *Intercountry Adoptions and Domestic Home Study Practices: SAFE and the Hague Adoption Convention*, 52(5) INT’L SOC. WORK 673, 674–75 (2009).

<sup>29</sup> See, e.g., *Crim v. Harrison*, 552 F. Supp. 37, 40–41 (N.D. Miss. 1982).

<sup>30</sup> CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH AND HUMAN SERVS., WHO MAY ADOPT, BE ADOPTED, OR PLACE A CHILD FOR ADOPTION?: SUMMARY OF STATE LAWS 2 (2009), available at [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/parties.pdf](http://www.childwelfare.gov/systemwide/laws_policies/statutes/parties.pdf).

<sup>31</sup> *Id.*

<sup>32</sup> See *Adoption Laws: State by State*, HUM. RTS. CAMPAIGN (2008), <http://www.hrc.org/issues/parenting/adoptions/8464.htm> (on file with the Harvard Law School Library).

couple categorically ineligible to adopt a child; even convicted felons and sex offenders are not statutorily barred from adopting.<sup>33</sup>

“Suitable” adoptive parents are only a fraction of those who are legally eligible to adopt. Whereas eligibility is based on objective factors (age, residency, marital status), suitability determinations (usually made by social workers or private adoption agents) are much more subjective. Who is deemed a suitable parent is shaped by federal and state legal and procedural requirements, agency preferences and protocols, and criteria set by birth parents (for private adoptions). Federal law requires a criminal background check of every PAP, and some states also require a review of the child abuse registry. Beyond this low threshold, however, states vary widely on how much discretion and direction they give pre-placement evaluators in determining suitability. Some statutes defer entirely to adoption agencies. For example, Wisconsin’s adoption law provides simply that “the court shall order an investigation to determine whether . . . the petitioner’s home is suitable for the child.”<sup>34</sup>

In addition to filling out forms and submitting to interviews regarding their religious beliefs, their relationships with their parents and other family members, their educational level and employment, and their daily routines, PAPs are commonly required to submit to a medical examination and might be asked for proof of infertility and/or assessments based on any mental health treatment.<sup>35</sup> Information about income, debts, investments, and insurance will also be required of PAPs to determine their financial security.<sup>36</sup> Finally, PAPs often need to provide autobiographical statements laying out their personal backgrounds and why they want to adopt.<sup>37</sup> The evaluators are looking for evidence of stability, maturity, resources, and capacity to parent, and there are virtually no limits on the questions they can ask or documents they can require of the PAP.<sup>38</sup> Generally, all of this information can be shared with other agencies, birth parents, and government authorities.<sup>39</sup>

Acknowledging the wide variation in state adoption codes, in 1994 the National Conference of Commissioners on Uniform State Laws approved a Uniform Adoption Act (UAA) designed to promote children’s interests in being raised in stable, loving families.<sup>40</sup> The UAA would not categorically exclude anyone from being an adopter or adoptee. Instead, it states: “Determinations concerning the availability and suitability of individuals to become each other’s adoptive parent or child are to be made on the basis of the particular needs and characteristics of each individual.”<sup>41</sup> Under the UAA, a

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<sup>33</sup> UNIF. ADOPTION ACT § 1-102, 9 U.L.A. 22 (1994).

<sup>34</sup> WIS. STAT. § 48.88 (2009).

<sup>35</sup> THE ADOPTION HOME STUDY PROCESS, *supra* note 7, at 3–4.

<sup>36</sup> *Id.* at 4.

<sup>37</sup> *Id.* at 5.

<sup>38</sup> See Crea et al., *supra* note 17, at 142.

<sup>39</sup> THE ADOPTION HOME STUDY PROCESS, *supra* note 7, at 7.

<sup>40</sup> UNIF. ADOPTION ACT prefatory note.

<sup>41</sup> *Id.* § 1-102 cmt.

PAP must provide basic information regarding any history of drug or alcohol abuse, all charges of domestic violence or child abuse, criminal convictions, any previous evaluation by a child welfare agency, and any other fact or circumstance that may be relevant in determining whether the individual is suited to be an adoptive parent.<sup>42</sup>

While the UAA is more specific than many state suitability provisions in the information it requires, the model law also limits how the evaluator may use this information in assessing the PAP's suitability to adopt. Under the UAA, a PAP should be deemed suitable as long as the information assessed “does not raise a specific concern.”<sup>43</sup> If the evaluator determines the PAP is not suitable, a written explanation of the specific concern is required.<sup>44</sup> The UAA also allows an individual who receives an unfavorable evaluation to seek judicial review of this finding, at which the PAP must prove his or her suitability by a preponderance of the evidence.<sup>45</sup>

The UAA's guidelines aim to create a presumption of suitability, but they have not been widely followed. Instead, most states persist with evaluation models that require PAPs to present affirmative evidence that they would provide the best possible home for the child. This approach puts a great deal of pressure on PAPs and makes evaluation results far more unpredictable, while potentially frustrating the joint goals of placing children in nurturing homes and helping adults build families. The next section explains how demonstrating suitability can be even more challenging for PAPs trying to adopt a child from overseas, followed by a critical analysis of these prevailing U.S. approaches to suitability.

### III. SUITABILITY CRITERIA FOR INTERCOUNTRY ADOPTIONS

Americans first adopted children from other countries (primarily from Germany, Greece, and Japan) as a humanitarian response to the crisis of World War II orphans.<sup>46</sup> The number of foreign children adopted by Americans quickly grew from fewer than 2,500 adoptions in 1970 to over 10,000 in 1987 and peaked in 2005 at nearly 23,000.<sup>47</sup> In 1994, the United States signed the Hague Convention on Protection of Children and Cooperation in Respect of Inter-Country Adoption, which seeks “to establish safeguards to

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<sup>42</sup> *Id.* § 2-203(d).

<sup>43</sup> *Id.* § 2-204(b). Although no definition of “specific concern” is given in the UAA, the accompanying comments suggest a high bar that includes only factors that “pose significant risks of harm to the physical or psychological well-being of a minor.” For example, low income should not disqualify a PAP unless his/her financial status would pose a threat to the child's well-being. *Id.* cmt.

<sup>44</sup> *Id.* § 2-204(c).

<sup>45</sup> *Id.* § 2-206.

<sup>46</sup> Kahan, *supra* note 22, at 63.

<sup>47</sup> *Id.* at 67; Office of Children's Issues, U.S. Dep't of State, *Total Adoptions to the U.S., INTERCOUNTRY ADOPTION* (2009), [http://adoption.state.gov/news/total\\_chart.html](http://adoption.state.gov/news/total_chart.html) (on file with the Harvard Law School Library).

ensure that intercountry adoptions take place in the best interests of the child.”<sup>48</sup>

U.S. domestic law implementing the Hague Convention (8 C.F.R. § 204.3 (2008) and 8 U.S.C. § 1101(b)(1)(G)(i)) allows a U.S. citizen to adopt and obtain U.S. citizenship for a child from another Hague country if the citizen can demonstrate his or her ability to provide proper care for the child. As in domestic adoptions, eligibility criteria for intercountry adoption into the U.S. are fairly inclusive. Any married American couple or unmarried U.S. citizen over twenty-five may submit a petition to adopt.<sup>49</sup> And as with domestic adoptions, PAPs seeking to adopt from abroad face a grueling suitability evaluation. This time, however, they are not afforded any of the safeguards recommended by the UAA or included in prevailing domestic adoption procedures.

The suitability evaluation is performed by an accredited intercountry adoption pre-placement evaluator, who uses the collected information to grant specific approval of the PAP, including what kind (age, gender, nationality) and how many children the PAP may adopt, and the reasons for such approval.<sup>50</sup> A denial of approval is far less specific, however, and PAPs may not know why they were deemed unsuitable to adopt from abroad. Under current U.S. law, there is little to no recourse for a PAP who receives an unfavorable suitability report, because the Intercountry Adoption Act bars PAPs from seeking administrative or judicial remedies for violations of the Act or the Hague Convention by agencies or other authorities.<sup>51</sup> Even those who are deemed suitable by the pre-placement evaluator can still be denied approval to adopt by the state adoption authority or by the United States’ Central Authority, the Department of State.<sup>52</sup> PAPs may appeal denial of their application to adopt from abroad with the U.S. Citizenship and Immigration Services’ Administrative Appeals Office. Since a PAP must disclose the result of any prior home study and application for adoption, a finding of unsuitability can doom future efforts to adopt domestically or internationally.<sup>53</sup>

#### IV. EVALUATING THE SUITABILITY CRITERIA

Despite frequent scrutiny in the media and debate in the child welfare community, no “best practice” has emerged regarding PAP suitability determinations, and wide variation in approach and quality persists across agen-

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<sup>48</sup> Hague Convention, *supra* note 14, at 183.

<sup>49</sup> 8 C.F.R. § 204.3(b) (Thomson Reuters, WestlawNext through Feb. 24, 2011).

<sup>50</sup> § 204.3(e)(6).

<sup>51</sup> 42 U.S.C. § 14922(c) (2000).

<sup>52</sup> § 14924.

<sup>53</sup> *Hague Home Study Guidelines*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Sept. 3, 2009), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnvnetoid=6ba1741b78c73210VgnVCM100000082ca60aRCRD&vgnnextchannel=6ba1741b78c73210VgnVCM100000082ca60aRCRD> (on file with the Harvard Law School Library).



cies, states, and countries.<sup>54</sup> At every level, the PAP evaluation process remains opaque both in terms of the assessment process and its outcomes. This means that adoption agencies have wide discretion in deciding what factors to consider and what information they use to evaluate a PAP. Even in states with statutes mandating a long list of specific assessments of the PAP’s finances, morals, education, social status, physical and mental health, et cetera, how these judgments are made varies widely. A pre-placement evaluation might be based on a single interview and home visit, or it may reflect psychological reports, reference interviews, numerous observations, or an array of other investigative efforts.<sup>55</sup> The resulting recommendation is also extremely subjective, frequently reflecting the unreviewable opinion of a single social worker.<sup>56</sup> This variation makes the outcome of a home study highly unpredictable for PAPs and can complicate interstate adoptions, because agencies are often reluctant to rely upon a home study conducted in another state.<sup>57</sup>

Regardless of the what information is collected and how it is interpreted, agencies tend to look for young, financially stable couples who have been married at least two or three years, and sometimes agencies prefer those who are biologically infertile.<sup>58</sup> Those who do not fit this “ideal” adoptive family archetype bear the burden of providing affirmative evidence of countervailing factors that make them suitable parents.<sup>59</sup> To better assess the current U.S. suitability evaluation process, the next subsections explore alternative approaches. The first describes a model proposed by American scholars to make the determination more standardized and uniform. The second looks at two countries with similar pre-adoption evaluation processes, but which offer PAPs a more proactive role. The subsequent section suggests how lessons from these different methods should inform a new U.S. approach to suitability.

#### A. *The SAFE Model of Suitability Assessments*

The Structured Analysis Family Evaluation (SAFE) was developed in 1989 to standardize assessments and accelerate the home study process for both domestic and intercountry adoptions.<sup>60</sup> The SAFE psychosocial inventory includes two detailed questionnaires completed by the PAP and one

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<sup>54</sup> Crea, *supra* note 28, at 673.

<sup>55</sup> For example, a 2001 study of home study practices in five California counties found that the average time an evaluator spent with each couple or individual hoping to adopt ranged from 14 to 75 hours. Crea et al., *supra* note 17, at 143.

<sup>56</sup> See Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 429 (1997).

<sup>57</sup> Crea et al., *supra* note 17, at 143.

<sup>58</sup> See Howe, *supra* note 56, at 429; Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 5 n.3 (2003).

<sup>59</sup> See Crea et al., *supra* note 17, at 149 (this phenomenon is reflected in the terminology of “screening in” applicants).

<sup>60</sup> Crea, *supra* note 28, at 675–76.

completed by a reference, as well as an optional Compatibility Inventory that evaluates a family's ability and willingness to meet an adopted child's needs in 112 areas.<sup>61</sup> Perhaps the most unique component of the SAFE model is the required inventory of PAPs involving sixty-eight psychosocial factors "to be considered uniformly by every worker in every case to ensure that critical issues are not overlooked."<sup>62</sup> The SAFE model is being implemented in fourteen American states and four Canadian provinces.<sup>63</sup>

While reducing the variability of the home study process, the SAFE model's highly standardized, structured approach sacrifices some of the flexibility called for by federal adoption law (8 C.F.R. § 204.3, which requires that the home study be tailored to the particular situation of the PAP). The questionnaires also institutionalize the invasion of privacy and administrative burden that discourage some PAPs. Finally, even the formally structured SAFE model cannot avoid the subjectivity of the suitability determination, since social workers still interpret the profuse objective information in light of their personal interviews and visits to make their recommendation. Therefore, while it represents an admirable effort to diminish disparities and biases in the home study process, the SAFE model continues to be driven by fear of mis-placing a child and is likely to result in the exclusion of suitable PAPs.

### *B. Comparative Analysis: Suitability in Ireland and the United Kingdom*

A brief review of suitability determinations in Ireland and the United Kingdom (U.K.) reveals that, although these countries initially based their practices on the United States's adoption policies, the United States has now fallen behind in a growing trend to give PAPs more of a voice in the process. These examples illustrate the need for a wider reexamination of suitability assessments in the U.S. Compared to the U.S., Ireland and the U.K. put PAPs through analogous processes and apply similar suitability criteria (with varying priorities, which reflect cultural social judgments regarding parentage). However, both foreign countries offer meaningful opportunities for PAPs to play a proactive role in shaping and revising the resulting assessment, which suggests the United States may be behind the curve in that important regard.

#### *1. Ireland*

Irish PAPs almost exclusively adopt from abroad.<sup>64</sup> In accordance with its ratification of the Hague Convention, Ireland enacted the Adoption Act of

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<sup>61</sup> *Id.*

<sup>62</sup> Crea et al., *supra* note 17, at 154.

<sup>63</sup> Crea, *supra* note 28, at 675.

<sup>64</sup> Citizens Info. Bd., *Adoption*, CITIZENS INFO., [http://www.citizensinformation.ie/en/birth\\_family\\_relationships/adoption\\_and\\_fostering/adopting\\_a\\_child.html](http://www.citizensinformation.ie/en/birth_family_relationships/adoption_and_fostering/adopting_a_child.html) (on file with the Harvard Law School Library).

2010, which proscribes detailed suitability determination procedures.<sup>65</sup> The Act creates the Adoption Authority of Ireland, a small panel including a pediatrician, social worker, child welfare scholar, family law attorney, and a psychologist, who make the ultimate determination of a PAP’s suitability to adopt domestically or internationally.<sup>66</sup>

Irish citizens wishing to adopt must apply to their local Health Service Executive, which assigns a representative to provide information, advice, and counseling to the PAP and to gather information for an assessment report.<sup>67</sup> That report is referred to a local adoption committee, which must then issue a recommendation, with reasons explaining its decision, to the national Adoption Authority regarding the PAP’s eligibility and suitability.<sup>68</sup> PAPs may review the assessment report and challenge a finding of unsuitability at any stage; they also have a statutory right to be heard by the Adoption Authority before the Authority may decline to issue a finding of suitability.<sup>69</sup>

Aside from this multi-layered process, which reduces the risk of arbitrariness inherent in a suitability determination made by a single social worker, the Irish approach is also unique in its statutory characterization of suitability. Irish suitability standards are defined by law and are uniform for all PAPs. Rather than simply mandating the data to be collected, as in the United States, Irish evaluators are asked to determine the capacity of PAPs to promote a child’s physical, emotional, social, health, educational, cultural, and spiritual development.<sup>70</sup> The final suitability component is whether the PAP “has been provided with appropriate information, advice and counseling concerning adoption.”<sup>71</sup> Thus, the home study in Ireland is a two-way process, with both the PAP and adoption authorities working together to ensure that children have healthy, nurturing homes.

## 2. *The United Kingdom*

Adoption in the U.K. is tightly controlled. There are only about 2,000 British children available for adoption annually, so public authorities are

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<sup>65</sup> *Adoption Act 2010*, HEALTH SERVICE EXECUTIVE, <http://www.hse.ie/eng/services/news/centre/Campaigns/adoptionact%202010.html> (on file with the Harvard Law School Library).

<sup>66</sup> *Adoption Act 2010* (Act No. 21/2010) (Ir.), available at <http://www.irishstatutebook.ie/2010/en/act/pub/0021/print.html>.

<sup>67</sup> *Id.* § 37.

<sup>68</sup> *Id.* § 39.

<sup>69</sup> *Id.* § 40(4).

<sup>70</sup> *Id.* § 34(b) (suitable PAPs are of good moral character, are in good health, are financially secure, and have “a reasonable expectation of being capable throughout the child’s childhood of—(i) fulfilling . . . parental duties in respect of the child, (ii) promoting and supporting the child’s development and well-being, (iii) safeguarding and supporting the child’s welfare, (iv) providing the necessary health, social, educational and other interventions for the child, and (v) valuing and supporting the child’s needs in relation to his or her identity, ethnic, religious and cultural background.”).

<sup>71</sup> *Id.*

very selective when approving PAPs.<sup>72</sup> At the outset, however, any British citizen who meets basic criteria (e.g., age and residence) and applies to adopt a child is granted a personal interview with a local adoption agency, and invited to join a “preparation for adoption group.”<sup>73</sup> These groups of PAPs and adoption agency staff meet four to six times over a few weeks to discuss doubts and expectations surrounding adoption and give the staff a chance to get to know the PAPs in a more informal setting.<sup>74</sup> After completing these sessions, PAPs are encouraged to take some time to speak with friends and family about their decision to adopt.<sup>75</sup> Only after some time has passed and the PAPs are confident that adoption is right for them will the agency initiate the home study and suitability proceedings.<sup>76</sup>

The U.K.’s suitability assessment involves a thorough evaluation of the PAP’s relationship with his or her family, employment and economic status, medical reports, the standard of living in the home, the quality of the neighborhood and local schools, the attitude of relatives towards the adoption, the PAP’s reasons for wanting to adopt, and criminal record.<sup>77</sup> The social worker will visit the PAP’s home approximately six times and will also conduct face-to-face interviews with some of the PAP’s friends, colleagues, and neighbors.<sup>78</sup> Compared to the standard U.S. suitability criteria, the U.K.’s criteria is less concerned with identifying any potential risk factors, and more focused on ensuring that the PAP has a strong community of support.

In response to a growing public perception that British PAPs are not treated, assessed, or prepared equally and that the process is arbitrary, unclear, and biased, in 2004, the Parliament established the Independent Review Mechanism (IRM).<sup>79</sup> Any time an adoption agency finds a PAP unsuitable, ceases an assessment before completion, or terminates an existing approval of a PAP, that PAP can apply to the IRM for review.<sup>80</sup> The IRM is independent of any adoption agency and reviews the home study and accompanying information afresh before submitting a recommendation to the PAP’s agency.<sup>81</sup> Although the IRM’s recommendation is non-binding, British courts have held that the senior decision-maker at the agency must present valid and substantial reasons for departing from the IRM’s finding.<sup>82</sup>

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<sup>72</sup> Judith Masson, *The 1999 Reform of Intercountry Adoption in the United Kingdom: New Solutions and Old Problems*, 34 FAM. L.Q. 221, 223–24 (2000).

<sup>73</sup> *The Home Study/Assessment*, ADOPTION AND FOSTERING INFO. LINE, [http://www.adoption.org.uk/information/home\\_study.html](http://www.adoption.org.uk/information/home_study.html) (on file with the Harvard Law School Library).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *See New to Adoption?*, ADOPTION UK, [http://www.adoptionuk.org/information/100172/100262/new\\_to\\_adoption/](http://www.adoptionuk.org/information/100172/100262/new_to_adoption/) (on file with the Harvard Law School Library).

<sup>78</sup> *Id.*

<sup>79</sup> DEP’T FOR CHILDREN, SCHS., AND FAMILIES, FULL REGULATORY IMPACT ASSESSMENT 1–2 (2004), available at [http://www.dcsf.gov.uk/ria/assessmentFiles/riaFile\\_44.pdf](http://www.dcsf.gov.uk/ria/assessmentFiles/riaFile_44.pdf).

<sup>80</sup> *Id.* at 3.

<sup>81</sup> Mary Lane, *Adoption: Suitability, the Independent Review Mechanism [IRM] and Financial Support*, FAM. L. WK., Oct. 28, 2008, <http://www.familylawweek.co.uk/site.aspx?i=ed27882>.

<sup>82</sup> *Id.*

## V. A NEW APPROACH TO SUITABILITY

The suitability procedures in Ireland and the U.K., and the experimental SAFE model, highlight how outdated, inflexible, and capricious the United States' current system is and how it might be reformed. Rather than enact piecemeal changes to increase the emphasis on the best interest of the child and decrease the unitary discretion of the American social worker, however, the United States should adopt a more modern, inclusive approach to suitability entirely.

The preeminent goal of adoption policy is to find nurturing homes for children who need them. However, adoption also allows adults to build families. The current system in the United States grants this privilege only to the “best” (a highly subjective qualification) potential parents. Meanwhile, the vast majority of people on Earth create families without having to demonstrate any capacity to be parents. The U.S. government does not regulate who may have a baby, or even who may become a parent through assistive reproductive technologies, although U.S. law prohibits fertility doctors from refusing to treat someone because of her race, religion, or country of origin.<sup>83</sup>

Prospective adoptive parents do not receive these same protections. In our worst-case-scenario-driven system, PAPs must prove not only that they can care for an adopted child, but also that there is no reason to doubt that they will do so. This creates an unknowable number of potential pitfalls that may result in an unfavorable recommendation, which can doom PAPs' current and future efforts to adopt a child. Many have criticized the way that U.S. agencies presently measure and rank the desirability of PAPs, yet in the absence of a new approach, the trend continues towards the addition of more potentially disqualifying factors to the suitability determination. For example, recently, new emphasis has been placed on credit ratings as evidence of financial stability and responsibility.<sup>84</sup>

Rather than looking for perfect parents, which is unrealistic and unreasonable, adoption agencies should begin by screening out only those people who pose a risk to the child's physical or psychological well-being. Evaluators of those seeking to adopt should apply a “minimal fitness” test. Once PAPs have been shown to have no history of child abuse or neglect, domestic violence, substance abuse, serious mental illness, or any other criminal record, they should be considered *presumptively* suitable. Under this new approach, a finding of suitability is only the beginning of the process to become an adoptive parent.

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<sup>83</sup> Elizabeth Weil, *Breeder Reaction: Does Everybody Have the Right to Have a Baby?*, MOTHER JONES, July–Aug. 2006, available at <http://motherjones.com/politics/2006/07/breeder-reaction>.

<sup>84</sup> See generally Hong, *supra* note 58, at 48–51.

No matter what jurisdiction the PAPs live in, or where they are adopting from, one thing is the same in all adoptions: every family is different. There is no magic formula for building a healthy, functioning family, and there is no proven set of characteristics that make a good parent. It is not surprising, therefore, that there is no evidence that the current invasive screening process distinguishes between more and less capable parents.<sup>85</sup> Among the qualities of adoptive parents who achieve successful adoptions and healthy families, child welfare experts list: resourcefulness, a sense of humor, ability to anticipate and manage problems, stability, flexibility, and tolerance of loss, anxiety, and ambiguity.<sup>86</sup> These traits are difficult to discern from tax returns and medical reports and may not be apparent from one or two interviews. To some degree, however, these are skills that can be taught and learned.

The truth is, like biological parents, adoptive parents must learn on the job, and their success depends upon their ability to cope with the trials of parenthood. Therefore, rather than requiring PAPs to *prove* they will be good parents, why not have the government invest in helping them to *be* good parents? Arguably, every potential new biological parent should be screened for a criminal record and substance abuse and then provided with education and training about how to raise a child. But such a program would be impossible to enforce and difficult to fund for everyone who is, or plans to become, pregnant. For PAPs, on the other hand, the infrastructure is already in place because many PAPs demand and seek out such resources.

In addition to a streamlined home visit, interview, and criminal background check, under this new approach, PAPs would be required to attend classes designed to explore their commitment to adopting a child and prepare them for the challenges of being an adoptive parent. A number of domestic adoption agencies already provide some educational services to help PAPs better understand the needs of children waiting for adoption and help PAPs decide what type of child they could parent most effectively. Additionally, for PAPs hoping to adopt from abroad, federal law (22 C.F.R. § 96.48) requires that an accredited agency or individual provide at least ten hours of education and training about what to expect and how to deal with potential short- and long-run challenges. Unfortunately, ten hours is not much, the quality of these programs varies widely, and there is little if any training or support post-adoption. If all PAPs were required to undergo a more comprehensive and formal training, economies of scale would incentivize research into best practices and lead to improvements in the quantity and quality of programming provided.

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<sup>85</sup> Romano, *supra* note 3, at 551.

<sup>86</sup> NAT'L RES. CTR. FOR FAMILY-CENTERED PRACTICE & PERMANENCY PLANNING, CONCURRENT PLANNING CURRICULUM (2004), available at <http://www.hunter.cuny.edu/socwork/nrcfcp/downloads/cpp/module4-handouts.pdf>.

The bulk of adoptive parent training could be the same regardless of where the PAP lived or from where he or she was adopting. Statistics indicate that there are over two million people in the United States who are actively interested in adopting a child,<sup>87</sup> so providing educational programs and ongoing support could become a profitable field without needing to charge PAPs (or taxpayers) large sums for the training. The sheer number of adoption books, newsletters, support groups, blogs, and consultants that have sprung up in recent years suggests that PAPs are desperate for assistance and advice. So it is likely that most PAPs would appreciate this new approach to adoption, one that puts less emphasis on their past and more on their future, rather than view it as a new hoop to jump through in order to adopt a child.

Whether obligatory PAP training is provided by organizations, small businesses, or individuals, the educators leading it should be federally accredited and unaffiliated with any public or private agency. Federal accreditation could ensure fair pricing, consistent quality, and non-discrimination. Being independent from any agency that matches PAPs with children needing adoption removes the conflict of interest that plagues many such “adoption consultants” today. A competitive market would likely emerge, with educators seeking to attract PAPs with high-quality, comprehensive, and individually tailored programs to guide them through the adoption process and beyond. Through a series of seminars, one-on-one counseling sessions, and support groups, these organizations would give PAPs the ability to anticipate challenges that may arise when raising an adopted child, and the tools to overcome them. More targeted programs could be developed—and made accessible through online “webinars” or distance learning courses—with information pertinent to unique state regulations, particular sending countries, or certain special needs of the intended child. The networks created through these programs could carry over to provide transitional and developmental support to adopted children and their families.

#### CONCLUSION

Adoption in America is no longer reserved for middle-class infertile whites. In fact, recent studies reveal that adoption affects three out of five Americans.<sup>88</sup> Common conceptions of a “suitable adoptive parent” must evolve to keep pace with the growing prevalence and diversification of adoption. Similarly, the way that suitability is assessed must be renovated to avoid deterring or disqualifying capable Americans who want to build their families and are needed to provide permanent homes for American and foreign-born children.

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<sup>87</sup> Gates, *supra* note 13, at 372.

<sup>88</sup> Kahan, *supra* note 22, at 51 (referring to the number of Americans who were adopted, have given a child up for adoption, or have an adopted relative).

Value judgments about adoption can never be separated from issues of class and race. Both domestically and internationally, most children are adopted by affluent whites from minority parents who cannot afford to raise them. The ongoing pursuit of the “ideal” adoptive parent has only perpetuated this uneven dynamic, which goes against the best interest of the child by delaying or denying them permanent homes. The best way to resolve this inequity is to provide all eligible parents with an interest in adopting the opportunity to develop the knowledge and skills necessary to raise an adopted child.

As it has become the test for suitability, the home study has become increasingly stressful, expensive, and invasive. Parents who are deemed unsuitable often find themselves without a second chance at adopting. For those who receive a favorable pre-placement evaluation, they are often on their own once they’ve been found suitable. Americans adopting from abroad under the Hague Convention receive ten hours of education and training, but the cost, quality, and value of such preparation vary dramatically.

A number of child welfare practitioners have criticized the artificiality of suggesting that there is some “best” arrangement for a given child.<sup>89</sup> There has been a recurring call for a framework for choosing the best of the immediately available placement alternatives. As part of this new framework, this Essay has suggested an innovative approach to suitability. Rather than requiring PAPs to undergo extensive disclosure and assessments, a minimal fitness test would identify those who are presumptively suitable to adopt a child.

This new approach would expand, outsource, and institutionalize the self-exploration, education, and preparation aspects of becoming an adoptive parent, while diminishing the current emphasis on financial reports, psychological evaluations, education history, health records, et cetera. Instead of adding to an ever-growing list of suitability factors, these pre-placement programs would focus on developing the attributes and skills known to contribute to successful adoptions and lifelong parent-child relationships. In contrast to the current system, an arrangement that is more inclusive and instructive, rather than intrusive and judgmental, would create a larger pool of suitable adoptive parents and result in more and more successful adoptions.

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<sup>89</sup> See Selmann, *supra* note 4, at 844.